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DO ROBOMEMOS DREAM OF ELECTRIC NOUNS?

A SEARCH FOR THE SOUL OF LEGAL WRITING

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[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."

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.

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

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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.2

As in literature, and perhaps as in real life, especially for writers, those with a love of writing and the written word 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.3 In fact, computers are already writing text read by a significant number of people who have no idea that a computer wrote the story they're reading.4 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.5 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.6

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.7

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2. See generally id.
3. Document "generation" is a replacement term for "writing" with which we might have to become familiar.
5. See id.
6. 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 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.
7. As likely as it is 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.
8. But, in this era of outsourcing and cost-cutting, perhaps lawyers in large firms as well.
9. See Bradshaw v. Unity Marine Corp., Inc., 147 F.Supp. 2d 668, 670 (S.D. Tex. 2001) (“Before proceeding further, the Court notes that this case involves two extremely likeable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the bellowed caseway... [w]hatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions.”).
10. See generally Linda L. Berger, Linda H. Edwards, & Terrill Pollman, The Past, Presence, and Future of Legal Writing Scholarship: Rhetoric, Voice, and Community, 16 J. LEGAL 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: the “Journal of the Association of Legal Writing Directors” and "Legal Communication & Rhetoric: JALWD.”
11. See generally Applied Legal Storytelling Conference: July 8-10, 2011, UNIV. OF DEN. STURM COLL. OF LAW (2011), http://www.law.du.edu/index.php/storytelling-conference (demonstrating that the legal storytelling movement is a new but remarkably fertile field. There have been three biennial Applied Legal
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Many would have difficulty accepting the idea of coding control to a machine, even after resolution of any ethical issues. On the other hand, the prospect of perfect documents, created from a quickly and inexpensively generated first draft, available for editing and personalization by a lawyer, would surely appeal to some. Lawyers in large firms may be less interested in utilizing this service,8 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 a judge unhappy with the state of legal writing 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 seem to be good news for those of us in the profession of legal writing instruction. In the academic world, the study of legal writing seems to developing down two paths that 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 illuminating the writing process for lawyers.10 The second path starts with the implications of storytelling in human communication and prizes the role of narrative in legal writing.11 The specter of writing generated entirely by

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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 conceivable that more complex, persuasive documents might be next. Were this to happen, the need for specialized faculty who are skilled in the study and teaching of human communication skills would inevitably be questioned.

This Article 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 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. 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 will distinguish human writing from a machine’s generated product and why the human document should be superior to the computer document. The answer, I contend, is the same as the one that occurred to Philip K. Dick: empathy is the quality that will distinguish a human’s work from that of a computer. A writer’s empathetic connection with a reader makes human writing more compelling and persuasive than a computer’s work product.

I. 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. Even courses that are not inherently litigation driven, such as property, contracts, and constitutional law, use court decisions, which are 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 this assumes that persuasive advocacy is an inherent part of a lawyer’s practice. The Sourcebook notes 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.”

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 is a branch of rhetoric,’ James Boyd White wrote, ‘[w]ho, you may ask, could ever have thought it was anything else?’”

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, who 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, which from contracts to opinion letters, have little to do with persuasion, at least as a principle focus.

Even litigators, for whom persuasion certainly is a crucial part of their practice, 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

15. Id.
17. Id. (footnotes omitted).
18. 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.

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See generally The Wall Street Journal CBO Council (Annual Meeting Nov. 17, 2006) available from r8545332450341, Rahm Emanuel “DON’T WASTE A GOOD CRISIS”, YouTube (Feb. 23, 2009), http://www.youtube.com/watch?v=VjMTNPyxu-Y (stating “[y]ou never want a 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.”).

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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 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, workday 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 much of a litigator’s writing, like letters to opposing counsel and documents filed with the court for purposes of obtaining a particular result, is full of persuasive techniques, even litigators do not spend all or even most of their time trying to persuade.

This is not 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” 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 practices.

22. See FED. R. CIV. P. 27 (describing the procedure for taking a deposition to perpetuate testimony).
23. See, e.g., FED. R. CIV. P. 33(b)(4) (describing the basis for objections to interrogatories); see also, e.g., FED. R. CIV. P. 34(b)(2)(c) (describing the process for objecting to document review).
25. See id. (“Using legal forms, that is, using existing documents as a template for drafting, is an age-old lawyer practice.”) (footnote omitted).
26. See id. at 674 (“An issue of competence exists from using and sharing forms in legal practice. If lawyers are not carefully examining the context and content of the forms they are using, they are arguably not performing competently.”).
27. The drafters of the federal rules of civil procedure anticipated this problem, and designed the rules accordingly. See FED. R. CIV. P. 33(a)(2) (defining the scope of interrogatories, which must relate to the scope of the matter at hand); see also FED. R. CIV. P. 34(b)(1)(A) (describing that a request for documents must be done with “reasonable particularity”).
28. See Davis, supra note 24, at 671-72 (“No wonder, then, that formbooks, form databases, document assembly systems, and sample document sources that offer lawyers the ability to more quickly and easily manage information and use others’ expertise to draft legal documents have become so popular in today’s practice environment.”) (footnote omitted).
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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 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 rhetorical/narrative-free zone that computer-generated documents might come into their own.

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II. COMPUTERS AND TEXT GENERATION

Narrative Science is a Chicago-based company that created a computer program to write articles and stories that humans no longer write. Narrative Science’s founder, Kristian Hammond, has stated, “the most important thing about us is that nobody has lost a single job because of us.” At present, the company specializes in computer-generated pieces derived from data, such as corporate earnings statements or sports box scores. For example, a report of a college basketball game generated from the box score and from the computer’s memory of previous basketball games may appear like the following:

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.

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 sports box scores. For example, a report of a college basketball game generated from the box score and from the computer’s memory of previous basketball games may appear like the following:

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II. COMPUTERS AND TEXT GENERATION

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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.

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 basketball games. And importantly,

30. See Levy, supra note 4.
31. Id. But one wonders, as the technology his company has developed moves into more areas, how long Hammond's claim will remain true.
32. Services: Publishing and Media, NARRATIVE SCI. (last visited Oct. 14, 2012), http://www.narrativescience.com/services/publishing-and-media/ ("We can create content on just about any topic including financial, sports, real estate, politics and more.").
33. Id.
34. See Levy, supra note 4 ("[I]t's not Roger Angell. But the grandparents of a Little Leaguer would find this game summary—available on the web even before the two teams finished shaking hands—as welcome as anything on the sports pages.").

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 help organize the data into structured text. 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... 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... We could cover the stock market in the style of Mike Royko.

This last point is important. The creators of these templates can program 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. Some evidence of this is already in the basketball report quoted earlier: the report uses a metaphor when it says that the Badgers were "hot" from long range. 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

35. See id. (describing another article that Narrative Science's computers wrote, and noting that "the articles don't read like robots write them.").
36. See id. (explaining how "meta-writers" create different algorithms for different types of articles, such as an article describing the best restaurants in the city).
37. Id. (quotations omitted).
39. See id. ("[I]magine creating multiple versions of the same story, with each story's content customized for different audiences and tailored to fit a particular voice, style and tone.").
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 usable form in order to understand, and narrative provides the necessary formal framework on which to hang data and turn it into information we can assimilate.

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.\textsuperscript{43} 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—for example, the importance of Wisconsin's defense, in keeping down Nebraska's field shooting percentage.\textsuperscript{44} 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.\textsuperscript{45} 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\textsuperscript{46} can be co-opted by computer programmers to help generate documents that can be created with minimal human engagement\textsuperscript{47} then do those paths ultimately lead readers 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 writing strategies?\textsuperscript{48}

One answer 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" and "statute." Similarly, we need to be able to distinguish between the prosaic and anatomical "Achilles tendon" and the poetic

43. Id.
44. Id.
45. Id.
46. See supra text accompanying notes 10-11 (rhetoric and narrative are the two paths down which legal writing theorists travel in order to understand and describe the ways in which lawyers communicate).
47. 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.
48. 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 metaphorical (and intended) "Achilles heel.\textsuperscript{49} Computers are good at generating perfect text, this argument suggests, but computers are a-contextual. That is, computers are 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. LexisNexis 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 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?\textsuperscript{50}" the chief technology officer and cofounder of Narrative Science replied, "More than 90 percent.\textsuperscript{51} This can be explained as the natural puffery of someone who has an emotional and financial stake in a company's success. And it could be disregarded, or at least downplayed, were it not that the percentage of any computerized journalistic output before the company was formed in 2012 was zero, a number it has certainly risen above 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 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 machine-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.\textsuperscript{52}

Other companies are dabbling in the same waters. A website called "EssayTyper," for example, offers a tantalizing, or terrifying, (depending on one's perspective) prospect of a program that, once given a topic, "pulls information straight out of Wikipedia and into a
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53. Levy, supra note 4.
54. Id.
pseudoprocessor.[702] 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. [53] At present, the program apparently does not generate anything that anyone would take seriously as even an incompetent piece of student writing. [54] 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 one would think. Most law students already know and use a version of one such algorithm already—the familiar IRAC or CREAC, or ORAC, 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 of the prongs of this formula might be challenging, the challenge hardly seems to be an insurmountable one. 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. [55] The prospect of having the writing burden lifted from their shoulders would surely be tempting to many practicing lawyers.

III. 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 that such a program would generate would doubtlessly 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 K. Dick was remarkably astute when he picked empathy as the means by which humans could distinguish themselves from robots, because empathy is particularly a human condition, and one that is especially important to writers. Although some appear to use the word in a 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.” [56] Put this way, the importance of empathy to a writer is immediately apparent: 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 and otherwise play with the “standard” approach for the document at issue. [7]

For an example of empathetic writing at its best, consider the petition for a writ of certiorari filed in Ortiz v. Fibreboard Corp., an immensely important class action suit decided by the Supreme Court in 1999. The legal details of the case are unimportant for present purposes, but the procedural posture is relevant. The case had first

53. Id.
54. Id. (noting that the program does produce good titles, though, including, “The Fluidity of iPad. Gender Norms & Racial Bias in the Study of the Modern iPad.”). For anyone who spends any time in academia, that title, sadly, does have an authentic ring to it.
55. 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 deceive their clients” and said that legal English was “excrementitious matter” and “literary garbage.” 3 Jeremy Bentham & Sir Andrew Bowning, 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.
57. A trite example of this technique can be found at the start of this article, where the perhaps overly-lengthy description of Dick’s book shielded you from discovering the true nature of this article for a page or so. The genre expectations of some of the article’s editors led them to object to this approach, but the delaying effect was something this all-too-human writer had intended and so resisted the suggested editorial revision. This act alone should persuade you that this article was written by a person, not a computer.
59. 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,
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come to the Supreme Court on a certiorari petition from a decision by the Fifth Circuit. The Court then vacated its grant of certiorari and remanded the case to the Fifth Circuit for reconsideration in light of its recent decision in *Achemen Products, Inc. v. Windsor.* Upon reconsideration, the Fifth Circuit affirmed its earlier decision in a curt, five paragraph per curiam opinion, and the petitioners were once again seeking Supreme Court review.

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." 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 certiorari petition, would lead with a sentence like that unless the lawyer was certain of success.

It is, for a legal writing teacher, a fascinating sentence. It ignores implant a seed about the nature of the case. In a remarkably informal and cavalier fashion, the sentence refers to the United States Court’s opening of a Statement of the Petitioner’s position, 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 certiorari petition, would lead with a sentence like that unless the lawyer was certain of success.

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 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"—with its twin processes of "emotional substance" and "medium mood control," and ethos, the "efforts on the part of the persuader to establish credibility in the eyes of the audience." 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 about the issues in the case. 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 legal documents.

The writer was Professor 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, nor need there be. The hard work has been done in this simple, short, first sentence.
come to the Supreme Court on a certiorari petition from a decision by the Fifth Circuit. The Court then vacated its grant of certiorari and remanded the case to the Fifth Circuit for reconsideration in light of its recent decision in Amchem Products, Inc. v. Windsor. Upon reconsideration, the Fifth Circuit affirmed its earlier decision in a curt, five paragraph per curiam opinion, and the petitioners were once again seeking Supreme Court review.

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because its outcome would affect the path of a case on which I had worked, almost exclusively, for several years.

61. Id.
62. In re Asbestos Litigation, 134 F.3d 668 (5th Cir. 1998) (per curiam); see also Ortiz Petition, supra note 36, at *1-2 (providing the petitioner's description of the Fifth Circuit's actions).
63. Ortiz Petition, supra note 26, at *1.

64. Id.
66. Id.
67. Id. at 13.
68. See Steven J. Johansen, Was Colonel Sanders a Terrorist? An Essay on the Ethical Limits of Applied Legal Storytelling, 7 J. ASN'N LEGAL WRITING Dirs. 63, 68 (2010) ("Rather, it is that the persuasiveness of a story does not turn on its truth. It turns on its narrative rationality—the logical coherence, its correspondence to audience expectations.")
Empathy, then, is arguably the attribute 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 matter much, but for those persuasive documents that many believe to be the lawyer’s principal output, these human qualities might 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.\(^{69}\) It is this soulful quality 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.\(^{70}\) Empathy, in short, is not just good writing; it’s good lawyering.

69. See id. at 110 n.3 (containing a short, selective bibliography of articles discussing the role of empathy in the law); see also Ian Gallacher, Thinking Like Nonlawyers: Why Empathy is a Core Lawyering Skill and Why Legal Education Should Change to Reflect Its Importance, 8 LEGAL COMM. & RHETORIC: JALWD 199 (2011).

70. 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 Herman explains, “[a]fter a relatively short time on an appellate bench, a judge’s brain becomes hard-wired to examine standards of review.” Mark Herman, INSIDE STRAIGHT: ADVICE ABOUT LAWYERING, IN-HOUSE AND OUT, THAT ONLY THE INTERNET COULD PROVIDE, 320 (2012). A lawyer who understands this will 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.

It is easy to sit, in the summer of 2012 when this was written, and say that the potential rise of computer-generated legal documents is a false fear; a threat that is unlikely to materialize. Some might say that lawyers have written since the Sumerians invented writing,\(^ {71}\) 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\(^ {72}\) and that, therefore, they always 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.

I hope I am wrong. Much of this Article 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 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 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 K. Dick recognized, empathy, as opposed to rhetoric or narrative cannot, as yet, be programmed into a computer. That means that while a computer-generated document might be almost the same as a human-written document, it is not 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 is left to us.

71. 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 Educator Programs, Early Writing, HARRY RANSOM CENTER, U. TEx. AUSTIN (last visited Oct. 14, 2012), http://www.hrc.utexas.edu/educator/modules/gutenberg/books/early/.

Empathy, then, is arguably the attribute 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 matter much, but for those persuasive documents that many believe to be the lawyer’s principal output, these human qualities might 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. It is this soulful quality 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. Empathy, in short, is not just good writing; it’s good lawyering.

69. See id. at 110 n.3 (containing a short, selective bibliography of articles discussing the role of empathy in the law); see also Ian Gallacher, Thinking Like Nonlawyers: Why Empathy is a Core Lawyering Skill and Why Legal Education Should Change to Reflect Its Importance, 8 LEGAL COMM., & RHETORIC: JALWD 199 (2011).

70. 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 or no 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 Hermann explains, “[a]fter a relatively short time on an appellate bench, a judge’s brain becomes hard-wired to examine standards of review.” Mark Hermann, Inside Straight: Advice about Lawyering, In-House and Out, That Only the Internet Could Provide, 530 (2012). A lawyer who understands this virtue 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.

71. This is literally true. Many of the Sumerian clay tablets, dating back to around 3,500 BC, and therefore the earliest known form of writing we know, record Sumerian laws. See Educator Programs, Early Writing, HARRY RANSOM CENTER, U. TEX. AUSTIN (last visited Oct. 14, 2012), http://www.hrctexas.edu/educator/modules/gutenberg/books/early/.