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Law, Legitimacy, and the Maligned Adverb

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ABSTRACT

The standard rules for good writing dictate that adverbs should be avoided. They undermine the effectiveness of the text and detract from the author's point. Lawyers have incorporated this general rule, leading them not only to avoid adverbs in their own writings but also to overlook them in the writings of others, including statutes. However, as philosopher Michael Oakeshott has argued, law happens not in the rules but in the adverbs. Through its adverbs the law allows moral space for the citizen to consent to the social order, rather than merely conforming to an imposed command to comply. To become desensitized to the power of adverbs or to presume that they are weak and unnecessary leads the reader not only to misunderstand the operation of the rule, but also to overlook the moral aspect that separates a society based on law from a power-based regime of command.

I. INTRODUCTION

Whatever their occupation, everyone should strive to write competently. Attention to good writing instills clarity of thought and a vitality of expression that benefits any line of expressive work. For lawyers, this skill is particularly critical, and the design of legal education curricula reflects this priority. While other professional programs rarely provide any coursework focusing on the mechanics of writing, law schools typically require two semesters, and often offer more. This default practice has been elevated to a requirement in the new ABA accreditation standards which now include language that law schools must offer "one writing experience in the first year and at least one additional writing experience after the first year, both of which are faculty supervised."[1] While business students concentrate on numbers, and medical students on bodies, for law students, the emphasis is on words.[2] The right word, at the right time, can determine fates.

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1. AMERICAN BAR ASSOCIATION, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2014-2015 16 [Standard 303(a)(2)] (American Bar Association, 2014), *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_bookmarked.authcheckdam.pdf.

2. *See, e.g.*, DAVID MELLINKOFF, THE LANGUAGE OF THE LAW vii (1963) ("The law is a profession of words.").

The craft of effective legal writing tracks the skills of good writing generally.[3] The goal of all writing is communication between writers and readers, and shared grammatical conventions remove unnecessary obstacles to this rapport. Rules drilled into future attorneys draw heavily upon the guidelines expected of all writers. Although style differences are recognized for genre and format – one wouldn't express himself in a dissertation in the same manner as in a short story – acknowledged deviations from the standard practices rarely arise simply because one is writing in law rather than, say, anthropology.[4]

This essay briefly considers one exception to the otherwise comparable writing training offered ordinary writers and attorneys. Despite a well-established tradition of discouraging the use of adverbs, lawyers have sound reasons to include them within legal texts. Rather than being distracting ornamentation, adverbs are often the most relevant part of a legal rule. To become desensitized to the power of adverbs leads the reader not only to misconstrue the practical operation of the law, but also to overlook the moral aspect of autonomy and choice that separates the rule of law from a power-based regime of command.

II. SKEPTICISM ABOUT ADVERBS

The received wisdom maintains that better writers avoid adverbs. "The adverb is not your friend," Stephen King pronounced in *On Writing: A Memoir of the Craft*, his autobiographical summary of tips for writing well.[5] King's distrust of adverbs is widely shared among professional writers. For instance, Mark Twain said that he was emotionally "dead to adverbs; they cannot excite me."[6] Graham Greene praised the skill of Evelyn Waugh for "a complete absence of the beastly adverb" within his works, for these are "far more damaging to a writer than an adjective."[7] Perhaps the general consensus is stated most concisely by poet Theodore Roethke: "In order to write good stuff you have to hate adverbs."[8]

Elaborating on his advice that the "road to hell is paved with adverbs,"[9] King tells aspiring authors that

> [a]dverbs, like the passive voice, seem to have been created with the timid writer in mind. With the passive voice, the

3. Robert C. Farrell, *Why Grammar Matters: Conjugating Verbs in Modern Legal Opinions*, 40 LOYOLA UNIV. CHIC. L.J. 1 (2008) (reviewing instances when courts have found it necessary to consider the legal implications of statutory text's grammar relating to mood, voice, tense, person, and verbals).

4. While true of texts, a notable exception concerns the use of footnotes for extensive reference citation in legal writing that is without parallel in other disciplines. *See, e.g.*, Jack L. Landau, *Footnote Folly: A History of Citation Creep in the Law*, 67 OR. ST. B. BULL. 19, 20 (Nov. 2006) ("According to several academic commentators, an article's footnote count has come to be a sure indicator of its respectability, with the current goal being 400 to 500 per article.").

5. STEPHEN KING, ON WRITING: A MEMOIR OF THE CRAFT 124 (2000).

6. Mark Twain, *Contributors' Club*, 45(272) THE ATLANTIC MONTHLY 849, 850 (June 1880).

7. GRAHAM GREENE, WAYS OF ESCAPE 225 (Lester & Orpen Dennys, 1980).

8. ALLAN SEAGER, THE GLASS HOUSE: THE LIFE OF THEODORE ROETHKE 184 (1968).

9. KING, *supra* note 5, at 125.

> writer usually expresses fear of not being taken seriously; it is the voice of little boys wearing shoepolish mustaches and little girls clumping around in Mommy's high heels. With adverbs, the writer usually tells us he or she is afraid he/she isn't expressing himself/herself clearly, that he or she is not getting the point or the picture across.[10]

So commonplace has this advice become that King feels no obligation to defend more fully the nature of the peculiar danger he fears adverbs hold for the unwary scribe. Although touching on these themes, King's message was framed more directly in similar counsel a century earlier from essayist Walter Bagehot:

> Cautious men have many adverbs, "usually," "nearly," "almost"; safe men begin, "it may be advanced"; you never know precisely what their premises are, nor what their conclusion is; they go tremulously like a timid rider; they turn hither and thither; they do not go straight across a subject, like a masterly mind.[11]

Adverbs transform a declaration into a tentative query. They diffuse a statement's power and belittle its significance. An attached adverb dilutes confident assertion into polite suggestion and deflates bold proclamations into beige, insipid possibilities. In this view, adverbs, like belladonna, are similarly toxic and should be employed sparingly and only by knowledgeable experts in the art.

Adverbs, we are instructed, are intrinsically weak and inevitably weakening. The warning would be fully warranted when they add little value to a sentence, but worse, like poor mortar in a wall, adverbs destabilize a text's overall structure. The adverb is not simply an empty and eliminable appendage; it is a contaminating excrescence that exsanguinates the text of all significance.[12]

Strong stuff, but the polemic goes further. While King discourages an adverb's appearance in all contexts, he mandates complete prohibition with verbs of attribution like *to say*. In this suggestion King echoes advice from Strunk and White's classic writing guide, *The Elements of Style*:

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10. *Id.* at 124.

11. Walter Bagehot, *The First Edinburgh Reviewers*, 47 LITTELL'S LIVING AGE 449, 461 (1855).

12. Much of the generalized distaste for adverbs may be attributable to a failure to discriminate between intensifiers such as *very*, *obviously*, and *clearly*, and adverbs used for other purposes, such as to indicate the actor's state of mind. One study found, true to the negative view in which adverbs are held, that "the odds of reversal can actually be higher for appellants who have high intensifier usage rates." Lance N. Long & William F. Christensen, *Clearly, Using Intensifiers is Very Bad—Or Is It?*, 45 IDAHO L. REV. 171, 185 (2008). This effect, however, was mitigated when the deciding judge also tended to overuse adverbial intensifiers. *Id.* The same can be said for adverbial hedges such as *almost*, *predominantly*, and *relatively*. *See* Steven Pinker, *Why Academics Stink at Writing*, 61(5) CHRON. HIGHER EDUC. 5 (Sept. 26, 2014).

> It is seldom advisable to tell all. Be sparing, for instance, in the use of adverbs after "he said," "she replied," and the like: "he said consolingly"; "she replied grumblingly." Let the conversation itself disclose the speaker's manner or condition. Dialogue heavily weighted with adverbs after the attributive verb is cluttery and annoying. Inexperienced writers not only overwork their adverbs but load their attributives with explanatory verbs: "he consoled," "she congratulated." They do this, apparently, in the belief that the word *said* is always in need of support, or because they have been told to do it by experts in the art of bad writing.[13]

Neither King's nor Struck and White's text considers the possibility that repetition of the same verb strikes the reader as dull and mechanical. Surely the English language recognizes valid reasons to use more than one verb to signal a speech act other than to create new sources of error, or at least poor form. Nor do these stylists allow for contexts where joining adverbs to verbs of attribution may clarify, not weaken, the author's voice.

Consider the following illustration. English is not a tonal language.[14] Despite lacking this semantic dimension, often an English sentence's meaning changes significantly when read with one inflection rather than another. For example, the sentence "Alice is supposed to have left" is facially ambiguous. On one reading the speaker states that Alice had an obligation to have vacated the premises by a set time, with which we have reason to expect she has complied (i.e., *supposed* = required). Alternatively, the speaker is communicating a belief held by others that as he speaks Alice is likely to have already departed, whatever her reasons (i.e., *supposed* = thought).

During actual conversation, this difference is marked by the inflection of the second syllable. In the case of requirement, the second syllable is explosive, almost staccato, but in that of reported belief, the syllable gets drawn out, an implied question inviting affirmation or denial. Because these differences in intonation cannot be marked in the text, indicating one reading over the other may necessitate violation of King's rules. The writer may avoid confusion either by using adverbs (e.g., *she said confidently*), or perhaps by "shooting the attribution verb full of steroids," and cheekily inserting something other than the naked "she said."[15] When one is attempting to mirror the nuances of natural language, the need for adverbs may be more complex than that captured by the default avoidance rule favored by composition guidebooks.

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13. WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE 75 (4th ed. 2000).

14. *See e.g.*, Chang Ke, *Dichotic Listening with Chinese and English Tasks*, 21 J. PSYCHOLINGUISTIC RES. 463, 464 (1992) ("[L]anguages such as Chinese and Thai, in which the variation of tones over syllable-sized units has linguistic significance, are categorized as tone languages, whereas languages like English and French, in which the variation of pitch is not phonemic, are categorized as nontone languages.").

15. KING, *supra* note 5, at 126.

III. The Growth of Legal Adverbs

Even if we were to grant that King's position offers solid advice for ordinary authors, we should not leap to the conclusion that his warning against adverbs thereby serves equally well for legal writers. An attorney's relationship to adverbs differs from that of the general public. One must account for this reality when framing the rules for legal writing.

When law students absorb King's rule that adverbs are weak and "timid," they learn not only to avoid them in their own writing, but also to discount adverbs encountered in the writings of others. Schooled to believe that adverbs perform no real work, or at least no work worth doing in their own compositions, law students expect that the central meaning of a text can be rendered accurately without noting the adverbial embellishments. This need not be a conscious strategy, but one that reflexively emerges after repeated admonitions from trusted sources that adverbs are "beastly."

Yet any such habit will bedevil the student's efforts to understand the law. Contrary to the ordinary view that adverbs are superfluous, law generally, and criminal law especially, emerges through its adverbs. Whether a deed has been performed may be a given, but the heavy legal lifting begins when ascertaining whether it was done *excessively*, *negligently*, *knowingly, wantonly*, *recklessly*, or any of a range of other possible legally relevant ways of doing.

Both the importance and the difficulty of reading adverbs correctly in statutes can be seen in a recent case heard by the United States Supreme Court.[16] In *Flores-Figueroa v. United States*, the Court considered the qualifying reach of a statute's adverb.[17] The Aggravated Identity Statute requires that the defendant be found guilty and assigned enhanced punishment if he "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person."[18] Flores-Figueroa was a Mexican citizen who used fake identification and Social Security numbers that belonged to someone else. Although he conceded that he was guilty of the predicate offense of presenting false documents, he argued that in order to be found guilty of the aggravated crime, and thus liable to the two-year sentencing enhancement, the Government had to prove that he knew that the false identification numbers belonged to another person.[19] The state, however, claimed that the statute's adverb "knowingly" did not reach to the final phrase, but only modified the

16. Flores-Figueroa v. United States, 556 U.S. 646 (2009); *see also* United States v. Yermian, 468 U.S. 63 (1984); Liparota v. United States, 471 U.S. 419 (1985); Lawrence Solan, The Language of Judges 67-75 (1993) (discussing the *Yermian* and *Liparota* decisions).

17. *Flores-Figueroa*, 556 U.S. at 647.

18. 18 U.S.C. § 1028A(a)(1) (2014).

19. *Flores-Figueroa*, 556 U.S. at 648.

verbs.[20] The Court granted certiorari on this question, on which there had been a circuit split.[21]

Justice Breyer, siding with Flores-Figueroa, reasoned that "[t]he manner in which the courts ordinarily interpret criminal statutes is fully consistent with . . . ordinary English usage."[22] In this case, the relevant premise was that

> [i]n ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence. Thus, if a bank official says, "Smith knowingly transferred the funds to his brother's account," we would normally understand the bank official's statement as telling us that Smith knew the account was his brother's.[23]

Although *Flores-Figueroa* holds that the proper method to construe adverbs is wholly a matter of ordinary language use (i.e., the ordinary language use is not simply one of a set of factors to be considered by a court),[24] the case offers this outcome against a background of competing strategies that the Court might have invoked either in lieu of or in addition to the solution it favored.[25] Available alternatives include deference to the

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20. *Id.*

21. Supporting the petitioner were the First (United States. v. Godin, 534 F.3d 51 (1st Cir. 2008)), Ninth (United States v. Miranda-Lopez, 532 F.3d 1034 (9th Cir. 2008)), and D.C. (United States v. Villanueva-Sotelo, 515 F.3d 1234 (D.C. Cir. 2008)) Circuits; supporting the Government were the Eighth (United States v. Mendoza-Gonzalez, 520 F.3d 912 (8th Cir. 2008)), Eleventh (United States. v. Hurtado, 508 F.3d 603 (11th Cir. 2007)), and Fourth (United States v. Montejo, 442 F.3d 213 (4th Cir. 2006)) Circuits.

22. *Flores-Figueroa*, 556 U.S. at 652. Although he does not provide authority for this conclusion, Justice Breyer could have referred to the Brief of Professors of Linguistics as Amici Curiae in Support of Neither Party at 2, Ignacio Carlos Flores-Figueroa v. United States, No. 08-108 (2008) ("it is a mistake to say that *knowingly* modifies only the statute's verbs. Rather, it modifies the entire predicate consisting of the verbs and their direct object."). Earlier, Frederick Schauer had outlined the reasons why courts would reasonably favor such plain meaning construction strategies, even when presumptively superior, but more idiosyncratic linguistic alternatives were available to them. Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 232 (1991) ("But for the Court to lessen its reliance on plain meaning would serve only to substitute for the community's contingent normative choices the equally contingent and equally normative choices of individual interpreters.").

23. *Flores-Figueroa,* 556 U.S. at 650.

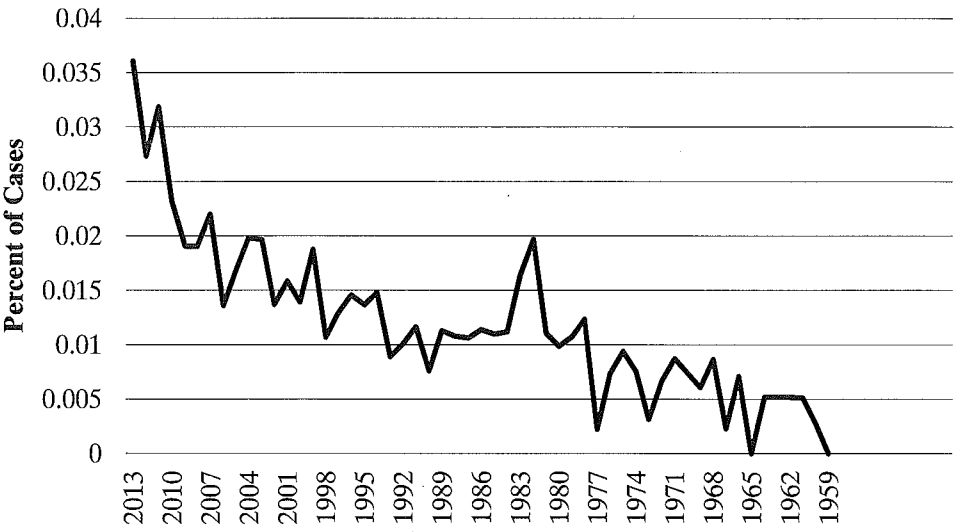
24. *Id.* at 651 ("The Government has not provided us with a single example of a sentence that, when used in a typical fashion, would lead the hearer to believe that the word "knowingly" modifies only a transitive verb without the full object.").

25. This tendency to offer linguistic reasoning as determinative even when other, equally reasonable outcomes can be imagined, has been noted by Lawrence Sloan. SLOAN, *supra* note 16, at 27 ("the appeal of neutral linguistic principles as justification for a decision will loom especially large when the judge's 'real reasons' for the decision are not ones that are properly articulated in a judicial opinion.").

ease of proof of elements by prosecutors[26] and consideration whether failing to extend the *mens rea* requirements could result in criminalizing otherwise innocent actions.[27] Lower courts continue to rely upon these interpretive alternatives even after *Flores-Figueroa* in at least some contexts, such as offenses involving minors and firearm crimes.[28]

Questions on the reading of adverbs are not unusual within the courts; a simple search identifies over three thousand such cases. More interesting is the observation that these issues have consistently grown and appear more frequently on the courts' dockets. Figure 1 shows that cases concerning the reading of adverbs represent a greater percentage of court decisions.[29]

ADVERB CASES AS A PERCENTAGE OF ALL COURT CASES



In real terms, this trend of presenting to courts problems concerning the reading of adverbs at least doubles every ten years:

26. United States v. Flores-Garcia, 198 F.3d 1119, 1122 (9th Cir. 2000) ("If the defendant's knowledge of the reason why an alien is inadmissible is an element of section 1327, the government would be required to prove that the defendant knew what was in the mind of a consular officer, the Attorney General, or the Secretary of State.").

27. Liparota v. United States, 471 U.S. 419, 426 (1985).

28. Leonid Traps, *"Knowingly" Ignorant: Mens Rea Distribution in Federal Criminal Law after* Flores-Figueroa, 112 COLUM. L. REV. 628, 644-652 (2012).

29. The total number of cases was determined by running a Lexis search with only the year as a search term; the number of adverb cases was ascertained through the following West query: (advanced: ATLEAST3(intentionally) ATLEAST3(knowingly) ATLEAST3(fraudulently) ATLEAST3(willfully) ATLEAST3(maliciously) ATLEAST3(corruptly) ATLEAST3(knowingly) ATLEAST3(wantonly) ATLEAST3(recklessly)) & ((modif! /30 intentionally knowingly fraudulently willfully maliciously corruptly knowingly wantonly recklessly) & ATLEAST2(modif!) & (modif! /35 word adverb words phrase words phrases noun element elements term terms verb)) & DA(aft 12-31-[year] & bef 01-01-[year]).

TABLE 1: ADVERBIAL CASES RATES OF GROWTH, 1954-2013

	Search 1[30] Actual [Predicted]	Search 1[31] Actual [Predicted]	Combined (S1+S2)[32] Actual [Predicted]
1954-1963	2	2	4
1964-1973	5 [4]	6 [4]	11 [8]
1974-1983	14 [8]	2 [8]	16 [16]
1984-1993	46 [16]	15 [16]	61 [32]
1994-2003	52 [32]	12 [32]	64 [64]
2004-2013	119 [64]	33 [64]	152 [128]

Adverbial disputes are not only common problems for judges, but they are becoming increasingly so for the practitioner as well. An explanation for this surge in cases would consider several factors. Perhaps most important is the common appearance of overt adverbs within statutory language, creating more opportunities for the interpretation of adverbs to become a significant legal problem. For example, a Westlaw search of the 1990 *United States Code* returns 763 occurrences of statutes using the adverb "knowingly," and 114 returns for the adverb "intentionally." Within the 2014 edition, however, these words appear in statutes 1,065 and 222 times respectively. A similar increase for these terms can be found in the *Code of Federal Regulations*. A search of the 1984 edition returns "knowingly" 755 times and "intentionally" 211 times in regulations; by 2013 those queries return 1,413 and 460 hits respectively. Increased use of adverbs within statutes and regulations raises the likelihood that this language will become the focus of a legal dispute landing in the courts.

The increase in the use of adverbs is confirmed by searching the texts actually being litigated and tracking the passage dates. Of the 255 federal cases identified as involving meaningful construal of the adverb "knowingly,"[33] the majority of these cases (133) concerned statutes passed since

30. advanced: (ATLEAST3(intentionally) ATLEAST3(knowingly) ATLEAST3(fraudulently) ATLEAST3(willfully) ATLEAST3(maliciously) ATLEAST3(corruptly) ATLEAST3(knowingly) ATLEAST3(wantonly) ATLEAST3(recklessly)) & ((modif! /30 intentionally knowingly fraudulently willfully maliciously corruptly knowingly wantonly recklessly) & ATLEAST2(modif!) & (modif! /35 word adverb words phrase words phrases noun element elements term terms verb)) & DA(aft 12-31-[year] & bef 01-01-[year])

31. advanced: ATLEAST3(cruelly) ATLEAST3(deliberately) ATLEAST3(unlawfully) ATLEAST3(wrongfully) ATLEAST3(negligently) ATLEAST3(carelessly) ATLEAST3(purposefully) & ((modif! /30 (cruelly deliberately unlawfully wrongfully adequately negligently carelessly purposefully) & ATLEAST2(modif!) & (modif! /35 (word adverb words phrase words phrases noun element elements term terms verb)) & DA(aft 12-31-[year] & bef 01-01-[year]).

32. The limits on character strings within WestlawNext required that the search be divided into two different queries.

33. The West search ("adverb and knowingly") identified a total of 273 cases; some were discarded as being false hits with no direct relevance to the present inquiry. This result set is nonexhaustive; decisions identified by other means – *see, e.g.*, United States v. Yermian, 468 U.S. 63 (1984) – are not captured because, despite dealing with the issue of the scope of the adverb "knowingly," those decisions failed to actually use the word *adverb*.

1970.[34] In other words, more cases involving this prototypical *mens rea* adverb involve statutes from the last forty years than from the earlier years of 1829-1968 combined.

This empirical pattern fits well with the historical trends arguably underlying the trend toward increased adjudication of grammar generally, and of adverbs particularly. Although the common law is adverse to strict criminal liability owing to its due process commitments, beginning in the twentieth century courts started to favor strict liability.[35] This direction was later changed in 1970 when, with the passage of the Uniform Controlled Substances Act,

> the Commissioners altered their statute, and provided that it is "unlawful for anyone person *knowingly* or *intentionally* to possess a controlled substance," thus requiring knowledge for the first time . . . . The enactment of the Model Penal Code [1962] and its subsequent interpretation to restrict, if not abolish, strict liability crimes, the growing movement among courts in interpreting the common law to require *mens rea*, and the Commonwealth experience in permitting mistake of fact to act as a defense all reflect a movement towards rejection of strict criminal liability.[36]

The increased preference of *mens rea* requirements arose concurrently with the patterns described in the earlier analyses: increased statutory adverbs in the early 1970s, culminating in more frequent statutory construction cases on reading adverbs in the 1980s and beyond. The creation of new crimes, with new scienter elements, has led to increasingly more frequent need for courts to read the language, as happened in *Flores-Figueroa*. We can predict that this pattern will continue.[37]

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34. This evaluation considered only the enactment date of the core statute, and did not review whether later amendments were at issue. This approach cuts against the hypothesis, rating possibly more recent enactments as older. The conclusions reported, while supporting the predictions, reflect the minimum distribution. The actual preference for recent law to provoke judicial scrutiny of adverbs may be even more pronounced.

35. Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B. C. L. REV. 337, 388 (1989), *available at* http://heinonline.org/HOL/Page?handle=hein.journals/bclr30&id=343.

36. *Id.*

37. An unintended outcome of this ongoing process, however, has been the apparent emergence of regional legal dialects as similar statutory language is read differently according to local preferences concerning the rules of grammar. While it is fairly common for the substantive contents of legal terms to vary (e.g., what constitutes "incest" varies by jurisdiction), for the rule to vary according to diverging grammar is a new development.

An example of this process is the post- *Flores-Figueroa v. United States*, 556 U.S. 646 (2009) case *Hunter v. Miller-Stout*, No. C12-5517 RBL/KLS, 2013 WL 1964928 (W.D. Wash. May 10, 2013) which centered on the proper way to read the following Washington statute RCW 9.35.020(1): "he knowingly obtains, possesses, uses, or transfers a means of identification or financial information of another person, living or dead, ..." This language parallels that at issue in *Flores-Figueroa*: the offender "knowingly transfers, possesses, or uses without lawful authority, a means of identification of another person." 18 U.S.C. § 1028A(a)(1).

IV. THE LAW'S UNIQUE RELATIONSHIP TO THE ADVERB

The increased use of adverbs within legal rules, leading more frequently to the need to litigate their meanings, may be read by critics as further demonstration of the pernicious effects of adverbs. However, this abundance of problematic legal adverbs should not be attributed entirely to the poor compositional choices of legislators.[38] But for the adverbs, law would be only a catalog of authoritatively enforced rules, *i.e.*, an exercise in political power, rather than *law* – a social order that consenting citizens have a duty to obey. The distinction hinges on whether compliance should be grounded in a fear of punishment for violation or a choice arising from an understanding that the law is, in some ethically relevant sense, proper. If we grant that the latter is the preferred basis for modern legal systems,[39] statutes could not escape an abundance of textual adverbs even if electorates sent only Stephen Kings to statehouses and Congress.

This point was made more formally by Shirley Letwin when she endorsed the essential nature of legal rules as "adverbial":

> Instead of commanding the subject to perform anything, a rule designates the manner in which certain activities are to be carried out by those who wish to engage in them or a

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Although ostensibly decided using ordinary rules of grammar, *Flores-Figueroa* is rejected by the state court: "*Flores-Figueroa*'s statutory interpretation approach is inconsistent with Washington law. The word 'knowingly' is an adverb, and, as a grammatical matter, an adverb generally modifies the verb or verb phrase with which it is associated. Washington's identity theft statute states that, '[n]o person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.' Under this state's statutory interpretation rules, 'knowingly' modifies the verb phrase—'obtain, possess, use, or transfer.' Our courts have construed 'another person' to require proof that the identification or financial information belonged to a 'real person.' But 'knowingly' does not modify the phrase 'of another person.' The phrase 'of another person' is an object and is not modified by the adverb knowingly." *Hunter*, No. C12-5517 RBL/KLS, 2013 WL 1966168 at *5 (internal citations omitted).

At this early phase it is not possible to predict the practical outcome of the appearance of legal dialects defined by different rules of grammar. However, argument can be made that it undermines the ideal of legal publicity under which the ordinary person should be able to read the law and know what behaviors are punishable by the state.

38. Although there is certainly enough of that to go around. *Cf.* Traps, *supra* note 28, at 664 ("Sloppy drafting of criminal laws by Congress is a scourge that likely will persist in the future.").

39. *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW 178 (1990) ("People obey the law because they believe that it is proper to do so, they react to their experiences by evaluating their justice or injustice, and in evaluating the justice of their experiences they consider factors unrelated to outcome, such as whether they have had a chance to state their case and have been treated with dignity and respect . . . . This image differs strikingly from that of the self-interest models which dominate current thinking in law, psychology, political science, sociology, and organizational theory, and which need to be expanded."); *contra* FREDERICK SCHAUER, THE FORCE OF LAW (2015). Frederick Schauer argues that rather than law striving toward an internalization of norms, law is primarily about coercion and sanction, threatening bad consequences for behavioral noncompliance: "the claim that there is widespread following of the law just because it is the law may well be false . . . . [The] pervasiveness of force and the threat of it may be what makes law distinctive." *Id.* at x, 7. The challenge for Schauer's thesis will be that sanction, at least when viewed cross-culturally, does not uniquely characterize law. Invoking that definitional strategy reduces "law" to a generic synonym for any norm of social regulation, indistinguishable from similar categories such as religion and custom, all of which also impose sanctions on violators. *See generally* JAMES M. DONOVAN, LEGAL ANTHROPOLOGY: AN INTRODUCTION (2008).

> manner of punishing certain actions that are forbidden. A law against murder does not command anyone to refrain from killing, nor does it prohibit all killing. It stipulates that whoever causes the death of another person in a certain manner under certain conditions will be guilty of the crime of murder. It prohibits causing death "murderously." Thus, at the heart of the idea of law is a sharp distinction between an obligation to subscribe to certain conditions in doing what we choose and an obligation to perform this or that action at a given time and place.[40]

In these comments, Letwin renders accessible the political philosophy of Michael Oakeshott. His thinking is complex but reduces to the following points: The rule of law is a "moral practice . . . analogous to [the rules of] a game."[41] A practice, in its turn, "consists of well-defined conditions that shape how people engage in a particular activity" and directs how things are properly done without specifying any particular outcome. The analogy here is with language. Speakers follow the rules for proper language use in order to be understood, but the rules do not dictate that any particular content be uttered. Similarly, within the boundaries determined by the rules of practice, one remains free to choose one's actions:

> What makes the idea of a practice so important is that it unifies those engaged in it without dictating what anyone does. This is because the requirements of a practice, being conditions rather than commands or orders, are not obeyed or disobeyed, but subscribed to. Structured this way, individuals remain free to choose what they will do.[42]

As Oakeshott explains,

> the expression 'the rule of law,' taken precisely, stands for a mode of moral association exclusively in terms of the recognition of the authority of known, non-instrumental rules (that is, laws) which impose obligations to subscribe to adverbial conditions in the performance of the self-chosen actions of all who fall within their jurisdiction.[43]

In other words, "[a] rule [like law] can never tell a performer what choice he shall make; it announces only conditions to be subscribed to in making choices."[44] Any appearance that a legal rule prohibits an act is illusory. Despite surface grammar to the contrary, in practice, as Letwin echoed,

40. SHIRLEY ROBIN LETWIN, ON THE HISTORY OF THE IDEA OF LAW 334-35 (2005).
41. *Id.* at 313.
42. *Id.* at 310.
43. MICHAEL OAKESHOTT, *The Rule of Law*, *in* ON HISTORY AND OTHER ESSAYS 136 (1983).
44. MICHAEL OAKESHOTT, ON HUMAN CONDUCT 58 (1991).

"[a] criminal law does not forbid killing or lighting a fire, it forbids killing 'murderously' or lighting a fire 'arsonically'."[45] Instead, the law states the penalties of choosing one course over the other. Aware of possible penalties, the actor remains free to choose.

This description differs from the popular reading that a law states what one must not do, upon penalty. Compliance with such a rule may yield results indistinguishable to the outside observer from the interior focus offered by Oakeshott. In both instances few persons are murdered. But the two approaches presuppose radically different relationships between the actor and the state. In the common reading of the statute prohibiting homicide, we refrain from murdering out of fear of the consequences ranging from imprisonment to death. Oakeshott, however, envisions a legal order grounded not on fear, but on free choice: choosing not to murder because it signals an act as incomprehensible to the rule of law as double negatives are to rules of grammar, or kicking the ball in the game of basketball. One can do any of those things, but they cannot be done while intending to observe the rules of the relevant practice.

This way of viewing legal order represents Oakeshott's attempt to explain why people have a duty to obey the law.[46] He works within the tradition that such a duty arises only after the individual has given consent. This conviction provided the basis, for example, on which Thomas Jefferson believed that a constitution should expire after nineteen years.[47] As Jefferson observed, none of us today have consented to be bound by the United States Constitution, and most of us have not given actual consent to the laws under which we live. If legal legitimacy flows from consent, as indeed Jefferson wrote in the *Declaration of Independence*,[48] these facts would imply that we have no obligation to obey laws that we have inherited. That conclusion, however, leads to anarchy. No one could be held to any obligations to which they had not specifically and personally already agreed.

Oakeshott was concerned to preserve the premise that the rule of law was built upon the Lockean "consent of the governed[,]"[49] while avoiding Jefferson's impractical result that constitutions expired or that individuals

45. *Id.* at n. 1.

46. The present author accepts that such a duty exists, although this is not a point universally conceded. A review of the most prominent justifications for such a duty is offered at William A. Edmundson, *State of the Art: The Duty to Obey the Law*, 10 LEGAL THEORY 215 (2004).

47. Thomas Jefferson, *Thomas Jefferson to James Madison, Paris September 6, 1789*, *in* THE PAPERS OF THOMAS JEFFERSON 395-396 (Julian Boyd, ed. 1958) ("[No] society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct. They are masters too of their own persons, and consequently may govern them as they please. But persons and property make the sum of the objects of government. The constitution and the laws of their predecessors extinguished then in their natural course with those who gave them being. This could preserve that being till it ceased to be itself, and no longer. Every constitution then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, and not of right.").

48. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("Governments are instituted among Men, deriving their just powers from the consent of the governed.").

49. *See, e.g.*, JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 192 (1662) ("For no government can have a right to obedience from a people who have not freely consented to it.").

could opt out of disagreeable rules because they had not previously signaled their agreement. The answer, he suggests, lies in the fact that law directs a manner of being rather than slavish conformity with specific acts. We remain free to choose, constrained only to make our choices within the bounds of the moral rules of our civic association, and the willingness to pay the costs for venturing beyond. To return to the language analogy, law establishes the grammar and syntax of social living, tools by which citizens are able to choose how to construct their own lives. So long as their choices remain comprehensible and reasonable to their fellows, they can be described as "following the law," and by so behaving, they signal their consent to be bound even by laws that were enacted centuries earlier.

By design, Oakeshott's analysis characterizes the deep background of legal institutions as adverbial. Frequently this disposition irrupts into our awareness through the appearance of the ordinary adverbs in legal rules. These literal adverbs permit the moral dimension of the normative social order to become manifest at appropriate moments. Adverbs direct our attention away from external behavioral conformity and toward the consenting wills of the actors, and thus to their free choices.

Adverbs have this impact because they pertain to the criterion of *mens rea*. *Mens rea* in legal terminology refers to the required "guilty mind" when performing a criminally prohibited act. The defendant must not only have acted wrongly, but also have known that the act was wrong.[50] In the case described earlier,[51] even though Flores-Figueroa could be convicted for presenting identification that may have belonged to another person, he could be guilty of aggravated identity theft only if he *knew* that the identification in fact belonged to another person.

Many of the adverbs commonly appearing in law bear an obvious relationship to the states of mind of the actor. Instances discussed by the courts include: maliciously,[52] knowingly,[53] intentionally,[54] unduly,[55] wilfully,[56] and deceitfully.[57] The goal of the present discussion, however, is not a simple reminder of the recurring function of adverbs to demarcate

50. *See, e.g.*, Morissette v. United States, 342 U.S. 246, 252 (1952) (defining "'mens rea,' [as] to signify an evil purpose or mental culpability"); People v. Digirolamo, 664 N.E.2d 720, 723 (Ill. App. 1996) ("The law requires that serious criminal conduct be accompanied by mens rea, knowledge of guilt.").

51. Flores-Figueroa v. United States, 556 U.S. 646 (2009); *see also supra* text accompanying notes 16-28.

52. Daeche v. United States, 250 F. 566, 570 (2d Cir. 1918).

53. United States v. Jae Shim, 584 F.3d 394, 395 (2d Cir. 2009). Michael Moore argues that, in the context of the decision over grammar in *United States v. X-Citement Video, Inc.*, that "'knowingly' never functions like true adverb." Michael S. Moore, *Plain Meaning and Linguistics—A Case Study*, 73 WASH. UNIV. L.Q. 1253, 1257 (1995). For present purposes, this observation serves simply to remind us that despite their mere appearance which has served to generate sweeping style guidelines on their use, adverbs are semantically complex.

54. Deur v. Sheriff of the Cnty. of Newaygo, 362 N.W.2d 698, 701 (Mich. 1984) ("The rules of grammar and common usage would require the adverb "intentionally" to modify the word or phrase it precedes and not the word of phrase that comes before it.").

55. Baltimore & O.R. Co. v. United States, 22 F. Supp. 533, 538 (N.D.N.Y. 1937).

56. Bryan v. United States, 524 U.S. 184, 191 (1998).

57. United States v. Brown, 5 F. Supp. 81, 84 (S.D.N.Y. 1933).

the psychological postures of actors. The broader argument suggests that adverbs offer a privileged window into the legally crucial inquiry of motivation and intent. *Mens rea* terms are "usually expressed as adverbs."[58] The tight relationship between adverbs and intentionality can lead courts to read *mens rea* requirements differently depending on whether the underlying ideas have been framed in terms other than adverbs.

United States v. Roberts concerned a trade secrets action in which the defendant argued that the Economic Espionage Act was unconstitutionally vague as applied.[59] The statutory language states that

> whoever, with intent to convert a trade secret, that is related to or included in a product that is produced for or placed in interstate or foreign commerce, to the economic benefit of anyone other than the owner thereof, and intending or knowing that the offense will, injure any owner of that trade secret . . . .[60]

The principle question for the court was whether this language required that the defendant have actual knowledge that the device in controversy was a trade secret.[61] The defendants argued in the affirmative, citing *Flores-Figueroa* as support for their position that "the mental state 'intent' in the first clause of subsection (a) modifies both "convert" and "trade secret" and that the language "intending or knowing," which occurs later in the subsection, modifies the subsequent term "trade secret."[62] The defendants' reading would presumably require that the defendant know that the article at issue was a trade secret.

The court rejected this argument for reasons of special relevance to this discussion.

> The present Court finds it hard to apply the holding from *Flores-Figueroa* to the portions of the EEA that the defendants cite because the *mens rea* terms the defendants point out are not adverbs. "Intent" in the first clause of subsection (a) is a noun, and "intending or knowing" are verbs.[63]

The court instead held that although the statute does require that the defendant have knowledge that the item is proprietary, that knowledge need not rise to the level of whether "the trade secret in question actually

58. Darryl K. Brown, *Federal Mens Rea Interpretation and the Limits of Culpability's Relevance*, 75 LAW & CONTEMP. PROBS. 109, 116 (2012).

59. United States v. Roberts, No. 3:08-CR-175, 2009 WL 5449224, at *1-3 (E.D. Tenn. Nov. 17, 2009) *report and recommendation adopted*, No. 3:08-CR-175, 2010 WL 56085 (E.D. Tenn. Jan. 5, 2010) *aff'd sub nom.* United States v. Howley, 707 F.3d 575 (6th Cir. 2013).

60. 18 U.S.C. § 1832(a)

61. *Roberts*, No. 3:08-CR-175, 2009 WL 5449224, at *3.

62. *Id.* at *9.

63. *Id.* at *10.

meets the statutory definition."[64] The stated rationale for this result, though, raises the possibility that the outcome might have been more favorable to Roberts if the statute had been written with adverbs.[65]

As Letwin noted, the adverbial emphasis of the legal system can be distinguished from the strict liability rules that *Flores-Figueroa* wished to avoid, and from ordinary compelled orders such as the requirement to pay income taxes. While these latter directives are also rules, they are of a different type that is more difficult to reconcile with the consent of the government thesis. Instead of generating a duty to obey from consent and choice, they instead base their compliance upon fear and sanction. Strict liability and similar rules thus may not rise to the level of true laws in Oakeshott's jurisprudential sense.[66] Such rules assign responsibility and maintain order by treating human actors akin to natural phenomena, social analogues to cattle or hurricanes, and not as rational thinking, and ultimately consenting, citizens.

The overarching question Oakeshott hoped to resolve asked "how people can engage in orderly activities, where they recognize and accept common standards, without being reduced to uniformity or having recourse to an infallible or non-human source of truth."[67] Adverbs shift the legal liability inquiry from the naked act to the intending person. Without adverbs, law can be efficient, but it will not be moral, nor would we have an ethical duty to obey (at least if one believes that the consent of the governed is required for the legitimacy of a legal regime). Were we to remove adverbs, as Stephen King recommends, we would move beyond the perimeter of the rule of law and into the exercise of mere power.[68]

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64. *Id.* at *21.

65. *See, e.g., id.* at *7 ("Whoever acts to intentionally convert a trade secret, that is related to or included in a product that is produced for or placed in interstate or foreign commerce, to the economic benefit of anyone other than the owner thereof, and intentionally or knowingly that the offense will, injure any owner of that trade secret, ...") (quoting 18 U.S.C. § 1832(a)). Decisions arguing the opposite – that adverbs bear no special relationship to *mens rea* evaluations –also exist. *See, e.g.*, United States v. Reynoso, 239 F.3d 143, 147-148 (2d Cir. 2000) ("Reynoso and our dissenting colleague emphasize that the statutory language is 'truthfully provided' rather than 'truthful information,' and would have us infer from Congress's use of an adverb that 'the emphasis in the statute is on the defendant's state of mind,' but we are unpersuaded. In previous cases concerning § 3553(f)(5), we have, except when quoting the statute itself, almost without fail used the adjective 'truthful' when articulating the standard to be applied. This consistent usage, considered in conjunction with both the dictionary definitions of the term 'truthful' quoted above and the ordinary, common-sense meaning of the word leads ineluctably to the conclusion that Congress intended no legal significance to attach to its use of the words 'truthfully provided' rather than 'truthful information.'") (internal citations omitted).

66. One possible escape from the suggestion that citizens bear no duty to pay income taxes, or the equally awkward conclusion that such rules fail to rise to the status of true laws, relates to the frequency with which such rules are amended. Contemporary changes to the tax code signal an underlying consent to the tax code in general. So long as such changes are made at least once every nineteen years, then Jefferson's argument for expiration is evaded. *See supra* note 42 and accompanying text.

67. LETWIN, *supra* note 40, at 310.

68. We can envision a possible comparative analysis of the development of the idea of the reasoning individual supporting the belief that political legitimacy is grounded in the consent of the governed, with the varying uses of adverbs in legal texts. Following Oakeshott, the prediction would be that these variables vary directly, so that an increase in the presence of the latter signals a growing acceptance of the former.

V. FINAL THOUGHTS

Despite the low reputation of adverbs, their use within legal rules continues to grow. While legal writers should be cautioned against superfluous use of adverbs, the reasons for such frugality contrasts with that offered to writers of other disciplines. In law, adverbs should be used sparingly, but not because they are weak and frivolous. Instead, in law, adverbs are intense and powerful. What a page of words gives or denies, a single adverb can reverse in practical effect.[69] An attorney's eyes should not be trained to skip lightly over a statute's qualifying adverb, but rather to highlight it as vital as any other word to its meaning, and perhaps more than most. Adverbs should be respected, even a bit feared, but not hated, and certainly never underestimated.

Messages that disparage the importance of adverbs risk training lawyers not merely to misread the technical operation of the law, but, and more damningly to society, encourage them to overlook the moral heart of law itself. Law works to organize the actions of willful citizens while respecting their status as intending persons. To instill the traditional aversion to adverbs upsets this balance between order and freedom. Lawyers must not become obsessed with the dissection of mere rules and grow blind to the people living their choices within the boundaries of those rules. Freely.

69. White v. E. Side Mill & Lumber Co., 158 P. 527 (Or. 1916) ("A very short word may change the whole meaning of a sentence. Eliminate the little adverb "not" from the Ten Commandments and there remains an injunction to commit the very offenses there prohibited.").