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# LINGUISTICS AND THE COMPOSITION OF LEGAL DOCUMENTS: BORDER CROSSINGS

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## I. INTRODUCTION

Although law is all talk and text, bar and academy alike show sur-prisingly little interest in linguistics. What attention is given to linguis-tic theory is largely focused on its most glamorous application, its rele-vance to legal interpretation.[1] Next to no attention has been paid by law teachers to the pedagogical applications of even the most elegant and accessible theories. Moreover, what little exchange there is between law-yers and linguists is edgy at best. One legal scholar participating in a recent law and linguistics conference described the linguists as "lined up like a phalanx in a Spartan army"[2] against himself and his colleagues.

This edginess and sparse attention tempt speculation. Perhaps all border conversations are about turf, and thus tense and laconic. It may be as simple as that. On the other hand, perhaps on the law side there is a nagging suspicion that the law may turn out finally to be *just* language and a big stick—not a discrete system with its own knowable rules, but instead, porous and indeterminate (as Critical Legal Studies scholars has long argued). Or worse, it may turn out not to be a discipline at all.[3]

Whatever the reasons for the sparse attention to linguistics, we think more is in order. In particular, more attention can usefully be focused on the applications of linguistic theory to the composition (rather than interpretation) of legal documents. If linguistic critique of legal interpretation is proving controversial (indeed few lawyers are

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    [1] *See e.g.*, Conference, *What is Meaning in a Legal Text? Northwestern University/Washington University Law & Linguistics Conference*, 73 WASH. U. L.Q. 769 (1995)(hereinafter Northwestern/Washington Conference).
    [2] *See* Proceedings, Northwestern/Washington Conference, *id.* at 948.
    [3] According to some commentators, a discipline "has freestanding theory but no inherent practice" whereas an interdiscipline has "an inherent practice but no freestanding theory." *See* Frank Parker & Kim Sydow Campbell, *Linguistics and Writing: A Reassess-ment*, 44 COLLEGE COMPOSITION AND COMMUNICATION 295, 301-02 (1993). Following this distinction, linguistics qualifies as a discipline, but law seems more like an interdiscipline.

comfortable when linguists characterize the profession's lapidary interpretive strategies as mistaken, base, or both),[4] contemplating the law through a linguistic lens leads to a far less tendentious observation as well: the need for interpretation often arises from nothing more than naive and thoughtless drafting.[5] Surely applying a linguistically educated eye to the crafting of statutes, contracts, wills and pattern jury instructions can only help. Moreover, these high-stakes "normative" documents are just some of the consequential things lawyers do with words. We also need to bring linguistically savvy deliberation to the composition of discursive prose—judicial opinions; appellate briefs; office memoranda; and opinion, client, and advocacy letters.[6]

The lessons of linguistics for composition are of two distinct kinds: prescriptive and cautionary. On the one hand, listening to what experts say about syntax, semantics, and (especially) linguistic pragmatics[7] can help lawyers create documents that communicate with clarity, force, and candor. On the other hand, linguistics can help us to "learn our limits."[8] The slipperiness of meaning, the inevitability of syntactic ambiguity, and the coercion inherent in seemingly innocuous language practices offer hard truths as well as heuristics.

Convinced that many of the insights of contemporary linguistics into the structure and use of ordinary language could be usefully applied to the composition of legal documents, our next concern was to see how these insights could enrich and transform practice in the law school classroom. Out of the many applications that presented themselves, we selected groups that correspond roughly to two parallel dichotomies: the

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[4] *See e.g. supra* note 2, at 891-898.

[5] Put another way, the primary question posed by H.L.A. Hart's classic "No vehicles are allowed in the park" hypothetical is not whether an ambulance is a vehicle, but rather, why we tolerate incompetent drafting. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). One linguist at the Northwestern/Washington Conference wondered "Why legislators should be held to a lower standard of writing than that to which...professors hold...students." William N. Eskridge, Jr. & Judith N. Levi, *Regulatory Variables and Statutory Interpretation*, 73 WASH. U. L.Q. 1103, 1108 (1995).

[6] We think that the kinds of writing lawyers do can be usefully (if not neatly) divided into "normative" (or "drafted") prose and "discursive" prose. The first includes all private and public rule-making prose—voice-less (or at least univocal) prose in which intent, expression, and understanding must be as alike as humanly possible, and which communicates directly. Discursive prose has discernable voice and leaves to the reader more of the job of making meaning than does "drafted" prose.

[7] Linguistic pragmatics is one of the newest branches of linguistics. In contrast to syntax and semantics, which study the structure of language, pragmatics studies language *use*—not what we say, but how we say it.

[8] *See* Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235 (1997).

two goals of communication (informing and influencing) and the two traditional modes of legal discourse (objective and persuasive). Thus, after sketching some background in Part II, we discuss in Part III the bearing of linguistics on the drafting of documents that are clear, cohesive, and coherent. In Part IV, we propose applications to persuasive writing—to appellate brief writing of course, but also to judicial opinions and to client and advocacy letters.

Finally, we emphasize that we are not linguists, but teachers of law and composition. We say this not to deflect criticism for our blunders, but rather, to clarify our limited purpose. We have borrowed and simplified some ideas from a discipline that is theoretical and descriptive in order to apply them, sometimes prescriptively, in the law school classroom. We also hope to encourage border crossings by our colleagues. We have learned, and continue to learn, from the disciplines of rhetoric and cogni-tive science. Linguistics is still an empty place on the law-teacher's map.[9]

## II. LINGUISTICS, COMPOSITION, AND THE LAW

Linguists study the unconscious psychological mechanisms by which we make and interpret utterances in our native language. Though boundaries can be porous and sub-fields abound, linguistics is conventionally divided into five core areas of study: phonology, morphology, syntax, semantics, and pragmatics. Phonology, which studies the rules that govern pronunciation, and morphology, which focuses on word formation, are not central to professional writing concerns. Their most obvious application to writing is to elucidate spelling errors, a problem even for some experienced writers, but one rarely so severe as to undermine the intelligibility of a text, especially in an era of spell check.[10] In contrast, syntax (which studies the structure of phrases,

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[9] We can recommend three fine guidebooks: Frank Parker & Kathryn Riley, LINGUISTICS FOR NON-LINGUISTS (2d ed. 1994) is a clear and congenial primer. Georgia M. Green, PRAGMATICS AND NATURAL LANGUAGE UNDERSTANDING (2d ed. 1996) is an introduction to that branch of linguistics by one of its leading exponents. Lawrence M. Solan, THE LANGUAGE OF JUDGES (1993), is concerned with interpretation rather than composition, but it is written for a law-school educated audience by a lawyer/linguist, and thus makes a fine introduction to some basic principles of linguistics (as well as putting the dilemmas of legal interpretation in a whole new light).

[10] Occasionally, spelling errors obscure the relationship between a word and some other part of the sentence, especially when coupled with other errors. Thus, students should recognize the causes of spelling errors, so they can correct them even when spell check is unavailable.

clauses, and sentences), semantics (which studies linguistic meaning), and pragmatics (which studies language in context) have an important bearing on professional writing.[11] Because semantics and linguistic pragmatics focus beyond the word and sentence level to the discourse level, they are especially relevant to the composition of legal documents and thus to legal writing pedagogy.[12]

Syntax, the set of rules we use to combine words and phrases, is largely rule-governed and predictable. Words are classified into parts of speech, groups of words fall into phrasal categories, and phrases are arranged into hierarchical constituent structures. (For example, a "prepositional phrase" may be the subset of a "direct object noun phrase.") Moreover, there are rules that allow moving a phrasal category from one sentence location to another and rules that restrict relocations. These combinatory rules form a "generative" grammar, a grammar that permits an infinite number of thoughts to fall into rule-governed sentence structures without those rules ever surfacing to consciousness.[13]

Sometimes, of course, language users make errors, mistakes that range from sentence fragments and misplaced modifiers to problems with noun/pronoun agreement. We are not, however, concerned with the application of linguistic theory to error-correction, but rather, with

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For a general discussion of these errors, *see* Parker & Riley, *supra* note 9. *See also* Patricia J. McAlexander, Ann B. Dodie, Noel Gregg, BEYOND THE "SP" LABEL: IMPROVING THE SPELLING OF LEARNING DISABLED & BASIC WRITERS (1972).

[11] When we talk about linguistic rules, we need to be aware that they are layered or hierarchical, as we see by contrasting the way a word and a sentence gain their meaning. In both cases the appeal is to rules, but, in the first case, the rule is one that ties words to the world, and, in the second case, the rule is one that ties well-formed sequences of words to the world and does so in virtue of two things: the meaning of the individual words (fixed by the first sort of rule), and the principles governing their combination into phrases, clauses and eventually sentences. It is the presence within language of this hierarchy of rules that ensures that linguistic meaning is essentially combinatory, and it is the combinatory nature of linguistic meaning that permits us to learn a language, and places the grasp of an infinite number of sentences with the capacity of a finite mind. If sentences had to be mastered like words, each time from scratch, language would lie outside our reach. A slogan for catching this last point is, "semantics rests on syntax."Richard Wollheim, THE MIND AND ITS DEPTHS 9, 10 (1993). This interdependence explains why the boundaries between linguistic fields are porous.

[12] Although much research in linguistics focuses on spoken language and much of linguistic theory is framed in terms of "speakers," it is generally agreed that writing is governed by the same syntactic and semantic rules, and even by the same pragmatic mechanisms as speech, despite the lack of overt "turn-taking" in writing. *See e.g.*, Green, *supra* note 9, at 1.

[13] Much of the contemporary view of syntax, including the notion of generative grammar, is informed by the work of Noam Chomsky. *See generally*, Solan, *supra* note 9, at 15-22.

utterances that, although grammatically correct, are ambiguous because conflicting syntactic principles govern their interpretations.[14] We also discuss the role syntax plays in organizing information and promoting textual cohesion.

Semantics and pragmatics are the areas most relevant to extended and coherent discourse. As much the domain of philosophers as of linguists, semantics is the study of linguistic meaning understood independently of the context in which it appears. Yet the meaning of a word or sentence is not always apparent. Many words are lexically ambiguous, that is, they have more than one sense. For example, a brief is a written argument to an appellate court, a student's summary of a judicial opinion, and (in British usage) a case-file. In addition to problems of sense like ambiguity, semanticists also study reference—the way in which words, phrases, and sentences refer to entities in the real world. One aspect of reference with particular relevance to the composition of legal documents is prototype analysis. Research in linguistics and cognitive psychology suggests that words do not refer to neatly confined categories of referents.

> For most words, there is no definition that contains the complete set of necessary and sufficient membership in the conceptual class that the word expresses. If we try to form tight definitions of a concept that will cover all and only the desired results, we will fail.... Rather...we form concepts, at least in part, by absorbing prototypes, and...concepts become indeterminate at the margins. As events and things become more remote from the prototype, they more closely fit into other categories.[15]

To some extent then, a document is always threatened by lexical ambiguity and drafters must always be concerned with ways of limiting atypical interpretations.

Beyond lexical semantics is compositional semantics, which is concerned with sentence meaning and which is "posited on the notion

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[14] For example, two conflicting structures govern the phrase "American law professor." "American" can modify *law* (a professor of American law) or it can modify *professor* (an American professor of law). The meaning of such utterances can often be clarified by further inquiry into the author's intent. But authorial intent can also be made syntactically manifest if we teach students how to construct sentences that circumvent the ambiguity, by using, for example, a prepositional phrase (American professor of law) rather than adjacent adjectives.

[15] *See* Lawrence M. Solan, *Judicial Decisions and Linguistic Analysis: Is there a Linguist in this Court*, 73 WASH. U. L.Q. 1069, 1073 (1995). *See generally*, sources cited by Solan, *id.*, n. 18.

that the meaning of a complex expression will be related in a predictive way to the meanings of the parts from which it is constructed."[16] Thus, for example, we know that articles and adjectives always modify the nouns that follow them. Compositional semantics is also "truth-conditional," that is, it explicates "the meaning of sentences...in terms of conditions under which they would be true."[17] In other words, "the meaning of an expression in a compositional semantics represents a state of affairs that would have to hold if the sentence containing the expression is to be considered true."[18] Aspects of a sentence that do not involve truth conditions, but instead involve a speaker's intention (rendering a sentence a promise, question, or ironic comment), fall outside the domain of semantics and inside pragmatics. Thus the semantic sense of "John is a great athlete" is that he has superior stamina and physical coordination. If the statement is said sarcastically, however, its pragmatic sense would be "John is clumsy."

Our interest in semantics here is twofold. On the level of word meaning, we want to discuss techniques for avoiding the semantic uncertainty that results when words are vague or have multiple meanings. Although interpretive disagreements about the meanings of words cannot be entirely avoided, linguistically savvy drafters can reduce the number of disputes. On the sentence level, we want to focus on those aspects of semantics that govern textual cohesion.

Pragmatics is the study of language in situational contexts, communications that are ambiguous outside of the context in which they arise. Much of pragmatics is informed by a basic puzzle about language: we routinely and unselfconsciously communicate more than we say and understand more than is uttered.[19] In the past thirty years, a number of influential theories that attempt to account for these phenomena have been elaborated by linguists and philosophers of language. Perhaps the

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[16] *See* Green, *supra* note 9, at 6.

[17] *See id.*

[18] *See id.* This mainstream statement is controversial, as is so much in this rapidly evolving discipline. The inherent fuzziness of lexical terms can be seen to undercut the very notion of truth conditionality. *See, infra,* text at note 15, and, *supra,* text at notes 51-53. Nonetheless, for heuristic purposes, the concept is a useful one.

[19] A law professor writes the following letter to Justice Scalia: "I write with respect to Kimberly Costello's clerkship application. Ms. Costello is an exceptionally conscientious student with excellent research and inter-personal skills." How does Justice Scalia know that the professor has a low opinion of Ms. Costello's writing skills? (This example is adapted from H.P. Grice, *Logic and Conversation,* in 3 SYNTAX AND SEMANTICS 41, 52 (Peter Cole & Jerry L. Morgan, eds. 1975).

most central idea of all is H. Paul Grice's theory of "implicature," including his "Cooperative Principle" and "conversational maxims."[20]

Grice noticed that participants in a conversation cooperate with each other in interpreting the meaning of each contribution. Participants make sense of each other's utterances—even when the point is implied rather than explicit—by assuming each participant's contributions will adhere to four maxims: quantity, the statement will be as informative as required; quality, the statement will be truthful and based on sufficient evidence; relation, the statement will be relevant; and manner, the statement will be clear, unambiguous, direct, orderly.[21] According to Grice's theory, addressees assume that speakers are following the maxims, and thus interpret utterances to be consistent with the maxims even when there are seeming violations. To use one of Grice's own examples, when speaker A says "Smith doesn't seem to have a girl-friend," and speaker B replies "He has been paying a lot of visits to New York lately," speaker A infers that speaker B believes Smith to have a girlfriend in New York, because otherwise, speaker B's contribution to the conversation would be irrelevant and thus in violation of the maxim of relation.[22] Further, when a speaker blatantly violates a maxim, the addressee assumes that the speaker intentionally violated the maxim to convey some unstated proposition that the addressee is meant to infer. For example, if speaker A says "Judge X is the biggest hack in the state," and speaker B replies "Nice weather for March," speaker A asks herself what speaker B could mean by this intentional flouting of the maxim of relation. Grice calls these kinds of indirect messages "conversational implicatures." Speakers use implicatures when there is something to be gained by indirection.[23] Here, speaker B may be telling A that Judge X is within hearing distance.[24] Then too, speakers sometimes deliberately but unostentatiously violate a maxim because they want to mislead their audience.[25] Both the persuasive use and the unethical use of implicature will be discussed in Part IV.

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[20] *See id.*

[21] *See id.* at 45-46.

[22] *See id.*

[23] *See id.* at 49-50.

[24] Of course, speaker B might also mean "Judge X is my brother-in-law. I am pretending I didn't hear that." Conversational implicature, unlike what Grice calls "conventional implicature," has meaning only in context and is also deniable: speaker B could insist that she was just discussing the weather.

[25] *See, e.g.,* Arthur E. Walzer, *The Ethics of False Implicature in Technical and Professional Writing Courses,* 19 J. TECHNICAL WRITING AND COMMUNICATION 149 (1989); *See also* Kathryn Riley, *Telling More than the Truth: Implicature, Speech Acts, and Ethics in Professional Communication,* 12 J. BUS. ETHICS 179 (1993).

"Speech act" theory is also central to pragmatics.[26] Statements have both a content and a function, that is, they simultaneously say something (the locutionary act) and do something (the illocutionary act).[27] Illocutionary acts include actions like ordering, requesting, promising, apologizing. Thus the statement "I sentence you to life imprisonment" both says something (describes a punishment) and does something (orders a defendant to prison). Of course, to be a valid performance of an illocutionary act, the circumstances must be appropriate: for example, a judge must deliver the sentence, not a spectator. Austin calls these circumstances "felicity conditions." Moreover, a speech act can be direct or indirect. An illocutionary act is direct when the syntactic form of the sentence comports with the illocutionary force.[28] For example, the imperative "Answer the question" matches the illocutionary force of a directive. An illocutionary act is indirect when the syntactic form of the sentence does not comport with the illocutionary force.[29] Thus the interrogative "Why don't you rephrase the question?" does not match the force of a directive. Felicity conditions and the mode in which an illocutionary act is cast play a role in persuasive rhetoric and will be discussed in Part IV.

Before pragmatics, linguistics was concerned almost exclusively with the structure of language, often uninterested (sometimes to the point of contempt) in how speakers and writers actually used language to communicate.[30] Arguably, pragmatics was a reaction to formal linguistics in the same way that legal realism was a reaction to formalism in the law. Although one might thus expect some commonality of viewpoints and values between linguistic pragmatists and lawyers, this seems not generally to be the case—perhaps because all but the most critical of legal thinkers would find the insights of pragmatics unsettling in their implications for the law. If, as one linguist put it, the meaning of a word is "what an individual believes that other people in the society understand by that word...[then] meaning includes everybody's theory of

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[26] *See* J. L. Austin, HOW TO DO THINGS WITH WORDS (1965); *See also* John Searle, *Indirect Speech Acts, in* 3 SYNTAX AND SEMANTICS 59 (Peter Cole & Jerry L. Morgan eds. 1975).

[27] *See* Austin, *supra* note 26; *see also* Searle *supra* note 26.

[28] *See* Parker & Riley, *supra* note 9, at 21.

[29] *See id.* at 22.

[30] See Sharon Crowley, *Linguistics and Composition Instruction: 1950-1980*, 6 WRITTEN COMMUNICATION 480 (1989).

everybody else,"[31] and indeterminacy is an inevitable part of our condition.[32]

In contrast to teachers and practitioners of law, teachers and researchers in the field of composition have increasingly drawn inspiration from the work of contemporary linguists.[33] This interest comes after many years of alienation during which the formalism and a-contextuality of formal linguistics was seen as irrelevant to the composition classroom.[34] In particular, the advent of linguistic pragmatics has led to a considerable body of scholarly literature devoted to the application of linguistic theory to the teaching of composition and the development of classroom practice based on that application.[35]

### III.   CLARITY, COHESION, AND COHERENCE: LESSONS FROM LINGUISTICS

In this Part, we consider what lessons linguistics has for teaching novice legal writers the fundamental skills of clarity, cohesion, and coherence.

Textual unity has two major components: cohesion, which is achieved when meaning flows across sentence boundaries because there are clear lexical and semantic connections within a text, and coherence,

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[31] *See supra* note 2, at 830.

[32] Indeed, the legal scholars who participated in the Northwestern/Washington Conference seemed to feel that a "crit" would be likely to agree with the linguists' view of legal interpretation. *See supra* note 2, at 879-884.

[33] *See supra* note 3, at 295.

[34] *See id.*

[35] *See e.g.*, Lynn Beene, *How Can Functional Documents Be Made More Cohesive and Coherent*, in SOLVING PROBLEMS IN TECHNICAL WRITING (Lynn Beene & Peter White eds. 1988); George A. McCulley, *Writing Quality, Coherence & Cohesion*, 19 RES. IN THE TEACHING OF ENG. 269 (1985); Stephen P. Witte & Lester Faigley, *Coherence, Cohesion & Writing Quality*, 32 COLLEGE COMPOSITION & COMM. 189-204 (1981); Kim Sydow Campbell, COHERENCE, CONTINUITY, & COHESION: THEORETICAL FOUNDATIONS FOR DOCUMENT DESIGN (1995); Jeanne Fahnestock, *Semantic & Lexical Coherence*, 34 COLLEGE COMPOSITION & COMM. 400-416 (1983); Isabelle Thompson, *The Given/New Contract & Cohesion: Some Suggestion for Classroom Practice*, 15 J. TECHNICAL WRITING AND COMM. 205 (1985); Marilyn Cooper, *Context as Vehicle: Implicatures in Writing*, in WHAT WRITERS KNOW: THE LANGUAGE, PROCESS, AND STRUCTURE OF WRITTEN DISCOURSE 105 (Martin Nystrand ed. 1982); Kim B. Lovejoy, *The Gricean Model: A Revising Rubric*, 16(1) J. TEACHING WRITING 9 (1987); Kathryn Riley, *Conversational Implicatures and Unstated Meaning in Professional Communication*, 15 TECHNICAL WRITING TCHR. 94 (1988); John Hagge & Charles Kostelnick, *Linguistic Politeness in Professional Prose*, 6 WRITTEN COMMUNICATION 312 (1989); Robert J. Tierney & James H. Mosenthal, *Cohesion and Textual Coherence*, 17 RES. IN THE TEACHING OF ENG. 215 (1983).

which is achieved when a text has focus and plausibility because readers can connect its parts to a discourse topic and to the context in which it occurs. Coherence results when "a speaker with an intention and a set of beliefs about her audience acts rationally on that intention by forming a plan to effect it that is consistent with those beliefs."[36] In a successful communication, the addressee is able to reconstruct that plan and intention.[37] To cohesion and coherence we add here a third component of textual unity, clarity on the syntacticosemantic level, since no text can cohere without sentence-level clarity.

The more the meaning of a sentence can be gleaned independently of its context, that is from reliance on prototypical definitions and the phrasal structure alone, the less debate there is about the meaning of a sentence and the more we are able to say it has clarity. Threatening this clarity are syntactic ambiguity and semantic uncertainty. "Syntactic ambiguity is the uncertainty of meaning that results from the arrangement of words in a sentence."[38] Semantic uncertainty results when words are ambiguous, that is, when they have double or multiple meanings. Semantic uncertainty also occurs when words are vague, that is, when there is uncertainty about "where the boundary is with respect to what a term does and does not refer to."[39] Although context can sometimes resolve syntactic or semantic uncertainty, even the clearest contextual markers of intent cannot prevent years of litigation and the eventual frustration of the drafter's intent. Thus, we must teach students to recognize and avoid—where necessary and possible—both types of linguistic uncertainty.

Textual cohesion largely results from the considered use of "cohesive ties or markers," semantic elements that direct a reader's interpretation of one sentence by referring to an element of another sentence.[40] Since cohesive ties bind individual statements into larger units of discourse, these too students must learn to manipulate. Yet researchers have also recognized that cohesion is not a sufficient condition for coherence, that is, a cohesive text may be only minimally coherent because the presence

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[36] *See* Green, *supra* note 9, at 4.

[37] *See id. See also* Rachel Giora, *What's a Coherent Text, in* TEXT CONNEXITY, TEXT COHERENCE 16-35 (Emel Sozer ed. 1985); Beene, *supra* note 35; McCulley, *supra* note 35; Witte & Faigley, *supra* note 35; Campbell, *supra* note 35; Fahnestock, *supra* note 35; Thompson, *supra* note 35; Cooper, *supra* note 35; Lovejoy, *supra* note 35; Tierney & Mosenthal, *supra* note 35.

[38] *See* Barbara Child, DRAFTING LEGAL DOCUMENTS 323 (2d ed. 1992).

[39] *See* Layman E. Allen & C. Rudy Engholm, *Normalized Legal Drafting and the Query Method*, 29 J. LEGAL EDUC. 380, 381-382 (1978).

[40] Pronoun reference is the simplest example of a lexical tie.

of surface linguistic links does not guarantee thematic focus, continuity, or development—characteristics of textual coherence.[41] Coherence then "entails explanations of semantic relationships beyond those indicated in the actual words of the text"[42] and depends on a clear statement of the writer's purpose and an appropriate responsiveness to the audience's knowledge and expectations. Coherence is as much the domain of pragmatics as of semantics and syntax. We will discuss clarity, cohesion, and coherence in turn.

## A.   Syntactic and Semantic Clarity

As discussed in Part One, generative grammar details the rules governing how sentences may and may not be constructed. Language users have no trouble with most of these rules, and teachers need only correct a few, if persistent and wide-spread, mistakes. Occasionally, however, we are challenged by more esoteric errors, as in, for example, "Doormen authorized to accept mail deliveries are proper service of process." This sentence violates what linguists call a selectional restriction, a semantic constraint on the type of subject or object a verb requires. Because a predicative nominative that follows a linking verb must describe the subject, the statement is incoherent: proper service of process does not describe doormen.[43] Thus one role of linguistics is to

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[41] *See* Tierney & Mosenthal, *supra* note 35. *See also* Witte & Faigley, *supra* note 35; Campbell, *supra* note 35; Green, *supra* note 9; Beene, supra note 35.

[42] *See* Beene, *supra* note 35, at 18.

[43] Of course, "correct" legal writing fairly regularly reveals syntactic and semantic constraint violations, as in "The deceased was assisting a motorist on the side of the thruway" or "The defendant fled the scene." The law often refers to parties by characterizations that were inappropriate at the time of the incident. Whether this linguistic practice is one more example of the legal profession's tolerance of incompetent writing, or whether it can be justified, is an interesting question. The conventional view is that these general descriptions are appropriate clarifications of the parties' legal roles. A key presupposition of the legitimacy of those results [the outcomes of legal disputes] in our society is the untying of the drama as legally translated from its usual social moorings, the putative objectivity of the story once told in the apparently dispassionate language of the law. As the people in the cases become "parties," strategic actors on either side of a legal argument, they are stripped of social position; their gender, race, class, occupational and other identities become secondary to their ability argue that they met one or another aspect of a legal test....Elizabeth Mertz, *Linguistic Ideology and Praxis in U.S. Law School Classrooms*, 2(3) INT'L PRAGMATICS ASS'N 325, 331 (1993). Writers like Peter Goodrich, Steven Stark, and Christopher Stone see these practices as dehumanizing and desensitizing. *See* Peter Goodrich, READING THE LAW: A CRITICAL INTRODUCTION TO LEGAL METHOD AND TECHNIQUES (1986); Dennis Klinck, THE WORD OF LAW: APPROACHES TO LEGAL DISCOURSE 27-28 (1992)(discussing Stark and Stone).

help us diagnose mistakes that we can generally recognize, but not explain grammatically. Beyond error, however, looms the more complicated problem of sentences that are intrinsically ambiguous because conflicting rules or sentence processing strategies govern their interpretation.

Syntactic ambiguity occurs whenever more than one role can be assigned to a constituent phrase, as we saw in the "American law professor" example in footnote 14 where "American" could modify either law or professor. Most cases of syntactic ambiguity occur in sentences with coordinate or subordinate structures.

Coordination allows writers to link sentences or parts of sentences by grafting part of one sentence onto another. Sometimes, however, it is unclear which parts of the sentence compose the base construction and which are the parallel, coordinated elements.

> In asking for a rent reduction, the tenant alleged that the janitor
> repeatedly failed to fix the boiler and asserted the elevator mainte-
> nance company was incompetent.

In this sentence, it is syntactically unclear if "and" is compounding the verbs "failed to repair" and "asserted," or "alleged" and "asserted." Whenever a third verb follows a main verb and subordinate verb and could pair with either, the writer must make the correct coupling manifest in the sentence. If the writer intends coordination within the "that" clause (the tenant alleged two things), the author must highlight that intention—with correlative conjunctions perhaps.

> In asking for a rent reduction, the tenant alleged that the janitor both
> repeatedly failed to fix the boiler and asserted the elevator mainte-
> nance company was incompetent.

If the writer intends to compound the predicate in the base sentence, that intention needs to be highlighted through the repetition of subordinating conjunctions and prepositions that clarify the sentence's construction.

> In asking for a rent reduction, the tenant asserted that the elevator
> maintenance company was incompetent and alleged that the janitor
> repeatedly failed to fix the boiler.

Like coordination, subordination allows a writer to add parts to the base sentence and to impose a hierarchic structure on the components added to the sentence. The writer can open with introductory phrases or

subordinate clauses, insert interruptions into the base sentence, or modify elements of the base sentence. Sometimes, however, the relationships between the parts of a sentence are unclear and the meaning therefore ambiguous. Modifiers are a frequent source of ambiguity.

> A key aspect of the deposition that his lawyers overlooked was the lighting conditions.

In this sentence, it is unclear whether the deposition was overlooked or only one aspect of it; moreover, no syntactic rule helps us to resolve the uncertainty. The only way to avoid the ambiguity presented by this kind of sentence is to construct it differently at the outset: when a prepositional phrase separates a noun from its modifier, the prepositional phrase should be eliminated or relocated.

> A key aspect that his lawyers overlooked in the deposition was the lighting conditions.

Modifiers that are positioned at the end of a series also create confusion, as in the following:

> This regulation affects educational institutions and corporations making charitable contributions.[44]

It is unclear whether the restrictive modifier "making charitable contributions" is confined to corporations, as the last-antecedent rule suggests, or whether it also applies to educational institutions. Militating against the last-antecedent rule is a grammatical principle called "coordinate structure constraint," which holds that grammatical operations may not disrupt a coordinate structure—elements joined by *and*.[45] Under this rule, the restrictive modifier might well apply to both corporations and educational institutions. The dispute hinges on a sentence processing strategy known as late closure strategy. In order to process information quickly, most language users assume that incoming items are "part of the phrase currently being processed, as opposed to part of a new phrase that needs to be constructed."[46] In the example above, the scope of the modifier, and thus the meaning of the sentence,

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[44] This example is adapted from Child, *supra* note 38, at 329.
[45] *See* Solan, *supra* note 9, at 29-34. This can also be referred to as the "across the board rule." *Id.* at 34.
[46] *See id.* at 31-32.

depends on whether the reader regards the entire complement (a compound phrase) as the phrase being processed or only the last part of the compound phrase.[47]

Here too, there is no simple way to resolve this dispute because one rule does not simply trump the other. Instead, there are two equally valid interpretive strategies that can be used for deriving meaning when more than one interpretation is possible. In this regard, grammatical rules are as helpful or unhelpful—as determinate or indeterminate—as the canons of construction.[48] When canon, rules, or strategies conflict, we must allow context to direct our choice, that is, linguistic pragmatics rather than sentence processing becomes the ultimate arbitrator.

Nonetheless, this type of syntactic ambiguity (and the litigation it generates) can be avoided if we teach, and drafters use, tabulated sentence structure. By showing graphically the relationship between the elements of the sentence, this technique clarifies meaning.

> This regulation affects
> > 1. educational institutions, and
> > 2. corporations making charitable contributions.

Because this layout attaches the modifier to the second item alone, it expressly restricts its reach to corporations. Educational institutions are not affected. Alternately, the provision could be tabulated as follows.

> This regulation affects
> > 1. educational institutions, and
> > 2. corporations
> making charitable contributions.

In bringing the modifier out to the margin, this layout attaches it explicitly to both items.[49] Were we to teach these techniques in law

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[47] *See id.* at 34.

[48] *See id.* at 38.

[49] However, in order to clarify, a tabulated sentence must meet the following criteria.
   a.   The material must constitute a complete sentence in which every word is essential to the meaning.
   b.   The indented items must be parallel in construction.
   c.   The indented items must begin with lower case letters rather than capitals. This is to emphasize that they are within a sentence rather than self-contained entities.
   d.   At the end of each item except the last one, there must be a comma or a semi-colon. When the items are short and when there is no punctuation within any single item, most drafters prefer commas to semi-colons.

school, drafters could preempt many interpretive wrangles.

Another area of ambiguity is that generated by the scope of adjectives and adverbs. For example, a civil-rights statute defining as places of public accommodation "wholesale and retail stores and establishments dealing with goods and services of any kind" is certain to generate costly and needless litigation. If "wholesale and retail" modifies only "stores," medical practices and law offices would seem to be included in the definition of "places of public accommodation;" if it modifies "stores and establishments," doctors and lawyers would seem to be excluded, a consequential distinction. An adjective or adverb preceding a series can be interpreted to modify the first or all the elements of the series.[50] In order to clarify the scope of such modifiers, tabulation can be used. Thus a whole range of syntactic ambiguities could be resolved if drafters took more care in making the structure of a sentence more apparent.

In addition to syntactic ambiguity, semantic uncertainty poses a threat to clarity and, ultimately, to textual coherence. Often there is a range of meanings we can give to individual words and phrases in a sentence. In poetry, this flexibility often enriches the meaning of the work; in law, however, efficacy and enforceability are often threatened by it.

Sometimes a range of meanings is possible because a word has multiple meanings. The application of "all doctors must be licensed" is difficult, for example, because we cannot determine, whether "doctor" includes osteopaths and veterinarians. Sometimes a range of meanings is possible because of vagueness: the boundaries of a word are unclear, as in "the landlord may not evict the family of a deceased tenant of record." It is unclear whether distant relations and domestic partners fall within the scope of family or without. Sometimes a range of meanings is possible because of a word's generality. For example, the term "academic dishonesty" is more general than the term "plagiarism,"

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e.    After the next to the last item, it is essential to put either "and" or "or" to indicate whether the items are cumulative or alternative.

f.    Introductory words and concluding words should read like a grammatical sentence when read with any one of the tabulated units.

*See also* Child, *supra* note 38, at 346-49.

[50] Solan, gives the example of a death penalty statute that prohibits a jury from being influenced by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." *See* Solan, *supra* note 9, at 56. In *California v. Brown*, 479 U.S. 538 (1987), the Court was asked to decide whether "mere" modified the entire list or only the first word "sentiment." Four justices said the word "mere" modified the whole list. Four disagreed. *See* Solan, *supra* note 9, at 58-59.

and may create more uncertainty about what conduct is prohibited than a code that simply punishes plagiarism. Is it, for example, academic dishonesty to proofread a friend's paper or to razor a case out of library book so that others cannot find it?

Yet the problem of semantic uncertainty is broader than these obvious examples suggest since, as noted earlier, many words—perhaps most—are indeterminate at their margins and subject to interpretive dispute. Thus, in *Smith v. United States*,[51] the Supreme Court was divided about the meaning of "use" in the provision "whoever, during and in relation to any crime of violence or drug trafficking crime...uses or carries a firearm, shall, in addition to the punishment provided for such crime...be sentenced to imprisonment for five years." 18 U.S.C. §924(c)(1).[52] Justice Scalia argued that the ordinary, prototypical meaning of "uses" suggests the statute be applied only if a firearm is used as a weapon. Justice O'Connor argued that trading a firearm for drugs is "use" of a firearm within the lexical definition of the verb "to use," and is, therefore, an activity that falls within the meaning of the statute.

Although we may have a preference for Justice Scalia's approach—or for Justice O'Connor's,[53]—there is no way we can guarantee our preference will be honored in a court of law. Thus our control over semantic uncertainty exists only in the drafting stage—in choosing words and writing definitions carefully.

If Congress intended "use" to have a prototypical meaning, for example, it could have written "uses a firearm as a weapon" directly into the provision itself. Vagueness problems can often be resolved by more precise diction. A statute could provide, for instance, "Protestors shall not come within fifteen feet of abortion clinic entrances," rather than "Protestors shall not stand near abortion clinic entrances."

Sometimes, of course, drafters might want to use more elastic language in order to cover unforeseen circumstances. Precise language or enumeration can be undesirably restrictive, just as general terms can lend themselves to atypical interpretation. In this situation, a stipulative definition that is descriptive or reflective of the drafter's intent might be appropriate. Assume, for example, that the rent law mentioned above is meant to prevent eviction of coinhabitants who have had a long and close relation to the tenant of record. If this is the intent,

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[51] 508 U.S. 223 (1993).

[52] This example is discussed in Solan, *supra* note 15, at 1075.

[53] Definitional approaches lead to broad interpretations and prototypical approaches lead to narrower interpretations. *See id.* at 1076.

the drafters could define "family" to include coinhabitants "whose relationship is long term and characterized by emotional and financial commitment and interdependence."[54] This definition is broad enough to protect some domestic partners or foster children, but narrow enough to exclude roommates.

Although instances of syntactic ambiguity and semantic uncertainty will undoubtedly survive these prescriptions, adherence to the drafting practices suggested here will reduce the occasions upon which we are forced to let others determine our meanings.[55] Moreover, since it is difficult to bridge the synapse between adjacent sentences when one or both of those sentences are internally ambiguous, ambiguity also threatens cohesion and coherence. Thus textual unity begins with clear local structures, and we must help students to achieve these structures.

## B. Syntax and Compositional Semantics: Textual Cohesion

The literature on textual cohesion is rich, much of it relying on Halliday and Hasan's work on the role of semantic elements like reference, substitution and ellipses, conjunction, and lexical cohesion.[56] These semantic elements work as "cohesive ties or markers" that transcend sentence boundaries and connect sequences of sentences by extending the domain of one sentence into another. Other research has examined syntactic structures that establish cohesion by structuring information in deliberate and discernable formations,[57] using subordination, passive voice and parallelism to organize material into clarifying "given information/new information" patterns.

The first of the semantic ties Halliday and Hasan discuss is reference cohesion. This occurs when one element in a text points to another element for its interpretation. The reference can be anaphoric (referring to a word or phrase in a previous phrase or sentence) or cataphoric (referring to a word or phrase in a subsequent sentence). It

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[54] See *Braschi v. Stahl Assoc.*, 74 N.Y.2d 201 (1989).

[55] We realize, of course, that in many cases, drafters are concerned less with *le mot juste* than with creating documents that will attract enough votes for passage or convince the buyer to sign on the bottom line. But we are convinced nonetheless that an understanding of how syntactic and semantic uncertainty are generated and how (and to what limited extent) they can be avoided would help enormously. Much linguistic uncertainty results simply because the writer didn't see the problem coming.

[56] *See* M.A.K. Halliday & Ruqaiya Hasan, COHESION IN ENGLISH (1976).

[57] *See* Beene, *supra* note 35, at 124-26; Green, *supra* note 9, at 134; Campbell *supra* note 35, at 45.

can involve the use of pronouns, demonstratives, definite articles, or comparatives.

> The legislature did not intend to include private dental offices within its definition of public accommodation. If it had meant to, it could have easily included them in its list.

Reference promotes cohesion by establishing a focus (the legislature/dental offices) and maintaining that focus through a series of sentences (it/them).

Substitution and ellipses also extend the domain of one sentence into another. By using a substitute word (a synonym) or by omitting a word or phrase that could be inferred from the previous sentence (ellipsis), continuity is achieved.

> The prosecutor was asked whether she wanted to make a motion. She replied that she did [want to make a motion].

Conjunctions and conjunctive adverbs form another category of cohesive ties. Although conjunctive elements do not promote continuity through focused repetition or anaphoric relation, they promote cohesion because their specific lexical meanings "presuppose the presence of other components in the discourse"[58] and establish a particular semantic relation to those components. Conjunctions have been classified into four groups—additive, temporal, adversative, and causal. The additives (*and, moreover*) expand ideas in the text by simple accretion. Temporal conjunctions (*then, finally*) clarify the relationships among textual components by establishing their sequences. Adversatives (*yet, however*) enable a writer to qualify, refute, or question a previous idea. Causals (*thus, because*) provide explanations and support for other statements. Properly used, conjunctions and conjunctive adverbs are helpful signposts. When they are misused, however, cohesion is seriously threatened.

> Because Murray was driving with the flow of traffic, he did not realize his failure to wear sunglasses would render him unable to see the state trooper.

It is unclear how the flow of traffic bears on Murray's failure to wear sunglasses. The explanation does not seem to justify the conclusion.

Some researchers have noticed that the relationship established by conjunctive elements exists in their absence and can often be inferred.

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[58] *See supra* note 56, at 226-227.

Frequently, in this situation, the other cohesive ties Halliday and Hasan describe carry the reader across the sentence boundaries.[59]

> The officers were not trespassing on defendant's property. Their surveillance of his property took place during an overhead helicopter flight in public air space and from a public sidewalk.

We can infer the second sentence is support for the first, partly through the anaphoric use of pronouns. If the point is not obvious enough, however, cohesion is threatened.

> The Human Rights Act has the express purpose of assuring that "every individual within this state is afforded an equal opportunity to enjoy a full and productive life." This court should hold that punitive damages are an appropriate remedy.

We need a transitional expression to bridge these sentences.

> The Human Rights Act has the express purpose of assuring that "every individual within this state is afforded an equal opportunity to enjoy a full and productive life." To promote this purpose, this court should hold that punitive damages are an appropriate remedy.

Lexical cohesion is the result of reiteration and collocation. Reiteration is, in many cases, a form of substitution. It establishes cohesion through the repetition of words or through the use of synonyms, near-synonyms, or general category words.

> There is an overarching *presumption of good faith relocation*. This presumption rests on the premise that the custodial parent has considered the child's best interest in the decision to move.

Collocation refers to lexical cohesion that is achieved by using words that are associated with one topic.

> The Supreme Court has repeatedly said that police utilization of *extra-sensory, non-intrusive equipment* to investigate people and objects is not a search for purposes of the Fourth Amendment. This investigation is analogous to the police using *a drug detection dog* to sniff luggage at an airport. The odor of marijuana escapes an object, compartment, or building and is detected by the sense-enhancing instrument of *a canine sniff* just like the heat escapes a home and is detected by *the sense-*

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[59] *See, e.g.*, Fahnestock *supra* note 35, at 402.

*enhancing infra-red camera. Use of the thermal imager,* like use of the *dog sniff,* involves no embarrassment or search of the person. In fact a *dog sniff* may be more intrusive since the dog is sniffing for substances within the home, where the *thermal imager* is measuring heat which is outside the home.

Because collocated items do not share an antecedent and are not precise synonyms, they do not establish direct connections. Instead they help readers to infer a tie because the phrases share characteristics. Thus we infer that a drug detection dog, canine sniff, infra-red camera, and thermal imager are examples of extra-sensory, non-intrusive equipment.

Lexical collocation is considered by some to be the best indicator of writing ability since it shows how writers are able to use substantive associations to weave sentences together.[60] But although lexical items are potentially cohesive, "nothing in the occurrence of a given lexical item necessarily makes it cohesive."[61] For lexical collocations to be understood, the reader might need some general knowledge of the subject matter to draw the correct inferences, some knowledge, for example, of search and seizure law. In other words, the inferences we draw from the explicit content may depend in part on extra-textual knowledge. Moreover, the correct use of cohesive ties does not guarantee effective communication when texts lack purpose. For instance, in the following example, reiteration [weapons], collocation [weapons/guns/switchblades; crimes/robberies], and conjunction [however] cannot provide textual unity.

> The suspect threw the weapon over the wall. Weapons are used in many crimes. Indeed, most robberies involve guns. The suspect, however, threw away a switchblade.

Although these sentences are cohesive, they violate a key condition of coherence, namely that the writer provide only that information relevant to the text's purpose.[62] In addition to cohesion, texts must have a pragmatic component: they must embody principles by which the addressee can infer the author's purpose.

Of course, it is somewhat misleading to assume too sharp a distinction between syntax, semantics, and pragmatics.[63] Semantic cohesion and pragmatic coherence can be bolstered, for example, by

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[60] *See* Witte, *supra* note 35, at 200.
[61] *See* Witte, *supra* note 35, at 93.
[62] See *infra* text at notes 69-74.
[63] *See supra* note 8, at n.57.

syntactic devices, especially when these devices assist in information flow. As Georgia Green notes in discussing connections between syntax and pragmatics, "there are correlations between the order of syntactic constituents in a sentence and the discourse role of the information which a particular constituent represents."[64] This order is tied to the way readers process information. Generally, readers tend to relate what they are reading to what they already know about the subject matter.

> First, as readers encounter each new sentence, they *parse* the sentence's information structure. They decide which information has been given previously and which is new. Second, they *match* old information to its antecedent already existing in memory. Third, they *connect* new information to the existing memory structure.[65]

To enhance this processing, it is helpful to put old information at the beginning of a sentence and new information at the end.[66]

Syntactical structures can be manipulated to achieve this information organization.[67] For example, one legitimate use of passive voice is to shift the object of a sentence into the initial subject position because it expresses old information.

> Students' first amendment rights can be abridged if their conduct creates a substantial disruption. No substantial disruption was caused by Kimberly Brossard wearing a tee-shirt that said "Drugs Suck" to school, however.

The repetition of "substantial disruption," made possible by the passive construction, bridges the sentences.

Parallel structures can also promote cohesiveness, especially in a series of sentences beginning with introductory phrases that organize information.

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[64] *See* Green, *supra* note 9, at 134.

[65] *See* Thompson, *supra* note 35, at 206.

[66] Some, like Isabelle Thompson, call this the given/new contract. *Id.* Some call this functional sentence perspective. *See* Lynn Beene & Thomas N. Huckin, *A Cognitive Approach to Readability,* in NEW ESSAYS IN TECHNICAL AND SCIENTIFIC COMMUNICATION: RESEARCH, THEORY, PRACTICE 90-108 (Paul V. Anderson, R. John Brockman, Carolyn R. Miller, eds. 1983); William J. Vande Kopel, *Functional Sentence Perspectives,* 333 COLLEGE COMPOSITION & COMM. 50 (1982).

[67] *See* Joseph M. William, STYLE: TEN LESSONS IN CLARITY AND GRACE (5th ed. 1997)(discussion of these techniques in detail).

> In Minnesota's Human Rights Law, the drafters broadly characterized the types of places considered public. In New York's law, the drafters listed places considered public.

The parallel AB:AC structure suggest there will be a review of several state human rights laws.

Also helpful are AB:BC patterns, a pattern frequently achieved through the use of complex sentences and sentences with introductory phrases.

> Mr. Eliot had blinds covering his windows. By covering his windows, he established an expectation of privacy.

All these techniques enable writers to emphasize and de-emphasize points, to focus on a topic, and to provide bridges between sentence boundaries. Thus it would be helpful to have classroom exercises in which students detect and label the various kinds of cohesion ties described above, create stronger ties when needed, and rewrite a passage to promote strong information patterns. The conscious understanding of the mechanisms of cohesion should provide students with a powerful tool for revising their own texts.

Yet this training alone will not produce a genuine and coherent text.

## C. Pragmatics and Textual Coherence

A coherent text is not the sum of its linguistic properties. Because writing is a communicative act, a writer must assess the audience's knowledge and inferencing capacities and supply what the audience needs to decode or discern the text's purpose and meaning.[68] This suggests that no text is sufficient unto itself; all texts rely on a reader's extra-textual knowledge, knowledge that helps the reader process the text. A coherent text is one in which the reader can easily construct the writer's plan because the writer has accurately assessed, and appropriately responded to, the reader's familiarity with the subject matter and linguistic and genre conventions.

All readers bring to a text some prior knowledge. In so far as they are familiar with the subject matter, they have schemata (also called frames and scripts)[69] that help them to organize both general subject knowledge (e.g. *mens rea*) and procedural knowledge (e.g. researching

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[68] *See* Green, *supra* note 9, at 106.
[69] *See* Beene & Huckin, *supra* note 66, at 93.

a legal issue). There are also schemata for discourse conventions, often called writing plans,[70] which structure the relationship of ideas without specific content, as in problem/solution paradigms or case comment formats.[71] In the communication process, these schemata account for a reader's ability to infer missing details or to recognize parts of a text. The schema, "an integrated, organized representation of past behavior and experience," guides the reader "in reconstructing previously encountered material."[72]

A classic example of a writer's failure to provide enough information to activate a semantic context or schema is the following.

> The procedure is actually quite simple. First you arrange things into different groups. Of course, one pile may be sufficient depending on how much there is to do. If you have to go somewhere else due to lack of facilities that is the next step, otherwise you are pretty well set. It is important not to overdo things. That is, it is better to do too few things at once than too many. In the short run this may not seem important but complications can easily arise. A mistake can be expensive as well....[73]

Only those readers who were told that the title of the passage was "Washing Clothes" could recall the tasks and order of steps mentioned. The passage also illustrates an important point about discourse conventions. Readers rely on titles, headings, and topic sentences to establish the semantic context, to trigger the schemata.[74]

Every coherent text, therefore, has a context upon which both writer and reader rely. Thus discourse, even written discourse, is a cooperative effort. Writers know that readers will use the context, their extra-

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[70] Richard Beach & JoAnne Liebman-Kleine, *The Writing/Reading Relationship: Becoming One's Own Best Reader,* in CONVERGENCES: TRANSACTIONS IN READING & WRITING 64-71 (Bruce T. Peterson ed. 1986); Barbra Doughtery, *Writing Plans as Strategies for Reading, Writing & Revisions,* in CONVERGENCES: TRANSACTIONS IN READING & WRITING 82 (Bruce T. Peterson ed. 1986)(hereinafter *Convergences*).

[71] *See* Elizabeth Fajans & Mary R. Falk, SCHOLARLY WRITING FOR LAW STUDENTS: SEMINAR PAPERS, LAW REVIEW NOTES AND LAW REVIEW COMPETITION PAPERS 55-57 (1995).

[72] *See* Marilyn S. Sternglass, *Writing Based on Reading,* in *Convergences, supra* note 70, at 151-162, 158. Readers, like beginning law students, who are new to a discipline have difficulty understanding and retaining what they read because they lack schemata for processing general and procedural knowledge as well as schemata for discourse conventions.

[73] J. D. Bransford & M. K. Johnson, *Contextual Prerequisites for Understanding: Some Investigations of Comprehension and Recall,* 11 J. VERBAL LEARNING & VERBAL BEHAV. 717, 724 (1972).

[74] *See* Beene & Huckin, *supra* note 66, at 97.

textual knowledge, to connect sentences or ideas when the connection is not explicit in the text itself. But for this to work effectively, writers must adhere to H.P. Grice's Cooperative Principle, briefly: "Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged."[75] From this principle flow Grice's four conversational maxims, the maxims of quantity (enough but not too much information), quality (only information one believes to be true and for which one has adequate evidence), relation (relevant information only) and manner (clear and well-organized information).[76] Insofar as writers adhere to these maxims and readers interpret text in accordance with them, discourse is coherent. Insofar as any one of these conversational maxims is unintentionally violated, coherence is threatened:

> (a) *quantity*—a contribution may appear to offer too little or too much information;
> (b) *quality*—a contribution may appear to be inaccurate;
> (c) *relation*—a contribution may appear to be irrelevant to earlier contributions; and
> (d) *manner*—a contribution may appear to be too obscure or indirect.[77]

Consider the following examples. The "Washing Clothes" example is incoherent because it violates the maxim of quantity: the passage gives less information than the situation requires. Once the title is supplied, however, the maxim is fulfilled. The maxim of relation is violated in the sentences that follow because the second sentence does not appear to be relevant to the first. "The haystack was important. The cloth had ripped."[78] Of course, a reference to "parachuting" would activate the schema needed to make these sentences cohere.

A novice in a discipline like law frequently violates the maxim of quantity. Outsiders who still need to assimilate what is common knowledge in a discipline are likely to make mistakes about what can be taken for granted and what needs articulation. First-year law students often teeter between belaboring the obvious, and overlooking the necessary, as in the example below.

> In order to evaluate Molloy's appeal, we must look to the statute, which is the most controlling authority, taking precedence over common law

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[75] *See supra* note 19, at 45. *See also, supra*, text at notes 20-25.
[76] *See id.* at 45-46 and text at notes 20-25.
[77] Kim S. Campbell, COHERENCE, CONTINUITY AND COHESION 16 (1995).
[78] *See id.*

> and yielding only to the Constitution. Then we must look to case law
> interpreting the statute and compare the facts of our case to the facts
> of decided cases, analogizing and distinguishing. When we follow this
> procedure, it is clear that Molloy's case is more like *People v. Gonzalez*
> than like *People v. Molyneux*; therefore, his conviction will be reversed
> because he did not commit a robbery.

The student here is clarifying for himself what his legal audience
already knows about weight of authority; he should omit the first
sentences. On the other hand, he fails to tell us the facts of the prece-
dent case and instant case, although we need this information to assess
the comparison and the conclusion.

Even a more advanced student will make some errors of judgment,
as in this paragraph from an office memorandum.

> [1] Menacing requires placing a person in fear of "imminent serious
> physical injury." [2] Serious physical injury is that which presents a
> substantial risk of death or causes a serious disfigurement or pro-
> tracted impairment of health. [3] In *Jackson*, the defendant covered the
> victim's mouth with duct tape and threatened to rape her. [4] The court
> concluded that the defendant's conduct presented a risk of protracted
> impairment of health. [5] Unlike in *Jackson*, however, the prosecution
> here cannot prove the threat of injury was on the point of happening.

The topic sentence adequately establish the semantic context—the crime
of menacing—and the information given in the next three sentences is
relevant to one element of the crime, serious physical injury. The fifth
sentence, however, violates the Cooperative Principle. The student fails
to organize around the legal issues, switching abruptly from a discussion
of serious physical injury to a discussion of imminence. Thus the maxim
of manner is violated: the contribution is disorganized and the compari-
son to *Jackson* obscure. Moreover the writer never describes the physical
injury in the instant case, nor does she provide any information either
on the meaning of imminence or the imminence of the threat either in
the precedent or the instant case. Thus she violates the maxims of
quantity (the contribution is not as informative as required) and relation
(the contribution is not relevant).

As this analysis illustrates, unintentional violations of the Coopera-
tive Principle are common in written discourse. They are perhaps even
more frequent than in conversation. The turn-taking nature of speech
allows a hearer to ask for clarification whenever necessary.[79] A reader

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[79] *See* Lovejoy, *supra* note 35, at 11.

has no such opportunity. Moreover, novices are especially prone to unintentional violations because they have not yet internalized the "local" maxims—for example, they don't know how much information is required in an office memo, nor do they know what makes some information relevant and other information irrelevant. Yet the above analysis also suggests that if students learn more about the cooperative nature of discourse, they may become more aware of audience and more sensitive to their responsibilities to it. Were they to apply Grice's maxims in the revising process, their products might be significantly more comprehensible earlier.

One might begin by asking students to critique an incoherent passage using Gricean principles. Later, students could use these principles to assess their own products. To determine whether they adhered to the maxim of quantity, writers would need to perform a serious audience analysis, assessing first the amount of information their audience has and the amount they need to understand their points, and then developing or streamlining the text accordingly. In applying the maxim of quality, students must focus on the sufficiency and truthfulness of their statements and support. The maxim of relation requires the relevance of each idea and detail to be assessed in terms of the text's purpose. Applying these three maxims to their work is likely to help students make meaningful substantive changes, not just surface corrections.[80] It is the maxim of manner that will assist them in editing for textual cohesion (for syntactic and semantic ambiguity, for example, or information patterns). Thus the Cooperative Principle offers us a new way of understanding textual incoherence and a new set of heuristics for addressing it.

Complicating the issue of coherence, however, is Grice's notion of "implicature." Although teachers, critical readers, or skeptics often conclude that violations of the Cooperative Principle are unintentional and result in irrational and unpredictable texts, many violations are not only intentional, but meaningful. Indeed, the whole notion of the Cooperative Principle was developed to explain how it is we can communicate things we did not say, to explain how it is statements routinely convey more than they literally denote.

Assume, for example, that a parole officer asks a parolee if he is getting on with his new employer. The parolee responds, "Well, he hasn't locked up the silver yet." Although the parolee's response seems to flout the maxim of relation, most listeners would infer that while there is, as

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[80] *See id.*

yet, no overt conflict, the employer seems to have reservations about the parolee's honesty.

How is it we are able to make this inference? Because conversation is a cooperative endeavor, participants assume that each exchange is purposeful. When a contribution seems to be deliberately and blatantly unresponsive, the audience assumes the contributor has a reason for being indirect, has a reason, that is, for violating a maxim. The audience then tries to figure out why the contributor is being indirect and what is being implicated.[81] In the example above, for instance, we may decide that the parolee is reluctant to admit his employer's suspicions to his parole officer. He answers indirectly to save face, to make light of the situation. Yet the words "locking up the silver" and "honesty" have a lexical collocation which enables us to infer the true state of affairs. In other words, we as listeners go through a bridging process in which we attempt to relate the response to the original statement.

In order for the bridging process to be successful, however, in order for the appropriate inference to be drawn, the implicature must be intentional. Writers and speakers must not only know they are "flouting" a maxim, as Grice calls it, but they must make sure their audience also knows they are flouting a maxim. Indeed, writers must carefully provide enough clues to steer us in the right direction or even an intentional violation can be ambiguous or indecipherable. If the context is unclear, for example, more than one inference may be possible. One text gives this illustration.

> John: Chester is coming for dinner.
> Mary: I guess I should lock up the liquor.

Whether Mary is implying Chester is a drunk, or whether she knows he is a disapproving teetotaler, cannot be determined without more information.[82]

Even when the semantic context is clear, an implicature might be difficult to infer unless the writer and reader share beliefs about their world. Consider this sentence in a letter to an American editor: "Is it unrealistic for me to assume a businessman and his employees should be able to communicate in English with their customers?" This is a rhetorical question, not a real one. The writer is not looking for answer, but is suggesting that all United States residents should speak English. Yet, as one commentator notes, "this implicature depends on readers

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[81] *See supra* note 19, at 49-50.
[82] *See* Parker & Riley, *supra* note 9, at 12.

sharing his opinion that bilingualism is detrimental to society. Readers...who do not share this belief...[may instead] infer the writer is a provincial bigot."[83]

To avoid misunderstanding, a writer must exploit the genre, textual, and linguistic conventions that draw attention to implicatures and guide us to the correct inference. We have talked about how titles, headings and topic sentences provide the schemata, the contextual clues we need to bridge literal meaning and implication. Legal documents also adhere to genre conventions. For example, an experienced practitioner knows opposing arguments in a brief are not explained and then rebutted, but are instead framed in terms of their rebuttal. Knowledge of these "genre conventions" direct our inferences. Punctuation also draws attention to maxim violations. For example, a colon generally indicates the next clause will explain, develop, or illustrate the prior clause. When a clause following a colon does not do so, we recognize a violation of the maxim of relation and look for an implicature. "You said you mailed the check last week: I have not received it." Because the second clause conflicts with the first, we understand the writer's sarcastic implicature that the debtor has lied.

For an implicature to be easily comprehensible, the contributor must make an accurate assessment of the reader's knowledge and beliefs, must provide an appropriate context, and must exploit genre, textual, and linguistic conventions that point the reader to the intended inference. Such control over language is, we note, the sign of a sophisticated writer and speaker. Thus students probably need to be warned that, however persuasive and effective, successful implicature is also a difficult writing strategy to acquire.[84]

One other warning may be in order: the Cooperative Principle is a promising editing tool for writers, but it is also something of a danger to critical thinking and reading. Insofar as we, as language users, interpret according to the Cooperative Principle, we try to make sense of even the nonsensical. In our bridging activities, we must be alert to situations in which no chain can be responsibly built. A classroom exercise which asks students to analyze both successful and unsuccessful implicatures might be a good way to introduce students to responsible interpretation and responsible use.

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[83] *See* Cooper, *supra* note 35, at 127.
[84] *See id.*

### IV. PERSUASIVE WRITING: LESSONS FROM LINGUISTICS

After the first semester or so of law school, argument (good, bad, or mediocre) is as natural as breathing. Moreover, whenever lawyers write discursively (in memos, briefs, letters, judicial opinion, scholarship) they are writing to influence the reader; even the "objective" office memo or client advice letter attempts, at a minimum, to persuade the reader of the soundness of the author's analysis. Yet when it comes to teaching the skills of eloquent, creative, and fair persuasion, we are often limited to passing on platitudes and folk wisdom—time-honored tips that seem to work, though we're not sure how. Linguistics, especially linguistic pragmatics, provides us with theories that help to explain how persuasion works. Indeed, linguistics provides the non-linguist with a confounding display of theories. Yet, legal writing teachers can, we believe, selectively apply some ideas that shed light on the writing (and reading) of persuasive prose. This enterprise promises several rewards: first, it can lead our understanding of persuasive writing further out of the shadows of intuition and generality; second, it can furnish the basis for teaching strategies; finally, we can take from it some warnings about the ethical limits of persuasion and some lessons in critical reading.

We focus here on applications of linguistic theory to persuasive writing, in particular Grice's theory of implicature. Then we apply some aspects of speech-act theory to persuasive writing. Finally we look at some examples of "truth-conditionally equivalent" syntactic constructions that carry different persuasive charges.

### A. *The Uses and Abuses of Implicature*

In Part III, we applied Grice's Cooperative Principle and theory of implicature to textual coherence. In addition to helping understand how texts hang together, however, implicature helps explain how texts influence and convince their readers. Initially, the application of implicature to persuasion seems counter-intuitive: surely the best way to persuade is by a clear and direct statement of one's reasons, not by indirection.[85] What complicates matters, however, is that the goal of clarity in communication coexists with the equally compelling goals of

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[85] The desire to be heard loud and clear probably explains why many novice brief writers bludgeon the reader instead of killing her softly.

politeness and "face-saving."[86] Implicature reconciles clarity and politeness by allowing the writer to be understood indirectly, and thus without fear of offending.[87] Moreover, like indirect expression in general, implicature is "face-saving": it allows speakers to save "positive" face, that is, to gain approval; and it allows addressees to save "negative" face, that is, to have their autonomy respected.[88]

When an advocate writes to persuade a court, the poles of clarity and politeness exert maximum equal and opposite force. The advocate is bound by his responsibility to his client to make his case loud and clear. At the same time, deference to his hierarchical superior requires exquisite politeness. Indirection is the solution, winning approval for the advocate while deferring optimally to the court's independence of action. This is why, when a student writes "The trial judge's staggering incompetence and counsel's ineffable sleaze combined to create a miscarriage of justice to rival the Dreyfus affair," we write "too strident" in the margin.

Although persuasive writing for the court is the ultimate balancing act, all persuasion pits clarity against politeness. Request letters call for indirection; even collection demands need to employ face-saving devices. We write "You say you mailed the check: we have not received it," not,

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[86] *See* Riley, *supra* note 25, at 179 (citing Robin Lakoff, THE LOGIC OF POLITENESS OR: MINDING YOUR P'S AND Q'S 292-305 (Proceedings Of The Ninth Regional Meeting of the Chicago Linguistic Society 1973).

[87] *See id.*

[88] *See* Penelope Brown & Stephen C. Levinson, UNIVERSALS IN LANGUAGE USAGE: POLITENESS PHENOMENA, IN QUESTIONS AND POLITENESS—STRATEGIES IN SOCIAL INTERACTION 56 (1987). The concept of saving (negative as well as positive) face explains the use of indirectness when writers write for subordinates as well as for those to whom they owe deference.

> [Brown and Levinson] postulate a universal principle governing cooperative social interaction. In essence this principle states that all participants will attempt to maintain two components of their public image: *negative face*, the desire to be unimpeded by others, and *positive face*, the desire to be approved of and admired by others. Stated in other terms negative face reflects a desire for individual autonomy, while positive face reflects a desire for group acceptance.
>
> &#42; &#42; &#42; &#42;
>
> At the same time, normal social interaction introduces a number of potentially *face-threatening* situations, in which either negative or positive face must be sacrificed in order for the transaction to take place. Brown and Levinson postulate that, because of "the mutual vulnerability of face, any rational agent will seek to avoid these face-threatening acts, or will employ certain strategies to minimize the threat." In terms of discourse, the goal of saving face means that indirectness will often take precedence over efficiency, unless the situation is one where urgency overrides the desire to save face.

Riley, *supra* note 35, at 67, 73 (quoting Brown & Levinson, *supra*, at 67, 73).

"We don't believe for one minute that you sent that check." Even judges writing for those beneath them in the hierarchy do well to respect their readers' autonomy of belief.

The skillful use of indirection in general and implicature in particular characterize the work of an experienced legal writer. Experts use intentional violations and near violations of Grice's maxims of quantity, quality, relation, and manner to get their points across. In contrast, the work of law student novices is characterized by provocative directness, unintentional violations, and inappropriate, if intentional, implicatures. Moreover, novices sometimes give in to the temptation of "false implicature"—uttering a truth in order to foster a false inference, misleading without lying.[89]

We can compare two versions of a fact-based argument—one from a brief written by an experienced appellate practitioner and one by a student working from the same record—to illustrate the effective use of implicature to make a point, and the clumsy and dubious strategies of the novice. Such examples could be used to show *how* experienced advocates communicate with an appellate court. It would be a mistake to expect instant improvement in student brief-writing, however. The expert is not an expert by virtue of understanding Grice's theory of implicature or by being a better "implicator." All writers are equally adept at manipulating the maxims. What distinguishes the expert here is his more extensive knowledge of the beliefs of his addressee—all sorts of knowledge about the law, the courts, and the world that the novice lacks. Acculturation is therefore the great teacher. But we can certainly start the process more effectively with some carefully glossed examples for classroom discussion.

Imagine for the purpose of our samples, that one William Costello has been convicted of simple burglary, that is, of intentionally entering a closed fast-food restaurant with intent to commit a crime therein and that the issue on appeal is whether the verdict was against the weight of the evidence. The evidence at trial was as follows.

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[89] *See* Walzer, *supra* note 25, at 15-151. Walzer's article is the first to discuss the ethics of false implicature in professional communication. He provides the following classic example of false implicature. A gardener receives a brochure for "Pro Gro Plant Food" describing the product as "the only plant food available to the home gardener that is protein enriched." This statement is literally true. The trusting and ignorant reader, assuming that the writer must be observing Grice's maxim of relation (relevance), infers a) that protein stimulates plant growth, and b) that commercial growers have long had this superior product available to them. Both of these inferences are in fact untrue: protein is useless as a plant food. The brochure writer has thus misled without lying. *Id.* at 153-54.

## Prosecutor's Case

Police Officers Nevins and Lamb responded to the scene of the burglary at 5 A.M.

Officer Nevins saw Costello walking out of the open door of the restaurant and across the parking lot toward the police car.

Nevins yelled "We got one!" and arrested Costello.

Costello was not carrying stolen property or burglar's tools.

Officer Lamb was looking in the other direction; he did not see Costello until his partner seized him.

Costello was wearing slacks, sport jacket, and dress shoes.

Officer Nevins was an inexperienced officer.

## Defense Case

Costello was dropped off in the parking lot at about 5 A.M. after a night of partying with friends.

He has lived a block away with his parents all his life.

He did not enter the fast-food restaurant, but walked by it and was arrested by Nevins.

He is 25 years old, an unemployed apprentice electrician with no criminal record.

According to the alarm company's records, an audible burglar alarm was set off at the fast-food restaurant at 4 A.M. and the police were notified at 4:05 A.M.

The appellate practitioner who represented William Costello on appeal argued as follows.

[1] The verdict convicting Appellant William Costello of burglary in the third degree is against the weight of the evidence.

[2] Appellant Costello, a twenty-five year-old apprentice electrician who had never been arrested before, was arrested by Officer Dorothy Nevins a block from his home at 5 A.M. on August 3, 1996. [3] The officer and her partner had just responded to a burglar alarm that was

transmitted to the police precinct by the alarm company an hour earlier. [4] The alarm itself was a loud, audible one. [5] Officer Nevins testified that she saw appellant emerge from the open doorway of the burglarized Kentucky Fried Chicken restaurant and walk toward her. [6] He carried no burglar tools or stolen property and he was wearing dress clothes (sport jacket; slacks; dress shoes, not sneakers). [7] Officer John Lamb's testimony offered no support for Officer Nevins' testimony concerning Costello's exit from the burglarized premises: his attention was elsewhere until he heard his partner shout "We got one!".

[8] Appellant Costello testified that he was walking across the KFC parking lot on his way home from a party when he was stopped at gunpoint by Officer Nevins. [9] He told the jury that at no time did he enter the KFC, though he noticed the open door.

In this excerpt from his brief, the experienced brief writer makes extensive use of implicature. The first sentence announces the topic of conversation, activating the experienced legal reader's schemata for "burglary" and "weight of the evidence." The second sentence appears initially to violate the second maxim of quantity by providing more than we need to know about a character in the story. It also seems to violate the maxim of relation: what has this got to do with the story? The reader is quick to infer, however, that the writer believes that a person like appellant is unlikely to commit a burglary. There may also be a "quiet" violation of the first maxim of quantity here—the reader is not telling us that appellant was unemployed.

The third, fourth, and sixth sentences seem to contain violations of the maxim of relation. Again, however, the reader quickly bridges the gaps, creating an argument out of seeming non-sequiturs. A burglar would be unlikely to be on the scene an hour after an audible alarm rang. No one dresses up to break into a fast-food restaurant. Therefore, appellant, dressed up and still at the crime scene an hour later, is not the burglar. Sentence seven seems to violate the maxim of manner—in an expository text, it jarringly introduces the officer's exact exclamation, "We got one!". The reader assumes, as she is meant to, that this detail is important: perhaps the officer is overly eager to make an arrest.

The novice brief writer, working from the same transcript, argued the facts as follows.

[1] James Costello was the innocent victim of circumstances when he happened on the scene of a burglary after a night of partying.

[2] A rookie cop arrived an hour after receiving a call to respond to a burglary in progress at a Kentucky Fried Chicken. [3] The officer claimed to see appellant exit the KFC. [4] However, the rookie's partner testified that he did not see appellant exit the restaurant. [5] Appellant did not have stolen property or burglar's tools on him when he was arrested.

[6] Appellant had a clean record at the time of his arrest and was learning the electrical trade, although he was unemployed. [7] Appellant truthfully denied entering the KFC. [8] The jury mistakenly took the word of a rookie cop who hoped to avoid criticism for her late arrival at the scene by making a "collar."

The novice betrays her lack of experience in the first sentence by announcing an inappropriate topic of conversation—appellant's innocent-victimhood. Except in the rarest of circumstances, this is a conversation the reader, a court, does not want to have. The rest of the writer's argument on the facts is characterized by "quiet" violations of the conversational maxims, by obvious violations that give rise to no persuasive implicature, and by false implicature. The second sentence quietly violates Grice's second maxim of quality: it states a proposition (Officer Nevins received the burglary call an hour before responding) for which it has insufficient evidence. Whether from carelessness or out of a conscious or unconscious desire to create a better past for their side, novices frequently violate this maxim. The same sentence is blatant in its violation of the maxim of manner: its slang "rookie cop" grates on the ear of the reader, whose only inference, unhelpful to appellant, is that his advocate is disrespectful of authority. "Collar," in the last sentence, produces a similar effect.

Extraneous details in the first and sixth sentences ("a night of partying," "unemployed") seemingly violate the maxim of relation—but the inference of drunken desperation is unhelpful to appellant. Like the second sentence, the seventh and eighth sentences violate the second maxim of quality: the writer has no evidence to support her assertion that appellant was truthful or that the officer was trying to avoid censure.

The fourth sentence contains a false implicature: the writer asserts something that is true (Officer Lamb did not see appellant leave the burglarized premises) in order to imply something that is not true (Lamb's testimony contradicted Officer Nevins' testimony). Since Lamb was not looking at the doorway, his failure to see Costello is insignificant. Like "quiet" violations, false implicature is quite common in the work of novices. It too may be intentional or careless, unprincipled or driven by the perception that anything goes in advocacy.

In his zeal to convince, the novice brief writer who intentionally implied what he believed to be false by uttering what he knows is only a partial truth is not communicating candidly.[90] Yet the novice's false implicature is not sinister. First, it *is* just the excessive zeal of a rookie who will, we hope, learn that evidence must be respected. Second, false implicature in an adversary context is most often exposed by the process itself—in the appellate context, respondent would expose appellant's false implicature in her brief and respondent's false implicature would be exposed in a reply brief by appellant. Finally, the intended addressee, the appellate court, lacks the two necessary conditions of "successful" false implicature: appellate judges and their clerks are neither gullible nor ignorant.[91] They are used to testing the assertions of advocates and they have at hand all of the information they need to test those assertions. Thus, whatever its ethical status, false implicature is ordinarily self-defeating in persuasive writing for a court.

But in contexts where readers place greater trust in the writer (as a client or first-year law student may) or have difficulty in gaining access to the actual facts, or both, false implicature is far more sinister. Moreover, there is one variety of false implicature that risks deceiving even a savvy and critical reader: false implicature arising under Grice's maxim of relation, that is, relevance.

> Grice links our ability to infer not merely to our knowledge of rhetorical conventions but also to our rationality itself. We are able to infer correctly and imply with confidence because we instinctively provide the suppressed premise or missing middle term that makes syllogisms of consecutive statements, for instance. We should, then, judge exploitations of Grice's maxim under relation as unethical in any context because, as rational beings, we are always vulnerable to false syllogisms.[92]

Judges routinely use implicature, and even sometimes resort to false implicature, as a persuasive strategy in judicial opinions, attempting to convince the reader that they have made the only and entirely correct decision. Most judges do not feel free to write "Well, here it is. I've done my best, and I had to decide one way or the other, but I could easily have decided otherwise. Here are my reasons: you may agree or disagree. What we really need is to figure out some way of not getting into these

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[90] Yet since he makes no false representation, there would seem to be no violation of the Rules of Professional Conduct.

[91] *See supra* note 89, at 153.

[92] *See id.* at 155.

disputes in the first place." Instead, with rare exceptions, judges use every device in the persuasive armory, fair or foul, to persuade the reader that they have reached the sole conclusion permitted by the law. Implicature is especially suited to judicial rhetoric because it helps the judge (an un-elected rule-maker) maintain the reader's good opinion while exploiting the reader's instinct for supplying the missing middle term.

The respect that appellate judges command and the tendency of novices (and many experts) to read judicial prose uncritically exacerbate our vulnerability to flawed syllogisms. Although judicial exploitation of Grice's maxim of relation is often exposed in the conversation of majority, concurrence, and dissent, it is nonetheless a disturbing phenomenon, and one that students need to recognize. Indeed, we all need to learn to be wary of our innate ability to leap to conclusions.

In the following excerpt from the dissent in *Romer v. Evans*,[93] Justice Scalia exploits the conversational maxims, especially quality (accuracy) and relation, to the hilt.

> When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn. [2] How that class feels about homosexuality will be evident to anyone who wished to interview job applicants at virtually any of the Nation's law schools. [3] The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real-animal fur; or even because he hates the Chicago Cubs. [4] But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant's homosexuality; then he will have violated the pledge which the Association of American Law Schools requires all its member-schools to exact from job interviewers: "assurance of the employer's willingness" to hire homosexuals. Bylaws of the Association of American Law Schools, Inc. § 6-4(b); Executive Committee Regulations of the Association of American Law Schools § 6.19, in 1995 Handbook, Association of American Law Schools. [5] This law-school view of what "prejudices" must be stamped out may be contrasted with the more plebeian attitudes that apparently still prevail in the United States Congress, which has been unresponsive to repeated attempts to extend to homosexuals the protections of federal

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[93] *See* 116 S. Ct. 1620 (1996). In *Romer*, the court struck down a Colorado referendum which sought to bar laws protecting homosexuals from discrimination.

civil rights laws, see, e.g., Employment Non-Discrimination Act of
1994, S.2238, 103d Cong., 2d Sess. (1994); Civil Rights amendments of
1975, H.R. 5452, 94th Cong., 1st Sess. (1975), and which took the pains
to exclude them specifically from the Americans With Disabilities Act
of 1990, see 42 U.S.C. s 12211(a) (1988 ed., Supp. V).[94]

The first half of the first sentence presents the reader with a clear
violation of Grice's first maxim of quality: it is not literally true that the
United States Supreme Court takes sides with the knights against the
villeins.[95] Searching for the reason for this apparent violation, the reader
concludes that Scalia is using a metaphor to express his belief that in
the culture wars the Court sides with the ruling class against the
common people. The rest of the sentence ("and more specifically....")
refines the metaphor (not just any knights, the Knights Templar,[96] a
powerful, semi-sacerdotal class) and tells the reader that the Court's
members themselves come from the class whose values they defend. As
an utterance, it largely observes the conversational maxims—though we
are left without sufficient information about *which* "lawyer class." The
second sentence ("How that class feels...") is relatively observant as well,
though it leaves the reader to work out that the "class" is the legal
academic community, because otherwise, the information at the end of
the sentence would be irrelevant.

The third sentence is a textbook example of "flouting" of the maxim
of relation. After announcing in the second sentence that information
about the legal academic community's views on homosexuality is forth-
coming, the writer presents a reader with information that is blatantly,
almost defiantly irrelevant: eight reasons why an employer interviewing
at a law school "may" refuse to hire an applicant. Indeed, so long is the
list that the reader may suspect an intentional violation of Grice's

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[94] *See id.* at 1637.

[95] Under feudalism, a villein was "a peasant occupier or cultivator entirely subject to a
lord or attached to a manor; a serf." By
extension, the term is used to refer to "a peasant, a country labourer, a rustic." *See* THE
NEW SHORTER OXFORD ENGLISH DICTIONARY 3580 (1993).

[96] The Knights Templar were "a religious and military order, orig[inally] occupying a
building on the site of Solomon's temple in Jerusalem, founded chiefly for the protection of
pilgrims to the Holy Land, and suppressed in 1312." *See id.* at 3244. "Templar" also refers
to a "lawyer or law student with chambers in the Temple, London," *see id.*, though Justice
Scalia seems to intend no pun. For a fuller account of the Knights Templar, *see* Umberto
Eco, FOUCAULT'S PENDULUM 79-101 (1989).

Metaphors that rely on specialist knowledge are perhaps more readily accepted as
meaningful than stale metaphors. Readers who understand the terms of the metaphor feel
part of an elite group, and those who do not understand the terms feel intimidated. Either
way, the reader is likely to accept it as a "good" metaphor.

second maxim of quantity (give no more information than required).
Suspending temporarily the perception of irrelevance and prolixity, the
reader understands that applicants from law schools "may" be rejected
by employers because of their politics (Republicans, wearers of "real-
animal" fur), their social status (wrong school or country club), their
heterosexual sexual conduct (adulterers and womanizers), or for any
reason at all, even funny ones (eating snails or hating the Chicago
Cubs).

Making use of the only explicit transition in the paragraph ("But..."),
the writer provides the information promised earlier, explaining that
homosexuality is considered by the American Association of Law Schools
(AALS) to be an unacceptable reason for not hiring an applicant.
Relating the previous information about hiring practices to this new
information, the reader understands the writer to say that the legal
academic community arbitrarily forbids discrimination against homo-
sexuals while permitting discrimination on the basis of other sexual
conduct or social or political affiliation.

Once the "Templar" view is thus characterized (with the reader's
help) as illogical, the writer returns to the "villeins," offering the
"contrast" between the "law-school" view and the "more plebeian"
attitude of Congress, "which has been unresponsive to repeated
attempts to extend to homosexuals the protections of federal civil rights
laws." Wanting to make sense of this information, the reader gets
Scalia's point: the Court is siding with the "Templar" legal academics
who gratuitously forbid discrimination against homosexuals. In so doing,
the Court is taking sides against the "villeins" or common people (as
exemplified by Congress), who believe that homosexuals do not deserve
to be protected against discrimination.

But Scalia's point here is really no point at all, just pure indignant
rant. In their eagerness to "get it," readers make sense where little
exists. In fact, the passage is no more than a series of unargued
conclusions. Four examples follow.

> The court "tends to" defend the cultural values of its own class, legal
> academia, against the values of the common people. ("tends to"? Are
> there other examples of this tendency?)

Legal academia is like the Knights Templar. (How? Does it impose its
views by the sword? Protect pilgrims?)

> The people necessarily hold views opposite to those of the ruling class.
> (If the ruling class hates broccoli, do the people necessarily love it?)

> Congress necessarily expresses the cultural values of the people when it passes (or refuses to pass) legislation. (???)

The extravagant use of implicature is of course both more frequent and more acceptable in dissents and concurrences than in majority opinions, and more acceptable in all three than in *per curiam* opinions. Nonetheless, as readers as well as writers, law students need to understand how it works so that they can look before they leap to conclusions.

## B.   *Speech-Act Theory and Persuasive Writing*

Law is an illocutionary calling, constantly doing things with words: sentencing, prohibiting, petitioning, charging, reversing, enjoining, objecting, accusing, dismissing. Understanding something of the basics of speech-act theory can help students to do things with words more deliberately and thus more effectively. In particular, it can provide fresh perspective on persuasive writing for the court and in client and advocacy letters.

For our purpose here, a quick overview of the types of illocutionary acts, the distinction between direct and indirect illocutionary acts, and the constraints, known as "felicity conditions," on illocutionary acts will suffice. Speech acts have locutionary (saying things) and illocutionary (doing things) aspects. Following Searle's taxonomy, illocutionary acts can be divided into six classes: directive acts, representative acts, commissive acts, expressive acts, declarations, and questions. These are illustrated in Table 1. below.[97]

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[97] This Table is adapted from Riley, *supra* note 25, at 183.

Table 1. Illocutionary Acts

| Type | Definition | Examples |
|------|-----------|----------|
| Directive Act | Designed to get the addressee to behave a certain way. | Approach the bench. |
| Representative Act | Asserts some state of affairs. | Defendant is present with counsel. |
| Commissive Act | Commits the speaker to behave in a certain way. | I pledge allegiance... |
| Expressive Act | Expresses the emotional state of the speaker. | I apologize to the court. |
| Declaration | Affects the status of entities in the world. | Motion denied. |
| Question | Request the addressee to confirm ("yes-no question") or provide information ("Wh-question"). | 1. Is this your signature?<br>2. Where were you on July 21? |

Illocutionary acts can be direct or indirect. They are direct when, as in the examples in Table 1, their illocutionary force corresponds to their syntactic form, as shown below in Table 2.[98]

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[98] This table is adapted from Parker & Riley, *supra* note 9, at 21.

Table 2. Direct Illocutionary Acts

| Utterance | Syntactic Form | Illocutionary Form |
|---|---|---|
| Defendant is present with counsel. | Declarative | Representative |
| Approach the bench! | Imperative | Directive |
| Is this your signature? | Yes-no interrogative | Yes-no question |
| Where were you on July 21? | Wh-interroga-tive | Wh-question |
| I pledge allegiance... | Declarative | Commissive |
| I apologize to the court. | Exclamatory | Expressive |
| Motion denied. | Declarative | Declaration |

Illocutionary acts are "indirect" when there is a mismatch between illocutionary force and syntactic form. Perhaps most significant for our purposes is the indirect framing of directives (formed directly as imperatives) as declaratives, wh-interrogatives, yes-no interrogatives, and even exclamatories, as shown below in Table 3, which illustrates the reframing of the directive/imperative "Approach the bench."

Table 3. Indirect Directives

| Utterance | Syntactic Form | Illocutionary Form |
|-----------|----------------|--------------------|
| Counsel may approach the bench. | Declarative | Directive |
| Why don't you approach the bench? | Wh-interrogative | Directive |
| Could you approach the bench? | Yes-no interrogative | Directive |
| Please approach the bench. | Exclamatory | Directive |

The directness of an illocutionary act can also be moderated by omitting an important element of the utterance and relying on implicature to fill it in.[99] Thus, the directive "Don't accept that offer," addressed to a client presented with a settlement deadline, can be rendered indirectly by the representation "That offer seems low." Consistent with Grice's maxim of relation, the client would assume that the comment is relevant to the deadline and infer a message not to settle.

Whether direct or indirect, however, an illocutionary act is not valid unless its context satisfies what Austin called "felicity conditions."[100] Searle's elaboration on Austin's theory names four kinds of conditions: preparatory, sincerity, essential, and propositional content.[101] For instance, an attorney's apology to the court (an "expressive" act) must do the following to be a meaningful illocutionary act. First, it must satisfy preparatory conditions ("those existing *antecedent* to the utterance, including the speaker's beliefs about the hearer's capabilities and state of mind"[102]), that is, the attorney must believe that something has happened to displease the court. Second, the apology must satisfy "sincerity" conditions, that is, the attorney must genuinely regret the

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[99] *See* Riley, *supra* note 25, at 184. The example that follows is adapted from that article.
[100] *See* Parker & Riley, *supra* note 9, at 16.
[101] *See id.*
[102] *See id.*

displeasing occurrence.[103] Third, the utterance intended as an apology must satisfy the "essential" condition: it must "count" as an apology, that is, it must be capable of being understood as such by the court. For example, "Me and my big mouth!" might not "count" as an apology to the court.[104] Finally, "propositional content" conditions must be met, that is, the apology must relate (expressly or in context) to some action in the past for which the attorney is responsible. For example, "I apologize" is meaningless unless it is clear what occurrence the attorney is apologizing for, e.g., "I apologize for losing my temper."[105]

Like the indirection inherent in implicature, the indirect framing of illocutionary acts and the manipulation of felicity conditions are good persuasive strategies. They are especially applicable to the composition of appellate briefs and client and advocacy letters because they allow the writer to reconcile clarity and courtesy, to calibrate precisely the force of our pleas, assertions, demands, and refusals.

In letter-writing, these strategies of indirection can facilitate both the making of requests and their denial. Even as adversaries, attorneys must be able to work together, often over extended periods of time. For example, counsel for a labor union and counsel for management must confront each other as politely as they do forcefully if they are to serve their clients well. Chief among their skills is the ability to make and deny requests, civilly and effectively. For instance, in the utterance "Supply the figures for the Fall quarter before our next meeting," the illocutionary force of a directive is matched to the corresponding syntactic form of an imperative, creating an obvious threat to the addressee's autonomy or "negative face" and unlikely to enhance the writer's "positive face" with approval. However, reframed in a different syntactic form, the request becomes indirect.[106]

> Can you supply the figures for the Fall quarter in time for us to review them before our next meeting? (yes-no question)
>
> When do you think the Fall quarter figures will be available? (Wh-question)

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[103] *See id.*

[104] *See id.* To give an example in poor taste (but less execrable than the state's execution of its citizens), a judge cannot impose a death sentence by cautioning the defendant not to buy green bananas.

[105] *See id.*

[106] Katheryn Riley, *Speech Act Theory and Degrees of Directness in Professional Writing,* in 15 TECHNICAL WRITING TEACHER 5-6 (1988). The examples that follow are adapted from that article.

We would welcome an opportunity to review the Fall quarter figures before our next meeting. (declarative)

Similarly, in order to refuse a demand or request, an adversary need not be abrupt. Rather, if the addressee of the demand can candidly and plausibly do so, she can refuse indirectly by alleging that the demand is infelicitous. Austin articulated five felicity conditions specific to valid requests.

> (1) The items referred to in the utterance must exist.
> (2) The addressee must be the actual agent of the action requested.
> (3) The action requested must be a future action.
> (4) The requestor must believe that the addressee can perform the act.
> (5) The requestor must sincerely want the addressee to perform the act.[107]

These conditions suggest five strategies for denying requests. As adapted from Austin by Kim Sydow Campbell, these strategies, with examples for their use, are as follows.

> (1) Deny that item requested exists. ("The fall figures have not yet been compiled.")
> (2) Deny that the addressee of the demand can perform the action. ("Our accounting office has not yet released the figures you request.")
> (3) Deny that the act requested is a future act. ("The figures you request can be extrapolated from the materials we provided at our last meeting.")
> (4) Give reasons for inability to perform the act requested. ("We are changing our computer systems and cannot access the information.")
> (5) Give reasons why the requestor may not want the act to be performed. ("The Fall quarter figures are atypical and will not be a good predictor of future profits.")

Of course, these indirection strategies for persuasively framing demands and refusals are not applicable to every situation. But exercises based on them are a real advance over the traditional directive to letter writers to be "clear and polite."

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[107] *See supra* note 3, at 308; Kim S. Campbell, *Explanations in Negative Messages: More Insights from Speech Act Theory*, 27 J. BUS. COMM. 357 (1990).

In addition to its applications to client and advocacy letters, speech act theory also illuminates persuasive writing for the court. Novice persuasive writers need to understand that brief-writers do more than argue the merits of their client's cause—more than just *say* things—they also *do* things with words. An appellate practitioner is engaged in the illocutionary act of requesting the court's performance of another illocutionary act—reversing or affirming a judgment. Counsel's performance of this act calls for close attention to felicity conditions and for other strategies of indirection.

Told that the brief-writer's mandate is to persuade, not to describe, students often react with a direct assault on the addressee-court's beliefs, top-of-the-lungs pleading that is rarely effective. They need to learn to express their arguments less directly for greater effect. One essential indirection strategy limits the syntactic form of persuasive utterances to the declarative no matter what the illocutionary force. Imperatives are obviously unacceptable ("Reverse the judgment below"), but exclamations and interrogatives are equally so: they invariably sound discordant notes to the expert ear and are sure markers of novice status ("What a travesty of justice the jury's verdict was!" "How could a battered woman be expected to call the police?").

Perhaps even more importantly, in their zeal to convince, novices ignore the felicity conditions on valid requests to an appellate court. Appellant's argument on the merits will not be "heard" or, if "heard," will not be granted unless she convinces the court that those conditions are met, and even the most meritorious and eloquent pleas will be of no effect. The felicity conditions on requests to reverse a judgment are many. For example, the request must be made in time, but not too soon—that is, notice of appeal must be timely and from a final judgment. The request must have been made before and it must be addressed to the proper court—that is, the issue must be preserved and the court must have subject-matter jurisdiction. In addition, the request must be a consequential one—that is, the error should not be harmless nor the case moot. Moreover, the requestor must be the proper person to make the request—that is, the requirement of standing must be met. Finally, the request must meet the "essential" condition on such requests, must "count" as such, by following the formal and stylistic conventions of an appellate brief.

If appellant's job is to demonstrate that all of the felicity conditions are met and that the request is meritorious as well as felicitous, respondent's job is, first of all, to challenge the felicity of appellant's request. Appellant has no choice but to try to change the court's beliefs, try to prod it to reluctant illocutionary action—a task fraught with

danger to the "face" of requestor and addressee. But respondent's ideal argument is not about substance (where tricky assessment and manipulation of the court's beliefs are entailed). Rather, respondent can emphasize its *indirect* arguments for affirmance: finality, preservation, standard of review, or harmless error.

The constraints on appellate review can be more easily explained and understood within this speech-act framework than presented as unrelated and arcane formal constraints that are tacked on *after* the basics of persuasive writing are mastered and after a year of reading appellate decisions. Students typically study some form of persuasive writing for the court in their first year, learning how to argue the merits of an issue, but they learn little or nothing about appellate review until their second or third years—in Moot Court competition or Appellate Advocacy courses—if then.

Moreover, this speech-act felicity-condition analysis of appellate review has applications to the reading of persuasive prose—judicial opinions, especially—as well as to brief-writing. When courts affirm on the basis of harmless error or lack of preservation, they are in fact denying appellant's request indirectly, because a felicity condition is not satisfied. To what extent courts—like letter writers—manipulate the conditions, why they do so, and how candidly, are questions students should be encouraged to consider when they read judicial opinions.

## C. *Syntactic Choice and Truth-conditionally Equivalent Alternatives*

In Sections A & B above, we were concerned with some strategies of indirection, some ways of negotiating the "face-threatening" potential of written advocacy. In this last section, we look at the application of a different aspect of linguistic pragmatics, the use of syntax to convey emphasis and express strength of belief about the propositional content of a sentence.

Even a "fixed-order" language like English presents a writer with many syntactic choices, different ways of expressing the same idea by choosing among what linguists call "truth-conditionally equivalent" counterparts.[108] The example below illustrates some of the options for one simple declarative sentence.

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[108] *See* Green, *supra* note 9, at 133. Using words imprecisely, we might say that from a semantic viewpoint, truth-conditionally equivalent constructions "mean" or "signify" the same thing.

Magistrate Connolly signed the search warrant.

The search warrant was signed by Magistrate Connolly. [passive]

There was a search warrant signed by Magistrate Connolly. [there-insertion]

It was a search warrant that Magistrate Connolly signed. [cleft or "it-shift"]

What Magistrate Connolly signed was a search warrant. [pseudo-cleft or "what-shift"]

And sign the search warrant, Magistrate Connolly did. [verb phrase preposing][109]

By her choice of syntactic structure, a writer indicates 1) "assumptions about the structure of the discourse" and 2) her attitude toward the content.[110] In Part III, we examined the role syntactic choice plays in discourse coherence;[111] here we will focus on attitude toward content, and in particular, on how different constructions express stronger or weaker conviction—and the implication of these choices for written advocacy.[112] Although the literature is rich, we will look at just three specific cases: "transported" negatives, "morphologically incorporated" negatives, and inversion constructions.

When a negative is placed at a distance from the clause it negates conversationally, the negation is weaker, or "hedged."[113]

The witness thought the appellant was not as tall as her assailant.

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[109] These examples are adapted from Green. *See id.* Again, we might say (though no linguist would) that these six sentences all "mean" the same thing. The more reader-friendly terms "It-shift" and "What-shift" are borrowed from Williams, *see supra* note 67, at 149-150.

[110] *See id.*

[111] *See supra*, text at notes 62-67.

[112] We are assuming here that (since we are all both writers and readers) when a syntactic construction expresses greater conviction, it is interpreted that way by the reader.

[113] *See* Green, *supra* note 9, at 140 (citing Robin Lakoff, *a Syntactic Argument for Negative Transportation*, in PAPERS FROM THE FIFTH REGIONAL MEETING OF THE CHICAGO LINGUISTIC SOCIETY (Robert I Binnick, et al., eds. 1969)); Laurence Horn, *Negative Transportation: Unsafe At Any Speed?* in PAPERS FROM THE SEVENTH REGIONAL MEETING OF THE CHICAGO LINGUISTIC SOCIETY 120-133 (1971); Laurence Horn, *Lexical Incorporation, Implicature and the Least Effort Hypothesis,* in CHICAGO LINGUISTIC SOCIETY PARASESSION ON THE LEXICON 196-209 (Donka Farkas, Wesley M. Jacobson & Karol W. Todrys eds., 1978); Laurence Horn, A NATURAL HISTORY OF NEGATION (1989).

The witness did not think the appellant was as tall as her assailant. ("transported," thus "hedged" negative)[114]

The second sentence represents a weaker claim—apparently because it implicates rather than states the proposition that in the witness' estimation the defendant was not as tall as the assailant.[115] Consequently, in a persuasive statement of facts in an identification case, the first sentence would further appellant's cause. The second (though "truth-conditionally equivalent" to the first) would weaken the impact of the witness' estimation of appellant's height in relation to that of her assailant, and thus be a better choice of syntactic construction for respondent.

Similarly, a "morphologically incorporated"[116] negative indicates a stronger belief on the writer's part than does an "unincorporated" negative.[117]

The witness was not able to identify anyone. (unincorporated negative)

The witness identified no one. (incorporated negative)

Thus, again in a brief in an identification case, the second sentence, with its incorporated negative "no one," would make a stronger claim for appellant, and the first, with its unincorporated "not" would be a more persuasive choice for respondent, because of its weaker negative force.

In addition to strengthening or attenuating the force of a negative through syntactic choice, writers can use syntax to focus the reader's attention. Inverted constructions (in which the subject noun appears after rather than before the main verb) are particularly adapted to this purpose.[118]

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[114] In the second example, "not" grammatically negates "think," although it conversationally negates "as tall as her assailant." In the first, "un-hedged" example, "not" both grammatically and conversationally negates "as tall as her assailant."

[115] *See* Green, *supra* note 9, at 140 (citing Laurence Horn, supra note 113); Laurence Horn, A NATURAL HISTORY OF NEGATION (1989)).

[116] In the sentence "He saw not a thing," "not" negates "thing." "He saw nothing" expresses the same idea, but the negative is "incorporated" in the word "nothing."

[117] *See* Green, *supra* note 9, at 140 (citing Gloria Sheintuch & Kathleen Wise, *On the Pragmatic Unity of Rules of Neg-raising and Neg-attraction,* in PAPERS FROM THE 12TH REGIONAL MEETING OF THE CHICAGO LINGUISTIC SOCIETY 548-557 (Salikoko S. Mufwene, Carol A. Walker & Stanford B. Steever eds. 1976)).

[118] *See id.* at 136-137.

> A plastic bag filled with envelopes of white powder was visible on the back seat.

> Visible on the floor of the back seat was a plastic bag filed with envelopes of white powder. (inverted construction)

The inverted construction puts the contraband at the end of sentence, focusing the reader's attention on it by exploiting the reader's expectation of finding something "new" at the end of the sentence.[119] The inverted construction is thus the natural choice in a brief for the prosecution. In contrast, the sentence that uses the more usual subject-before-verb construction focuses the reader's attention on the location rather than on the contraband itself—probably the better strategy for appellant, who might want the reader to wonder how "visible" the bag could have been. Similarly, inversion can be used to create a surprise ending.[120]

> Agent Smiley's thoroughness was rewarded. Appellant walked out of the electrical closet.

> Agent Smiley's thoroughness was rewarded. Out of the electrical closet walked appellant. [inverted construction]

Much as it can be used to exploit the expectation that new or noteworthy information will occur at the end of a sentence, word order can be used in some circumstances to exploit the expectation that information at the beginning of a sentence is old news and thus non-controversial. Initial subjects or other initial phrases are more likely to be accepted as true—especially when they also represent the topic of the sentence—than the same clauses or phrases appearing toward the end of a sentence.[121]

> It is irrelevant that appellant was intoxicated.

> That appellant was intoxicated is irrelevant. (Here, appellant's intoxication is the topic of the sentence and occurs at the beginning.)

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[119] The role of "old-new" syntactic patterns in discourse coherence is discussed *supra* in text at notes 63-67.

[120] *See* Green, *supra,* note 9 at 137.

[121] *See id.* at 118 (citing Laurence Horn, *Presupposition, Theme and Variations,* in PARASESSION ON PRAGMATICS AND GRAMMATICAL THEORY, 22ND REGIONAL MEETING OF THE CHICAGO LINGUISTIC SOCIETY 168-192 (Anne M. Farley, Peter Farley & Karl-Erik McCullough eds. 1986)).

Thus, the second of the two sentences above is more likely to convey that appellant was in fact intoxicated, the first that the matter is still debatable as well as being beside the point. The first would thus seem ideally constructed for the respondent prosecutor and the second sentence for the appellant, who might benefit from the reader's belief (relevant or not) that he was drunk.

These are just a few examples of the impact of syntactic choice on the persuasive charge of a sentence. Indeed, it may be that even the slightest syntactic variation is significant. It is possible, for instance, that the second of the two sentences below indicates stronger conviction on the writer's part.

Appellant therefore knew *that* his co-defendants were armed.

Appellant therefore knew his co-defendants were armed.[122]

As practitioners and teachers of persuasive writing, we need to educate ourselves further about the conjunction of pragmatics and syntax. We attend carefully to our choice of words when we write to persuade and when we teach our students to do so,[123] but we are less careful in our choice of syntactic construction. By attending to the work of our linguist colleagues, we stand to become as fluent manipulators of syntax as we are of diction, and thus more effective advocates.

## V. CONCLUSION

After years spent in the company of beginning law students, we have learned that the entry into a new discipline, with its foreign discourse practices, is almost always accompanied by tides of excitement, confusion, resistance, and frustration. Fluency is a slow process, requiring nothing short of immersion in the field and the steady, unrelenting accretion of knowledge. Yet, even if experience is the supreme mentor, we are convinced that acquisition of the discourse practice of the law can be made more explicit, more comfortable, and therefore more rapid if we can show students how expert legal writing "works." We can nurture this learning by translating descriptions of expert practice into exercises and revision practice for novices. In this

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[122] *See id.* at 144 (citing Dwight Bolinger, THAT'S THAT (1972)).

[123] Though even here we would do well to acquire some firmer linguistic grounding. We do not attempt in this article to look at the lessons of lexical semantics for persuasive writing—but it is a project worth taking on.

effort, the discipline of linguistics has much to offer. It furnishes us with observations about language structure and use upon which we can base a promising set of heuristics—giving name, as it does, to cohesive markers and information patterns, to the cooperative principles that govern implicature and inference, to speech act theory, and to the persuasive charges of syntactic constructions.

From these general descriptions of language practices, we can derive exercises responsive to the special circumstances of the legal profession and its code of conduct. Thus, for example, we can critique statements exhibiting different degrees of indirection to determine the proper balance of advocacy, professional civility, and judicial deference. We can ask students to play with syntax to achieve different effects for different parties. Although the lessons such exercises teach may not be immediately internalized, they provide students with a concrete starting point.

Of course, to develop exercises that exploit linguistic theory, we teachers need to do some risky border-crossing. It would be a mistake to under-estimate the difficulties of inter-disciplinary excursions. Borders may be arbitrary, but they are real. Lawyers and linguists have radically different discourse practices; we change our skies, but not our expectations. Yet if we set ourselves the modest goal of getting a new and useful perspective on our own work, we have a lot to gain. Moreover, this undertaking has an unexpected payoff: to the extent that our study of the highly evolved discourse of linguistics replicates the experience of law students, the lesson is a powerful (and humbling) one for teachers.