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3-1-2023

### Recovering Grammar

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## RECOVERING GRAMMAR

Rachel T. Goldberg\*

### Introduction

Many legal writing professors take a rhetorical approach to teaching nearly all aspects of legal writing: we teach students that they should consider their audience and purpose when composing, that they should follow routinized genre conventions, that they should carefully calibrate their organizational and analytical choices to achieve a particular effect on their audience, and so on. And even though most in the legal writing community agree that students need grammar instruction,<sup>1</sup> teaching the rhetoric of legal writing and teaching the mechanics of grammar are often considered separate tasks, with the teaching of grammar discussed as a problem to be solved.<sup>2</sup> Accordingly, recent scholarship on grammar-teaching

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<sup>1</sup> See, e.g., Ann Nowak, *The Struggle with Basic Writing Skills*, 25 LEGAL WRITING 117, 117 (2021) (observing that “entering law students have become weaker and weaker in basic writing skills - grammar, punctuation, and syntax - over the past decade.”); Joe Regalia & Amy B. Levin, *Grammar, Editing, and Writing Tech Tools: the Teaching Tool You’ve Been Looking For?*, 28 PERSP. 51, 51 (2020) (“Writing mechanics are a key component of most Legal Research and Writing classes, and many of us grade our students’ grammar, punctuation, and writing style. Yet there has been a general sense among legal writing professors that students’ skills in these areas have declined in recent years.”); Aida M. Alaka, *The Grammar Wars Come to Law School*, 59 J. LEGAL EDUC. 343, 343 (2010) (noting that “many, if not most, legal writing instructors have been surprised by the sometimes astounding lack of basic writing skills exhibited by a few of their students” and that students “underperform in basic knowledge and skill acquisition, including reading and writing skills”).

<sup>2</sup> The orthodoxy in our field is that “[f]ew professors want to teach mechanics and grammar.” Amy Vorenberg & Margaret Sova McCabe, *Practice Writing: Responding to the Needs of the Bench and Bar in First-Year Writing*

focuses on how students can learn the subject *outside* of the legal writing classroom: in writing centers,<sup>3</sup> in doctrinal classes,<sup>4</sup> and through online grammar tools.<sup>5</sup>

Three major reasons have been proposed for why legal writing professors do not—or should not—teach grammar. First, the argument goes, teaching grammar would take valuable time away from more important, higher-order writing concerns.<sup>6</sup> Second, some legal writing professors do not feel comfortable teaching grammar because, while they can certainly spot grammar problems in their students' writing, they never learned technical grammar terms themselves.<sup>7</sup> Third, legal writing professors steer clear of grammar because it is perceived to be associated with remedial writing and “mere” skills teaching—associations that further confine legal writing professors to a lower academic status than their clinical and doctrinal peers.<sup>8</sup>

These are reasonable criticisms and concerns. However, I believe they emerge from a narrow conceptualization of grammar as a set of prescriptivist, elitist, and (for most) boring set of rules one can

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*Programs*, 2 PHOENIX L. REV. 1, 27 (2009); see also, e.g., Edward H. Telfeyan, *The “Grammar Bee” - One Way to Take the Pain Out of Teaching the Mechanics of Writing*, 17 PERSP. 25 (2008) (emphasis added in title).

<sup>3</sup> See Jeremy Francis, Daphne O'Regan & Ryan C. Black, *Designing Success: Motivating and Measuring Successful 1L Student Engagement in an Optional, Proficiency-Based Program Teaching Grammar and Punctuation*, 21 LEGAL WRITING 129, 133 (2016); Ann L. Nowak, *Tough Love: The Law School That Required Its Students to Learn Good Grammar*, 28 TOURO L. REV. 1369, 1371-72 (2012).

<sup>4</sup> See Nowak, *supra* note 1, at 121.

<sup>5</sup> Regalia & Levin, *supra* note 1.

<sup>6</sup> See, e.g., Regalia & Levin, *supra* note 1, at 51-52; Douglas Laycock, *Why the First-Year Legal-Writing Course Cannot Do Much About Bad Legal Writing*, 1 SCRIBES J. LEGAL WRITING 83 (1990).

<sup>7</sup> See Nowak, *supra* note 1, at 118 (suggesting that one reason new legal-writing instructors do not teach grammar is because they were never taught formal grammar rules); Alaka, *supra* note 1, at 351 (same).

<sup>8</sup> See Kristen K. Tiscione & Amy Vorenberg, *Podia and Pens: Dismantling the Two-Track System for Legal Research and Writing Faculty*, 31 COLUM. J. GENDER & L. 47, 57 (2015) (noting that one of the reasons legal writing and research professors are underrepresented as full and faculty members is because doctrinal faculty “still assume that legal research and writing courses teach grammar, punctuation, and Bluebooking”).

memorize and then deploy effectively without thinking much about them.

In this article, I argue that a broader, rhetorical approach to grammar minimizes the negative associations with grammar teaching. I make the case that we shouldn't divorce grammar from the "rest" of legal writing because grammar<sup>9</sup> itself is rhetorical: necessary for and deeply tied to meaning-making and social practices. I contend that a rhetorical approach to grammar can actually enhance our field's language-focused disciplinary identity. Moreover, I argue that a rhetorical approach to grammar will help ensure that students with diverse language practices feel included and supported, while at the same time providing all students with the linguistic-convention awareness that will allow them to write for successful legal practice. Ultimately, because grammar is foundational—constitutive of and integral to all other components of legal writing—I encourage legal writing professors to embrace grammar from a rhetorical perspective and center it as an important and intellectual part of the first-year legal writing course.<sup>10</sup>

In Part I, I discuss how the legal writing field's call to focus on rhetorical theory coincided with a charge that legal writing professors should avoid teaching grammar. Both exhortations emerged from an effort to create a distinct disciplinary identity that would, ideally, help counter legal writing faculty's marginalization. Yet, I argue, the wholesale rejection of grammar may have come at a cost to our students.

In Part II, I argue that embracing grammar as part of the rhetorical tradition can serve as a rich site of knowledge-production in our field. I define rhetorical grammar as an approach that recognizes the inherent connection between linguistic choices and rhetorical goals, requiring us to pay close attention to the connection between grammatical forms and rhetorical effects. Rhetorical

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<sup>9</sup> I use the term "grammar" in a broad sense to encompass grammatical structures, syntax, mechanics, and style.

<sup>10</sup> Despite the prevailing negative views of grammar teaching, some legal writing programs and professors have devoted impressive resources to teaching grammar and style. Michigan State University, for example, takes a rhetorical perspective to teaching grammar in its successful writing center. See Francis, O'Regan & Black, *supra* note 3, at 133; see also Nowak, *supra* note 3, at 1371-73 (describing Touro law school's grammar program).

grammar stands in stark contrast to a decontextualized, drills-and-skills approach to grammar teaching, which assumes a singular correct English grammar, and which has been used as a tool to exclude writers and speakers of non-prestige English.

In Part III, I detail the benefits that rhetorical grammar provides our students. In Part III.A, I explain rhetorical grammar's equity ramifications and argue that it can help reorient some of our negative assumptions about student writing. Recognizing that grammar is contingent, ideological, and flexible helps make clear that *all* of our students have a wealth of linguistic resources, even if they have not yet mastered the grammar conventions of legal English. In Part III.B, I discuss other practical benefits of teaching rhetorical grammar, which include helping students adhere to legal writing conventions, becoming more careful readers of legal texts, and using language to promote strategic and social-justice goals.

Finally, in Part IV, I provide concrete examples of rhetorical-grammar lessons for the legal writing classroom, as well as suggestions for how to assess our students' grammar choices.

### **I. A Turn Towards Rhetoric and Away from Grammar**

It is well known that legal writing courses and the labor that goes into teaching them are undervalued.<sup>11</sup> In an effort to create a distinct disciplinary identity and to increase the perceived legitimacy of the field, legal writing scholars have, in the last few decades, focused on

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<sup>11</sup> For early work on the marginalized status of legal writing courses and professors, see, for example, Pamela Edwards, *Teaching Legal Writing As Women's Work: Life on the Fringes of the Academy*, 4 *CARDOZO WOMEN'S L.J.* 75, 82 (1997); Jo Anne Durako, *Dismantling Hierarchies: Occupational Segregation of Legal Writing Faculty in Law Schools: Separate and Unequal*, 73 *UMKC L. REV.* 253 (2004); Jan M. Levine & Kathryn M. Stanchi, *Women, Writing & Wages: Breaking the Last Taboo*, 7 *WM. & MARY J. WOMEN & LAW.* 551 (2001). For more recent scholarship, see, for example, Kristen Konrad Tiscione, *A Writing Revolution: Using Legal Writing's "Hobble" to Solve Legal Education's Problem*, 42 *CAP. U. L. REV.* 143 (2014); Nantiya Ruan, *Papercuts: Hierarchical Microaggressions in Law Schools*, 31 *HASTINGS WOMEN'S L.J.* 3, 21-29 (2020); Amy H. Soled, *Legal Writing Professors, Salary Disparities, and the Impossibility of "Improved Status"*, 24 *LEGAL WRITING* 47 (2020).

the rigorous study of legal language and pedagogy in what is known as the “rhetorical turn.”<sup>12</sup> The teaching of grammar seems to have become collateral damage in this important effort. Below, I chart a brief history of grammar’s exile from the legal writing classroom before arguing for its recovery.

Although it may seem obvious to legal writing instructors that legal writing is rhetorical, historically, rhetoric “receive[d] very little explicit attention in the law school curriculum.”<sup>13</sup> In her history of writing and rhetoric in the legal academy, Kristen Konrad Tiscione traces rhetoric’s disfavor to Plato’s famed disdain for the trickery of rhetoric and admiration of the supposed truth-seeking Socratic dialogue, associated with logic and reason.<sup>14</sup> This bifurcation continued into the Enlightenment, which further divorced classical rhetoric from the study of law.<sup>15</sup> Rhetoric was denigrated as a mere tool of persuasion, associated with dishonesty and manipulation in an age of scientific rationalism whose intellectual inquiries purportedly sought objective “truth.”<sup>16</sup> At the end of the nineteenth century, rhetoric “became irrelevant” to law school pedagogy, which focused instead on analytical doctrine.<sup>17</sup> With the rise of the modern law school’s case method and its use of the Socratic dialogue to “discover” the “rational” legal rules that supposedly underlie our legal system, legal educators and scholars thoroughly rejected a language-directed, invention-focused, rhetorical approach to law teaching.<sup>18</sup>

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<sup>12</sup> See Linda L. Berger, Linda H. Edwards & Terrill Pollman, *The Past, Presence, and Future of Legal Writing Scholarship: Rhetoric, Voice, and Community*, 16 *LEGAL WRITING* 521, 553 (2010) (using the term “rhetorical turn” to describe focus on rhetoric in legal writing pedagogy).

<sup>13</sup> Mark A. Hannah, Susie Salmon, *Against the Grain: The Secret Role of Dissents in Integrating Rhetoric Across the Curriculum*, 20 *NEV. L.J.* 935, 937 (2020).

<sup>14</sup> Kristen Konrad Robbins, *Philosophy v. Rhetoric in Legal Education: Understanding the Schism Between Doctrinal and Legal Writing Faculty*, 3 *J. ASS’N LEGAL WRITING DIRECTORS* 108, 113 (2006) (now known as Tiscione).

<sup>15</sup> Linda Levine & Kurt M. Saunders, *Thinking Like a Rhetor*, 43 *J. LEGAL EDUC.* 108, 110 (1993).

<sup>16</sup> *Id.*

<sup>17</sup> Robbins, *supra* note 14, at 122.

<sup>18</sup> See Levine & Saunders, *supra* note 15, at 111; Robbins, *supra* note 14, at 122.

Over the past few decades, the legal writing community has successfully created a distinct disciplinary identity by, in part, reclaiming rhetoric as an important site of intellectual work. As Linda Berger, Linda Edwards, and Terrill Pullman noted in their overview of legal writing's disciplinary practice, "[m]uch of the early discipline building was designed to create a community of legal writing professors who were excellent teachers."<sup>19</sup> In the late 1990s and early 2000s, however, the legal writing field began producing scholarship focused on the study of rhetoric: that is, the "concept that meaning is constructed out of the interaction of reader and writer, text and context."<sup>20</sup> This rhetorical turn in legal writing scholarship focuses on the ways that legal texts are created, constituted, and received, producing interdisciplinary work influenced by linguistics, rhetorical theory, composition, psychology, and feminist and other critical theories.<sup>21</sup>

At the same time that legal writing scholars turned to rhetoric in their work on legal texts, those focused on pedagogy also urged the field to explicitly incorporate rhetoric into legal education, given that the production and understanding of legal texts involves a complex interplay of interpretation, audience, and composition.<sup>22</sup> As a result, particularly when it comes to teaching persuasive writing, many legal writing courses incorporate explicit references to ancient rhetoric, such as asking students to attend to Aristotle's appeals to ethos, logos, and pathos.<sup>23</sup> Several popular legal writing textbooks address the

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<sup>19</sup> Berger, Edwards & Pollman, *supra* note 12, at 528.

<sup>20</sup> *Id.* at 521-22.

<sup>21</sup> *Id.* at 527-30; Kirsten K. Davis, *A Provisional Definition of "Legal Writing Scholarship"*, 2 PROCEEDINGS (2021), <https://perma.cc/4GYU-5NTV>

<sup>22</sup> *See, e.g.*, Levine & Saunders, *supra* note 15, at 109 ("Legal education will benefit by taking a rhetorical approach to teaching students to think like lawyers."); Berger, Edwards & Pollman, *supra* note 12, at 556; Linda L. Berger, *Studying and Teaching "Law as Rhetoric": A Place to Stand*, 16 LEGAL WRITING 3 (2010) (making the case for the importance of rhetoric in the law school classroom); Barbara P. Blumenfeld, *Rhetoric, Referential Communication, and the Novice Writer*, 9 LEGAL COMM. & RHETORIC 207, 207 n.1 (2012) (noting that "there is a movement to heavily integrate rhetoric as the primary focus and structure of legal writing courses").

<sup>23</sup> Hannah & Salmon, *supra* note 13, at 939.

connection between classical rhetoric and legal writing.<sup>24</sup> Recently, scholars have begun to critique assumptions underlying traditional legal rhetoric, surely a sign of the rhetorical turn's maturation. For instance, Elizabeth Berenguer, Lucy Jewel, and Teri McMurtry-Chubb highlight the racism, sexism, and elitism inherent in the ancient legal rhetoric, arguing that we should teach students the types of multicultural and oppositional rhetorics that can be used to interrogate oppressive legal doctrine and create more just legal outcomes.<sup>25</sup>

Yet despite the field's contemporary focus on the use of language for communicative purposes, grammar itself has been either largely ignored or explicitly blamed for legal writing's status problems. To explain the perception that legal writing courses were less intellectually rigorous than "doctrinal"<sup>26</sup> courses—a perception that contributed to and perpetuated the marginalization of legal writing courses and its professors—legal writing scholars blamed, in part, the teaching of grammar. For instance, in the early, discipline-building days of legal writing pedagogy, Thomas R. Newby argued that, "[t]o the extent that legal writing teachers spend time attempting to teach

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<sup>24</sup> *E.g.*, Kirsten Konrad Robbins-Tiscione, *RHETORIC FOR LEGAL WRITERS: THE THEORY AND PRACTICE OF ANALYSIS AND PERSUASION* (2009); Michael R. Smith, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* (2d ed. 2008); J. Christopher Rideout, *Ethos, Character, and Discoursal Self in Persuasive Legal Writing*, 21 *LEGAL WRITING* 19, 20 (2016) (pointing out that many legal writing textbooks discuss Aristotle's three modes); Blumenfeld, *supra* note 22, at 207 (noting that classical rhetoric is an "integral part of legal writing instruction at many law schools").

<sup>25</sup> Elizabeth Berenguer, Lucy Jewel & Teri McMurtry-Chubb, *Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power*, 23 *HARV. LATINX L. REV.* 205 (2020). After detailing the exclusionary antecedents of the U.S. legal system, the authors describe a student case study about employment discrimination that centers "Afro-Latinx women's experiences in written client representation. To this end, Western rhetorical tools, the analytical reasoning tools by which law students are taught to read, comprehend, and write about the law, would prove inadequate." *Id.* at 226.

<sup>26</sup> I use quotes here because, of course, legal writing professors also teach doctrine. See Linda H. Edwards, *The Trouble with Categories: What Theory Can Teach Us About the Doctrine-Skills Divide*, 64 *J. LEGAL EDUC.* 181, 194-97 (2014).



English usage, it certainly is not a ‘real’ law course.”<sup>27</sup> A few years later, Stewart Harris argued that “law professors must stop teaching basic grammar and composition skills” because “[o]ur colleagues will not consider us their peers so long as we are teaching subjects that are properly learned in junior high school.”<sup>28</sup> In their important article on the gendered disparity among law school faculty, Kristen K. Tiscione and Amy Vorenberg noted that one of the reasons legal writing and research professors are underrepresented as full faculty members is because doctrinal faculty “still assume that legal research and writing courses teach grammar, punctuation, and Bluebooking.”<sup>29</sup>

In order to foreground the intellectual and rhetorical work required for the teaching and production of legal writing, it was argued that we should not “sett[e] for composition and grammar” but instead “we must reclaim the substance of rhetoric and teach it.”<sup>30</sup> And indeed, our field has not only bifurcated the teaching of grammar

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<sup>27</sup> Thomas R. Newby, *Law School Writing Programs Shouldn't Teach Writing and Shouldn't Be Programs*, 7 PERSP. 1 (1998).

<sup>28</sup> Stewart Harris, *Giving Up Grammar and Dumping Derrida: How to Make Legal Writing A Respected Part of the Law School Curriculum*, 33 CAP. U. L. REV. 291, 297 (2004).

<sup>29</sup> Tiscione & Vorenberg, *supra* note 8, at 57; *see also, e.g.*, Robbins, *supra* note 14, at 114-15 (“In plain terms, doctrinal faculty teach ‘the law,’ and we teach grammar, punctuation, and citation format. Legal writing is thus considered an intellectually inferior pursuit, and we who teach it acquire that inferiority by association.”); Melissa H. Weresh, *Fostering A Respect for Our Students, Our Specialty, and the Legal Profession: Introducing Ethics and Professionalism into the Legal Writing Curriculum*, 21 TOURO L. REV. 427, 454-55 (2005) (“We do not simply teach grammar or transitions or roadmap paragraphs. . . . As our conference presentations often illustrate, many members of the legal academy continue to misunderstand the objective of our courses. In part because of this misapprehension, many members of our profession are devalued and marginalized.”).

<sup>30</sup> Robbins, *supra* note 14, at 127.

from other, more advanced legal writing skills<sup>31</sup> but exiled it<sup>32</sup>—at least publicly.<sup>33</sup>

It might have been necessary to minimize grammar-teaching to make the scholarly case that our field can be a site of rich intellectual

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<sup>31</sup> Typically, those who discuss grammar teaching at all discuss it as an editing concern best left for final-stage polishing. *See, e.g.*, Adam Lamparello & Charles E. MacLean, *A Proposal to the ABA: Integrating Legal Writing and Experiential Learning into a Required Six-Semester Curriculum That Trains Students in Core Competencies, “Soft” Skills, and Real-World Judgment*, 43 CAP. U. L. REV. 59, 90 (2015) (In arguing for the complexity of legal writing, noting that “[f]irst, students must acquire basic and advanced writing techniques, including proper grammar, sentence structure, and word choice . . . . Students must then acquire legal writing skills.”); Miriam E. Felsenburg & Laura P. Graham, *Beginning Legal Writers in Their Own Words: Why the First Weeks of Legal Writing Are So Tough and What We Can Do About It*, 16 LEGAL WRITING 223, 262 (2010) (“We do not mean to suggest that the mechanical skills of legal writing, such as grammar and citation, are unimportant in producing a professional legal writing product. However, we believe strongly that at the beginning of first-year legal writing classes, learning to analyze, organize, and synthesize should take priority.”).

<sup>32</sup> For arguments that teaching grammar takes valuable time away from more important, higher-order writing concerns, such as syllogistic reasoning, organization, and legal research, see, for example, Nowak, *supra* note 1, at 118; Regalia & Levin, *supra* note 1, at 51-52; Laycock, *supra* note 6.

<sup>33</sup> Based on messages posted to the LWI listserv and informal conversations, it seems likely that many legal writing professors actually do teach some grammar and style, even if it is unfashionable to do so. *See* Soma R. Kedia, *Redirecting the Scope of First-Year Writing Courses: Toward A New Paradigm of Teaching Legal Writing*, 87 U. DET. MERCY L. REV. 147, 154 (2010) (“Though many legal writing professors decry the need to teach basic writing principles in their classroom, the fact remains that most legal writing courses do teach these concepts.”). Moreover, some legal writing scholars discuss grammar from a rhetorical perspective, though they do not call it rhetorical grammar. *See e.g.*, Francis, O’Regan & Black, *supra* note 3, at 138–39 (“Expla[ining] . . . the role of rules of punctuation and grammar in enhancing clarity and in litigation allows students to incorporate what they are learning into the overall [professional-identity] project of the first year, instead of to experience instruction as filling gaps and correcting past failures or as mitigating problems derived from socio-linguistic provenance.”); Patrick Barry, *The Infinite Power of Grammar*, 67 LEGAL WRITING 853, 854 (2018) (“[K]nowing the infinite power of grammar, good

inquiry. And the efforts mostly paid off—after all, “Legal Research and Writing” is now a robust and vibrant discipline, even if we have not achieved the status or salaries of our doctrinal peers.<sup>34</sup> However, precisely because of the rigorous scholarship and dynamic disciplinary community created over the past two decades, we may now be in a place to embrace grammar in our classrooms—if, as I argue below, we recognize grammar as an important site of rhetorical contestation.

## II. Grammar is Integral to Rhetorical Practice

If we understand grammar choices as rhetorical ones that affect both logic and persuasion in legal texts (rather than as rote rules that students can “check” with a word processing program), we will provide students with more options for using language strategically to refine their legal analysis and arguments. At the same time, doing so will allow legal writing professors to bring the rhetorical turn—and its generative connections between rhetorical criticism, sociolinguistics, and other language-focused fields—into the legal-writing classroom, supporting and expanding the discipline-building project in legal communication scholarship.

My sense is that the type of grammar that our doctrinal colleagues assumed legal writing professors were teaching (and that they may have actually been teaching), is the kind of rule-based, decontextualized grammar that makes so many people despise the subject. Those who had formal grammar instruction in school in the twentieth century were probably taught with drills-and-skills exercises that asked students to find errors in worksheets, diagram sentences, and so on. This *prescriptivist* view sees grammar merely as a series of rules that can be mastered—an approach to grammar that focuses on technical correctness. Prescriptivist grammar “refers to the rules in most grammar or usage books that tell writers (and

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lawyers will always think about how the order of words can be flipped and shifted.”). Some legal writing textbooks do the same. *See, e.g.*, ANNE ENQUIST & LAUREL CURRIE OATES, *JUST WRITING: GRAMMAR, PUNCTUATION, AND STYLE FOR THE LEGAL WRITER* 159 (2d ed. 2005).

<sup>34</sup> *See, e.g.*, Ruan, *supra* note 11, at 21-29; Soled, *supra* note 11; Deborah J. Merritt, *Salaries and Scholarship*, L. SCH. CAFE (Jan. 13, 2018), <https://perma.cc/Y3LY-H6JL>

speakers) what they should and should not do. It is about language etiquette ('table manners,' as some linguists put it), and more often than not it's what we shouldn't do: don't split infinitives, don't end sentences in prepositions, don't use double negation, don't use *between you and I*."<sup>35</sup>

Composition and rhetoric scholars have been critiquing prescriptivist grammar teaching as ineffective for decades.<sup>36</sup> In the 1960s, Richard Braddock, Richard Lloyd Jones, and Lowell Schor synthesized grammar pedagogy and concluded—in an influential study known as the “Braddock Report”—that “the teaching of formal grammar has a negligible or, because it usually displaces some instruction and practice in actual composition, even a harmful effect on the improvement of writing.”<sup>37</sup> In the decades following, explicit grammar teaching increasingly fell out of fashion in both high school and college.<sup>38</sup>

Not only does the prescriptivist, formal grammar approach fail to produce the writing results sought, but it presumes a single, unchanging, “right” way to speak and write English.<sup>39</sup> Usage and grammar rules depend on a unified Standard English, one associated

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<sup>35</sup> Anne Curzan, *Says Who? Teaching and Questioning the Rules of Grammar*, 124 PMLA 870, 871-72 (2009) (emphasis in original).

<sup>36</sup> See, e.g., Nicole Amare, *Style: The New Grammar in Composition Studies?*, in REFIGURING PROSE STYLE: POSSIBILITIES FOR WRITING PEDAGOGY 154 (T.R. Johnson & Tom Pace, eds., 2005) (noting that, for forty years, studies have shown that “formal grammar instruction [focused on correctness] not only does not improve [college-composition] students’ writing but in fact may have an adverse effect on their compositions”); Nancy E. Millar, *The Science of Successful Teaching: Incorporating Mind, Brain, and Education Research into the Legal Writing Course*, 63 ST. LOUIS U. L.J. 373, 398 (2019) (noting that numerous meta-analysis studies in English composition “have found that isolated grammar instruction does not help students and can even hurt”).

<sup>37</sup> Richard Braddock, Richard Lloyd-Jones, & Lowell Schoer, RESEARCH IN WRITTEN COMPOSITION 37-38 (1963).

<sup>38</sup> See Nowak, *supra* note 1, at 118; see also Alaka, *supra* note 1, at 346-48; Robert J. Connors, *The Erasure of the Sentence*, 52 COLL. COMPOSITION & COMMUN 96 (2000); Sharon Crowley, *Linguistics and Composition Instruction: 1950-1980*, 6 WRITTEN COMM. 480 (1989).

<sup>39</sup> Curzan, *supra* note 35, at 872 (“Usage rules for formal written English often presuppose the concept of Standard English.”).

with elite, White discourse practices used in formal settings.<sup>40</sup> Two major problems underlie the presumption. First, the very idea of an unchanging Standard English is a myth.<sup>41</sup> All language practices are variable and unstable. Language scholars know that “[s]tandards of written English are neither uniform nor fixed. What constitutes expected norms—for example, Edited American English—varies over time and from genre to genre. Indeed, these genres themselves change boundaries and intermingle.”<sup>42</sup>

The second significant problem with the prescriptivist view of grammar and the purported Standard English on which it depends, is that the standards are used as a tool of exclusion and marginalization. Composition and rhetoric scholars Min-Zhan Lu, Bruce Horner, and John Trimbur note that “[m]yths of unchanging, universal standards for language have often been invoked to simplify the teaching and learning of language. But these have often resulted in denigrating the language practices of particular groups and their members as somehow ‘substandard’ or ‘deviant.’”<sup>43</sup>

The ability to write in Standard English has not just a technical value attached to it, but also a moral value. As Deborah Cameron notes, “[l]ike other superficially innocuous ‘customs’, . . . rules of language use often contribute to a circle of exclusion and intimidation, as those who have mastered a particular practice use it

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<sup>40</sup> See, e.g., Asao B. Inoue, ANTIRACIST WRITING ASSESSMENT ECOLOGIES: TEACHING AND ASSESSING WRITING FOR A SOCIALLY JUST FUTURE 29 (2015) (“[W]hitenedness and white racial formations historically are closely associated with [Standard English] and dominant discourses.”) <https://perma.cc/T6HQ-9F43>.

<sup>41</sup> I use terms like “Standard English,” “prestige English,” “Edited American English,” and “Standard Academic English” virtually interchangeably to refer to the kinds of discourses expected in elite academic spaces. Although it is standard practice for some linguists to refer to a singular “Standard English,” as I explain here, no such thing actually exists.

<sup>42</sup> Bruce Horner, Min-Zhan Lu, Jacqueline Jones Royster & John Trimbur, *Language Difference in Writing: Toward a Translingual Approach*, 73 COLLEGE ENGLISH 303, 305 (2011).

<sup>43</sup> *Id.*; see also Sharon Crowley & Debra Hawhee, ANCIENT RHETORICS FOR CONTEMPORARY STUDENTS 283 (2d ed. 1999) (“[U]sage rules are the conventions of written English that allow Americans to discriminate against one another.”).

in turn to intimidate others.”<sup>44</sup> As Ann Curzan puts it, “Standard English and prescriptive grammar are about who has the social power to prescribe and who is silenced in the process.”<sup>45</sup> Writing that follows expected language conventions is associated with truthfulness, intelligence, morality, and discipline. The corollary is that dialect deviations or errors are perceived to reflect the negative character of the writer, such as carelessness, lack of education, or purposeful defiance.<sup>46</sup> In the United States, this distinction has a particular racialized and class-based focus, given that Standard English is used as a tool to exclude people of color and poor people from elite spaces.<sup>47</sup>

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<sup>44</sup> Deborah Cameron, *VERBAL HYGIENE* 12 (1995).

<sup>45</sup> Curzan, *supra* note 35, at 877.

<sup>46</sup> See Anne Ruggles Gere, Anne Curzan, J. W. Hammond, Sarah Hughes, Ruth Li, Andrew Moos, Kendon Smith, Kathryn Van Zanen, Kelly L. Wheeler & Crystal J. Zanders, *Communal Justicing: Writing Assessment, Disciplinary Infrastructure, and the Case for Critical Language Awareness*, 72 *COLL. COMPOSITION & COMMUN* 384, 392 (2021); Inoue, *supra* note 40, at 29-54.

<sup>47</sup> “‘Correct’ and ‘appropriate’ English has been equated, popularly and institutionally, with the variety of American English associated with and preferred by white, upper-middle class Americans. Correspondingly, other varieties of English—that is, varieties typically spoken and written by people of color and the working class—have historically been, and continue to be, treated as signs of linguistic deviance or deficiency and by extension, signs of inferiority, moral depravity, or other-ness.” Gere, Curzan, Hammond, Hughes, Li, Moos, Smith, Zanen, Wheeler & Zanders, *supra* note 46, at 392. Although she doesn’t mention Standard English specifically, Teri McMurtry-Chubb would likely include linguistic expectations when she writes that “Law schools are ‘white spaces’—spaces normed to White, male, elite experiences.” Teri A. McMurtry-Chubb, *STRATEGIES AND TECHNIQUES FOR INTEGRATING DIVERSITY, EQUITY AND INCLUSION INTO THE CORE LAW CURRICULUM* 5 (Howard Katz, ed., 2022); see also APRIL BAKER-BELL, *LINGUISTIC JUSTICE: BLACK LANGUAGE, LITERACY, IDENTITY, AND PEDAGOGY* 12 (2020) (“[T]he policing of Black Language and literacies in schools is not separate from the ways in which Black bodies have historically been policed and surveilled in U.S. society, and the ubiquitous assault and murder of Black bodies is not independent of the symbolic linguistic violence and spirit-murder that Black students experience daily in classrooms . . . linguistic in/justice is fundamentally intertwined with all other forms of justice.”). See generally Inoue, *supra* note 40.

The reality, of course, is that Standard English “is one dialect among many—not the source of all the others. It is a dialect that has been elevated to the standard for social and political reasons, not because it is grammatically more logical or better.”<sup>48</sup> For example, the specific and rich rule-based grammatical features of Black English are well known. Decades ago, linguist Geneva Smitherman published detailed studies of the highly rule-governed grammar, lexicon, semantics, and rhetoric of Black English.<sup>49</sup> Yet, taken to its extreme, prescriptivist grammar sees only a singular “right” grammar, obscures or ignores the reality that grammar is ideological, and ignores the historical oppression of other grammars.

This prescriptivist grammar—boring, unintellectual, exclusionary, and disempowering—is the one that should be rejected by legal writing scholars. Prescriptivist grammar, which is antithetical to creative invention and a dead-end for subject-matter respectability in the legal writing field, has no real place in legal writing classrooms. It can be demeaning to students and likely feels, at least at the discipline level, demeaning for legal writing professors to teach.

While it is fair to reject prescriptivist grammar pedagogy and the assumptions that underlie that pedagogy, I believe we lose out if we reject the teaching of grammar altogether. We lose the opportunity to help students see how intimately grammar is tied to ideology, how fundamental it is to expressing relationships and establishing meaning, and how it can be strategically deployed to create and respond to audience expectations. That is, we lose out if we don’t teach grammar as *rhetorical*.

The meaning of the term “rhetoric” is hard to pin down. Ancient rhetoric is associated with persuasion. Plato in *Phaedrus* said that rhetoric is “an art of enchantment, which makes things appear good and evil, like and unlike, as the speaker pleases.”<sup>50</sup> For Aristotle, rhetoric was “the faculty of observing in any given case the available

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<sup>48</sup> Curzan, *supra* note 35, at 872.

<sup>49</sup> See GENEVA SMITHERMAN, *BLACK LANGUAGE AND CULTURE: THE SOUNDS OF SOUL* (1975); GENEVA SMITHERMAN, *TALKIN AND TESTIFYIN: THE LANGUAGE OF BLACK AMERICA* (1986). For more on Black Language’s distinct linguistic features, see Baker-Bell, *supra* note 47, Chapter 4.

<sup>50</sup> PLATO, *PHAEDRUS* (Benjamin Jowett tr., 2008), <https://www.gutenberg.org/files/1636/1636-h/1636-h.htm> [<https://perma.cc/4F5P-KRXD>].

means of persuasion.”<sup>51</sup> This agonistic view of rhetoric seems to have prevailed in the West for more than two thousand years, but in the nineteenth century, the scope of rhetoric expanded to include not just argumentative ends, but a multitude of discursive purposes.<sup>52</sup>

In the modern era, Kenneth Burke defined rhetoric as being rooted in “the use of language as a symbolic means of inducing cooperation in beings that by nature respond to symbols.”<sup>53</sup> For Lloyd Bitzer, rhetoric “is a mode of altering reality . . . by the creation of discourse which changes reality through the mediation of thought and action.”<sup>54</sup>

Within the legal-rhetoric context, James Boyd White defined rhetoric as “the central art by which community and culture are established, maintained, and transformed.”<sup>55</sup> According to Linda Berger:

[r]hetorical theorists agree that rather than being engaged in a search for ‘truth,’ in the sense of a universal principle, rhetoric’s goal is the meaning that emerges from a contingent interaction among the reader and the writer, the speaker and the audience, the language and the context. From the rhetorical standpoint, words do not “fit” nor do they “represent” the world: instead, they are ways of interacting with it.<sup>56</sup>

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<sup>51</sup> ARISTOTLE, *THE RHETORIC AND THE POETICS OF ARISTOTLE* 24 (W. Rhys Roberts tr., 2015).

<sup>52</sup> ROBERT J. CONNORS, *COMPOSITION-RHETORIC: BACKGROUNDS, THEORY, AND PEDAGOGY* 60 (1997).

<sup>53</sup> KENNETH BURKE, *A Rhetoric of Motives* 43 (Cal. ed. 2d prtg. 1974).

<sup>54</sup> LLOYD F. BITZER, *The Rhetorical Situation*, in *CONTEMPORARY RHETORICAL THEORY* 219 (John Louis Lucaites, Celeste Michelle Condit & Sally Caudill eds., 1999).

<sup>55</sup> JAMES BOYD WHITE, *Rhetoric and Law: The Arts of Cultural and Communal Life*, in *THE RHETORIC OF THE HUMAN SCIENCES: LANGUAGE AND ARGUMENT IN SCHOLARSHIP AND PUBLIC AFFAIRS* 298 (John S. Nelson, Allan Megill & Deirdre N. McCloskey eds., 1987).

<sup>56</sup> Berger, *supra* note 22, at 11-12.



Teri McMurtry-Chubb reminds us that rhetorical practices in the legal academy and in legal practice are not neutral: they replicate hierarchies of exclusion and marginalization.<sup>57</sup>

Regardless of the specific definition one finds most compelling, current rhetorical approaches to legal communication recognize that written texts are socially constructed: they contend with, circulate, and derive meaning within specific discourse communities. Through legal discourse, legal knowledge is developed, generated, and constructed. I would add that grammar choices in legal discourse are inherently connected to communication purposes and goals, as well—they are as rhetorical as any other writing choice. Grammatical choices make meaning: they express relationships, create an audience, and initiate the exigency for a communicative response. Grammar is foundational, constitutive of and integral to all other components of legal writing.

Martha Kolln, a scholar in the field of rhetoric and composition, coined the illustrative term “rhetorical grammar” in the 1990s. In her textbook, *Rhetorical Grammar*, she writes to students that “[u]nderstanding rhetorical grammar means understanding both the grammatical choices available to you when you write *and the rhetorical effects* those choices will have on your reader. . . . You can think of the grammatical choices you have as tools in your writer’s toolkit.”<sup>58</sup> Rhetorical grammar is “grammar in the service of rhetoric: grammar knowledge as a tool that enables the writer to make effective choices.”<sup>59</sup> If language is a social phenomenon, and meaning is not merely found in texts but is created through communication, it becomes clear that grammar—including such things as modifier placement, sentence structure, and punctuation—is constitutive of meaning-making, not separate from it. Like all communicative choices, grammar is part of a dynamic process that has effects on audience, text reception, persuasion, and, ultimately, on power and ideology.

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<sup>57</sup> Teri A. McMurtry-Chubb, *Still Writing at the Master’s Table: Decolonizing Rhetoric in Legal Writing for A “Woke” Legal Academy*, 21 SCHOLAR 255 (2019).

<sup>58</sup> MARTHA KOLLN & LORETTA GRAY, RHETORICAL GRAMMAR: GRAMMATICAL CHOICES, RHETORICAL EFFECTS 2-3 (8th ed. 2017).

<sup>59</sup> Martha Kolln, *Rhetorical Grammar: A Modification Lesson*, 85 ENG. J. 25, 29 (1996) (emphasis added).

Rhetorical grammar merits a place in the legal writing classroom and in scholarly discussions about legal writing pedagogy. Rather than focusing solely on formal correctness, rhetorical grammar instead asks students to consider how grammatical choices impact the rhetorical purposes of their writing. Rhetorical grammar teaches and encourages metalinguistic awareness, or an understanding of how and why language practices are used in certain contexts. Laura R. Micciche, in arguing for teaching grammar from a rhetorical perspective in the college composition classroom, calls for a grammar instruction that “emphasizes grammar as a tool for articulating and expressing relationships among ideas. The purpose of learning rhetorical grammar is to learn how to generate persuasive, clear thinking that reflects on and responds to language as work, as *produced* rather than evacuated of imperfections.”<sup>60</sup>

I make a similar call here for grammar in the legal writing classroom. Rather than conceptualizing grammar solely as remedial or a site of error correction, we can see grammar as a generative rhetorical tool that students can learn, make choices about, and control, just like other concepts we already teach, such as memo organization or case selection.

Viewing grammar from a rhetorical perspective doesn’t mean that we should never reference grammatical standards and forms when we teach grammar. We can and should still use grammar and style books, and teach standard language conventions as “rules.”<sup>61</sup> My suggestions here are meant to supplement whatever successful formal grammar teaching we are already doing. But a rhetorical approach fundamentally reorients our teaching of grammar from a focus on accuracy to a focus on *effectiveness and context*. It teaches students that intentional grammar and style choices have effects on—and are related to—the genre, situation, and intended effect on their reader.

Our discipline has ample room for both the study and teaching of grammar, provided we acknowledge that grammar is a fundamental part of the social practice of writing and that grammar, like all language choices, creates and reflects existing social realities in the law. Ultimately, instead of outsourcing the teaching of grammar or

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<sup>60</sup> Laura R. Micciche, *Making a Case for Rhetorical Grammar*, 55 COLL. COMPOSITION & COMMUN 716, 720 (2004).

<sup>61</sup> Indeed, many have done so with great success. *See, e.g.*, Nowak, *supra* note 3, at 1370 & n.4; Telfeyan, *supra* note 2.

avoiding it altogether, I suggest we embrace rhetorical grammar because it can both enhance our disciplinary identity and teach students how to communicate effectively as lawyers.

Below, before providing specific ways to incorporate the teaching of grammar in the legal writing classroom, I briefly describe some of the benefits of this approach to legal writing professors and to our students.

### III. Why Teach Rhetorical Grammar?

#### A. Rhetorical Grammar Helps Us—and Our Students—Recognize Their Discursive Resources

In her recent book, *Strategies and Techniques for Integrating Diversity, Equity and Inclusion into the Core Law Curriculum*, Teri McMurtry-Chubb calls on law professors to “acknowledge the experiences of minoritized students and faculty and [to] seriously grapple[e] with their legal and societal implications.”<sup>62</sup> In a legal writing classroom, that means, in part, to both acknowledge and embrace the full range of our students’ existing language knowledge, including that of students whose grammar expertise is in languages other than standardized, elite English. Recognizing that grammar is rhetorical—that it is contingent, ideological, and flexible—helps clarify that our students *can* write, even if they have not yet mastered the grammar conventions of legal English.

Many of our students did not grow up surrounded by or speaking standardized prestige or legal English.<sup>63</sup> At my law school, for

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<sup>62</sup> McMurtry-Chubb, *supra* note 47, at 62. Generation Z and Millennial law students are, in general, more anxious and stressed than previous generations. Sha-Shana Crichton, *Teaching in the Time of Disruption: A Case for Empathy and Honoring Diversity*, 25 *LEGAL WRITING* 4, 8 (2021). Law students of color, in particular, may feel particularly anxious because of systemic racism, micro-aggressions, physical aggression, and other forms of exclusion and bias. *Id.* at 8-9; McMurtry-Chubb, *supra* note 47, at 6-9.

<sup>63</sup> See Paul Kei Matsuda, *The Myth of Linguistic Homogeneity in U.S. College Composition*, 68 *COLLEGE ENGLISH* 637, 640-41 (2006). As composition scholars Bruce Horner, Min-Zhan Lu, Jacqueline Jones Royster and John Trimbur acknowledged over a decade ago, “Language use in our classrooms, our communities, the nation, and the world has always been

example, typically about a quarter of my first-year legal writing students self-identify as having grown up speaking a language other than English at home. Many of us teach students from a variety of language backgrounds: international students from non-English-speaking countries who learned English in their home countries, immigrants or refugees who may have had a few years of high school or college in the United States, and monolingual students who grew up in the United States speaking a non-prestige or stigmatized version of English.<sup>64</sup> Law schools are—all too slowly—becoming more diverse.<sup>65</sup> As law schools belatedly welcome more students from a wider variety of socio-economic, cultural, academic, geographic, and family backgrounds, we can expect an increased diversity of home dialects and grammar knowledge.

Further, because of the ubiquity of social media use, all of our students, whether or not they grew up speaking and writing prestige English, are constantly following the conventions of their generation's major forms of communication: they are writing text messages, engaging in public writing on social media, making public commentary in response to others' posts, and so on. Social media

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multilingual rather than monolingual.” Horner, Lu, Royster & Trimbur, *supra* note 42, at 303.

<sup>64</sup> Of course, not all marginalized students and their respective language practices are similarly stigmatized. Groups who have been traditionally underrepresented in law schools and in the legal profession suffer disproportionately. And not all non-standardized Englishes are stigmatized in the same way. Asao Inoue, who argues for antiracist assessment practices in college writing classrooms in particular, calls for writing instructors to “engage with the local diversities in the classroom” and develop materials “at the local level, considering the racial and linguistic diversity in their classrooms[.]” Inoue, *supra* note 40, at 68, 72.

<sup>65</sup> 34.7% of the incoming law school class in 2021 were students of color, representing the most racially diverse class since the American Bar Association began keeping records of student demographics. Susan L. Krinsky, *The Incoming Class of 2021—The Most Diverse Law School Class in History*, LAW SCHOOL ADMISSION COUNCIL (December 15, 2021), <https://www.lsac.org/blog/incoming-class-2021-most-diverse-law-school-class-history> [<https://perma.cc/V9RD-SPFU>].

provides rich opportunities for rhetorical activity, and each platform has specific and concrete discourse norms.<sup>66</sup>

Thus, all of our law students are already language experts. All speakers and writers innately know the rules of their grammars, although mostly subconsciously. And we all code-switch—we all use different languages and grammars depending on our audience.<sup>67</sup> We use different grammars when we're talking to our students, our Deans, our partners, our children, or on Twitter. The conventions of those different grammars are observable and describable.

Although our students may not be experts in standardized legal language,<sup>68</sup> they are experts in the languages and grammars they come to law school speaking and writing. Scholars in the field of college composition have long recognized that students come to our classroom with a multitude of what Min-Zhan Lu calls “discursive resources,” or “the often complex and sometimes conflicting templates of languages, englishes, discourses, senses of self, visions of life, and notions of one’s relations with others and the world.”<sup>69</sup> Our approach to teaching elite legal language should, at the very least, recognize this wealth of rhetorical experience. It should also recognize that students who grew up speaking and writing marginalized languages likely have deeper knowledge about the need for rhetorical

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<sup>66</sup> See generally, e.g., Ann N. Amicucci, *Four Things Social Media Can Teach You About College Writing—And One Thing It Can't*, 4 WRITING SPACES: READINGS ON WRITING 18 (2022) (discussing how various conventions on Twitter signal membership in discourse communities with shared linguistic expectations),

<https://wac.colostate.edu/docs/books/writingspaces4/amicucci.pdf> [<https://perma.cc/MT2P-33R9>].

<sup>67</sup> See, e.g., Inoue, *supra* note 40, at 33 (“We use variations of English that we encounter around us. . . . [W]e all have hybrid Englishes. We speak in codes that are meshed with other codes . . . .”)

<sup>68</sup> For the purposes of this article and for a shared vocabulary, I frame legal language as having fixed expectations; however, as noted above, every discourse community’s language practices fluctuate and many are quite flexible.

<sup>69</sup> Min-Zhan Lu, *An Essay on the Work of Composition: Composing English Against the Order of Fast Capitalism*, 56 COLL. COMPOSITION & COMM’N 16, 28 (2004).

flexibility than students who primarily write and speak Standard English.<sup>70</sup>

Recognizing that grammar expectations are fluid and negotiable can help us see that students who do not conform to the exacting standard of legal language are not deficient and should not be criticized because they “can’t write.” Instead, it helps us see that they are merely learning to communicate effectively using a different grammar than they are used to.<sup>71</sup> To teach students elite legal language means, by necessity, that a goal is to reduce language differences. Many students will struggle with the elision of the grammars they have the most facility with. As Lu notes, “in every instance of discursive practice, all users of English are working with and on very specific, often complex and sometimes dissonant, discursive resources and for potentially complex and conflicting purposes.”<sup>72</sup>

While it is true that some students might just be ignoring standardized legal grammar out of sloppiness or cognitive overload, students who use a non-legal dialect in their writing may be writing correctly and following language patterns of their home dialects. Or they may be making “mistakes” that are actually *typical* of new language acquisition.<sup>73</sup> Or they may be making deliberate

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<sup>70</sup> Some of us are already doing so. For example, Brian Larson advocates for centering “students’ own rhetorical knowledge, and establish[ing] the authority of students—especially minoritized students—as rhetorical agents.” Brian Larson, *Centering Students’ Rhetorical Knowledge: The Community of Inquiry as Formative Assessment*, RHETORICKED (Dec. 3, 2021), <https://rhetoricked.com/2021/12/03/centering-students-rhetorical-knowledge/> [<https://perma.cc/3DEU-57SV>]. After all, as Larson notes, students “have extensive experience constructing discourse suited to certain audiences and certain contexts,” a resource that Larson calls “rich *rhetorical experience*.” *Id.*

<sup>71</sup> Indeed, legal writing has been compared to learning a new language. Suzanne E. Rowe, *Legal Research, Legal Writing, and Legal Analysis: Putting Law School into Practice*, 29 STETSON L. REV. 1193, 1205-06 (2000).

<sup>72</sup> Lu, *supra* note 69, at 26.

<sup>73</sup> Language-acquisition scholars note that certain errors or idiosyncrasies are expected and predictable when students are learning a new language. See, e.g., Dana Ferris, *Theory, Research, and Practice in Written Corrective Feedback: Bridging the Gap, or Crossing the Chasm?* 15 NEW ZEALAND

grammatical choices that consciously challenge the elite expectations of the law's dominant discourses.

Whatever the reasons for students' grammatical variations, if we view grammar as constituting a range of specific and contextual rhetorical choices that writers can and should control—rather than solely a site of remediation and error-correction—we will be able to work more effectively with our students. Seeing grammar from a functional, rhetorical view can help us be more hospitable to those whose legal writing reflects marginalized and alternative grammars. And it just might help minimize our own frustrations with teaching and critiquing our students' grammar choices.

### **B. Rhetorical Grammar Can Help Students Become Successful Readers and Writers of Legal Texts**

We should teach grammar because our students need to use Standardized Legal English for successful legal practice. In the legal world, writing errors can have substantive negative effects—we have all heard about cases in which a missing or misplaced comma had catastrophic consequences in a contract dispute.<sup>74</sup> In the profession, [p]oor “grammar and punctuation readily become class markers in a hiring situation in which social class already plays an identifiable role, particularly at elite firms.”<sup>75</sup> We expect our students to produce writing that follows formal, Standardized Legal English conventions because their colleagues and judges do, too.

Primarily, teaching rhetorical grammar can help students learn these conventions and make their writing more precise, accurate, and fluid. But, just as important, it enhances students' abilities to make strategic rhetorical choices about *all* aspects of their legal writing. As Linda Berger notes, “rhetoric recognizes students' power and ability to affect outcomes in their rhetorical communities, both now, while they are law students, and later, when they are practicing lawyers.”<sup>76</sup> The same can be said about rhetorical grammar: if we teach students

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STUDIES IN APPLIED LINGUISTICS 1, 1-2 (2009); Paul Kei Matsuda, *Let's Face It: Language Issues and the Writing Program Administrator*, 36 WRITING PROGRAM ADMINISTRATION 141, 156-57 (2012).

<sup>74</sup> For a list, see, for example, Nowak, *supra* note 3, at 1371 n.9.

<sup>75</sup> Francis, O'Regan & Black, *supra* note 3, at 136.

<sup>76</sup> Berger, *supra* note 22, at 8.

that there is not a single, monolithic “correct” grammar, but instead that they should make grammar choices—like other writing choices—best suited for their rhetorical occasion, students will become more flexible and creative communicators in general. Many of us already encourage students to make choices about the content and organization of their legal documents based on the texts’ intended purposes and audiences. By asking students to consider how syntactical and mechanical choices also can affect a text’s contextualized reception, we reinforce the lessons we already teach students about “higher-order” writing issues. This kind of coherent pedagogical approach to teaching all aspects of legal writing has mutually reinforcing benefits.

Rhetorical grammar can also help students become the kind of detail-oriented *readers* of texts that will help them excel in law practice. When students attend to grammar while reading cases, statutes, and legal memoranda, they can evaluate and ask critical questions about each word, punctuation mark, and syntactical structure. Such close and critical reading not only helps when it comes to canons of statutory construction but also allows students to locate and generate legal arguments they might otherwise overlook.<sup>77</sup>

Rhetorical grammar also helps students recognize their own agency over their writing choices and effects, giving them confidence as they adapt to their new legal discourse community. In contrast to the prescriptive approach that presents grammar as a set of rules students must memorize and abide, rhetorical grammar teaches students that they have flexibility and creativity in how they present their message.

Such an approach may be particularly important for students who do not come to law school with a background in elite English or who struggle with Standard English conventions. As noted above, linguistic conventions can signal membership in a particular discourse community, and often serve to police or exclude those who do not follow such conventions. It is crucial to teach legal language conventions in a way that does not unintentionally disparage our students’ other dialects or disparage our students for speaking or writing in non-Standard English. Teaching grammar from a

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<sup>77</sup> For more on the relationship between close-reading abilities and legal-writing skills, see Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163 (1993).



rhetorical perspective makes clear that Standard English is just one dialect of many. It helps students see that non-elite dialects are legitimate and can be deployed effectively, just as Standard English is not universally appropriate.<sup>78</sup> Further, acknowledging that students are already fluid language users—that they have large linguistic repertoires, that they already speak and use different grammars depending on the rhetorical situation—can give linguistically marginalized students the fluency and confidence to utilize the grammatical conventions of formal legal writing without devaluing their non-legal communicative practices.

Finally, teaching grammar rhetorically acknowledges that grammar is deeply bound up in meaning, discourse, persuasion, and power. It can help students not only to understand and produce work that adheres to prevailing linguistic practices but also understand how those practices reproduce and are shaped by hierarchies of privilege and access.<sup>79</sup>

Almost twenty-five years ago, Kathryn M. Stanchi noted that traditional legal writing pedagogy marginalizes and silences minoritized voices

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<sup>78</sup> Some suggest that, rather than fostering equity, teaching Standard English contributes to inequity by privileging and normalizing White, elite dialects while denigrating minoritized students' language as deficient. *See* Baker-Bell, *supra* note 47, Chapter 2 (arguing that pedagogical approaches promoting code-switching reinforce Anti-Black racism because they privilege “White Mainstream English”); Horner, Lu, Royster & Trimbur, *supra* note 42, at 306-07 (assigning divergent language practices a discursive home such as “‘home’ language, ‘street’ language, ‘academic’ language, ‘business’ language,” and so on, “fails to acknowledge the operation of power relations in defining what is appropriate, and . . . [mask[s] the politics involved in hierarchically ordering these spheres”); Bryant Jensen & Gregory A. Thompson, *Equity in Teaching Academic Language—An Interdisciplinary Approach*, 59 *THEORY INTO PRACTICE* 1, 1 (2020) (noting that attempts to teach academic language can perpetuate inequality).

<sup>79</sup> For more on teaching students how language choices affect power and hierarchy, *see* L. Danielle Tully, *The Cultural (Re)Turn: The Case for Teaching Culturally Responsive Lawyering*, 16 *STAN. J. C.R. & C.L.* 201 (2020); McMurtry-Chubb, *supra* note 57, at 290–91; Lorraine Bannai & Anne Enquist, *(Un)Examined Assumptions and (Un)Intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, 27 *SEATTLE U. L. REV.* 1 (2003).

because it teaches law as a language, and thereby both reflects and perpetuates the biases in legal language and reasoning. Indeed, because of the degree of cultural and ideological bias contained in the language of law, legal writing's effectiveness in teaching that language is directly proportional to its effectiveness in muting outsider voices: the better legal writing is at teaching the language of law, the more effective it is at muting those individuals whose voices are not included in the language of the law, and the more effective legal writing is at ensuring that those voices will continue not to be heard in the legal context.<sup>80</sup>

In her important work on comparative rhetorical traditions, McMurtry-Chubb calls on legal writing professors to "include a discussion of oppositional rhetorics as alternatives to dominant ones."<sup>81</sup> Given that law school pedagogy is a site of hegemonic reproduction that often perpetuates social inequalities, she warns:

If the traditional [dominant] legal analytical process is normalized and passed off as objective, both in the content of the legal writing curriculum and in the body of the person teaching the curriculum, most students unwittingly will continue to replicate racist and elitist legal structures as they learn the very process of legal reasoning and analysis in law school and as they undertake the practice of law.<sup>82</sup>

While Stanchi and McMurtry-Chubb focus on forms of argumentation, narrative, and legal analysis more broadly, their calls

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<sup>80</sup> Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 DICK. L. REV. 7, 20 (1998).

<sup>81</sup> McMurtry-Chubb, *supra* note 57, at 289; *see also* Berenguer, Jewel & McMurtry-Chubb, *supra* note 25 (arguing for the teaching of critical and oppositional rhetorics).

<sup>82</sup> Teri A. McMurtry-Chubb, *Writing at the Master's Table: Reflections on Theft, Criminality, and Otherness in the Legal Writing Profession*, 2 DREXEL L. REV. 41, 54-55 (2009).

can be extended to grammatical forms as well. A rhetorical approach to grammar can help students identify specific linguistic practices that are used to create and elide certain identities, stories, and truths.<sup>83</sup> It can provide students with tools and vocabulary to critique the linguistic moves that both conceal and enact oppression and exclusion. It can encourage students to question received grammar conventions and prescriptive rules while at the same time giving students access to the grammatical and stylistic conventions expected in formal legal writing. Moreover, teaching rhetorical grammar can also open up space for more inclusive social realities by allowing students to strategically *depart* from prevailing orthodoxies around Standard English when appropriate.<sup>84</sup> Ultimately, teaching students that grammar is a tool to deploy strategically, rather than a set of nameable and fixed rules, can help students innovate in ways that produce new and more just forms of legal communication.<sup>85</sup>

### **III. Rhetorical Grammar in the Legal Writing Classroom**

#### **A. How to Teach Rhetorical Grammar**

Like most legal writing professors, I don't have time to teach my students everything they should learn in their first-year legal writing course. But given that rhetorical grammar is a critical tool for effective legal communication, I make an effort to include at least some

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<sup>83</sup> Laura R. Micciche makes an argument for rhetorical grammar in first-year college composition courses, asserting that it can help students recognize “that language does purposeful, consequential work in the world—work that can be learned and applied.” Micciche, *supra* note 60, at 719.

<sup>84</sup> A well-known and increasingly accepted deviation from Standard English expectations in legal writing is the singular generic “they” pronoun. See generally, e.g., Heidi K. Brown, *Get with the Pronoun*, 17 LEGAL COMM. & RHETORIC 61 (2020); Ezra Graham Lintner, *To Each Their Own: Using Nonbinary Pronouns to Break Silence in the Legal Field*, 27 UCLA WOMEN'S L.J. 213 (2020).

<sup>85</sup> I hope this article inspires legal writing and rhetoric scholars to examine the ways in which innovative legal writers strategically depart from traditional grammar orthodoxies to achieve rhetorical goals, but such a study is outside the scope of this article.

rhetorical grammar exercises and lessons every year. I provide some examples of these exercises below.

Law students who attended high school and college in the United States have probably never had much explicit grammar instruction,<sup>86</sup> but, like most of us, they likely associate grammar-learning with drills-and-skills exercises. Therefore, it is important to emphasize early in the first semester that grammar use is a situated social practice, not a singular set of rules that students must memorize and always follow. In one of the first classes of the year, I explain to students that grammar choices might change depending on the genre, audience, and purpose. To illustrate the point with a realistic example, I provide students with a scenario: they have to explain their tardiness in both a text message to a friend and in an email message to their law professor. After the students generate their messages in this quick writing exercise, we discuss the different grammatical choices they made and interrogate the rhetorical effects of those differences. I also show students a few sentences from a legal brief alongside examples of technical writing from various fields they might be familiar with from college, and we briefly discuss how grammar conventions and expectations change depending on the professional field. Students are adept at spotting and explaining the distinct grammatical choices in a legal brief, literary critique, and scientific lab report. Discussing these examples helps draw students' awareness to the conventions that govern familiar writing situations while, at the same time, introducing them to the linguistic expectations in their new legal discourse community.

Another activity that helps students see grammar from a rhetorical perspective is to have them generate a list of three grammar "rules" they have heard. Students share these rules in an online discussion board and then work together in small groups to rewrite one or two of their prescriptive rules from a rhetorical perspective. Students must describe the rhetorical effect of their rule and decide when, if ever, breaking the rule would serve a communicative purpose. For instance, students often select the prescriptive rule: "Don't use passive voice." By rewriting the rule from a rhetorical

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<sup>86</sup> See Alaka, *supra* note 1, at 347. As noted above, *supra* note 7, some legal writing professors never learned technical grammar terms, either. However, as I hope to demonstrate here, it is possible to teach rhetorical grammar without a deep knowledge of formal grammar terminology.

perspective—explaining that eliding or burying the subject of the sentence is often confusing but sometimes desirable—students both learn the mechanics of the passive voice and better understand the effect of the grammatical structure on the writer’s message. This exercise helps students see that some grammar “rules” should always be followed in legal prose, but that some can be deployed or avoided strategically.

Opinions and briefs can also serve as models in lessons about the communicative nature of grammar choices.<sup>87</sup> For an in-class activity or homework assignment, I provide the opening paragraphs of opposing briefs with different styles and ask students to consider how the mechanics and grammar affect the meaning and reception of the texts. I usually pick briefs from current, newsworthy cases so students are familiar with the topic. I ask students to note how writing choices like sentence structure, word choice, and punctuation create an authorial “voice,” and ask them to describe how that authorial voice relates to the brief’s argument. Students tend to focus on sentence length and rhythm, number and placement of adverbs, complexity of diction, use of punctuation, and word choice. In conjunction with a discussion of the organization and content of the briefs, this exercise helps students gain a deeper understanding of the ways that grammar choices both create and reflect the rhetorical purposes of a legal text. This activity can also facilitate discussions about power and

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<sup>87</sup> Susan Hankin describes a terrific rhetorical grammar exercise in *Statutory Interpretation in the Age of Grammatical Permissiveness: An Object Lesson for Teaching Why Grammar Matters*, 18 PERSP. 105 (2010). She gives students a decision about New York State’s animal cruelty statute and whether it requires a pet owner to provide medical care. The decision turns on the absence of a serial (Oxford) comma in the statute. In reaching its decision, the court assumed that the absence of a serial comma meant that the statute did not contain a list. Hankin uses the opinion as the basis for a discussion about how much the grammar “rules” about serial commas influenced the court’s reasoning, how grammar choices change interpretation, and about ambiguous language more broadly. She writes: “Having students read even this short case excerpt demonstrates that grammar does matter, and that in some instances it might be especially important to understand how legal readers are likely to use rules of grammar to interpret meaning of statutes or contracts.” *Id.* at 108.

representation in the law. By closely reading a legal text for the ways that grammar elides or privileges particular stories and points of view, students become more critical readers and writers, acquiring the tools to both interrogate and, where necessary, disrupt the ways that power works through language.

In a somewhat similar exercise, I provide students with a particularly obtuse excerpt of legal prose. The students read the piece and discuss why the writing is difficult to wade through. For example, the students often note that the author fails to follow the typical subject-verb-object order, that the sentences contain multiple nested modifiers, and that the passage includes several lists with complicated grammatical structures. Although the students may not have the vocabulary to identify all the parts of speech or syntactical structures, they can usually describe with specificity why the piece was difficult to read. Again, I usually select a recent, widely discussed opinion or brief; students also like to deconstruct portions of a case they've recently read in one of their other courses. No matter what specific excerpt we work with, this activity inevitably leads to a fruitful discussion about the gatekeeping function of legal prose, the importance of calibrating a text's register to its audience, and whether it ever is appropriate to make writing purposefully dense or opaque.

As an inversion of the above exercise, I ask students to choose a judicial opinion or brief whose style they admire and have them analyze the grammatical choices of an excerpt from the piece. For this exercise, students post a link to their selection on a discussion board and write a paragraph analyzing some of the grammar choices and their rhetorical effects. As a follow-up, I invite students to mimic the writing choices of their admired jurists or advocates in their next writing assignment.

While it is useful to supplement activities like these with grammar and style books that provide students with technical terminology, the beauty of these lessons is that students can identify and discuss the "rules" of grammar framed around rhetorical choice even if they don't have a linguist's vocabulary.

Incorporating examples of students' own writing during discussions of grammar can also be helpful. For example, after introducing students to a grammar topic through one of the exercises described above or by reading selections from a grammar or style book, I generally take a few minutes in class to show an example of student work that makes a relevant grammar "mistake" (getting

permission from the student so they don't feel embarrassed). Rather than labeling these examples as grammatical violations, I ask what the class thinks the student intended to communicate and how the communicative goal could be furthered by making an alternative choice.

To enhance metacognition,<sup>88</sup> I usually have students complete a one-page reflection essay or include reflective footnotes with each major writing assignment. As part of these reflective pieces, I ask students to select some of their grammatical choices and explain how those choices enhance the communicative purpose of their assignment. This exercise reinforces the lesson that students have agency to make grammatical choices that serve their rhetorical purposes.

Finally, for professors who do not have the time or inclination to teach grammar, online grammar tools may be a good supplemental option, as long as those tools approach grammar from a rhetorical perspective.<sup>89</sup> Grammar programs that stress correctness alone can inhibit students' understanding that there may be multiple and variable "right answers" depending on the situation. And grammar programs that provide exercises divorced from context and meaning-making likely fail to help students understand how grammar affects the reception of texts. That said, the online grammar tools that take a more rhetorical approach and explain the effect of grammar choices on readers—such as Grammarly Pro and BriefCatch—may be effective teaching tools in legal writing classes.

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<sup>88</sup> In the education context, metacognition—a skill that facilitates long-term knowledge-acquisition and growth—refers to students' ability to actively and consciously reflect on how they are learning. See Jennifer A. Gundlach & Jessica Santangelo, *Teaching and Assessing Metacognition in Law School*, 69 J. LEGAL EDUC. 156, 157 (2019); Anthony Niedwiecki, *Teaching for Lifelong Learning: Improving the Metacognitive Skills of Law Students Through More Effective Formative Assessment Techniques*, 40 CAP. U. L. REV. 149, 155 (2012); Felsenburg & Graham, *supra* note 31, at 303.

<sup>89</sup> For an article that provides a helpful overview of online grammar and editing tools, see Regalia & Levin, *supra* note 1.

## B. How to Assess Grammar from a Rhetorical Perspective

If we expect students to produce writing that follows the conventional grammar expectations of legal prose, we should, as I argue, *teach* our students those grammatical expectations from a rhetorical perspective. But the question emerges: should we *grade* students on their grammar choices?

I would caution against grading students on their grammar usage unless we actually spend time teaching grammar. A foundational principle of instructional design requires that professors set learning goals or outcomes, teach to those outcomes, and assess students' performance of those outcomes.<sup>90</sup> In other words, we should assess only what we want students to be learning and assess only what we're actually teaching.

It would clearly violate this basic instructional design principle to penalize students for failing to follow the CREAC structure of legal analysis without teaching it. Similarly, if we tell students that their memos must be written in "plain English" and contain "no grammatical errors," but penalize students for failing to meet those

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<sup>90</sup> See, e.g., Marie Summerlin Hamm, Benjamin V. Madison, III & Ryan P. Murnane, *The Rubric Meets the Road in Law Schools: Program Assessment of Student Learning Outcomes As Fundamental Way for Law Schools to Improve and Fulfill Their Respective Missions*, 95 U. DET. MERCY L. REV. 343, 379 (2018) ("Backward design is a method of curricular planning that involves setting learning goals before selecting instructional methods or forms of assessment. There are three steps in the backwards design process. First, the instructor must decide what students should know and be able to do (outcomes). Second, the instructor must determine what evidence will support whether the learning has occurred (assessment tasks and methods). Third, the instructor must design learning activities that will give them evidence (lecture, readings, etc.)."); Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 383-84 (2001) (stating that to follow instructional design principles, the course designer "develops information regarding the parameters of the project (known as the 'analysis phase'), creates instruction tailored to the particular characteristics of the project (the 'strategy phase'), and then assesses the instruction to determine whether it is succeeding (the 'evaluation stage'). Throughout the process, the designer strives for congruence among the instructional goals, the test items, and the selected instructional strategies").



standards without explicitly teaching students how to meet them, we violate this same instructional design principle. We should not penalize students for failing to perform skills that we do not teach, even if those skills are grammar related.

Further, assessing for grammar without teaching it *doubly* privileges those who learned prestige English in school or grew up speaking and writing it at home. Those students—disproportionately wealthy and White—have to spend less time learning and practicing elite grammar conventions, plus they receive higher grades for merely deploying their native linguistic knowledge. As Paul Kei Matsuda notes in the college writing context, if we do not explicitly teach grammar but nonetheless assess for it, “those who are not native speakers of dominant varieties of English are thus being held accountable for what is not being taught.”<sup>91</sup> To avoid unfairly penalizing students who do not enter our classrooms already speaking and writing prestige English, legal writing instructors should avoid grading grammatical correctness unless we also provide adequate support and instruction on grammar issues.

One simple way to bypass this unfairness is to avoid grading grammar issues altogether. However, if we do grade for grammar, we should grade only the grammar issues that we have addressed in class, and keep the proportion of the grammar grades aligned with the proportion of class time spent on grammar instruction.<sup>92</sup>

Regardless of whether we grade students on their grammar usage, the best way to address individual grammar issues, as with all writing issues, is through feedback. We can provide students with feedback on their grammar choices in individual conferences and on written work. But in any case, our grammar feedback should focus on rhetorical awareness, rather than simple error correction. Merely pointing out errors may help students with revision for a second draft of their memo, but, as noted above, this prescriptivist approach to

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<sup>91</sup> Matsuda, *supra* note 63, at 640.

<sup>92</sup> Matsuda, *supra* note 73, at 157 (explaining that in the context of college composition courses, “[l]imiting the percentage of grammar grades (e.g., up to 5%) can . . . prevent grammar from affecting students’ grades disproportionately. As a rule of thumb, the proportion of grammar grades should not exceed the proportion of grammar instruction provided that can guarantee student learning”).

grammar does not affect subsequent or long-term grammar acquisition.

A rhetorical approach to commenting on grammar fosters a deeper understanding of grammar expectations and furthers students' understanding of grammar as a tool for writing persuasive prose. I recognize that our critiquing time, like our class time, is limited. To be sure, we should not and cannot comment on all grammar issues in our students' work. But ignoring grammar altogether does not help students make better grammatical choices. And—just as teaching grammar through drills-and-skills exercises is not particularly effective—marking grammar “errors” is less useful than taking the time to comment on grammar from a rhetorical perspective by explaining the effect that the grammatical choice had on the reader. For example, a traditional, prescriptivist comment might say “comma splice” in the margin. A comment from the rhetorical perspective might say something like, “I misread your sentence here and at first couldn't understand what you were trying to say. If you combine two independent clauses with just a comma, your reader won't be prepared for the second independent clause and will be confused. To prepare your reader for the second independent clause, you could use a semicolon or just split the sentence into two.” Or, instead of writing “awkward” in the margin, explain the confusing effect: “I had to read this sentence twice before I realized it addresses a counterargument. To help your reader see that you're about to shift your focus, you could include a transition phrase like ‘however’ or ‘on the other hand.’”

In my experience, although it is time intensive, commenting on grammar from a rhetorical perspective pays dividends beyond merely addressing the grammatical issue. It encourages students to consciously invoke their imagined reader while they write, leading to better outcomes for grammar issues as well as organizational and substantive issues.

### **Conclusion**

My aim in writing this article is to encourage us to change both our prevailing attitudes and orientations regarding grammar: away from a focus on error correction and towards a recognition that grammatical choices are foundational to meaning-making and the

writing that lawyers do. A rhetorical approach to grammar can benefit both our field and our students.

In the field of rhetoric and composition—whose institutional hierarchy in English Departments mirrors our own, and where many of the debates around the study and teaching of written texts are similar to our field's—Robert J. Connors wrote in his detailed disciplinary history that

[s]triking a balance between formal and rhetorical considerations is the problem we now face, and it is a delicate one. We cannot escape the fact that in a written text any question of mechanics is also a rhetorical question, and as a discipline we are still trying to understand the meaning of that conjunction. We may spend the rest of our professional lives investigating how the balance between rhetoric and mechanics can best be struck.<sup>93</sup>

While I wouldn't ask—or expect—any legal writing scholars to spend the rest of their professional lives on the question, we can and should open a bit more space in our teaching and our scholarship for the issue of grammar and its communicative purposes and effects.

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<sup>93</sup> CONNORS, *supra* note 52, at 170.