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Do RoboMemos Dream Of Electric Nouns?: A Search For The Soul Of Legal Writing

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Essay

Do RoboMemos Dream of Electric Nouns?: A Search for the Soul of Legal Writing

Ian Gallacher*

> *"[Sheep] get a lot of diseases but the symptoms are always the same; the sheep can't get up and there's no way to tell how serious it is, whether it's a sprained leg or the animal's dying of tetanus. That's what mine died of: tetanus. . . . I took him to the vet's and he died, and I thought about it, and finally called one of those shops that manufacture artificial animals and I showed them a photograph of Groucho. They made this. . . . It's a premium job. And I've put as much time and attention into caring for it as I did when it was real. But ---" He shrugged. "It's not the same," Barbour finished. "But almost."*[1]

In Philip K. Dick's dystopian novel about the aftermath of a devastating nuclear war, most humans have left earth to live on other planets where much of the work is done by increasingly more lifelike androids. These androids sometimes seek to return to earth where they are hunted down and "retired," by bounty hunters like the book's anti-hero, Rick Deckard. Why the androids seek a life on earth is unclear; Dick portrays it as a grotesquely unattractive place in which radioactive waste from the nuclear war has killed almost all non-human animals. Ownership of a real animal is a status symbol among the survivors but the need for an empathetic contact with a pet has driven those who do not have a real animal to purchase expensive, and sophisticated, replicas of animals, like Deckard's android sheep-replica of Groucho.

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[1] Philip K. Dick, DO ANDROIDS DREAM OF ELECTRIC SHEEP?, 12 (1968). The title of this article is an obvious paraphrase of Dick's book, familiar to science-fiction fans in its book version and in the movie adaptation, entitled *Blade Runner* (Warner Bros. 1982).

The importance of empathy to humans forms the crux of Dick's book. Religion has become a crude reconceptualization of Christianity in which devices allow humans to experience heightened empathy as they observe the stoning death of a Christ-like character, and bounty hunters use an empathy-response test to determine if an entity is human or android. Androids are virtually indistinguishable from humans and are even able to sing opera at a professional level, but they cannot simulate human empathetic responses to the bounty hunters' questions about animals. Empathy, in Dick's world, is what allows us to distinguish between machines and humans.

As in literature, so, perhaps, in real life, especially for writers. Because for those with a love of writing and the written word, we stand at an interesting point in history. For the first time it is possible to read intelligible prose that was not written by anyone -- something that would be inconceivable even a decade ago. We can do this because computers are now able to "generate" documents.[2] In fact, computers are already writing text that is read by a significant number of people who have no idea that a computer wrote the story they're reading. In particular, stories concerning corporate earnings statements found on some websites and stories about minor sports generated on behalf of some news services are being produced without any human input, except for writing the software used to generate the documents and -- at least at the moment -- providing the data necessary for the software to operate.[3] And while this new reality has not yet affected legal writing, it is possible that lawyers will have to face its implications in the near future.[4]

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[2] Document "generation" is a replacement term for "writing" with which we might have to become familiar.

[3] Steven Levy, *Can An Algorithm Write A Better News Story Than A Human Reporter?*, Wired.com (April 24, 2012), located at http://m.wired.com/gadgetlab/2012/04/can-an-algorithm-write-a-better-news-story-than-a-human-reporter/all/1.

[4] Perhaps this is a pessimistic assessment, but it is based on the assumption that if someone thinks there is money to be made from adapting current computer writing programs

It is uncertain how lawyers will react to the prospect of having a computer write documents for them. On the one hand, there is something distinctly strange and troubling about the thought of typing in a few pieces of information, pressing the "Enter" key, and having a fully-fledged document sitting on one's computer desktop.[5] The ceding of control to a machine would be difficult for many to accept, even after any ethical issues were resolved. On the other hand, though, the prospect of perfectly-drafted documents, available for editing and personalization by a lawyer but with the first draft generated quickly and inexpensively, would surely appeal to some; perhaps not those in large firms,[6] but solo practitioners and those in small firms might find such a service difficult to resist.

Aside from anything else, the prospect of avoiding a tongue-lashing from an judge unhappy with the state of legal writing[7] might make such a program a tempting prospect. And would it necessarily be a bad thing? Assuming -- and this is, of course, a large assumption -- that all the technical problems could be addressed, and that the computer really could take some basic information and turn it into well-structured, technically perfect, legal documents, what would be the harm?

Certainly a development like this might not be seem to be good news for those of us in the legal writing teaching business. In the academic world, the study of legal writing seems to developing down two paths which might, or might not, lead to the same destination. The first, more well-trodden path, is based on the study of rhetoric and prizes rhetorical analysis as a way of

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for the legal market, the adaptation will be made. And if a lawyer thinks the adapted software will save money or time, the software will sell.

[5] Likely as not, it will be possible to set up the program to generate at least some documents with no human input at all. A file entry that a deposition transcript has been received, for instance, could cause the computer to generate an automatic transmittal letter to the deponent for review of the transcript with no specific request for such a letter being made.

[6] But, in this era of outsourcing and cost-cutting, perhaps lawyers in large firms as well.

[7] For an extreme example of this, *see* Bradshaw v. Unity Marine Corp., 147 F.Supp. 2d 668 (S.D.TEX. 2001).

illuminating the writing process for lawyers.[8] The second path starts with the implications of story-telling in human communication and prizes the role of narrative in legal writing.[9] The specter of writing generated entirely by machine, however, forces us to consider a third path, one that recognizes that much legal writing -- perhaps most of it -- is utilitarian and functional, owing little if anything to rhetorical or narrative considerations. And it is this functional writing that is susceptible to infiltration by computer-generated documents that are well-structured, technically accurate, and easy to produce. If this approach to document generation gains a toehold in the legal writing world, it is not inconceivable that more complex, persuasive documents might be next. Were this to happen, the need for specialist faculty who are skilled in the study and teaching of human communication skills would inevitably be questioned.

This short essay explores the nature and implications of this potential threat to the ordered world of legal writing and proposes that if document generation becomes a crisis for those of us who believe that good writing is a crucial skill for all lawyers, legal writing teachers should take Rahm Emanuel's advice and not let this crisis go to waste.[10] Rather, we can take the opportunity offered by the possible incursion of machines into what has been, until now, an exclusively human endeavor, and use it to consider what

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[8] *See, e.g.,* Linda L. Berger, Linda H. Edwards, and Terrill Pollman, *The Past, Presence, And Future Of Legal Writing Scholarship: Rhetoric, Voice, And Community*, 16 Leg. Writing 521, 522 (2010)("The study and practice of "law as rhetoric" is a thread that can run through the fabric of a professional life, weaving together the legal writing professor's work in scholarship, . . . teaching, and professional service."). Further evidence of the role of rhetoric in legal writing study can be seen in the recent name change of one of the two journals devoted to legal writing scholarship, from the "Journal of the Association of Legal Writing Directors" to "Legal Communication & Rhetoric: JALWD."

[9] The legal storytelling movement is a new but remarkably fertile field. There have been three biennial Applied Legal Storytelling conferences, each generating a large amount of fine scholarship on the topic. *See,* http://www.law.du.edu/index.php/storytelling-conference/.

[10] The actual quote is "[y]ou never want s serious crisis to go to waste. Now what I mean by that is [it's] an opportunity to do things that you could not do before." Rahm Emanuel, http://www.youtube.com/watch?v=VjMTNPXYu-Y (Feb 23, 2009).

will distinguish human writing from a machine's generated product and why the human document should be superior to the computer's. The answer, I contend, is the same as the one that occurred to Philip Dick: empathy is the quality that will distinguish our work from that of a computer and a writer's empathetic connection with the Reader[11] is what will make human writing more compelling and persuasive than a computer's work product.

1. Not All Legal Writing Is Persuasive Writing

A quick glance at a law school curriculum might persuade an observer that all legal careers are litigation-based. Courses like Civil Procedure, Criminal Procedure, Torts, and Criminal Law are entirely to do with litigation, both civil and criminal. Even courses that are not inherently litigation driven, such as Property, Contracts, and Constitutional Law, use court decisions, themselves a product of litigation, to illustrate the legal doctrine in their subjects.

As a law school subject, legal writing falls easily into this pattern. The ABA Sourcebook on Legal Writing Programs acknowledges that lawyers play multiple practice roles, but then assumes that persuasive advocacy is an inherent part of a lawyer's practice, noting that a legal writing course "should introduce students to the variety of ways that lawyers serve their clients and society. . . . At a minimum, students should learn the difference between the objective analysis of the law necessary to advise a client fully and the persuasive advocacy necessary to represent a client effectively."[12]

Others have been more direct. After posing the question "what's the place of rhetoric in legal education?", Linda Berger notes that the answer "appears obvious: 'Simply put, lawyers are rhetors. They make arguments to convince other people. They deal in persuasion.' . . . Proposing 'that the law

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[11] I use the convention of capitalizing the "R" in "Reader" when I write of a legal writer writing for a specific person, and use the lower case "reader" when speaking in general of those who read.

[12] ABA Section of Legal Education and Admissions to the Bar, SOURCEBOOK ON LEGAL WRITING PROGRAMS, 11 (2d ed. 2006).

is a branch of rhetoric,' James Boyd White wrote, 'Who, you may ask, could ever have thought it was anything else?'"[13]

And yet many lawyers might question White's confidence. The substantial number of lawyers who have nothing to do with litigation in their daily practice, for example, might, with good reason, disagree with White's assessment. For those lawyers who draft contracts or respond to contract proposals, who work in trusts and estates, solve complex tax problems, or who engage in a myriad of other legal activities that keep them far away from the courthouse, the notion that they "deal in persuasion" might seem strange. These lawyers write many documents, from contracts to opinion letters, that have little to do with persuasion, at least as a principle focus.[14]

Even litigators, for whom persuasion certainly is a crucial part of their practice lives, write many documents that have little to do with persuasion as an integral part of their content. Discovery requests, for example, rely on little or no rhetorical or narrative subtlety to do their job. Such requests have a simple, prosaic, role: they require one side in litigation to do something -- give the other side answers to questions, or produce documents, or to appear for depositions. Sometimes they fail in this task, generating objections from the other side instead of answers or documents, but that failure is unlikely related to any failure in rhetorical or narrative skill on the propounding lawyer's part. While these requests are developed in support of a theory of the case, which is an inherently narrative structure, and while it might be possible to locate standard discovery requests within a larger

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[13] Linda L. Berger, *Studying and Teaching "Law As Rhetoric": A Place To Stand*, 16 LEG. WRITING 3, 10 (2010), quoting Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUM. 155, 177 (2006), and James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985).

[14] Rhetoricians would doubtless argue, and I would happily concede, that rhetoric is fundamental to all human communication. But all that means is that these lawyers are no more or less rhetors than the average person, and that is surely not enough reason to support the claim that lawyers, in particular, are rhetors.

narrative or rhetorical framework, the actual requests themselves likely owe little or nothing to rhetorical or narrative practices.

Indeed longer, more complex analysis documents developed in conjunction with litigation need not rely on rhetoric or narrative to accomplish their simple, workaday, tasks. A research memo about an area of the law, drafted to memorialize the legal research necessary to develop a case theory, can be written without regard to the story into which the research fits, or without conscious or actual use of rhetoric to accomplish its purpose. In fact, while many of the public writings a litigator engages in -- letters to opposing counsel and documents filed with the court for purposes of obtaining a particular result, in particular -- are full of persuasive techniques, even litigators do not spend all, or perhaps even most, of their time trying to persuade.

This is not at all to say that the documents lawyers write are not susceptible to rhetorical or narrative analysis. If, as Jonathan Gottschall maintains, "story infiltrates every aspect of how we live and think,"[15] then surely we can analyze the narrative or rhetorical significance of every written word. But, and this is a crucial distinction, what is true for the studying academic might not be true for the practicing lawyer. In short, an insight into the narrative or rhetorical significance of a document request might have value in the academy but it might not matter as much to the practicing lawyer who must draft countless similar documents during the course of a career.

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[15] Maria Konnikova, *The Storytelling Animal: A Conversation with Jonathan Gottschall, Scientific American,* located at http://blogs.scientificamerican.com/literally-psyched/2012/04/19/the-storytelling-animal-a-conversation-with-jonathan-gottschall/ (April 19, 2012).

This is perhaps why lawyers are so fond of using form documents to help them. Form documents should be anathema to students of rhetoric or narrative;[16] they take words drafted in one context and force them into a completely different context for utilitarian purposes. And it is true that, done badly, the use of forms can be problematic. When a discovery request, for example, is not modified to meet the facts of the case for which is going to be used, an attorney can request documents, or propound interrogatories, that have no bearing on the current piece of litigation. But many discovery requests, and many other documents lawyers write, are fungible, moving comfortably from case to case without regard to the broader theoretical considerations at play.

None of this is intended to depreciate the importance of rhetoric and narrative study in legal writing. On the contrary, an understanding of both areas[17] is crucial to an understanding of the way lawyers use and receive words. But it is to say that lawyers need not understand the rhetorical or narrative implications of their writing in order to generate some, and perhaps most, adequate, functional, cost-effective documents. And it is in that large rhetoric/narrative-free zone that computer-generated documents might come into their own.

2. Computers and Text Generation

Narrative Science is a Chicago-based company that uses computers to write articles and stories that humans no longer write.[18] At present, the company specializes in computer-generated pieces derived from data --

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[16] Either anathema or a subject for valuable scholarship. For the latter, *see,* Kirsten K. Davis, *Legal Forms as Rhetorical Transactions: Competency in the Context of Information and Efficiency,* 79 UMKC L. REV. 667 (2011).

[17] I say "both" in full knowledge that some would argue that narrative is merely a sub-category of rhetoric, and will only note that if that it so, then it is a very important sub-category that yields its own valuable insights.

[18] *See*, Levy, *supra* at n. 3. Narrative Science's founder, Kristian Hammond, notes that ". . . the most important thing about us [is that n]obody has lost a single job because of us." *Id*. As the technology his company has developed moves into more areas, however, one wonders how long Hammond's claim will remain true.

corporate earnings statements or sports box scores. Here, for example, is a report of a college basketball game generated from the box score and from the computer's memory of previous basketball games:

> Ryan Evans scored 22 points and grabbed six rebounds to lift No. 11 Wisconsin to a 64-40 win over Nebraska at Bob Devaney Sports Center in Lincoln. Evans and Jordan Taylor both had solid performances for Wisconsin (12-2). Evans made 9-11 shots from the floor. Taylor had 15 points and contributed seven assists. Scoring that few points is rare for Nebraska (8-4), a team that came in averaging 66.8 points per game this season. The Badgers held the Cornhuskers to 31 percent shooting from the field, hauled in 25 defensive boards, while only allowing eight offensive rebounds, and just nine free throw attempts. Wisconsin hit 51 percent of its field goals (24-47). The Badgers were hot from long range, hitting 11-of-21 threes for a 52 percent night beyond the arc. Toney McCray contributed 16 points and pulled down seven rebounds for Nebraska in the game. Winning the battle on the boards was crucial for Wisconsin as it grabbed 30 rebounds to 24 for the Cornhuskers. With the win, the Badgers extend their winning streak to six games.[19]

A report like this will not win any prizes for insightful reporting, but it does its job. A little pedestrian and generic, perhaps, and a little clichéd in places, but a piece like this would not be out of place in the sports pages of any newspaper that does not specialize in reporting Wisconsin or Nebraska basketball games. And importantly, it is unlikely that a reader could tell that this text was entirely computer-generated.

This is not to suggest that no human agency was involved in the document generation, just that the involvement happened in a very different way from that in which humans are usually involved in the writing process. Humans had to input the data the computer used, and Narrative Science uses a group of writers to develop templates to help organize the data into

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[19] Located at http://www.narrativescience.com/services/publishing-and-media/

structured text.[20] These templates allow clients of Narrative Science to customize the tone of the generated documents:

> "You can get anything, from something that sounds like a breathless financial reporter screaming from a trading floor to a dry sell-side researcher pedantically walking you through it," says Jonathan Morris, COO of a financial analysis firm called Data Explorers, which set up a securities newswire using Narrative Science technology. (Morris ordered up the tone of a well-educated, straightforward financial newswire journalist.) Other clients favor boggy snarkiness. "It's no more difficult to write an irreverent story than it is to write a straightforward, AP-style story," says Larry Adams, Narrative Science's VP of product. "We could cover the stock market in the style of Mike Royko."[21]

This last point is important. The creators of these templates can program in any style they wish in order to match the written product with the client's desired tone and voice. For them, rhetoric is malleable, and can be the programmed result of an algorithm. We see some evidence of this already in the basketball report quoted earlier: the report uses a metaphor when it says that the Badgers were "hot" from long range, and its use of sports rhetoric, clichéd though it is, points to the way in which the program could be set up to produce a product either in legalese or in plain English, depending on the user's preferences.

Just as rhetoric can be transformed into a tool for a computer program, so too can narrative. Indeed, the entire purpose of programs like this is to transform arid raw data into readable narrative. Sports aficionados, or financial experts, might be able to scan box scores or corporate earnings reports and derive from them the information they need, but the rest of us need to have information presented in a useable form in order to understand it, and narrative provides the necessary formal framework on which to hang data and turn them into information we can assimilate.

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[20] Levey, *supra* n. 3.

[21] *Id*.

And the sports report generated by Narrative Science's computer does an adequate job of presenting its information in narrative form. Just as with many sports reports, it begins by identifying the most important performance of a player on the winning side and then tells the reader who won the game.[22] One quickly learns about other key performers, the location of the game, and then the reader learns some details about the game that better explain the result -- the importance of Wisconsin's defense, for example, in keeping down Nebraska's field shooting percentage.[23] The report flows well, giving the names of key players on both teams and allowing a reader who did not see the game to understand why the game ended as it did.[24] It is a solid, though uninspiring, piece of sports journalism.

For those uncomfortable with the idea of computers writing prose for us, this is disturbing. If both rhetoric and narrative -- the two paths down which legal writing theorists travel in order to understand and describe the ways in which lawyers communicate -- can be co-opted by computer programmers to help generate documents that can be created with minimal human engagement,[25] then do those paths ultimately lead us to a meaningful destination? Put another way, if a computer can use rhetoric and narrative to generate a functional legal document, is it important for lawyers to know anything more than, say, a non-lawyer about those writing strategies?[26]

One answer, of course, is "of course." We might have spell-checkers built into word processing programs, but we need to know the difference between "know" and "no," between "aisles" and "isles," and between "statue"

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[22] *See*, *supra*, at n. 19 and accompanying text.

[23] *Id*.

[24] *Id*.

[25] I say "minimal" rather than "no" here because I assume that a person will still have to enter basic information -- the name of the client, the relevant cases and their holdings, and so on, before the computer can generate the desired documents. But perhaps that is a failure of vision on my part.

[26] Again, I stress "lawyers" here instead of "law students." The pedagogical value of studying the principles of rhetoric and narrative that currently underpin the typical legal writing curriculum is not in debate here.

and "statute." Similarly, we need to be able to distinguish between the prosaic and anatomical "Achilles tendon" and the poetic and metaphorical (and intended) "Achilles heel."[27] Computers are good at generating perfect text, runs this argument, but are a-contextual -- incapable of telling when a correctly spelled word is incorrectly used, and equally incapable of distinguishing between anatomy and metaphor, or of determining when metaphor is well-chosen.

But I'm not so sure. Context-sensitive spell checkers are already in our midst; Lexis and Westlaw already understand the difference between "statue" and "statute," and there is no reason to assume that just because Microsoft Word's spellchecker can't tell when a correctly spelled word is incorrectly used today, it will always be incapable of doing so; those of us who remember when a spellchecker was a bound dictionary are well aware that technology has a way of doing things one didn't think were possible until suddenly they were.

Narrative Science certainly believes that the future belongs to computers. When asked, in 2011, "what percentage of the news would be written by computers in 15 years [, the CLO and cofounder of Narrative Science replied]: 'More than 90 percent.'"[28] This can be explained as the natural puffing of someone who has an emotional and financial stake in a company's success, and could be disregarded -- or at least downplayed -- were it not that the percentage of any journalistic output before the company was formed in 2012 was zero, and it certainly is not that now.

In order for Narrative Science, or a company doing similar work, to make inroads into the legal writing world, it would have to do a lot of work. In particular, it would have to find a way to convert the analog world of legal precedent into digital data, and it would have to develop an extensive series

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[27] These are all examples of mistakes I have seen in student-written documents over the years.

[28] Levy, *supra* n. 3.

of algorithms to mimic the genre expectations of various legal documents. But it is showing the capacity to do something similar in other areas already:

> [In order to expand its scope, Narrative Science] will have to invest in sophisticated audience-learning and data-mining technologies. It will also have to get deeper into the business of understanding natural language, which would allow it to access information and events that can't be expressed in a spreadsheet. It already does a little of that.[29]

Other companies are dabbling in the same waters. A website called "EssayTyper," for example, offers the tantalizing or terrifying (depending on one's perspective) prospect of a program that, given a topic, "pulls information straight from the Wikipedia and into a pseudo-processor. . . ."[30] In other words, give the program a topic and it will write something approximating a term paper for a student with no other required input. At present, the program apparently does not generate anything that anyone would take seriously as even an incompetent piece of student writing.[31] But given time, programs like this might be another reason students come to law school with serious writing deficits.

As to algorithms for generating legal documents, this likely would not be as difficult as might at first be thought. Most law students already know and use a version of one such algorithm already -- the familiar IRAC or CREAC, or CRIAC, or something-RAC formula for presenting legal analysis. Although teaching a computer to recognize the linguistic clues that signal that the source document is engaging in one or other of the prongs of this formula might be challenging, the challenge hardly seems to be an insurmountable one.

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[29] *Id*.

[30] Anastasia Salter, *Robot Writers, Robot Readers?* The Chronicle of Higher Education (May 7, 2012), available at http://chronicle.com/bligs/profhacker/robot-writers-robot-readers/39793?sid=at&utm_source=at&utm_medium=en.

[31] The program does produce good titles, though: for example, "The Fluidity of iPad. Gender Norms & Racial Bias in the Study of the Modern iPad." *Id*. For anyone who spends any time in academia, that title, sadly, does have an authentic ring to it.

There is nothing to indicate that Narrative Science is interested in the legal market yet. But there is no reason why this company, or one like it, should not consider law as a possible expansion area. Lawyers write a lot, after all, and the general perception is that they don't do it very well.[32] The prospect of having the writing burden lifted from their shoulders would surely be tempting to many practicing lawyers.

3. The Importance of Empathy to a Legal Writer

The threat of computer-generated legal documents poses a particular challenge to rhetoricians and narrative theorists. Their areas of expertise can be invaded and co-opted by companies like Narrative Science, so that the computer can generate documents that are rhetorically functional and have narrative flow. The documents such a program would generate would doubtless be as unexciting and prosaic as the journalistic reports Narrative Science generates now, but they would not be devoid of rhetorical or narrative content. What they would lack, though, is empathy.

In fact, Philip Dick was remarkably astute when he picked empathy as the means by which humans could distinguish themselves from robots, because empathy is a particularly human condition, and one that is particularly important to writers. Although some appear to use the word in way that makes it synonymous with "sympathy," empathy in fact is a much more neutral concept, meaning simply "[t]he power of projecting one's personality into (and so fully comprehending) the object of contemplation."[33] Put this way, the importance of empathy to a writer is immediately apparent:

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[32] Plucking one comment from the many bad things that have been said about bad lawyer writing over the years, Jeremy Bentham claimed that lawyers were known for "poisoning language in order to fleece their clients" and said that legal English was "excrementitious matter" and "literary garbage." 3 JEREMY BENTHAM & SIR ANDREW BOWRING, WORKS 260 (1843), *quoted in*, Robert W. Benson, *The End of Legalese: The Game is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 521 (1985). Although Bentham was writing over 150 years ago, it doesn't feel like an overstatement to say that his comments are echoed today.

[33] Oxford English Dictionary, vol. 5, 184 (J.A. Simpson & E.S.C. Weiner eds., Oxford U. Press 1989).

one way to define good writing generally is that the writer displays the ability to anticipate what the Reader will be thinking and to provide the information the Reader seeks precisely when the Reader needs it.

Good persuasive legal writing is no different. A lawyer should anticipate what a judge, or other legally-informed reader, needs to read in order to accept an argument as correct and should be able to provide the necessary information at the right time. Part of this is genre-driven of course, like the importance of grouping all legally relevant facts together in one section rather than sprinkling them throughout a document, and those genre-driven expectations could likely be met, or, at worst, simulated, by a computer. But good persuasive legal writing also requires judgment. Sometimes, in order to create an effect or cause a reader to react in a particular way, a writer must work within, or against, genre expectations or otherwise play with the "standard" approach for the document at issue.

As an example of empathetic writing at its best, consider the petition for a writ of certiorari filed in Ortiz v. Fibreboard,[34] a hugely-important class action case decided by the Supreme Court in 1999. The legal details of the case are unimportant for present purposes,[35] but the procedural posture is relevant. The case had first come to the Supreme Court on a cert. petition from a decision by the Fifth Circuit.[36] The Court had then vacated its grant of certiorari and had remanded the case to the Fifth Circuit for reconsideration in light of its recent decision in Amchem Products, Inc. v. Windsor.[37] Upon reconsideration, the Fifth Circuit affirmed its earlier

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[34] Petition for Writ of Certiorari at 1, Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), (No. 97-1704), 1998 WL 34081053, at *1.

[35] It seems strange to write that, even now. At the time the case was argued and decided, Ortiz was a significant part of my professional life, because its outcome would affect the path of a case on which I had worked, almost exclusively, for several years.

[36] *Id.*

[37] 521 U.S. 591 (1997). *Id.*

decision in a curt, five paragraph *per curiam* opinion, and the petitioners were once again seeking Supreme Court review.[38]

After the required initial portions of the certiorari petition, the Statement of the Case began with a simple, seven word sentence: "Some people just can't take a hint."[39] I remember vividly the way my stomach lurched when I first read that sentence and every lawyer -- without fail -- to whom I showed that sentence had the same reaction: without knowing anything more about the facts or law in the case, they correctly predicted that the petition would be granted and that the petitioner would ultimately prevail; not the result I was hoping for. We all had the same reason for our reaction as well. No lawyer, especially one writing to the Supreme Court in a cert. petition, would lead-off with a sentence like that unless the lawyer was certain of success.

It is, for a legal writing teacher, a fascinating sentence. It ignores the many possible variants on the standard "this is a case about . . ." opening of a Statement of the Case, preferring to set a tone rather than implant a seed about the nature of the case. In a remarkably informal and cavalier fashion, the sentence refers to the United States Court of Appeals for the Fifth Circuit as "some people," as if the writer was giving a resigned, knowing shrug to the Supreme Court to indicate that the petitioner and the Court had far better things to do with their time than deal with the follies of "some people." There's a contraction, something from which we often suggest legal writers stay away. And in another nod to the unity of petitioner and Court, the Court's vacation of the writ of certiorari and remand to the Fifth Circuit is called "a hint," something a Civil Procedure professor might expect a first year law student to call this procedural step, perhaps, but not an experienced lawyer writing to the Court about its own actions. All in all, this is the sentence of a writer completely at ease with subject matter and audience,

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[38] *Id.,* at 1-2.
[39] *Id.* at *1.

sending a powerful message of competence and control by breaking several rules of form and style.

The writer was Lawrence Tribe. And even for so experienced a lawyer as Professor Tribe, one wonders how many drafts the petition went through in order to capture the perfect tone to take for this brief. Interestingly, the remainder of the brief is entirely conventional; there are no more flashes of personality like this in the rest of the document. There don't need to be. The hard work has been done in this simple, short, first sentence.

The genius of this seven word sentence is its empathetic understanding of how to deliver the petitioner's message. It tells the Justices that they are in the hands of a lawyer who will make their jobs easy, even though the case -- on its face -- presents complicated questions about the nature of a rarely-interpreted rule of civil procedure and the nature of class action settlements. Coming as it does in the first sentence of any significance in the brief, the sentence signals that the Reader can relax in the knowledge that what follows will be a professional presentation of the issues and the law.

This sentence can certainly be analyzed for its rhetorical and narrative content. A rhetorical study would likely focus on how the sentence conveys a sense of *pathos* -- what Michael Smith calls "an appeal to the audience's emotions"[40] with its twin processes of "emotional substance" and "medium mood control"[41] -- and *ethos*, the "efforts on the part of the persuader to establish credibility in the eyes of the audience."[42] A narrative study, on the other hand, would likely focus on the priming effect this sentence has on the reader and how it prepares the reader to accept what the writer has to say

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[40] Michael Smith, ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING, 11 (2d Ed. 20080

[41] *Id*.

[42] *Id*. at 13.

about the issues in the case.[43] And both analyses would render valuable insights into the persuasive writing process.

But both rhetorical and narrative theorists might miss the way in which the writer subverts the genre expectations set up by numerous briefs filed in the Supreme Court over the years and, by doing so, establishes an empathetic bond with the reader. When we see this bond, we are approaching what I -- probably fancifully -- call the "soul" of legal writing, something no computer program is likely to reproduce because no one would be foolish enough to program rule-breaking of this kind into an algorithm designed to generate perfect legal documents. Empathy, then, is arguably the password by which human agency can be identified in legal writing, or, indeed, all writing; the shibboleth by which we can identify ourselves to each other.

If a company like Narrative Science takes aim at the legal market and begins to develop software that can generate standard documents for lawyers, this empathetic quality in human writing might quickly become the only quality to which we can point that will make human writing identifiable and superior to that generated by a computer. For many of the documents lawyers produce every day, this might not much matter, but for those persuasive documents that many believe to be the lawyer's principal output these human qualities might make continue to make the difference between persuading and failing to persuade.

And because empathetic writing is good practice, even without the threat of a computer taking over the task, lawyers should be encouraged to think as much as possible about their Readers and to adjust their writing to anticipate and meet their Readers' expectations.[44] It is this soulful quality

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[43] My thanks to Steve Johansen for introducing me to this concept at a fascinating presentation he gave at the 2012 LWI conference.

[44] I have written about the importance of empathy in lawyering before. Ian Gallacher, *Thinking Like Nonlawyers: Why Empathy is a Core Lawyering Skill and Why Legal Education should Change to Reflect its Importance,* 8 LEGAL COM. & RHETORIC: JALWD 109

that transforms a technically correct analysis to a deeply persuasive one. When compared to a document created without regard to the Reader's needs -- whether generated by a computer or written by a human -- the empathetically-aware document will be more persuasive because it answers the Reader's questions and reassures the Reader that the writer understands how to help the Reader resolve the issues raised by the document.[45] Empathy, in short, is not just good writing, it's good lawyering.

CONCLUSION

It is easy to sit, in the summer of 2012 when I am writing this, and say that the potential rise of computer-generated legal documents is a false fear, a threat that is unlikely to materialize. Lawyers have written since the Sumerians invented writing, some might say,[46] and it is unlikely that this will change soon if ever. But that is the logic of the blacksmith who, having seen his first automobile, argues that people have relied since at least Sumerian times on the horse[47] and that, therefore, they always will and will need blacksmiths to shoe them. It certainly seems true that lawyers will continue to rely on memorialized communication, but it is less clear who, or what, will be doing the memorializing.

(2011). And I am certainly not alone. For a short, selective bibliography of articles discussing the role of empathy in the law, *see id*, at 110, n. 3.

[45] An example of this type of sensitivity is the experienced appellate attorney's understanding of the importance of the standard of review. Law students and inexperienced attorneys assume that the standard of review is just a procedural quirk, and spend little if any time on it in a brief because they assume that the court knows what the applicable standard of review is and will not be interested in having counsel tell the court about it. But as Mark Herrman explains, "[a]fter a short time on an appellate bench, a judge's brain becomes hard-wired to examine standards of review." Mark Herrman, INSIDE STRAIGHT: ADVICE ABOUT LAWYERING, IN-HOUSE AND OUT, THAT ONLY THE INTERNET COULD PROVIDE, 230 (2012). A lawyer who understands this writes to emphasize, or minimize, the standard of review's effect on a case and through an empathetic understanding of the Reader's needs, drafts a persuasive document that helps the court to resolve the case in the lawyer's client's favor.

[46] This is literally true. Many of the Sumerian clay tablets, dating back to around 3,000 BC, and therefore the earliest known form of writing we know, record Sumerian laws. *See*, http://www.hrc.utexas.edu/educator/modules/guttenberg/books/early.

[47] For images of Sumerian war chariots being pulled by horses -- presumably shod ones -- *see*, http://sumerianshakespeare.com/687045.html

I hope I am wrong. Much of this essay was drafted using a fountain pen and ink to make marks on paper, in a process remarkably similar to the way Sumerian scribes made marks on clay, so I am nothing if not traditional when it comes to composition. But even if I am wrong, and computers never play a role in legal document generation, there is value to emphasizing the role of empathy in legal writing. Thinking about our readers, considering what information they need in order to understand and accept what we are writing, and providing that information at the right time and in the right way, is a skill equal in importance to choosing the most appropriate rhetorical form or the most effective narrative scheme, and even though the scholars in both of those disciplines would claim that empathy is merely a subordinate component of their specialty, there is an argument to be made that in one vital sense, empathy stands alone.

As Philip Dick recognized, empathy, as opposed to rhetoric or narrative can't - as yet, at least -- be programmed into a computer. That means that while a computer-generated document might be almost the same as a human-written document, it isn't yet identical. And it's in the narrow margin between "almost" and "identical" that legal writers need to work, because soon it might be all that's left to us.