



The Scrivener

Scribes – The American Society of Writers on Legal Subjects

Spring 2006

Annual Luncheon Set for August 5 in Honolulu

Scribes will host the annual luncheon for members and guests on Saturday, August 5, 2006, in conjunction with the American Bar Association's annual meeting in Honolulu, Hawaii. The event will begin at noon in the Roof Garden on the sixth floor of the Banyan Wing of the Sheraton Moana Surfrider Hotel.

Opened in 1901, and known as "The First Lady of Waikiki," the Sheraton Moana Surfrider presents a turn-of-the-century contrast to modern-day Waikiki. The glass-enclosed Roof Garden offers dazzling views of the Pacific Ocean.

Our guest speaker will be Roy M. Mersky. He is the Harry M. Reasoner Regents Chair in Law and Director of Research at the Jamail Center for Legal Research of the Tarlton Law Library at The University of Texas School of Law. His topic will be "Issues in Legal Research and Writing."

Professor Mersky is a past president of Scribes. He will be introduced by Dean Donald J. Dunn of the University of La Verne School of Law, who is also a past president and coauthor with Mersky of *Fundamentals of Legal Research*, now in its eighth edition.

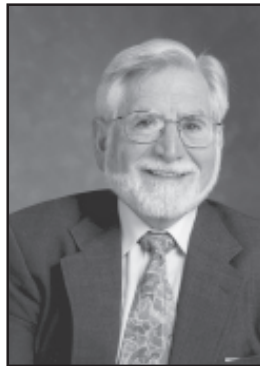
We will present the forty-sixth annual Scribes Book Award at the luncheon, for the best new book on a legal subject, and the Scribes Brief-Writing Award, for the best of the winning briefs in national moot-court competitions.

Following the presentations, we will hold a brief business meeting to elect three members to the Scribes Board of Directors and vote on amendments to the constitution and bylaws. The amendments are reported on page 4 of this issue.

All members of Scribes and others interested in legal writing are invited to attend the annual luncheon. Advance reservations are encouraged because seating is limited. The cost is \$30 a person or \$50 with a guest. Checks should be made out to Scribes and sent to Prof. Joseph Kimble, Thomas M. Cooley Law School, P.O. Box 13038, Lansing Michigan 48901.

The luncheon menu will consist of corn-and-clam chowder; Asian-influenced chicken salad with seared tofu, pineapple, and chicken tossed with sprouts, won bok, bell pepper, and green onion, in a sweet shoyu dressing; pineapple and guava sherbet; and freshly brewed Kona-blend coffee and an array of fragrant teas.

Scribes has been able to keep the cost of the luncheon very reasonable through the generous sponsorship of Thomson West. If you are planning to attend the ABA annual meeting, be sure to include the Scribes luncheon on your list of things to enjoy while in Honolulu.



Featured speaker at the Scribes annual luncheon will be Roy M. Mersky, Director of the Jamail Center for Legal Research at The University of Texas School of Law.

President's Column

Norman Otto Stockmeyer
Emeritus Professor,
Thomas M. Cooley Law School

Advice in Small Doses

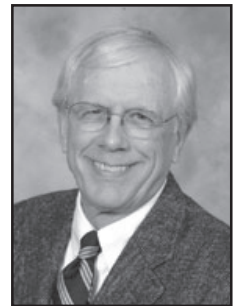
I don't know about you, but I find that although I do a lot of writing, I am by no means expert at it. I need fairly regular reminders of best practices and new conventions (such as hyphenating phrasal modifiers—when did that start?). Fortunately, many guides to good legal writing exist. But they are not fascinating reading, so I find it hard to sit down and read new ones, or new editions, cover to cover.

I suppose I could map out a plan to work my way through books on legal writing by reading a chapter a week. Bryan A. Garner's *The Elements of Legal Style* and Richard C. Wydick's *Plain English for Lawyers* both lend themselves to this installment-reading approach. But I have found this plan to be easier resolved than practiced. There are alternatives that I enjoy; here are some of them.

Newspaper and magazine columns: Here the grandparent is "The Grammatical Lawyer," a bimonthly column that began in the ALI-ABA magazine *The Practical Lawyer* back in 1976. Its purpose is "to deal with matters of style, syntax, punctuation, and spelling that should interest lawyers." I have enjoyed reading it for many years and sometimes consult two hardcover collections of the column, published in 1979 and 1996. (I now see that the collection includes an item on using hyphens to connect compound modifiers; I must have missed that column.)

Another source of good advice that I regularly enjoy is Judge Mark Painter's "Legal Writing" column in the legal newspaper *Lawyers Weekly USA*. He is the author of *The Legal Writer: 40 Rules for the Art of Legal*

Writing (Jarndyce & Jarndyce Press, 2005). And Michigan lawyers have profited from the *Michigan Bar Journal's* "Plain Language" column, edited since 1988 by Joe Kimble. A collection of his columns, along with some of his essays from other periodicals has been published in his book *Lifting the Fog of Legalese* (Carolina Academic Press, 2006).



Norman Otto Stockmeyer,
President of Scribes.

Internet transmissions: A newer way to receive regular pointers is offered by Legalwriting.net, a weblog sponsored by Wayne Schiess that sends out weekly e-mails with legal-writing tips. Schiess has written *Writing for the Legal Audience* (Carolina Academic Press, 2003). To subscribe to his weekly tips, e-mail wayne@legalwriting.net with "subscribe" in the subject line. Similar services may exist elsewhere on the Web. If you know of one, please let me in on it.

I am proud to say that in addition to their legal-writing expertise, these authors have one other thing in common: all are active members of Scribes. Thank you, Bryan, Richard, Mark, Joe, and Wayne, for your participation and support.

Legal-Writing Tidbit

"Make the paragraph the unit of composition" is the second of Strunk and White's "Elementary Principles of Composition" in *The Elements of Style*. In the opinion of Professor Jonathan Van Patten of the University of South Dakota School of Law, it is "the single most important principle of legal writing" and deserves top billing.

Van Patten's article "Twenty-Five Propositions on Writing and Persuasion," 49 *South Dakota Law Review* 250 (2004), has much worth repeating on the importance of thinking of paragraphs as units. An excerpt appears on the next page.*

Scribes wishes to thank Stetson University College of Law and its Dean, Darby Dickerson, for generously hosting the 2006 meeting of the Scribes Board of Directors.

The paragraph is the unit of composition

What does it mean to be the unit of composition? It means that the unit is about one thing. If it is about more than one thing, then it should be split into separate paragraphs. If it is not about anything (that is, anything worth advancing), then it should be eliminated or worked with until the point of the paragraph becomes clear. You ought to be able to summarize what each paragraph is about in a single sentence.

The paragraph as a unit means that the paragraph is about one thing and for which the sentences in the paragraph play various roles. Just as a movie has lead actors, supporting actors, and extras, so paragraphs have sentences with different functions. There is the topic sentence—what the paragraph is about. It is usually in first position. The next few sentences play a supporting role. They explain, elaborate, describe, give examples, and give authority and support for the topic sentence. If you understand that sentences within the unit of the paragraph have different roles (particularly the distinction between topic sentences and supporting sentences), your writing is on the right track. Start with a proposition and, before you go on to anything else, think about what can be said to support that proposition. What can you do to support it, to explain it? If possible, the last sentence in the paragraph should conclude the thought in such a way as to point to the next topic sentence. When you think through the formation of paragraphs in this manner, then the sentences will form a unit.

Although paragraphs come in many sizes, it is useful to think about a model paragraph in a brief as follows. In first position is the topic sentence, the proposition around which the paragraph is formed. The next two to six sentences are the supporting sentences. The last sentence will either conclude the thought or point to the next proposition. Ideally, it will do both. The well-ordered paragraph has this kind of shape to it. It isn't flat or uniform. It has a point, supporting information, and direction to the next point. This also means that one-sentence paragraphs are inherently suspect. A division of labor is needed between assertion and support. The shortest paragraph one can write and make it work is a single-sentence proposition followed by citation of authority.

I have the feeling with a lot of briefs that the function of the paragraph is mostly visual. That is, a paragraph indentation functions more like a breath mark in music—in essence a mental pause before the reader goes on. These paragraphs don't have any internal cohesion. They simply break every so often. They are not built as units. When you see a brief with the paragraph as a cohesive unit, you know the writer is a good writer. Good briefs use this method, whether consciously or not. . . . If you think of paragraphs in terms of units, you are on your way as a writer.

*Reprinted with the permission of Jonathan K. Van Patten and the *South Dakota Law Review* (footnote omitted).

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Submit Your Articles

Please send items for upcoming issues of *The Scrivener* (electronically or on disk) to the address shown below.

Deadlines

Summer	July 15
Fall	October 15
Winter	January 15

Jane Siegel
Thomas M. Cooley Law School
P.O. Box 13038
Lansing, Michigan 48901
siegelj@cooley.edu

Proposed Changes in the Scribes Constitution and Bylaws

At our annual meeting in Hawaii on August 5, the members present will be asked to approve the following amendments to the Scribes Constitution and bylaws, as recommended by the Board of Directors. The Constitution and bylaws are available at www.scribes.org.

(1) Constitution, article 1. The first sentence now reads: "The name of this organization is Scribes—The American Society of Writers on Legal Subjects." The amendment would change "The American Society of Writers on Legal Subjects" to "The American Society of Legal Writers." The amendment reflects the better writing style that Scribes promotes.

(2) Constitution, article 4, section 2. The first sentence now begins: "The Board consists of 16 members." The amendment would change "of 16 members" to "of the following members." For various reasons, the Board does not always total 16 members.

(3) Constitution, article 4, section 3. Add a sentence: "A vacancy in an elected member's position may be filled by the Board for the rest of that member's term." This provision was inadvertently omitted during the recent redrafting of the Constitution and bylaws.

(4) Bylaws, article 1, section 2. This section deals with associate members. Someone who is not a member of the legal profession but who otherwise qualifies for membership "may be elected to associate membership by a majority vote of the Board, on the recommendation of the Executive Director." The amendment would change this to "may be approved for associate membership on the recommendation of the Executive Director." The Board wishes to delegate that decision to the Executive Director, who already decides whether any person meets the eligibility requirements for membership.

Join other Scribes members for our annual luncheon meeting in Hawaii

Date: Saturday, August 5, 2006

Time: 12:00 noon

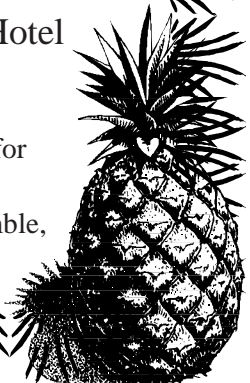
Featured Speaker: Roy M. Mersky

Place: Roof Garden, Moana Surfrider Hotel

Cost: \$30, or \$50 with a guest

Join other Scribes members to hear Roy M. Mersky, Director, Jamail Center for Legal Research at The University of Texas School of Law.

If you plan to attend, please send a check, made out to Scribes, to Joseph Kimble, Thomas Cooley Law School, Box 13038, Lansing, Michigan 48901



Scribes Annual Board Meeting a Success

The Scribes Board of Directors held its 2006 annual meeting on March 4, in St. Petersburg, Florida. The setting was the campus of Stetson University College of Law, one of our institutional members. Stetson Law Dean Darby Dickerson, a Scribes board member, and her staff extended generous hospitality, providing meeting space and lodging on campus as well as assistance with events.

The annual meeting is the board's one face-to-face chance each year to discuss and vote on matters affecting our organization. In attendance were Beverly Ray Burlingame, Charles Dewey Cole, Dean Darby Dickerson, Michael Hyman, Professor Joe Kimble, Christy Nisbett, Hon. Lee Rosenthal, Hon. Stuart Shiffman, Dean Steve Smith, Professor Otto Stockmeyer, and John Williams.

With President Stockmeyer presiding, board members reviewed a full agenda of committee reports and business items and planned future Scribes activities.

- Executive Director Joe Kimble reviewed the budget and membership. Expenditures totaled \$30,247 in 2005. For 2006, expenditures are estimated at \$26,275, because of reduced administrative costs. Membership has increased in the past year from 1,334 members to 1,460 members. Twenty-three law schools and four appellate courts are now institutional members. The board voted to create an additional membership category for student editors of law reviews and journals on a one-year trial basis.
- President Stockmeyer reviewed plans for the annual luncheon meeting of members, to be held as part of the ABA annual meeting in Honolulu, Hawaii. Despite the travel distance involved, a good turnout of members is hoped for. As usual, the Book Award and Brief-Writing Award will be presented. The president expressed appreciation to Thomson West for its continuing financial support for the annual luncheon, which helps keep the cost extremely reasonable.



Scribes board members at their annual meeting. From left to right: Dean Darby Dickerson, Judge Lee Rosenthal, Charles Dewey Cole Jr., Dean Steven Smith, Michael Hyman, Professor Otto Stockmeyer, John Williams, Judge Stuart Shiffman, Professor Joe Kimble, Beverly Burlingame, and Christy Nisbett. The meeting was generously hosted by Stetson University College of Law.

- Michael Hyman reported on the work of the Book-Award Committee. The 2005 award went to *Perilous Times: Free Speech in Wartime*, by University of Chicago law professor Geoffrey R. Stone. The board authorized the committee to award certificates of merit for “runner-up” books and to present a publisher with an award for its body of work and contributions to the field of legal writing.
- As reported by Judge Kenneth Gartner for the Brief-Writing Committee, the committee selected as the winning brief for 2005 one submitted by the John Marshall Law School. The student authors were Juliet Bikbova, Sara Boyd, Linda Burns, and Shama Patari.
- Roy Mersky's Law-Review Committee selected as the 2005 winner a note by Jeremiah Kelman, “E-Nuisance: Unsolicited Bulk E-mail at the Boundary of Common Law Property Rights,” 78 *University of California Law Review* 363. The Barry University law faculty performed initial screening.
- Michael Hyman reported on the Committee on Legal-Writing Programs. The board complimented him and his panel of speakers (Beverly Burlingame, Judge Rosenthal, and Judge Shiffman, with Dean Dickerson moderating) on the program for Stetson students and legal-writing faculty the

(continued on page 6)

preceding day. We plan to host a legal-writing program at the 2007 ABA annual meeting and perhaps a separate program for the Young Lawyers Division.

- Judge Shiffman reported that the Nominating Committee will nominate individuals for the three board seats to be filled this year. The election will take place at the annual luncheon meeting in Hawaii in August.
- Executive Director Joe Kimble reported on our publications. Volume 10 of the *Scribes Journal* should be sent to the printer soon and will include a ten-year index. Volume 11 is planned for 2007. Also in 2007, we anticipate that *The Scrivener* may be published in electronic form, as a PDF e-mail attachment. For this reason, dues renewal forms this year will request e-mail addresses.

In addition, the board took the following actions:

- The board voted to approve changing the organization's name to Scribes—The American Society of Legal Writers. The change requires amending the constitution. This and other amendments to our governing documents are detailed on page 4 and will be voted on at the annual luncheon.
- The Executive Director was asked to investigate accepting credit-card payment of dues. He was also asked to recommend to the board a reasonable reimbursement policy for meetings and other Scribes functions.
- The board voted to authorize the Executive Director to continue to distribute the *Scribes Journal* widely.
- The board authorized that plaques be issued to all those who have been members of Scribes for 25 years.
- The board selected Houston, Texas, as the site for its 2007 meeting and will invite our institutional members there to cohost the event. In addition, a legal-writing program for Houston-area law students and legal-writing faculty is being planned along the lines of the Stetson program.

Scribes extends a sincere “thank you” to Dean Dickerson and Stetson University College of Law for their outstanding hospitality and all their efforts to make the 2006 meeting a success.

News from Members

Richard L. Neumeier published an article, *Disclaiming Coverage When the Insured Fails to Give Proper Notice of ‘Any Circumstance’ Giving Rise to a Claim*, in 41 *Tort Trial & Insurance Practice Law Journal* 45 (2005).

Deborah B. Luyster announced that she had a book review published in Vol. 55, No. 3 of the *Journal of Legal Education* (Sept. 2005). The review is of *Law in the Liberal Arts*, edited by Austin Sarat. Deborah teaches Law in Literature, and she is a member of the prelaw program board of advisers at the University of North Florida in Jacksonville.

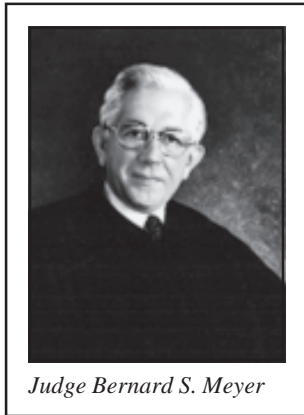
From Our Peevish Readers

Judge Jane Markey of the Michigan Court of Appeals wrote that “it grinds me no end when lawyers say or write that a party ‘made a motion.’ It should be ‘filing’ or ‘arguing’ (unless he or she is wagging a finger or something).”

Lillian Hardwick wrote that, although she has many pet writing and language peeves, topping the list is the “just because . . . doesn’t mean” construction, which is a grammatical aberration. “‘Just because’ starts an adverbial clause, which means that it can’t mean or not mean anything. It cannot serve as a subject. The correct choices are ‘Just because you can’t skate, you shouldn’t avoid the ice rink’ and ‘The fact that you can’t skate doesn’t mean you should avoid the ice rink.’ I hold my breath when I hear or read the words ‘just because,’ fearing the dreaded words ‘doesn’t mean,’ and over 95% of the time they follow.”

In Memory of Judge Meyer

Judge Kenneth L. Gartner



Earlier this year saw the passing of Bernard S. Meyer, a former judge of New York State's highest court, the New York Court of Appeals. Judge Meyer was a life member of Scribes.

In his 90 years—of which 14 were spent on the New York trial bench and another 7 on the Court of

Appeals—Judge Meyer played a role in a number of high-profile matters. Judge Meyer was the Special Deputy Attorney General who headed the investigation into the 1971 Attica prison riots. Judge Meyer presided over the landmark school-prayer case of *Engel v. Vitale*. Judge Meyer's defeats in elections for New York's Court of Appeals likely provided the impetus for the state's change from partisan elections to merit appointments for its highest appellate court. And Bernard Meyer was the first judge appointed to the court under the new merit system.

Among the bench and bar, Judge Meyer was known and remembered not for a high profile but for his clear, lean prose; his legendary work ethic; and his gentle demeanor. He was a judge's judge—one of intellectual rigor, honesty, and courage. Judge Meyer, who believed in the need for consistency in the legal system, was the principal author of New York's pattern jury instructions. This compendium of standard jury instructions for civil cases became the definitive reference for judges and lawyers in New York. Judge Meyer also chaired advisory panels to revise New York's rules of evidence and to provide permanency planning for foster children. Just before his death, Judge Meyer coauthored a history of the New York Court of Appeals.

A jurist of national reputation, Judge Meyer served as chair of the National Conference of State Trial Judges, director of the National Center for State Courts, board member of the National College of the State Judiciary, and member of the Governor's Commission on Integrity in Government.

A native of Baltimore, Judge Meyer was educated at Johns Hopkins University and the University of Maryland School of Law. Admitted to the bar in 1938, Judge Meyer worked in the office of general counsel of the United States Treasury Department before serving in the Pacific with the United States Navy during World War II. After the war, Judge Meyer helped establish the law firm of Meyer, Suozzi, English & Klein, P.C.; his partners included former presidential advisers, appellate and trial judges, prosecutors, and other high government officials.

It was while I was privileged to be his partner there that Judge Meyer introduced me to Scribes and encouraged my participation. Judge Meyer believed that a judge should explain in writing the reasons for his or her decision, so parties and their counsel know that the judge has considered their arguments and addressed them in a principled way. Judge Meyer viewed Scribes as an organization that embodied his professional values, just as he embodied those of Scribes. His obituaries described Judge Meyer as a "giant" and a "role model." And he certainly was.



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Hastings Student Wins Scribes 2006 Law-Review Award

Amanda L. Morgan, a student at Hastings College of Law, won the 2006 Scribes Law-Review Award for the best student-written note or comment in a law review or law journal. Her note was entitled *U.S. Officials' Vulnerability to "Global Justice": Will Universal Jurisdiction over War Crimes Make Traveling for Pleasure Less Pleasurable?* It was published in 57 *Hastings Law Journal* 423 (2005). The award was presented by Joe Kimble, Scribes' Executive Director, in March at the National Conference of Law Reviews.

Remarks by Professor Kimble

First, I want to thank three organizations: the National Conference of Law Reviews for making this Scribes dinner an annual event; Thomson West for once again sponsoring the dinner; and Joe Christensen, Inc., for producing the offprints of the winning article.

I'd also like to make a quick plug for Scribes. Scribes is the oldest and, we believe, most prestigious organization devoted to improving legal writing and honoring legal writers. Since all of you in this room are editors of a law review or law journal, you automatically qualify for membership. And we have a new offer to make: Scribes has decided to offer a one-year membership for student editors at \$15. You'll find an application form at the NCLR table, where you can also pick up a complimentary copy of *The Scribes Journal of Legal Writing*.

Now, one more preliminary. I want to give you some inside information that you can share with your successors for next year's competition. I'll call these the special secrets of winning the Scribes Law-Review Award. Let me list ten, plus a bonus item.

1. Try to have more than half of every page devoted to footnotes. After all, readers care less about what you are saying than about whether you have cited every authority even remotely on point since the beginning of recorded history.
2. Practice the art of the midsentence footnote. Try to hang one on every clause, at least. The current record is held by an author who managed to work in 9 footnotes into a 21-word sentence.
3. Use as many prepositional phrases as possible. Never settle for "the landlord's duty to maintain the common areas" when you can write "the duty of the landlord with regard to the maintenance of the common areas."
4. Use *pursuant to* as often as possible. Sprinkle it on your paper like salt. We love the poetry of *purSOOant TO*. So forget about the word *under*. And while you're at it, never use *before* and *after* when you can write *prior to* and *subsequent to*. We all know that Robert Frost made a rare misstep when he wrote "And miles to go before I sleep." It should have been "And miles to go prior to my sleeping." In short, strive for inflated diction. Never mind what George Bernard Shaw said: "The ambition of a novice is to acquire the literary language; the struggle of the adept is to get rid of it."
5. Try for an average sentence length of about 35 words. Anything less will not challenge your reader enough. It will open your writing to charges of being unsophisticated, dumbed down, babyish, base, dull, and drab.
6. Likewise, test your reader's mental agility by inserting long intrusive phrases between the subject and verb. For example: "The employees, who had tried unsuccessfully for more than a year to resolve the problem through a series of meetings with company representatives, finally sued in federal court." Wait a minute. A simple verb like *sue* isn't good enough. Make it *brought suit*. Better yet: *instituted litigation*.
7. Never start a sentence with *But*. Everybody knows that *How-ev-er*, with a comma, is much more rhythmic. And we all learned from our high-school teachers that you should never start a sentence with *And*, *But*, or *So*. We also learned that we should never split an infinitive, never end a sentence with a preposition, never use the first person, and never use a contraction. God forbid that you should write *it's*. We have standards to uphold—and superstitions to believe in.

8. Never use a dash. The dash is way too informal for the lofty enterprise of the law-review article.
9. Pay no attention to navigational aids or to formatting. Readers love to be faced with long stretches of uninterrupted text without any headings or subheadings to point the way. And do not stoop to using lists or bullet dots or diagrams or graphic devices of any kind.
10. Do not try for anything humorous or light. Ignore Fred Rodell's complaint that "it seems to be a cardinal principle of law-review writing and editing that nothing may be said forcefully and nothing may be said amusingly." It's just too risky to try for anything fresh or expressive, or to use an occasional allusion or metaphor. Readers are more comfortable with aphorisms and clichés, such as "Legal writing is like the weather: everybody complains about it, but nobody does anything about it." And when you use expressions like this, try hard to track down the source. If all else fails, attribute it to Mark Twain. He's always a good bet.
11. Finally, a bonus secret: ignore the model of the Scribes law-review winner. We all know that the winners, including this one, aren't perfect. So don't write as Amanda Morgan does in her winning article, on page 445:

The photos that emerged from Abu Ghraib were sinister and shocking. The actions were brazen. Capturing those acts on film was intended, not covert. The photographs told a story, but one that was open to interpretation. Questions remained. Why were these acts of torture and degradation discovered when usually such abuse remains carefully hidden behind closed doors? Why did the soldiers involved appear to feel justified in their actions?

Actually, that's pretty good, isn't it? And for writing like that, Amanda's note was chosen as the best from among more than 70 entries in the Scribes competition.

Let me tell you just a bit about her. She received her B.A. and M.A. from Stanford, she was a Fulbright Scholar, and she graduates in May from Hastings, where she won a bunch of academic awards and moot-court competitions.

What's more, she's a versatile writer. She has published in a book of short stories, and she published an essay in a rhetoric and reader for writers.

When we asked Amanda how she became interested in universal jurisdiction over war crimes, here's what she said:

I have been interested in human-rights law since I studied abroad in Chile my junior year of college. When choosing a topic for my note, I knew that I wanted to focus on human rights. I have

always had a personal interest in the Pinochet case, based on my experiences in Chile. The Pinochet case set an interesting precedent for using universal-jurisdiction laws, and I began to wonder how these laws might be used in the future. When the Center for Constitutional Rights petitioned the German government to investigate crimes committed by U.S. officials in Iraq, I thought that it presented very timely and interesting political and legal questions.

Indeed it did. And it produced a winner. So if Amanda will come forward, I'd like to present her with the award.

Remarks by Amanda L. Morgan

Thank you, Professor Kimble, Scribes, and the National Conference of Law Reviews. I'm honored to be here tonight representing the Hastings Law Journal, and honored to receive the Scribes Award. I have been asked to say a few words about my note, which is about universal jurisdiction over war crimes, and whether U.S. political and military leaders might be subject to prosecution in foreign jurisdictions for war crimes committed at Abu Ghraib.

Universal jurisdiction arises under international law and refers to the jurisdiction that nations have over crimes that are so heinous they are considered crimes against all of humanity. Traditionally, criminal jurisdiction is coterminous with a state's sovereignty. Therefore, traditionally, states have criminal jurisdiction only over crimes that occur within a state's territory or that have



Amanda L. Morgan accepted the 2005 Scribes Law-Review Award from Professor Joe Kimble.

some other connection or nexus to the state. But, under universal jurisdiction, a state may assert criminal jurisdiction over a crime that has no connection to the territory of the state, or the state itself. Rather than a nexus, it is the nature of the crime itself that exposes the crime to prosecution through universal jurisdiction. Since the 1990s, a number of European nations, including Germany, began to write universal jurisdiction into their criminal codes.

Following the scandal at Abu Ghraib, the Center for Constitutional Rights in New York petitioned the German government, under Germany's universal-jurisdiction law, to investigate and prosecute high-level U.S. military and political leaders for war crimes allegedly committed in Iraq. The German prosecutor declined to investigate or prosecute, since he determined that one of the essential elements of prosecuting under the universal-jurisdiction law in Germany was absent. That missing element was that the state with primary jurisdiction over the crime—the United States—must be unwilling or unable to investigate and prosecute. Despite the German prosecutor's finding to the contrary, the United States has not investigated the role that high-level U.S. leaders, named in the complaint, played in the events at Abu Ghraib.

The German prosecutor's reasoning for declining jurisdiction—which was the U.S.'s own willingness and ability to investigate and prosecute these crimes—seems to hold the key for protecting U.S. citizens from prosecution in foreign forums where constitutional protections such as due process may not apply, while simultaneously holding U.S. citizens accountable for their actions abroad. I therefore proposed in the note the need for an independent prosecutor to be able to initiate investigation of the political branches, without becoming vulnerable to being co-opted by political or partisan interests.

In deciding to write this note, I was inspired by my personal experiences living abroad in Chile over ten years ago. During that time, I was conducting research for my undergraduate honors thesis. Through my research, I interviewed victims of human-rights abuse that occurred during Pinochet's military dictatorship, and I witnessed how the amnesty law, preventing investigation and prosecution of perpetrators of human-rights abuse, prevented a national healing process from taking place. These experiences contributed to my personal interest in following Pinochet's story, and I became intrigued by the possibility of using universal

jurisdiction to hold human-rights abusers accountable for their actions, when politics and security interests in their own country make accountability impossible.

Perhaps the biggest success story arising from the use of universal-jurisdiction laws to indict Pinochet in Europe was that this indictment led to political change in Chile. Officials in Chile opened investigations into over 170 domestic complaints against Pinochet, after an amnesty law had made this impossible after Chile's transition to democracy in 1989. In the case of Abu Ghraib, I was hopeful that international legal action could also inspire domestic accountability to investigate and, if appropriate, prosecute war crimes that may have been committed by U.S. leaders in Iraq. But, this domestic response is not possible if the people responsible for investigating alleged crimes are also implicated in those crimes. For this reason, an independent-prosecutor role must be reestablished, but with new, additional checks and balances, perhaps through the judiciary, to prevent that prosecutor from developing unbridled power.

In conclusion, I would like to thank the Board of the Hastings Law Journal, especially Christopher Lockard, Kathleen Kizer, Katie Patton, Audrey Jing, and Jeffrey Wehr, who all played a significant role in the publication process and my ability to be with you here tonight. Thank you.

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