Future Predictions About Legal Writing: Redundancies and Musings

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> [*T*]*he evidence must be admitted not only for its relevance to the defendant's character and past history but also for its relevance to a prediction about his future behavior.*
> — *Justice John Paul Stevens, dissenting in* Franklin v. Lynaugh[1]

I have musings about the future of legal writing, which I start this article with, and musings about the present too, which follow soon. For example, in the future, will software detect the redundancy of *past history* or a reference to predicting the future, as in Justice Stevens's dissent?

I'm a lawyer, not a futurist, and I'm not steeped in the conventions of futurists. But nobody seems to be writing about the future of legal writing. So I'll step in.

Looking Forward

The larger English language will continue to evolve. That's one reason why William Shakespeare's English, four centuries old, is hard to understand. Said Hamlet to Horatio in a well-known graveyard scene, "[W]hy may not that be the skull of a lawyer? Where be his quiddities now, his quillities, his cases, his tenures, and his tricks?"[2] I'm not talking about the difficulty of understanding *quiddities* and *quillities*. Look at *tenures*. The word isn't strange to our contemporary ears, but do you know

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[1] 487 U.S. 164, 190 (1988).

[2] William Shakespeare, *Hamlet* act 5, sc. 1.

what it means in that context? We can't be sure, without delving, that even *tricks* meant then what it more or less means now.

Even Mark Twain's English is slipping into the past. Consider this account from Capitol Hill, published in the *Chicago Republican* on February 8, 1868: "I was standing, all by myself, in the Committee room, reading a vast law book . . . and wondering also at the bewildering tautology of the said aforesaid book aforesaid, when a youth to fortune and to fame unknown, flourished in the most frisky way, and came to a halt before me."[3] We can kind of understand his description of the youth — but only kind of.

Legal English continues to evolve too. (The absence of a comma before *too* in the previous sentence is intentional. More on that soon.) We can dispute the originalist way of interpreting the U.S. Constitution — what did the Framers intend two centuries ago? — but we cannot dispute that the Framers, and Americans of that generation, used words differently than we do.

In 2014, the U.S. Supreme Court interpreted the Constitution's two-centuries-old Recess Appointments Clause. That clause authorizes the president "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[4] In *NLRB v. Canning*,[5] the Court examined the meaning of *Recess*, *Session*, and *Vacancies that may happen*.

Justice Scalia wrote a concurrence (although a dissentious one, concurring only in the judgment) that relied on definitions in Samuel Johnson's *A Dictionary of the English Language* from 1773, Noah Webster's *American Dictionary of the English Language* from 1828, and *The Oxford English Dictionary* from

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[3] Mark Twain, *Adventure with a Native of Kalamazoo — A Michigander at a Reception*, Chicago Republican (Feb. 8, 1868), http://www.twainquotes.com/18680208.html.

[4] U.S. Const. art. II, § 2, cl. 3.

[5] 134 S. Ct. 2550, 2556 (2014).

1989 — the last because it cited sources from the eighteenth and nineteenth centuries for relevant definitions. He wanted to know what key terms in the Recess Appointments Clause meant over 200 years ago.

Justice Scalia wrote that "the partisan tables are turned" and that "[t]he tide seemed to turn . . . in the mid-19th century."[6] Over 200 years from now, will people still be turning those phrases? Will they be able to understand them?

The evolution of legal language is reflected in the tenth edition of *Black's Law Dictionary*, which appeared in 2014. But keep your earlier editions. You may need them if you live long enough or the language changes rapidly. In two centuries, or even in a half-century, judges and scholars may need to consult early-twenty-first-century dictionaries, legal and nonlegal, to understand *Canning*. What did the Supreme Court mean by using *trigger* as a verb? What's *upshot* and *C-SPAN coverage*?[7]

The Court discussed "resolution not only through judicial interpretation and compromise among the branches but also by the ballot box."[8] If, in a future world, people no longer vote in person, online voting has already been discarded, and people can opt out of candidates selected for them by algorithm — opt out by activating their implanted voting chips — how many will understand what a *ballot box* is? Justice Scalia, in his nominal concurrence, wrote, "The Constitution is not a road map for maximally efficient government . . . ."[9] In the twenty-third century, lawyers may wonder, "What's a *road map*?"

Some references to technology in legal writing are already dated. In 2005, Judge Richard Posner began an opinion this way: "At the risk of sounding like a broken record, we reiterate our oft-expressed concern . . . ."[10] That was one of the last references

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[6] *Id.* at 2605, 2613.

[7] *Id.* at 2557, 2564, 2576.

[8] *Id.* at 2577.

[9] *Id.* at 2610.

[10] *Pasha v. Gonzales*, 433 F.3d 530, 531 (7th Cir. 2005).

in a legal decision to a broken record in a world that had moved beyond stereo records and had begun to move beyond compact discs.

Where else will the English language go, and legal language with it? I think we'll lose the comma before *too*, the hyphen in *email* (some courts dropped it in the first years of the millennium), and the space in *health care*.

Some use of punctuation or language that is considered nonstandard or even blatantly incorrect could become acceptable in several decades. For example, *they* could become the singular personal pronoun. Consider the sentence "Each lawyer has their own writing style." We talk that way all the time, but many, if not most people, consider it wrong in writing; it lacks noun–pronoun agreement. *Each lawyer* is singular, and *their* is plural.

I'm not predicting whether or when *they* and *their* will become singular pronouns in legal writing. I'm suggesting that *some* nonstandard punctuation and language will become acceptable.

The distinction between *verbal* and *oral* is just about gone. (Verbal communication uses *words*, written or spoken. Oral communication is *spoken*.) *Verbal* and *oral* are not synonyms — but lawyers and judges use them that way.[11] If you care about the distinction (I do), you've (we've) just about lost the battle. Meanwhile, the word *literally* is losing its literal meaning and is becoming an intensifier, similar to *very* or *really*. In a few decades, this new meaning may take over.

Right now, the distinction between different words is beginning to get lost. Some words' meanings are starting to change. The process is so early with some distinctions and meanings that we haven't noticed yet. But eventually, these blurred distinctions and changed meanings will be like *literally* — in transition — and then like *oral* and *verbal* — fairly well established. The pro-

[11] *E.g.*, *Ohio v. Robinette*, 519 U.S. 33, 35 (1996); *United Steelworkers of Am. v. CCI Corp.*, 395 F.2d 529, 531 (10th Cir. 1968).

cess has begun; it's always happening; we just don't know yet with which words.

Legal writing may get breezier. This is an excerpt of a 2014 dissent by Chief Justice Roberts: "Not very likely."[12]

"Well, he's a Supreme Court Justice, and I'm not," you might say. "I'm not allowed to write like that."

But some breezier judges' style might trickle down. And a lawyer who wishes to write more conversationally can search in an opinion for a colorful phrase or expression and quote it. For example, a lawyer could rebut an argument with this: "'Not very likely.' *Kaley v. United States*, 134 S. Ct. 1090, 1114 (2014) (Roberts, C.J., dissenting)."

Legal writing *has* gotten breezier. That's one point of blogging, a new genre of legal writing. "Incisive analysis is not restricted to law review articles. The immediacy and informality of law blogs (or blawgs) have upended traditional norms in the law, as social media have in every other field of human endeavor," said David Harlow, a lawyer who blogs at HealthBlawg.com.[13] Thomas Bruce, director of Cornell's Legal Information Institute, noted, "There are now entire parts of the CFR where the table of contents looks like the table of contents for an FAQ, because all of the entries are in question form."[14]

Stuart A. Forsyth, who runs the website LegalFuturist.com, wrote:

> What we know as "writing" will become more visual. Humans absorb and understand visual information much faster than textual information, and lawyers will come to understand and use that as technological tools are developed to facilitate their doing so. Indeed, book and film may merge into a form yet to

[12] *Kaley v. United States*, 134 S. Ct. 1090, 1114 (2014) (Roberts, C.J., dissenting).

[13] E-mail interview with David Harlow, The Harlow Group (Aug. 24, 2014).

[14] E-mail interview with Thomas Bruce, Director, Cornell University Legal Information Institute (July 24, 2014) (offering one example from the CFR at http://www.law.cornell.edu/cfr/text/32/part-37/subpart-B).

> be named. Books and film will not disappear, but something new may appear.[15]

Legal "writing" already includes photographs (e.g., the appendixes in the 2011 Supreme Court case of *Brown v. Plata*[16]), graphs (e.g., Justice Sotomayor's dissent in the 2014 case *Schuette v. BAMN*[17]), and maps. A marked-up aerial photograph resembling a map appears in the appendix to the 2014 Supreme Court case *United States v. Apel.*[18] What's next? A court opinion with a link to the court's website — and a video appendix?

I don't want to discuss legal forms and software extensively. The field is changing rapidly, and I don't want to write a software review. In addition, I can't seem to get the forms companies and software companies to discuss their capabilities. The salespeople (the tactical people, if you will) don't want to talk to someone who's interested in talking but not buying (me), and the people on the business side (the strategic people) are remarkably insulated from contact. Executives at one well-known legal-forms company cannot be reached by email and will not return phone calls, at least not mine. Even the public-information office won't call me. I say this not out of pique but to explain that I'm aware of legal forms as one front in the future of legal writing. I just don't have much to say about them here.

The wide availability and use of electronic and computer-assisted forms might reduce the need for legal writing — or increase it. Just because a company has provided a form written with legalese and in the passive voice does not mean that lawyers should accept it. They might have to rewrite the form. The website of one well-known company selling computerized legal products and services has such awkward writing that I doubt the quality of the writing it sells to customers.

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[15] E-mail interview with Stuart A. Forsyth, The Legal Futurist (July 10, 2014).

[16] 131 S. Ct. 1910, 1949–50 (2011).

[17] 134 S. Ct. 1623, 1680–82 (2014).

[18] 134 S. Ct. 1144, 1153 (2014).

Legal forms are not new. Electronic and computer-assisted forms are relatively new — but probably won't revolutionize legal writing. Writes Forsyth, "Lawyers have automated repetitive tasks for decades; we call it 'boilerplate.'"[19]

In the future, if not now, software will and should detect — and flag for your correction — apparent misuses of *country* when you mean *county*, *interstate* when you mean *intestate*, and *statue* when you mean *statute*. It will detect and flag redundancies, such as *convicted felon*, *close proximity*, *armed gunman* — and *past history* and *future prediction*.

Ron Dolin, who teaches legal technology and informatics at Stanford Law School, points out "the difference between synthesis and analysis. Analyzing text (message understanding, named-entity extraction, tracking citations, etc.) is much easier than synthesizing text (writing briefs, motions, contracts, etc.)."[20] Named-entity extraction is the process by which software recognizes names of entities and people, dates, dollar figures, citations, and so on in documents; extracts them; and organizes them.

"I think that you can expect to see a lot of progress on the analysis side, but the synthesis side is likely going to be decades," says Dolin. "If anything, the law lags behind" other fields.[21]

Associated Press announced on June 30, 2014, that it would start writing articles about corporate earnings — without human writers. AP explained that for years, it spent many hours "crunching numbers and rewriting information from companies to publish approximately 300 earnings reports each quarter. We discovered that automation technology . . . would allow us to automate short stories — 150 to 300 words — about the

[19] E-mail interview with Stuart A. Forsyth, The Legal Futurist (Aug. 28, 2014).

[20] E-mail interview with Ron Dolin, Professor, Stanford Law School (July 25, 2014).

[21] *Id.*

earnings of companies in roughly the same time that it took our reporters."[22]

A company named Automated Insights generates routine sports reporting. The *Los Angeles Times* has robots to write about earthquakes and homicides.[23]

What does all that portend for legal writing? As Dolin says, technology to write briefs, motions, and contracts is likely decades away. Will legal writers be replaced by robots and software in the near future?

As Chief Justice Roberts said in a different context, "Not very likely."[24]

Legal Redundancies

The U.S. Supreme Court used my favorite legal redundancy in 2012: "The Government further refers to lower court decisions in cases involving 18 U.S.C. § 922(g), which prohibits the possession of firearms by convicted felons."[25] Felons *are* convicted; that's what made them felons.

My second-favorite redundancy (although it is not confined to legal writing) appeared in this excerpt from the same Supreme Court case: "Rather, they address dangers that arise postenactment: sex offenders with a history of child molestation working in close proximity to children, and mentally unstable persons purchasing guns."[26] *Proximity* connotes "close." Thus, *close proximity* means "close closeness" or "near nearness." So the

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[22] Paul Colford, *A Leap Forward in Quarterly Earnings Stories*, Associated Press (June 30, 2014), http://blog.ap.org/2014/06/30/a-leap-forward-in-quarterly-earnings-stories.

[23] Will Oremus, *The First News Report on the L.A. Earthquake Was Written by a Robot*, Slate (Mar. 17, 2014), http://www.slate.com/blogs/future_tense/2014/03/17/quakebot_los_angeles_times_robot_journalist_writes_article_on_la_earthquake.html.

[24] *Kaley*, 134 S. Ct. at 1114 (Roberts, C.J., dissenting).

[25] *Vartelas v. Holder*, 132 S. Ct. 1479, 1489 (2012).

[26] *Id.* at 1489 n.7.

Supreme Court used my two favorite redundancies in one case. In close proximity.

Here's a redundancy from a different court: "3M states that 'sintering' means heating the preform to a temperature just below the matrix melting point, causing the powder particles to bond together without melting."[27] When chemicals bond, they come together. *Bond together* is redundant. You will see the phrase outside the chemical context. But remember: it's a *bonding experience*, not a *bonding-together experience*.

Here's a related redundancy: "The magistrate ultimately noted that the claims seem to merge together and that there was no substance to either aspect of the motion to vacate in any case."[28] And this: "It does not prohibit individuals from dining together or associating together to conduct a strike, nor in any other way 'directly and substantially' interfere with family living arrangements or workers' ability to combine together to assert their lawful rights."[29] Use *merge*, not *merge together*; *associating*, not *associating together*; *combine*, not *combine together*.

A process opposite from bonding, merging, and combining — namely, separating — has also led to a redundancy: "Congress also repealed the exclusion for interns and residents-in-training working at federal hospitals[,] . . . which further demonstrates the intent of Congress to categorize separately, medical school students, medical interns, and residents-in-training."[30] *Categorize* means to "separate." The word *categorize* alone is sufficient.

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[27] *Kinik Co. v. Int'l Trade Comm'n*, 362 F.3d 1359, 1366 (Fed. Cir. 2004).

[28] *Dyer v. United States*, No. 95-6308, 1996 WL 437924, at *1 (6th Cir. Aug. 2, 1996).

[29] *Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW*, 485 U.S. 360, 360 (1988).

[30] *United States v. Detroit Med. Ctr.*, No. 05-71722, 2006 WL 3497312, at *12 n.3 (E.D. Mich. Dec. 1, 2006).

"[T]he Compulsory Process Clause cannot be invoked without the prior planning and affirmative conduct of the defendant."[31] *Prior planning*? Prior is the only kind of planning that exists.

"Fluor had assured the Company that maintenance costs could be curtailed by reducing the work force, decreasing fringe benefits and overtime payments, and by preplanning and scheduling the services to be performed."[32] *Preplanning*? The word is a cousin to *prior planning*, and both are illegitimate cousins.

Here's the Supreme Court continuing to use redundancies related to time: "The agents gave no advance warning, one later testified, because they wanted to retain the element of surprise."[33] *Advance warning* is the only kind of warning there is. Just plain *warning* will do.

In yet another time-related redundancy, the Supreme Court has talked about "predicting future behavior."[34] A lower court wrote that "these concerns do not go to felon disenfranchisement, which was neither a new innovation nor a predictable future innovation."[35] A *predictable future innovation* is probably redundant in this context, and a *new innovation* is definitely redundant.

Wait! This latter case is about felons. Do you suppose that the First Circuit wrote about *convicted* felons? Yup, it did: "Unlike many other states, Massachusetts does not disqualify convicted felons from voting once they are released from prison."[36]

Now back to redundancies involving time. In *Franklin v. Lynaugh*, where the epigraph to this article appeared, the Supreme Court discussed a *prediction* in the context of the *future*, which is redundant — and in the same sentence invoked *past*

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[31] *Taylor v. Illinois*, 484 U.S. 400, 415 (1988).

[32] *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 206 (1964).

[33] *Brogan v. United States*, 522 U.S. 398, 409 (1998).

[34] *Navarette v. California*, 134 S. Ct. 1683, 1688 (2014).

[35] *Simmons v. Galvin*, 575 F.3d 24, 40 (1st Cir. 2009).

[36] *Id.* at 28.

history.[37] History is always past. True, William Faulkner wrote, "The past is never dead. It is not even past."[38] But when it comes to writing the word *history*, it is always past.

"An assistant chaplain similarly testified that, based on past experience, respondent likely would be adept at counseling other prisoners to avoid the mistakes he had made when they leave prison."[39] Experience, like history, is past; that's what makes it experience.

Avoid these redundancies (all from Supreme Court cases):

- *prior arrangement*, which appeared in *Kuhlmann v. Wilson*;[40]
- *advance arrangements*, which appeared in *Town of Castle Rock, Colo. v. Gonzales*;[41] and
- *advance notice*, which appeared in *Clapper v. Amnesty International USA*.[42]

Here's the Rhode Island Supreme Court: "It was an early evening in May when an armed gunman in a hooded sweatshirt approached her in front of 95 Congress Avenue in Providence."[43] And the U.S. Supreme Court: "[T]he Election Code clearly vests discretion whether to recount in the boards, and sets strict deadlines subject to the Secretary's rejection of late tallies and monetary fines for tardiness."[44] *Armed gunman* and *monetary fines* are redundant. Add that second redundancy, *monetary fines*, to the criticisms of *Bush v. Gore*.

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[37] 487 U.S. at 190.

[38] William Faulkner, "Requiem for a Nun," *in Novels 1942–1954*, at 471, 535 (1994) (act 1, sc. 3).

[39] *Ayers v. Belmontes*, 549 U.S. 7, 12 (2006).

[40] 477 U.S. 436, 459 (1986).

[41] 545 U.S. 748, 753 (2005).

[42] 133 S. Ct. 1138, 1154 (2013).

[43] *State v. Pona*, 66 A.3d 454, 458 (R.I. 2013).

[44] *Bush v. Gore*, 531 U.S. 98, 118 (2000).

Spot the redundancies in these quotations from other Supreme Court cases:

"Prisons have backlogs of up to 700 prisoners waiting to see a doctor. A review of referrals for urgent specialty care at one prison revealed that only 105 of 316 pending referrals had a scheduled appointment, and only 2 had an appointment scheduled to occur within 14 days."[45]

"[T]he subtle nuances among different standards are likely to be difficult to differentiate, as evidenced by the lack of any clear distinction between a 'rational understanding' and a 'reasoned choice' in this case."[46]

"Judge Hartz dissented, contending that Congress intended to set a maximum limit on the Government's liability for contract support costs."[47]

The redundancies are *scheduled appointment*, *subtle nuances*, and *maximum limit*. Appointments are scheduled; in general, just write *appointment*. Pick *subtlety* or *nuance*. Pick *maximum* or *limit*.

Am I picking on the Supreme Court? No. My point is that this endeavor we're engaged in, legal writing, is hard. Some redundancies just roll off the tongue, roll out of the pen, and seem to type themselves — such as the phrase *closely scrutinized*: "As Enron's one-time CEO, Skilling was at the center of the storm. Even if these extraordinary circumstances did not constitutionally compel a change of venue, they required the District Court to conduct a thorough *voir dire* in which prospective jurors' attitudes about the case were closely scrutinized."[48]

Consider this excerpt: "If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the [Indian

[45] *Brown*, 131 S. Ct. at 1933.

[46] *Godinez v. Moran*, 509 U.S. 389, 407 (1993).

[47] *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2188 (2012).

[48] *Skilling v. United States*, 561 U.S. 358, 427 (2010).

Child Welfare Act]."[49] *Quite possibly* rolls off the tongue; is that what the Court meant instead of the redundant *might possibly*? Quite possibly.

"But in this case, as in the hypothetical case just posed, investigating the facts involved contacting people who might potentially become parties."[50] The phrase *might potentially* is redundant. The wording here should be *people who might become parties* or *people who are potential parties*.

Some redundancies *don't* roll off the tongue, yet judges write them anyway. For example: "Judicial interpretation has added additional grounds, such that awards may be vacated under limited circumstances where the arbitrators manifestly disregarded the law."[51] Another example of the same redundancy: "Dr. Wolinsky in effect added additional language to the policy."[52]

Look at this heading from an order issued by a U.S. district court in Louisiana: "Fundamental Guiding Principles."[53] It's a double redundancy. Principles *are* fundamental; they're guiding too. As long as we're discussing *principles*, they are also basic; don't write about a *basic principle*.

One way to avoid redundancies is to ask yourself: What's implied in a word? For example, what's an *aquifer*? Underground water. What's implied? *Aquifer* implies two key words: *water* and *underground*. But what did the Supreme Court write in *Texas v. New Mexico*? "The non-flood 'base' flow of the Pecos below Alamogordo Dam is supplied to a large part by groundwater aquifers . . . . [T]here is some suggestion that at times heavy groundwater pumping in the area around Roswell may actually reverse the direction of flow of the underground

[49] *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013).

[50] *Maracich v. Spears*, 133 S. Ct. 2191, 2221 (2013).

[51] *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 27 (2d Cir. 2000) (citation omitted).

[52] *Zervos v. Verizon N.Y., Inc.*, 277 F.3d 635, 647 (2d Cir. 2002) (citation omitted).

[53] *United States v. Bowen*, 969 F. Supp. 2d 546, 568 (E.D. La. 2013).

aquifer . . . ."[54] The phrase *groundwater aquifers* is redundant. So is *underground aquifer.*

(I omitted from the excerpt above a sentence teaching another lesson unrelated to redundancies: "The operation of these aquifiers is little understood."[55] The lesson is to spell-check. There's no such word as *aquifier.*)

Let's say that you have a bad writing day. I hope you don't, but let's say that you do. Your supervisor or peer reviewer has marked up your writing in red pen, or someone has told you that you are incapable of writing an intelligible English sentence, as someone once told me. Take solace in this: On your worst writing day, you probably won't write what one trial judge wrote when explaining a departure from the state sentencing guidelines. That judge, as quoted by the Michigan Court of Appeals, noted that the defendant had left "three children with the dead corpse of their mother."[56]

The Synonym Game — Play It Only If Game Conditions Are Right

I advise against using multiple synonyms in your writing. Just call a spade a spade, not a *shovel*, then a *digging implement*, then a *handheld excavation device*. Nonetheless, Justice Kagan used multiple synonyms in a 2014 Supreme Court opinion — deftly and effectively.

Justice Kagan's first paragraph in *Abramski v. United States* introduced the case's issue and a key phrase, *straw purchaser*:

> Before a federally licensed firearms dealer may sell a gun, the would-be purchaser must provide certain personal information, show photo identification, and pass a background check. . . . In

[54] 462 U.S. 554, 557 n.2 (1983).

[55] *Id.*

[56] *People v. Smith*, No. 277903, 2008 WL 2389515, at *8 (Mich. Ct. App. June 12, 2008).

> this case, we consider how that law applies to a so-called straw purchaser — namely, a person who buys a gun on someone else's behalf while falsely claiming that it is for himself. We hold that such a misrepresentation is punishable under the statute, whether or not the true buyer could have purchased the gun without the straw.[57]

In discussing how she reached that holding on behalf of the Court, Justice Kagan could have repeated *straw purchaser*, varying it with *straw buyer* (which she did use once[58]) and *straw* or *straws* (which she also used[59]). But Justice Kagan went further. She used:

- *the middleman*[60]
- *the conduit at the counter*,[61] meaning the counter of the gun store
- *mere conduits*[62]
- *an intermediary* (twice)[63]
- *a hired deliveryman*[64]
- [*d*]*eliverymen*[65]
- *the nominal buyer*[66]
- *the fictitious purchaser*[67]
- *the fictitious . . . buyer*[68]

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[57] 134 S. Ct. 2259, 2262–63 (2014).
[58] *Id.* at 2266 n.4.
[59] *E.g.*, *id.* at 2263, 2266, 2273.
[60] *Id.* at 2267.
[61] *Id.*
[62] *Id.* at 2268.
[63] *Id.* at 2268, 2269.
[64] *Id.* at 2269.
[65] *Id.*
[66] *Id.* at 2270.
[67] *Id.* at 2272.
[68] *Id.* at 2269.

- *the frontman*[69]
- *the hidden purchaser*[70]

Brilliant.

One reason for a writer not to play the synonym game is that it risks confusing the reader. A reader can be left wondering: by using different words, did the writer intend different things?

Justice Kagan risked no such confusion. Her first paragraph made it clear that she was writing about straw purchasers. By using multiple synonyms — pejorative ones — she was editorializing.

Another reason not to play with synonyms is that a writer often keeps playing after he or she has run out of good ones. For example, *spade* doesn't have good synonyms. Trying to come up with synonyms makes a writer imprecise — a shovel is not really a spade — and ridiculous, as in *handheld excavation device*.

Justice Kagan did not run out of synonyms. The only one I can think of that she didn't use is *proxy*. And maybe she avoided it because it has its own legal meaning.

Still, I discourage you from playing the synonym game (especially in contracts). The lesson from Justice Kagan is not that you can play the game if you're on the Supreme Court. The lesson is that if the right game conditions converge, writing with multiple synonyms works.

A Point About Bullet Points

Let's go back to *Abramski* and innovations in Supreme Court opinions, such as photographs, charts, and maps. Justice Scalia's dissent in *Abramski* might be the first use of bullet points in a Supreme Court decision.[71] If any lawyer thinks that bullet points don't belong in briefs — use an outline format, yes;

[69] *Id.* at 2272.

[70] *Id.* at 2273.

[71] *Id.* at 2278–79.

but bullet points, no, because they're not numbers or letters — it will be harder to sustain that position when a Supreme Court Justice is bulleting points.

Evolving Legal Lingo, and *Chutzpah* as a Legal Word

Before I discuss *chutzpah* as a legal word, I'll discuss it briefly as a Yiddish word — or rather, I'll quote an authoritative source, Leo Rosten's *The Joys of Yiddish*.

First, here's Rosten on how to pronounce the word: "Pronounced KHOOTS-*pah*; rattle that *kh* around with fervor; rhymes with 'Foot spa.' Do *not* pronounce the *ch* as in 'choo-choo' . . . but as the German *ch* in *Ach!* or the Scottish *loch*."[72]

Now here's an excerpt from Rosten's entry on the word, which he spells without an *h* at the end:

> Gall, brazen nerve, effrontery, . . . arrogance such as no other word, and no other language can do justice to. The classic definition of *chutzpa* is, of course, this:
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> > *Chutzpa* is that quality . . . in a man who, having killed his mother and father, throws himself on the mercy of the court because he is an orphan.[73]

Thus, the classic definition involves a legal proceeding. The word is almost made for the law. And judges and lawyers use it.

Chutzpah debuted in a reported judicial opinion in 1972, when the Georgia Court of Appeals used it in *Williams v. State*.[74] The word was the subject of a law-journal article that surveyed courts' use of *chutzpah* and its variants, *chutzpa*, *hutzpah*, and

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[72] Leo Rosten, *The Joys of Yiddish* 92 (1968).

[73] *Id.* at 93.

[74] 190 S.E.2d 785, 785 (Ga. Ct. App. 1972).

hutzpa.[75] Courts have used the word in hundreds of cases. Many quote Leo Rosten.[76]

A non-Jewish Justice was the first to use *chutzpah* in a Supreme Court opinion: Justice Scalia used it in passing in a concurring opinion in 1998.[77]

The Supreme Court used it in 2005, quoting the Ninth Circuit Court of Appeals, which in turn was quoting one set of parties: "The Court of Appeals obliged petitioners' request[,] . . . a request that respondents apparently viewed as an 'outrageous act of chutzpah.'"[78] By the way, to call chutzpah *outrageous* is almost always redundant.

Chutzpah appeared again in a 2011 case, twice. In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, a campaign-finance case, Justice Kagan wrote in her dissenting opinion, "Some people might call that *chutzpah*."[79]

The majority responded in a footnote: "The dissent sees '*chutzpah*' in candidates exercising their right not to participate in the public financing scheme, while objecting that the system violates their First Amendment rights. . . . The charge is unjustified, but, in any event, it certainly cannot be leveled against the independent expenditure groups."[80] All this discussion — yet no definition. The justices assumed that readers know the word and that they need not define it. But does it belong in a legal dictionary for the benefit of those who don't know it?

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[75] Jack Achiezer Guggenheim, *The Evolution of Chutzpah as a Legal Term: The Chutzpah Championship, Chutzpah Award, Chutzpah Doctrine, and Now, the Supreme Court*, 87 Ky. L.J. 417 (1999).

[76] *E.g.*, *Williams*, 190 S.E.2d at 785 n.1; *Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 128 n.5 (2d Cir. 2009).

[77] *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 597 (1998) (Scalia, J., concurring).

[78] *San Remo Hotel, L.P. v. City & Cnty. of S.F.*, 545 U.S. 323, 330 (2005) (citation omitted).

[79] 131 S. Ct. 2806, 2835 (2011) (Kagan, J., dissenting).

[80] *Id.* at 2820 n.6.

The tenth edition of *Black's Law Dictionary* was published in 2014 — and *chutzpah* is not in there. Nor are its variants, with or without italics.

This noninclusion raises an interesting question: When is a word a *legal* word? Just because lawyers and judges use it doesn't mean that it's a legal word that belongs in a legal dictionary. On the other hand, just because nonlawyers use a word doesn't make it a nonlegal word. Nonlawyers use *church* and *churning*, two words to which *chutzpah* would be a neighbor in the dictionary, and *church* and *churning* do appear in *Black's*.[81] My sense is that *chutzpah* is a legal word. (My sense is lexicographically untrained, but then again, America has no degree programs in lexicography.)

Bryan Garner, the editor in chief of *Black's*, has said that 2,500 potential new entries are awaiting the next edition.[82] Perhaps *chutzpah* is among them.

But I'm not taking any chances, and I'm not waiting. I'm putting *chutzpah* into *Bresler's Law Dictionary*, my online list of legal words that otherwise seem to have escaped definition. The word arrived in legal lingo long ago:

> **chutzpah**. noun. Audacity, especially when an argument or position is advanced hypocritically, with unintentional irony, or with unclean hands.[83]

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[81] *Black's Law Dictionary* 294–95 (10th ed. 2014).

[82] Stephanie Francis Ward, *Bryan Garner on Legal Neologisms and How "Black's Law Dictionary" Keeps Up*, A.B.A. J., July 7, 2014, http://www.abajournal.com/news/article/podcast_monthly_episode_52.

[83] *Bresler's Law Dictionary*, Clear Writing Co., http://www.ClearWriting.com/dictionary (last visited April 20, 2015).

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