2013

"When Numbers Get Serious:" A Study of Plain English Usage in Briefs Filed Before the New York Court of Appeals

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"WHEN NUMBERS GET SERIOUS"*:
A STUDY OF PLAIN ENGLISH USAGE IN BRIEFS FILED BEFORE THE NEW YORK COURT OF APPEALS

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At the time of writing, the academic discipline of legal writing has just celebrated its twenty-fifth birthday in the United States.[1] This is a significant milestone and the discipline enters its second quarter century in impressively robust health: it has three professional organizations dedicated to it,[2] three specialist journals,[3] an ever-expanding bibliography of articles

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* This title is taken from a Paul Simon song of the same name. Paul Simon, *Hearts and Bones* (Warner Bros. 1982). For the lyrics of the song, see http://www.lyricstime.com/paul-simon-when-numbers-get-serious-lyrics.html.

** Associate Professor of Law and Director, Legal Communication and Research Program, Syracuse University College of Law. Thanks to my indefatigable research assistants, Juliana Chan, Rachel Barranello, and Meredith Burke, who did the hard work on this project. Thanks also to Dean Hannah Arterian for her support. As always, this is for Julia McKinstry.

1 *See*, Kirsten B. Gerdy, *Introduction To The Legal Writing Institute: Celebrating 25 Years of Teaching & Scholarship*, 61 MERCER L. REV. 759 (2010). For a concise discussion of the history of legal writing as a discipline, *see* Linda L. Berger, Linda H. Edwards, and Terrill Pollman, *The Past, Presence, and Future of Legal Writing Scholarship: Rhetoric, Voice, and Community*, 16 LEG. WRITING, 521 (2010), and Mary S. Lawrence, *The Legal Writing Institute The Beginning: Extraordinary Vision, Extraordinary Accomplishment,* 11 LEG. WRITING 213 (2005). It is difficult to date with precision the origins of legal writing as a subject of study, of course. Lawyers were giving each other advice on how to write in the nineteenth century (*see, e.g.,* Irwin Taylor, *Preparation of a Legal Brief*, 6 Am. Law. 219 (1889), *quoted in*, Helen Anderson, *Changing Fashions in Advocacy: 100 Years of Brief-Writing Advice*, 11 J. APP. PRAC. & PROC. 1 (2010). The publication of David Melnikoff's *The Language of the Law*, in 1963, and his *Legal Writing: Sense and Nonsense* in 1982, helped to provide a contemporary basis for the study and teaching of legal writing in the American legal academy, and the MacCrate Report -- more properly, the ABA Section on Legal Education and Admissions to the Bar, *Legal Education and Professional Development: An Educational Continuum* (1992) -- with its emphasis on writing as a core lawyering skill, was instrumental in persuading almost all American law schools to provide legal writing education to all their students in the first year of law school. The Legal Writing Institute has been holding biennial conferences since 1984. *See,* Carol McCrehan Parker, *The Signature Pedagogy of Legal Writing* 16 LEG. WRITING 463, 464 (2010), and has published a newsletter since 1985. *Id.*

2 These are Scribes -- "The American Society of Legal Writers" -- the Legal Writing Institute ("LWI") , and the Association of Legal Writing Directors ("ALWD"). Both the LWI and ALWD mount substantial biannual conferences. The legal writing section of the American Association of Law Schools is also an active organizer of conference presentations about legal writing, as are the numerous organizing committees of regional legal writing conferences around the country. In addition, there have been three biennial Applied Legal Storytelling conferences (*see, http://www.law.du.edu/index.php/storytelling-conference?*)

published in other journals and law reviews,[4] two listservs and at least one blog,[5] and a library-full of books devoted to its study and teaching.[6] Most law schools in the country employ faculty dedicated to teaching legal writing, many of them adjuncts, to be sure, but many more as full-time teachers. Indeed, because the recognized best practices model of teaching legal writing involves relatively small classes,[7] it is likely that there are more teachers of legal writing in the current American legal academy than there are for any doctrinal subject.[8]

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and a seventh Global Skills legal writing conference was held in March, 2012. *See,* http://globallegalskills.net/.

[3] The Scribes Journal of Legal Writing, Legal Writing: the Journal of the Legal Writing Institute, and Legal Communication and Rhetoric: the Journal of the Association of Legal Writing Directors. Shorter, more pedagogically-based, articles can be found in *Perspectives*: *Teaching Legal Research and Writing,* a collection of short articles that was in print from 1992 to 2010 and is now an online journal, located at west.thompson.com/journal/perspectives, and The Second Draft, the LWI's newsletter, located at http://www.lwionline.org/the_second_draft.html. Legal writing also has an online journal as part of the Social Science Research Network, located at http://papers.ssrn.com/sol3/JELJOUR_Results.cfm?form_name=journalbrowse&journal_id=902240.

[4] A relatively comprehensive bibliography of scholarship written by legal writing faculty was published in 2005. Terrill Pollman & Linda H. Edwards, *Scholarship by Legal Writing Professors: New Voices in the Legal Academy*, 11 LEG. WRITING 329 (2005). Other bibliographies of legal writing scholarship include Kathryn Stanchi, *Persuasion: An Annotated Bibliography*, 6 J ALWD 75 (2009) and Carrie W. Teitcher, *Legal Writing Beyond Memos and Briefs: An Annotated Bibliography,* 5 J ALWD 133 (2008).

[5] LRWPROF-L is a closed listserv devoted to discussions between legal writing scholars and faculty. For more information on this listserv, *see* http://www.lwionline.org/mailing_lists.html. The DIRCON listserv is a closed listserv for members of the Association of Legal Writing Directors. *See*, http://www.alwd.org/contact.html. The Legal Writing Prof Blog provides information and updates of interest to those interested in legal writing. *See* http://lawprofessors.typepad.com/legalwriting/.

[6] A full bibliography of such books would be lengthy and pointless. The catalogs of legal text publishers -- especially Aspen/Wolters Kluwer, Foundation Press, and Carolina Academic Press -- should give a sense of how many textbooks directly and tangentially related to legal writing there are.

[7] The American Bar Association's Sourcebook on Legal Writing Programs suggests that "each professor in a required legal writing course should have no more than 30 to 35 students." ABA Section of Legal Education and Admissions to the Bar, Sourcebook on Legal Writing Programs, 89 (2d ed 2006).

[8] For purposes of this article, I use the commonly-accepted division between "doctrine," (those subjects that are principally involved with the identification and study of legal principles -- torts, contracts, evidence, and so on) and "skills" (those subjects involving the practical application of legal doctrine, including legal writing, legal research, clinics, trial advocacy, and so on). In fact, such distinctions are unreliable and are frequently blurred;

There are, of course, numerous challenges still to be faced by those teaching in the area,[9] but it would be difficult not to view the rapid growth and integration of legal writing into the American legal curriculum as an almost complete success story.

The rise of legal writing's importance in the legal academy has coincided with a recognition of writing's importance in a lawyer's professional life.[10] Practitioners,[11] clients,[12] judges,[13] the general public,[14] and

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students in contracts classes might be asked to draft a simple contract, for example, and students in legal writing classes are often asked to identify and study legal principles related to their writing assignments. Given the speed with which legal writing has established itself in the American law school curriculum, it is entirely possible that such distinctions will be unrecognizable when the LWI's fiftieth birthday is celebrated.

[9] Things might have improved recently for some legal writing faculty, but few would disagree that Kent Syverud's assessment of many legal writing teachers' status in 1992 still has relevance ten years later: "The terms and conditions of employment reflect the [lower caste] status [of legal writing teachers], with caps on terms of employment, low salaries, and other restrictions -- including resistance at many schools even to the use of a Professor or Faculty title." Kent D. Syverud, *The Caste System And Best Practices In Legal Education*, 1 J ALWD 12 (2002). As Kathryn Stanchi observed, "[t]he legal writing profession is a place where the complexities of institutional inequality, economics, and gender bias intersect." Kathryn M. Stanchi, *Who Next, The Janitors? A Socio-Feminist Critique Of The Status Hierarchy Of Law Professors*, 73 UMKC L. REV 467, 469 (2004). *See also,* Jan M. Levine, *Voices in the Wilderness: Tenured and Tenure-Track Directors and Teachers in Legal Research and Writing Programs*, 45 J. LEGAL EDUC. 530 (1995); Jan M. Levine, *Legal Research and Writing: What Schools are Doing, and Who Is Doing the Teaching* 7 SCRIBES J. LEG. WRITING 51 (1998-2000). An improving trend in legal writing faculty status was recorded in a later article: Susan P. Liemer & Jan M. Levine, *Legal Research and Writing: What Schools Are Doing, and Who Is Doing the Teaching (Three Years Later),* SCRIBES J. LEG. WRITING 113 (2003-2004).

[10] The 1992 MacCrate Report is perhaps the best-known formal recognition of the importance of legal writing education. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT -- AN EDUCATIONAL CONTINUUM (1992). That report, however, acknowledges an earlier ABA report as support for the proposition that "[t]here is a general recognition among legal educators and the practicing bar that effective communication skills are essential to competent legal practice. *Id*. at 175, citing SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N., REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS, 9 (1979)(listing writing effectively as one of seven fundamental skills required for "[l]awyer competence.") More recently, the Carnegie Report has recognized that legal writing education in law schools helps students "begin[] to cross the bridge from legal theory to professional practice." William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law*, 105 (2007).

[11] *See, e.g.,* David T. Mittelman & William L. Tolbert, Jr., *Preparation Of Annual Disclosure Documents*, PRACTICING LAW INSTITUTE: CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES, 1039 (2008)("The truth is, companies can better control their litigation risk if they present material information to their investors in plain English"); Leigh Walton & Chambre Malone, *Latest Developments In Sophisticated Exempt Offerings*, ALI-ABA

legislators[15] have all recognized that clarity and simplicity of expression are important to lawyers[16] and are the natural allies of legal writing faculties across the country.

REPRESENTING THE GROWING BUSINESS: TAX, CORPORATE, SECURITIES, AND ACCOUNTING ISSUES (2008)("Lawyers should . . . consider utilizing plain English when drafting [Private Placement Memorandums] because plain English risk factors provide more appropriate disclosure under the 'bespeaks caution' doctrine, assure consistency with later public offering documents, and, once learned, it will be easier to draft all offering documents in the same style.").

[12] See, e.g., Christopher R. Trudeau, *The Public Speaks: An Empirical Study of Legal Communication,* 14 SCRIBES J. LEG. WRITING __ (2012), HTTP://PAPERS.SSRN.COM/SOL3/PAPERS.CFM?ABSTRACT_ID=1843415, at 26 (2012)("[T]he vast majority of clients and non-clients prefer plain language. For the choice-of-language questions, respondents chose the plain-language version 80.2% of the time. In fact, the plain-language version handily prevailed in all the choice-of-language questions, and clients were five percent more likely to prefer plain language than were non-clients"). In his preface to the U.S. Securities and Exchange Commission's Plain English Handbook, Warren Buffet, one of the more prominent consumers of corporate legal writing, notes that "[i]f corporate lawyers and their clients follow the advice in this handbook, my life is going to become much easier." Warren E. Buffet, *Preface, A Plain English Handbook: How To Create Clear SEC Disclosure Documents*, 1 (1998).

[13] After conducting an empirical study of judicial preferences, Sean Flammer concluded that "[t]he results are clear: judges prefer Plain English to Legalese. Whether a judge is an appellate or trial judge or a federal or state judge plays no role in whether the judge prefers Plain English. Nor does the judge's gender, age, years of judicial experience, or years of experience in the legal profession. Whether a judge's district is rural or urban plays no role, either. Judges -- by a two-thirds margin, find Plain English more persuasive than Legalese. Thus, it is in the litigator's interest to submit pleadings in Plain English. Sean Flammer, *Persuading Judges: An Empirical Analysis Of Writing Style, Persuasion, And The Use Of Plain English* 16 LEG. WRITING 183, 211 (2010).

[14] See, e.g., Maria Mindlin, *Is Plain Language Better? A Comparative Study of Court Forms,* 10 SCRIBES J. LEG. WRITING 55, 55 (2005-2006)(study of 60 citizens on a Sacramento jury panel showed "a marked and statistically significant improvement in reader comprehension when court forms are converted to plain language").

[15] In particular, legislatures seem to be concerned that documents affecting consumers be written in plain English. In defining the concept, the Plain Writing Act of 2010 notes that "[t]he term 'plain writing' means writing that is clear, concise, well-organized, and follows other best practices appropriate to the subject or field and intended audiences." 5 U.S.C. § 301. George Gopen has critiqued this language from a Plain English perspective, wondering "what 'best practices' have been established." George D. Gopen, *IRAC, REA, Where We Are Now, And Where Should We be Going In The Teaching Of Legal Writing*, 17 LEG. WRITING xvii, xxv (2011). For discussion of other Plain English legislation, *see* Louis J. Scirico, *Readability Studies: How Technocenterism Can Compromise Research And Legal Determinations,* 26 QUINN. L. REV. 147, 148, nn. 5-6 (2007), citing, CONN. GEN. STAT. ANN. § 42-152 (West 2007); MINN. STAT. ANN. § 325G.31 (West 2006); N.J. STAT. ANN. § 56:12-10 (West 2007); N.Y. GEN. OBLIG. LAW § 5-702 (McKinney 2006); OR. REV. STAT. § 180.545 (2005); 73 PA. CONS. STAT. § 2205 (West 2006).

[16] While no one disagrees that lawyers should write as clearly as possible, at least one study suggests that a client's chances of winning an appeal are not improved by the writing skills of the client's lawyer. Lance N. Long and William Christensen, *Does The Readability*

This rosy picture might come as a surprise to someone whose perception of lawyers has been formed by the historically poor light in which legal writing has been viewed.[17] And it is here that a slight blur of doubt must intrude into the optimistic vision of the current legal writing landscape, because the criticisms of legal writing continue, apparently unabated, even though for the past twenty-five years or so, law schools have been producing graduates who are carefully trained in the technique and practice of legal writing.[18] If legal writing is such a successful discipline, why is it that the

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Of Your Brief Affect Your Chance Of Winning? -- An Analysis Of Readability In Appellate Briefs And Its Correlation With Success On Appeal, 12 J. APP. PRAC. & PROC. 145 (2011). Viewed one way, this is a disappointing result for one who teaches legal writing, who would like to believe that writing skill would be recognized and rewarded. A more realistic view, though, is that this is precisely the result society should wish for. Were the result to have been otherwise, and were it true that good writing always prevailed over bad, the legal system would be dominated by the law school graduates who showed themselves to be the most skillful writers and justice would be in the hands of those who could afford to pay those writers the most money. It is, therefore, reassuring to note that judges appear to reach their decisions based on the factual and legal merits of the case, not just on how those merits are presented.

[17] In 1566, a lawyer "expanded what should have been 'a short pleading' [in]to [one of] 120 pages." George D. Gopen, *The State Of Legal Writing:* Res Ipsa Loquitur, 86 MICH. L. REV. 333, 346 (1988), citing *Milward v. Welden* 21 Eng. Rep. 136 (Ch. 1566). In response to the lawyer's inability to keep the document short, the judge "ordered a hole cut in the middle of the document, through which the offender's head was thrust; this interlocking pair was then to be led around Westminster Hall during court sessions as an example to future padders and expanders." *Id.* More recent criticisms abound. *See, e.g.*, Ian Gallacher, *Who Are These Guys?": The Results Of A Survey Studying The Information Literacy Of Incoming Law Students*, 44 CAL. WESTERN L. REV. 151, 153, n. 7 (2007)(quoting David M. Becker, *My Two Cents on Changing Times*, 76 WASH. U. L. Q. 43, 53 (1998)("do [law] students of the nineties write better or at least as well as the students of the sixties and seventies? The answer is: no, they do not even write as well!"); Albert P. Blaustein, *On Legal Writing*, 18 CLEV.-MARSHALL L. REV. 237, 237 (1969)("Virtually all legal writing is atrocious!"); William L. Prosser, *English As She Is Wrote,* 7 J. LEGAL EDUC. 155, 157 (1954)("Very, very many of [my students] are hopelessly, deplorably unskilled and inept in the use of words to say what they mean, or, indeed, to say anything at all"); Arthur T. Vanderbilt, *A Report on Paralegal Education,* 25 N.Y.U. L. REV. 199, 209 (1950)("[There is a] well-nigh universal criticism respecting the inability of law students to think straight and to write and speak in clear, forceful, attractive English); Fred Rodell, *Goodbye To Law Reviews,* 23 VA. L. REV. 38, 38 (1936)("There are two things wrong with almost all legal writing. One is its style. The other is its content."); K.N. Llewellyn, *On What Is Wrong With So-Called Legal Education,* 35 COLUM. L. REV. 651, 660 (1935)("I want every law student to be able to read and write. Half of my first-year students, more than a third of my second-year students, can do neither.")).

[18] See, e.g., Susan Hanley Kosse & David T. ButleRitchie, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study*, 53 J. LEGAL EDUC. 80 (2003). The bottom line conclusion from that study was simple, direct, and pessimistic: "Nearly 94 percent, overall, of the respondents found briefs and

consumers of that writing -- practitioners, judges, and so on -- are still so critical of it?

Part of the answer to that conundrum might be that criticism of legal writing is a cultural norm, an accepted critical trope passed down from generation to generation that has nothing to do with the actual quality of the writing under consideration. If that is the case, then evidence should exist to show that legal writing has actually improved in the recent past, and that the current criticisms of legal writing are, if not unfounded, then at least based in part on perception rather than reality.

At least one study suggests precisely that.[19] Professor Brady Coleman and Quy Phung conducted a survey of briefs filed in the United States Supreme Court between 1969 and 2004[20] -- a corpus of nearly 9,000 documents.[21] The authors used three "readability" formulas -- the "Flesch Reading Ease," the "Gunning Fog," and the "Flesh-Kincaid" to study trends in the readability of these briefs.[22] The authors conducted their survey based on the assumption that "the average readability scores of [the briefs would function] as a proxy for plainness in writing" and summarized their results by noting that "[i]f our most important assumptions are accepted -- that readability offers reliable evidence of plainness, and that Supreme Court briefs provide an acceptable representation of legal writing[23] -- then the

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memoranda marred by basic writing problems. *Id*. at 85. *See also*, Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 LEG. WRITING 257, 276 (2002)("[A] significant percentage -- twenty-one percent, thirty-nine percent, and twenty-six percent -- said that lawyers' abilities range from poor to fair in mechanics, style, and tone, respectively. Only two percent rated mechanics as 'excellent.' Twenty-six percent rated mechanics as 'very good,' eleven percent rated style as 'very good,' and sixteen percent rated tone as 'very good.' Apparently, in addition to working better with the law, lawyers still need to brush up on -- or develop -- basic writing skills").

[19] Brady Coleman and Quy Phung, *The Language of Supreme Court Briefs: A Large-Scale Quantitative Investigation* 11 J. APP. PRAC. & PROC. 75 (2010).

[20] *Id*. The data set for the survey comprised "nearly every brief on the merits presented to the Court for the thirty-five years between 1969 and 2004." *Id*. at 76.

[21] *Id*. at 103.

[22] *Id*. at 85.

[23] This is an understandable assumption. The United States Supreme Court is, after all, the pinnacle of appellate practice in this country and it is fair to assume that every

following conclusion is warranted: A gradual historical trend towards plainer legal writing is revealed over recent decades."[24]

The Coleman/Phung study found that a Flesch Reading Ease analysis of the "argument" section of their brief corpus revealed no significant changes over time, and therefore did not include those results in the final article.[25] The study did, however, find a reduction in the Flesch-Kincaid scores for argument sections in briefs, from a starting position of 14 in 1970 to a final result of 13.5 in 2004, with a high just below 14.4 in 1973 and a low just below 13.2 in 1983.[26]

The authors of the Coleman/Phung study recognized that the results of their study, while consistent with a trend towards greater plainness of expression in the argument section of their brief corpus, were not especially strong indicators of this trend. They explain their results as follows:

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lawyer with the chance to work on a brief to be filed there will work hard to produce the best possible work product. But given the importance of Supreme Court decisions, and the nature of law practice in this country, it is likely that the vast majority of Supreme Court briefs are corporate products, the result of numerous lawyers working together with the drafts being edited multiple times by committees. There is no way to know, of course, how a particular brief was drafted, and the survey's authors acknowledge the committee-like nature of written Supreme Court advocacy when they note that "[f]reshly-minted law school graduates are less likely to write briefs to the Supreme Court than are more senior attorneys, of course, although junior lawyers employed at the Solicitor General's office are presumably involved in the brief-writing process at a much earlier stage in their careers, to offer just one possible counter-example." *Id*. at 103, n. 45. The emphasis on "process" here is telling and is likely correct; junior attorneys, especially in the Solicitor-General's office, likely are involved in the process of generating Supreme Court briefs, but the final product is likely the product of a corporate sensibility that makes it difficult to identify stylistic trends, especially using empirical methods. Of course, any consideration of the process by which Supreme Court, or any court, briefs are generated is covered by the shroud of work product and attorney-client privilege and is, therefore, anecdotal and speculative.

[24] *Id*. at 103.

[25] *Id*. at 97. The survey did reflect changes in statements of facts under both the Flesch Reading Ease and Flesch-Kincaid tests, as well as changes using the Fog Index. *Id*. at 95-101. Because the present survey looks only at the Flesch Reading Ease and Flesch-Kincaid scores as calculated by Microsoft Word, I have focused on the comparable results here.

[26] *Id*. The numbers correspond to a grade level. in the U.S. educational system. "For example, a score of 8.2 would indicate that the text is expected to be understandable by a student in the eighth grade." *Id*. at 84.

> As we anticipated, changes in average readability scores were stronger in the Statement of Facts section of Supreme Court briefs than in the Argument section. The Statement of Facts almost always offers legal writers more stylistic and structural flexibility than the Argument section. The factual narrative, typically chronological, yet unencumbered by the constraints of rule-based legal argument and the need for citation to legal authority, should normally reveal more stylistic freedom, and therefore more long-term variation, as a consequence of external forces such as greater emphasis on writing plainly. Again, though, both the Argument and the Statement of Facts components do reveal parallel changes in readability over the quarter century of our data, even if the latter component provides more striking evidence of this historical shift.[27]

Arguably, though, it is precisely in the Argument section of a brief -- with its stylistic "constraints of rule-based legal argument" -- where a greater emphasis on plainness and simplicity of expression are most needed, and of the three tests employed by the survey's authors, one showed no change from 1970 to 2004, and one showed a reduction of one-half of one grade level.[28] Viewed more closely, then, the Coleman/Phung study is not quite the good news the legal writing community might have hoped upon reading the authors' conclusion that "[a] gradual historical trend towards plainer legal writing is revealed over recent decades."[29]

The present survey reveals results that suggest even less cause for optimism than do those presented in the Coleman/Phung survey. Using a much more limited brief corpus, from the New York Court of Appeals instead of the United States Supreme Court, and using different methodology from that used in the Coleman/Phung survey, the present survey suggests that the trend is actually moving away from plainer writing, even at a time when the efforts of legal writing teachers should be producing the opposite effect.

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[27] *Id*. at 101.

[28] The third test employed by the authors -- the Fog index -- showed a similarly-scaled reduction "from about 17.6 to about seventeen over our twenty-five year time period." *Id*. at 96.

[29] *Id*. at 103.

This article will first discuss the two reading tests on which the Coleman/Phung survey (in part) and the present survey (in whole) were based, and will then discuss the methodology employed for the present survey. After then discussing the results of this survey, the article will discuss some possible reasons for those results and will conclude with some suggestions for ways in which the current state of legal writing in practice might be improved.

A. Readability Tests and their Dangers

Readability tests are designed, as one might imagine, to determine how readable a piece of writing might be. Developing such a test is fraught with difficulties, not the least of which is coming up with a definition of what the concept of "readability" might mean. Rudolph Flesch, the developer of the readability test that bears his name, defined "readable" as "a text that will evoke a large number of correct comprehension test responses, if read by a given group of readers."[30] Such a circular definition, though, raises almost as many questions as it answers: who are the "given group of readers?," for example, and when will their comprehension be tested? Attempting to answer such questions, and the others that are raised by the concept of "readability," could engulf any review of the application of readability studies, so I propose a different approach: "readability," in the context of this article, at least, stands as a proxy for those things measured by readability studies. Such a definition has the same vices of circularity and self-referentiality as the Flesch definition, but has the virtue of side-stepping the morass of problems freighted with the simple question "readable to whom?"[31]

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[30] Rudolph Flesch, MARKS OF READABLE STYLE: A STUDY IN ADULT EDUCATION 9 (1943), *quoted in*, Sirico, *supra,* n. 15, at 147, n. 1.

[31] Professor Scirico notes additional problems with readability tests, observing that "practically everyone in the readability field understands that the comprehensibility of a document depends on a number of factors that do not lend themselves to numerical testing, for example, the intellectual complexity of the contents and the syntactical complexity of the writing style." *Id*. at 149. Other criticisms of these tests are summarized by Professors Long and Christensen in their article. Long and Christensen, *supra* n. 16, at 151-2.

The Flesch Reading Ease test is based on two assumptions: (a) short words are easier to understand than long ones, and (b) short sentences are easier to understand than long ones."[32] When reduced to numbers, the test can be expressed as "Reading Ease = 206.835 minus .846 (number of syllables per 100 words) minus 1.015 (average number of words per sentence)."[33] The formula produces a "score[] between 0 and 100, with higher scores indicating greater readability. . . ."[34]

The Flesch-Kincaid test is a reformulation of the Flesch Reading Ease test that expresses its result in terms of the grade level a hypothetical reader should have achieved before the selected passage would be readable.[35] Once again, the test requires a calculation of the number of sentences and syllables are counted. "Then, the average number of words per sentence (average sentence length or 'ASL') and the average number of syllables per word ('ASW') are calculated. The grade level is determined once the numbers are entered into the following formula: .39(ASL) plus 11.8(ASW) minus 15.59."[36] The final result is once again expressed in a number, but as opposed to the Flesch Reading Ease test, the more "readable" the writing, the lower the resulting number, corresponding to a lower grade level for the hypothetical reader.

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[32] Richard C. Wydick, *Book Review How to Write Plain English: A Book for Lawyers and Consumers,* 78 U. MICH. L. REV. 711, 714 (1980). For a detailed discussion of the development of the Flesch Reading Ease test, *see*, Scirico, *supra* n. 15, at 155-59.

[33] Rudolph Flesch, THE ART OF READABLE WRITING, 213-216 (1949), *quoted in* Scirico, *supra* n. 15, at 158.

[34] Scirico, *supra* n. 15, at 159. Documents falling before a score of 45 on the Flesch test scale are deemed to have "failed" the Reading Ease test. Gopen, *supra* n. 15, at xxiii. Professor Gopen notes that "[t]he idea that '45' has some magic qualities to it should have been dismissed in derision many decades ago." *Id*.

[35] *Id*. at 161.

[36] Scirico, *supra* n. 15, at 150.

Rudolph Flesch published several books about the virtues of Plain English[37] but likely both his Reading Ease test and the Flesch-Kincaid test would have remained on the periphery of the academic debate about lawyer writing had not Microsoft incorporated both tests into its popular "Word" word processing software.[38] Microsoft's decision makes the tests available to any writer at the click of a mouse, and saves the researcher from the arduous task of counting syllables and words by automating the calculation.

Unfortunately, there is some mystery involved in Microsoft's implementation of these two tests. Microsoft apparently considers the formula it uses to determine the test scores to be confidential,[39] but it appears that Word counts characters, not syllables, and then uses "some algorithm to approximate the number of syllables."[40] In addition, different versions of Microsoft Word appear to apply the Reading Ease and Flesch-Kincaid tests differently, producing different results for the same piece of text.[41]

The prospect of having one's word processor determine, at the click of a button, how readable a given piece of text is powerfully seductive, especially for researchers seeking to compare large bodies of text. Professor Scirico rightly warns against an over-reliance on the results of such comparisons, sounding a warning against a blind "technocentric" acceptance of Microsoft's

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37 THE WAY TO WRITE (rev. ed. 1949); THE ART OF READABLE WRITING (1949); HOW TO TEST READABILITY (1951); THE ART OF PLAIN TALK (1951); THE ART OF CLEAR THINKING (1951); WHY JOHNNY CAN'T READ (1955); THE ABC OF STYLE (1964); SAY WHAT YOU MEAN (1972); HOW TO WRITE PLAIN ENGLISH: A BOOK FOR LAWYERS & CONSUMERS (1979).

38 Professor Scirico suggests three possible reasons for Microsoft's decision to incorporate the Flesch-Kincaid test into its word processor: "First, it bears the surname of Rudolph Flesch, a renowned researcher in the field. Second, it supplies the reader with an exact grade level [for their writing]. Third, because it was produced under a government contract, there is no requirement to gain copyright permission or make payment for its use." Scirico, *supra* n. 15, at 166.

39 Scirico, *supra* n. 15, at 165. Professor Scirico's article describes his failed attempts to uncover Microsoft's readability formula. *Id.*,

40 *Id.*

41 Scirico, *supra* n. 15, at 151-2

readability tests.[42] Yet for all their problems, such tests offer a fixed point against which one can measure texts in order to discern trends relating to the "plain" nature of legal writing.[43] Such trends are, to be sure, limited to those that can be identified in relation to the aspects of writing these tests analyze, but for legal writers, the prospect of seeing the progress of Plain English principles in court-filed legal texts is a fascinating prospect.

Professors Long and Christensen recognized the dangers of the Reading Ease and Flesch-Kincaid tests, but argued that they could still provide meaningful results given their limited area of study:

> For our purposes, the limitations and criticisms of readability formulas are largely irrelevant. We chose the Flesch formulae because we wanted to see if using longer sentences and longer words correlated with success on appeal. We assumed that the audience for appellate briefs could read the longer, more complex words and sentences. We only wanted to know whether the length of words and sentences correlated with success on appeal.[44]

Similarly, the present study was not designed to reveal anything significant about how readable the briefs filed in the New York Court of Appeals might be for the judges, law clerks, and lawyers who must read them, but rather was designed to give information about how the principles of Plain English analyzed by the tests -- sentence and word length -- have been applied over time in those documents.[45] In particular, the study was

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[42] Scirico, *supra* n. 15, at 152. Quoting Seymour Papert, Professor Scirico defines technocenterism as "the fallacy of referring all questions to the technology." *Id*., n. 15, quoting Seymour Papert, A Critique of Technocenterism in Thinking About the School of the Future, http://papert.org/articles/ACritiqueofTechnocenterism.html.

[43] Even Professor Scirico, a stern critic of Microsoft's implementation of the Flesh and Flesch-Kincaid tests, notes that "[i]f every version of Word employed the Flesch-Kincaid test correctly, then researchers could reply on the results comfortably. Scirico, *supra* n. 15, at 150.

[44] Long and Christensen, *supra* n. 16, at 154. As the authors revealed in the first sentence of their article, "the short answer is 'no' -- at least if by 'readability' you mean readability as judged by two of the several well-recognized readability formulas developed by researchers during the past fifty or sixty years." *Id*. at 145.

[45] The study therefore uses the Reading Ease and Flesch-Kincaid tests in a fundamentally different way from those statutes that require various documents to achieve

designed to reveal if the effects of systematic legal writing instruction in law schools could be seen in documents written by lawyers.

B. Plain English and Legal Writing

That Plain English[46] is something to be desired in legal writing[47] -- at least legal writing intended to be filed with courts -- is something taken almost as an article of faith in legal writing circles.[48] Much scholarly writing has been devoted to the topic,[49] and many of the many legal writing textbooks

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specific scores on the tests. *See, e.g.*, TEX. ADMIN. CODE § 31.14(d)(1)(C) and D (2007)(contracts for services for clients of private child support enforcement agencies must score at least forty-nine on Reading Ease test and no higher than 10.5 grade on Flesch-Kincaid test).

[46] I use in this article the phrase "Plain English" with both words receiving initial capital letters, to distinguish this style of writing from its description, which is properly written as plain English.

[47] Plain English is considered to be a desirable trait in other styles of writing as well, of course. This article, however, focuses solely on legal writing.

[48] Almost, but not quite. Writing in the early Seventeenth Century, Sir Edward Coke argued that some statutes should continue to be written in French rather than be translated into English, maintaining that "[i]t was not thought fit nor convenient, to publish either those, or any of the Statutes enacted in those days in the vulgar toungue, lest the unlearned by bare reading without right understanding might sucke out errors, and trusting to their owne conceit might endamage themselves, and sometimes fall into destruction." 1 THE SELECTED WRITINGS OF SIR EDWARD COKE 76 (Steve Sheppard ed., 2003)(1605). Writing almost four hundred years later, David Crump offered almost the same argument when arguing that transactional documents might benefit from not being written in plain English. "One case for which I had responsibility early in my practice involved an employment contract. . . . The contract was written in relatively plain English, and it was headed with the words, "employment agreement." One of the parties to the agreement testified adamantly that the document 'obviously' was "not a contract"; instead, he claimed, it was "a simple 'agreement', as simple as the agreements with which we began this deposition." Apparently, this individual had downgraded the importance of the document . . . because its language was not abstruse enough." David Crump, *Against Plain English: The Case for a Functional Approach to Legal Document Preparation*, 33 RUTGERS L. J. 713, 734 (2002). Professor Crump continues that by stripping away language that lawyers might consider boilerplate, such as the agreement "witnesseth that," plain English placed one of the parties to the contract at a disadvantage because the document failed to convey the "dignity, solemnity, and gravity" of a binding legal contract. *Id*. *See also*, Jack Stark, *Should The Main Goal Of Statutory Drafting Be Accuracy Or Clarity*, 15 STATUTE L. REV. 2007 (1994)(arguing that proponents of Plain English know little about the challenges of legislative drafting, where the emphasis should be on accuracy, not clarity).

[49] In addition to the many journal articles already mentioned here, no discussion of the role of Plain English in American legal writing could be taken seriously without mentioning the pioneering work of Professor Joseph Kimble, who has been a tireless advocate for its use. *See, e.g.*, Joseph Kimble, LIFTING THE FOG OF LEGALESE (2006); Joseph Kimble, *How to Mangle Court Rules and Jury Instructions*, 8 SCRIBES J. LEG. WRITING 39 (2001-2001); Joseph Kimble, *The Great Myth that Plain Language is Not Precise*, 7 SCRIBES J. LEG.

and related texts offer at least a brief description of Plain English and its virtues.[50] As Nancy Shultz and Louis Scirico observe, "[c]urrent books and articles make clear that short sentences and plain English are the trend. Rambling sentences and legalese are out."[51] Commentators appear to agree that concise, short sentences are a particularly important feature of Plain English in the legal context. "Part of the goal of using plain English is to be readily understood, and to this end, you should strive to write as concisely as possible. Omit needless words in your writing. Rigorously examine each sentence to see if it can be made shorter."[52]

Diana Pratt has provided a workable set of characteristics for Plain English in legal documents:

"(1) short direct sentences for important information,

(2) subject-verb-object order,

(3) active voice unless you have a reason for using the passive voice,

(4) positive rather than negative construction,

(5) parallel construction for compound ideas,

(6) no unnecessary words."[53]

WRITING 109 (1998-1999); Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 THOMAS M. COOLEY L. REV. 1 (1992).

[50] At least two textbooks include Plain English in their titles: Richard C. Wydick, PLAIN ENGLISH FOR LAWYERS (5th ed. 2005), and Bryan A. Garner, LEGAL WRITING IN PLAIN ENGLISH (2001).

[51] Nancy L Schultz and Louis J. Scirico, Jr., LEGAL WRITING AND OTHER LAWYERING SKILLS, 3-4 (5th ed. 2010).

[52] Michael D. Murray and Christy H. DeSanctis, LEGAL WRITING AND ANALYSIS, 242 (2009). See also, e.g., Terri Le Clerq, GUIDE TO LEGAL WRITING STYLE, 24 (4th ed 2007)("Most legal sentences are too long and too convoluted for easy reading."); Mary Barnard Ray, THE BASICS OF LEGAL WRITING, 6 (Revised 1st ed. 2008)("If you have written previously in other academic fields, you are likely to find that legal writing requires shorter sentences, more obvious transitions, and a smaller vocabulary."); Bradly G. Clary and Pamela Lysaught, SUCCESSFUL LEGAL ANALYSIS AND WRITING: THE FUNDAMENTALS, 99 (3d ed. 2010)("Express your thoughts in the fewest words that are adequate to cover the subject matter. Prefer short words. Prefer short sentences (no more than twenty to twenty-five words). Prefer short paragraphs (no more than eight to ten sentences.)").

[53] Diana V. Pratt, LEGAL WRITING: A SYSTEMATIC APPROACH, 247 (4th Ed. 2004).

Perhaps the strongest sign that Plain English is the accepted model for legal writing is its inclusion as a skill to be taught in first-year legal writing courses in the ABA's Sourcebook on Legal Writing Programs:

> Students should understand the conventions of written discourse in the legal profession. This includes using the appropriate tone and degree of formality, as well as avoiding those conventions that are no longer acceptable in a "Plain English" era, like excessive legal jargon and redundant terms. Students should be able to adapt their writing to a variety of audiences and purposes and to use clear, concise, error-free English in every documents they create.[54]

Yet while Plain English has apparently won almost universal acceptance among legal writing academics, some have noted that its influence is more discernible in the classroom than it is in practice. "Corporate lawyers rely heavily on boilerplate, and most practitioners seem to have absorbed the language of their law school casebooks. They may have heard that legalese is dead, but they don't write like they believe it."[55] The present study was designed to test this assertion; in essence, to explore the extent to which legal writing instruction in law schools can be seen to have changed the way in which lawyers write documents.

C. Methodology and Study Results

In order to study the progress of Plain English, or "readability," -- as measured by the Reading Ease and Flesch-Kincaid tests -- since the advent of widespread intensive legal writing instruction in law schools, this study looked at portions of eight[56] briefs filed in the New York Court of Appeals for each year between 1969 and 2008.[57] Four of the briefs chosen for each year

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54 ABA SOURCEBOOK, supra n. 7, at 25.

55 Anne Enquist and Laurel Currie Oates, JUST WRITING: GRAMMAR, PUNCTUATION, AND STYLE FOR THE LEGAL WRITER, 127 (3d ed. 2009).

56 This number was selected in order to generate a large but not unwieldy body of briefs for analysis. No attempt was made to select a number that represented a certain percentage of the number of briefs filed in any given year.

57 These years were chosen so that a readability baseline that showed scores for the years before legal writing had become an established part of the law school curriculum could

involved criminal law issues and four involved civil law,[58] but no attempt was made to refine those parameters further.[59] The briefs were obtained from microfilm sources and, for those briefs filed more recently, from Westlaw.

In order to prepare the microfilmed briefs for analysis by Microsoft Word's versions of the two readability tests, they were converted to Word documents using Optical Character Recognition ("OCR") software and then were individually checked to make sure that errors introduced into the documents by the OCR process were corrected.[60] This error correction was so time-consuming that I decided[61] to limit the number of pages to be analyzed for purposes of the study. Accordingly, the study reviewed three pages from each brief, drawn from a point beginning on the third page of the brief's analysis section.[62] The results were then averaged to give one score for each year.

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be compared to the scores for the years during and after the introduction of systematized legal writing education.

[58] This limitation was imposed on the study in order to see if differences in writing style between practitioners in these two doctrinal areas could be identified. The impracticability of making more refined distinctions, such as between lawyers practicing primarily in tort and in contract, left this large doctrinal division as the only one susceptible to study.

[59] The briefs were mostly selected at random, although sometimes the companion briefs in litigation -- either civil or criminal -- were selected. This was done with a view to comparing the writing styles of adversaries; to see, in short, whether one attorney's writing style affected the writing style of his or her opponent. That potential aspect of study was dropped, at least for the present study's purposes.

[60] Once again, I need to acknowledge and thank my three research assistants, Juliana Chan, Rachel Barranello, and Meredith Burke who toiled through this process in order to generate the body of documents that were used in this study and to generate the numbers used throughout it. They accepted the grinding nature of this task with more good grace and humor than I had any reason to expect.

[61] A seemingly irrelevant observation that nonetheless highlights one of the issues discussed in this article. Until quite late in the writing of this article, the start of this sentence read "[t]his error correction was so time-consuming that a decision was made to limit . . ." The passive voice is powerful and pervasive, especially when the writer seeks to deflect responsibility -- consciously or unconsciously -- from the actor.

[62] Again, there was no statistical significance attached to the decision to use three pages of each brief. The number was chosen in order to generate a sample that, for most briefs, would contain a substantial amount of lawyer-written sentences (as opposed to citations, which were included in the study as being part of the fabric of a brief) without making the error-correction process any slower than it already was. The decision to start the sample at the third page of the analysis section was a conscious attempt to avoid any introductory material and to look instead at the use of Plain English writing principles in lawyers' analytical writing.

In an attempt to provide more detail to the general Reading Ease and Grade Level scores, the study also looked at the average number of sentences per paragraph within the selected portions of the chosen briefs, the average number of words per sentence, and the average incidence of passive voice constructions within the various briefs used for the study.

The study used Microsoft Word 2003 throughout in order to avoid the introduction of possible variations in test results generated by different versions of Microsoft Word. Because the corpus of documents in the study was incomplete, no attempt at statistical analysis of the data was attempted and this should more properly be thought of as a study whose results are suggestive rather than empirical.

The animating hypothesis of this study was that the writing under examination would reflect the influence of legal writing instruction in American law schools. It was anticipated that the earlier-written briefs would generate relatively low scores in the Reading Ease test and relatively high scores in the Flesch-Kincaid test, that these results would be relatively stable during the 1970s and early '80s, and that the scores would then gradually go up (for the Reading Ease test) and down (for the Flesch-Kincaid test) as students who had studied legal writing in law school graduated and moved into practice. It was difficult to predict when this shift would occur, given the anecdotal perception that briefs filed in a state's highest court are usually written by more experienced lawyers, but it was anticipated that the predicted trend would be clearly identifiable by the end date of the study.

In fact, however, this study indicated the reverse of the expected trend.[63] The Readability and Grade Level scores of the corpus did indeed begin at the anticipated levels, and remained relatively stable for some

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[63] The experience of conducting this research has suggested the truth of Sherlock Holmes's observation: "It is a capital mistake to theorize before one has data, Insensibly, one begins to twist facts to suit theories, instead of theories to suit facts." Sir Arthur Conan Doyle, *A Scandal in Bohemia,* in THE COMPLETE SHERLOCK HOLMES, 162, 163 (1992).

time.[64] Rather than moving in the anticipated directions, however, the scores then moved in the opposite direction, showing a tendency towards longer sentences and words rather than towards a simpler, plainer mode of expression.

1. Readability Scores

Figure one shows the anticipated upward trajectory of the Flesch-Kincaid, or Reading Ease, scores, showing a relatively flat decade as legal writing programs took hold in American law schools, and then a smooth transition from less plain to increasingly more plain writing over the study's remaining three decades:

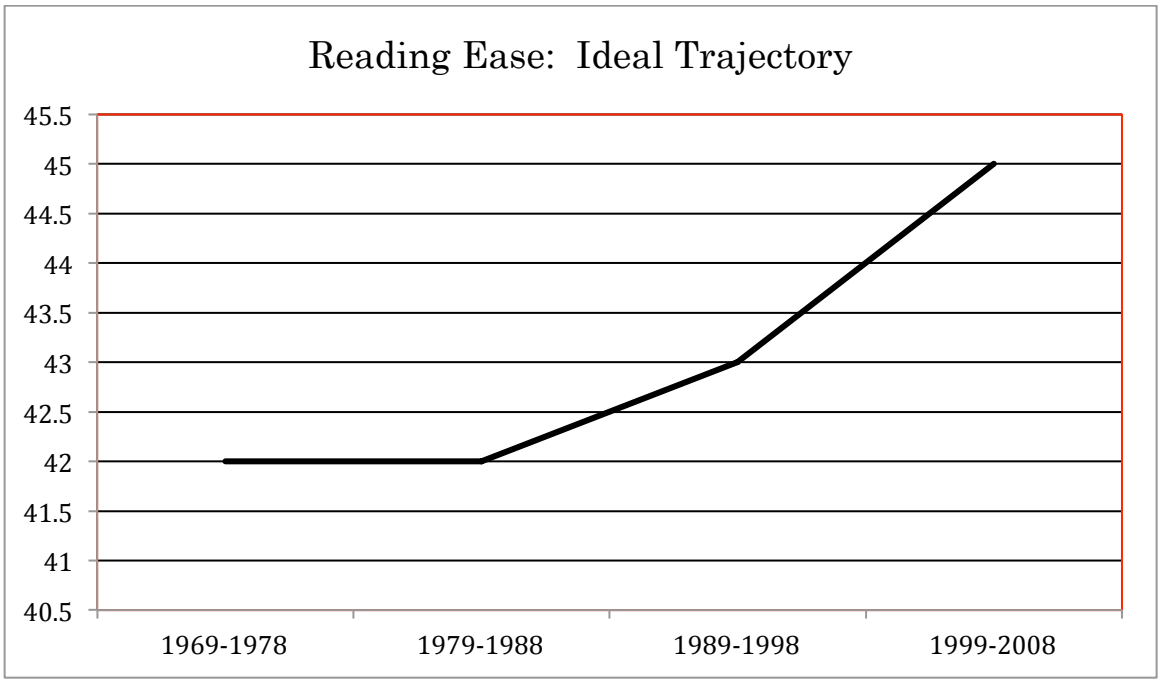

Figure 1.

Note that the theoretical scores begin at a Reading Ease score of 41.97, substantially below the "passing" score of 45,[65] and move to achieve this score by 2008.

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[64] This is true of the average scores. Predictably, individual briefs were often at variance -- sometimes wildly -- with the average.

[65] *See* n. 34 and accompanying text for a discussion of the notion that 45 is a passing score for the Reading Ease score and Professor Gopen's rejection of this number as a valid yardstick.

By contrast, Figure two shows the actual trajectory of average Reading Ease scores, by decade, from the study:

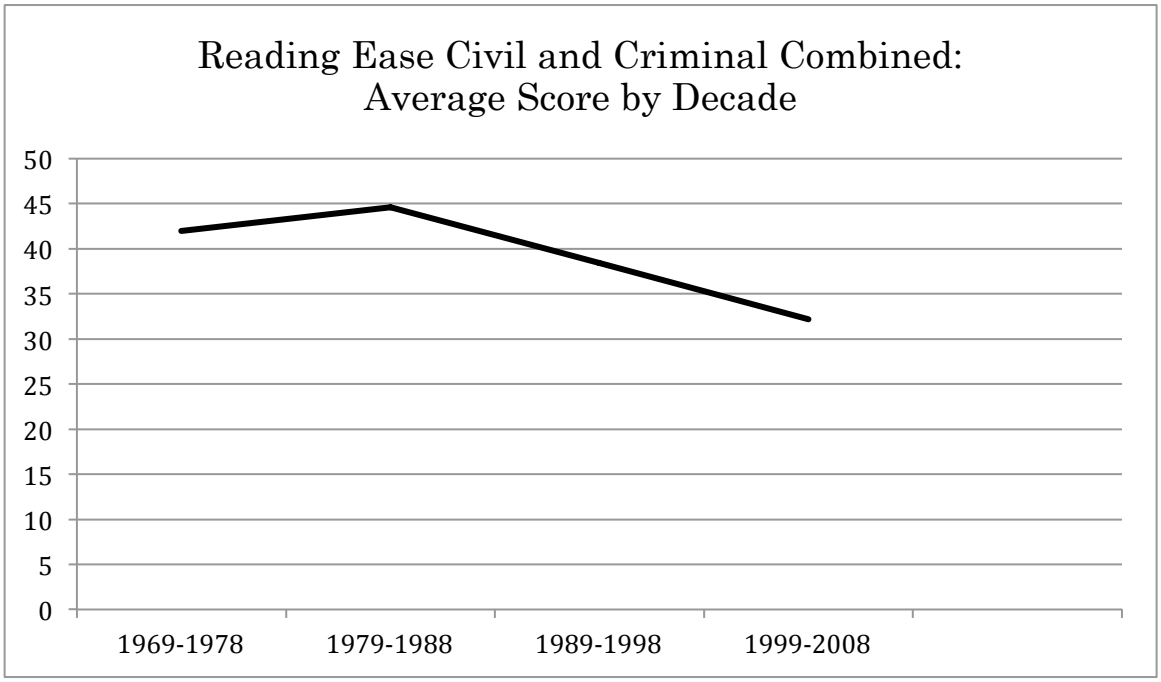

Figure 2.

The actual study scores start at an average of 41.97 in the 1969-1978 decade, rise to 44.59 in the following decade, and then slip steadily, from 38.42 in 1989-1998, and 32.16 in 1999-2008.

When viewed year by year, the pattern is still readily identifiable. Figure three gives the year-by-year Reading Ease study results:

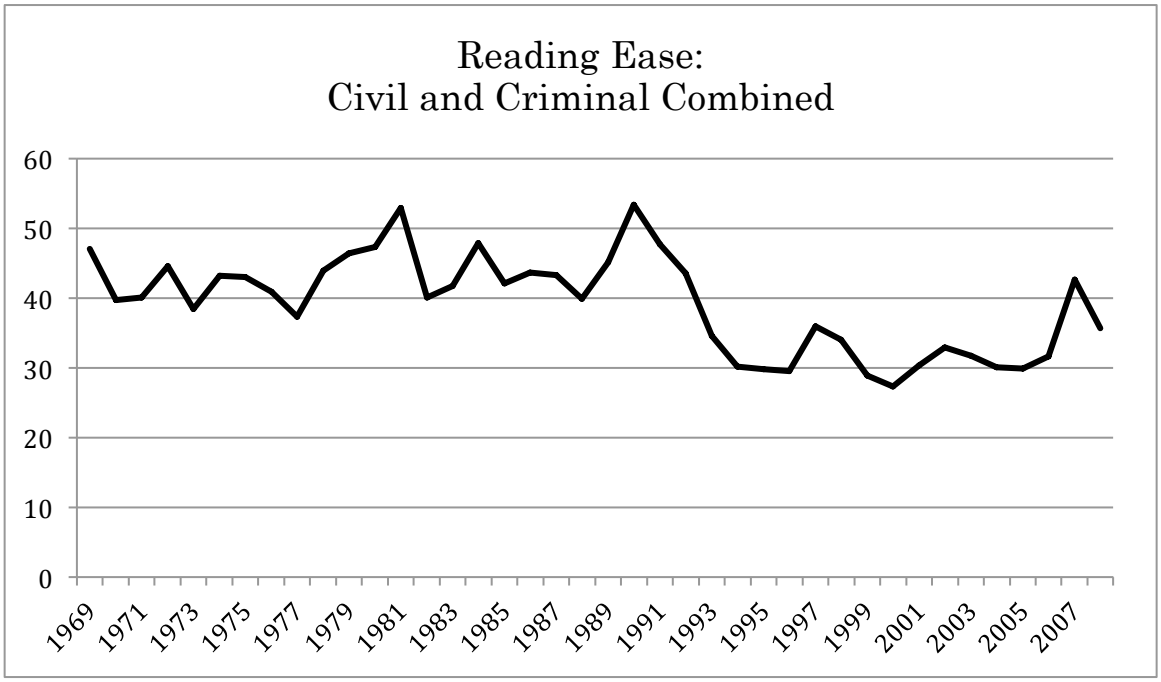

Figure 3.

The study begins in 1969, where the combined civil and criminal briefs score was 47.1, comfortably above the notional "passing" score of 45. The score drops to 39.7 in 1970, however, and does not again reach above the 45 score until ten years later, in 1979, when it reaches 46.4. After two further years of above 45 scores (47.3 in 1980 and 52.9 in 1981), the scores average in the middle 40s for the rest of the decade.

Another improvement in 1989 boosts the combined brief score to 45.1, and in 1990 the study records the highest score, 53.4. After 1991s 47.7, however, the study shows scores slipping back below the 45 number and never breaking through that barrier again. The lowest score -- 28.9 -- is recorded in 1999, and the highest score recorded in the 2000s is 42.7, in 2007.

The scores for all years are as follows:

Reading Ease: Civil and Criminal Combined

1969	47.1
1970	39.7
1971	40.1
1972	44.6
1973	38.4
1974	43.2
1975	43
1976	40.9
1977	37.3
1978	43.9
1979	46.4
1980	47.3
1981	52.9
1982	40.1
1983	41.7
1984	47.9
1985	42.1
1986	43.7
1987	43.3
1988	39.9

1989	45.1
1990	53.4
1991	47.7
1992	43.6
1993	34.6
1994	30.2
1995	29.8
1996	29.5
1997	36
1998	34
1999	28.9
2000	27.3
2001	30.4
2002	32.9
2003	31.7
2004	30.1
2005	29.9
2006	31.6
2007	42.7
2008	35.7

Interestingly, there was no significant[66] difference between briefs drafted in principally in civil cases and those drafted in criminal matters. Figure four gives the civil scores by decade:

[66] I use "significant" here in the non-statistical sense of the word.

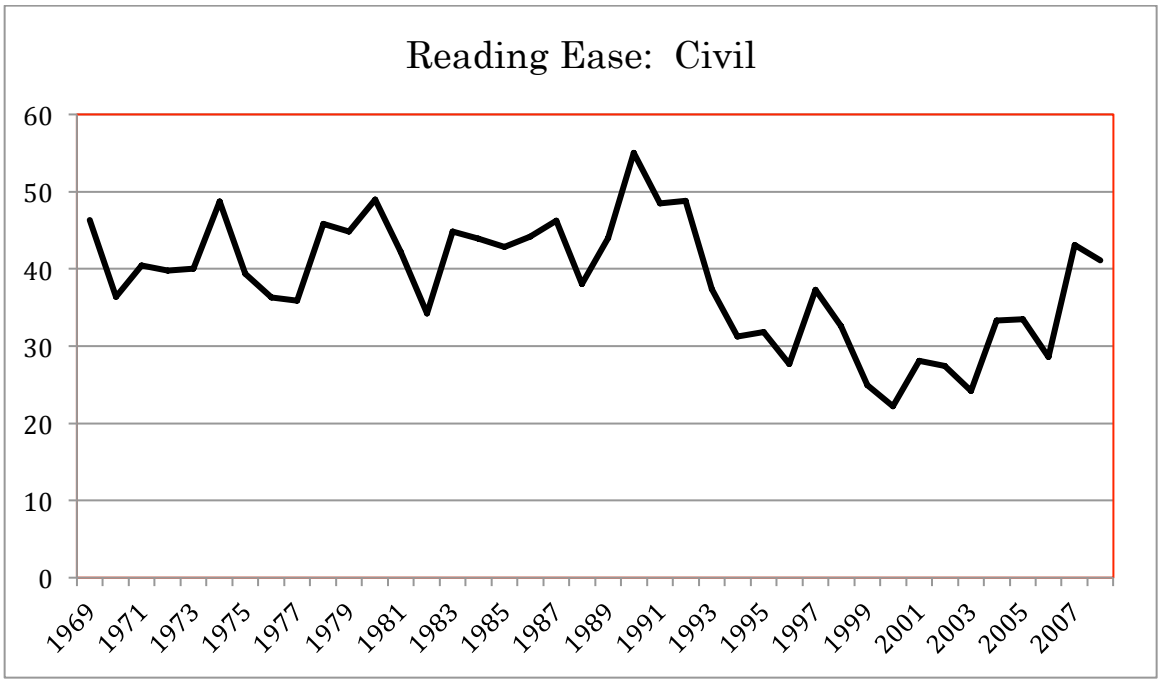

Figure 4

while Figure five gives the criminal scores by decade:

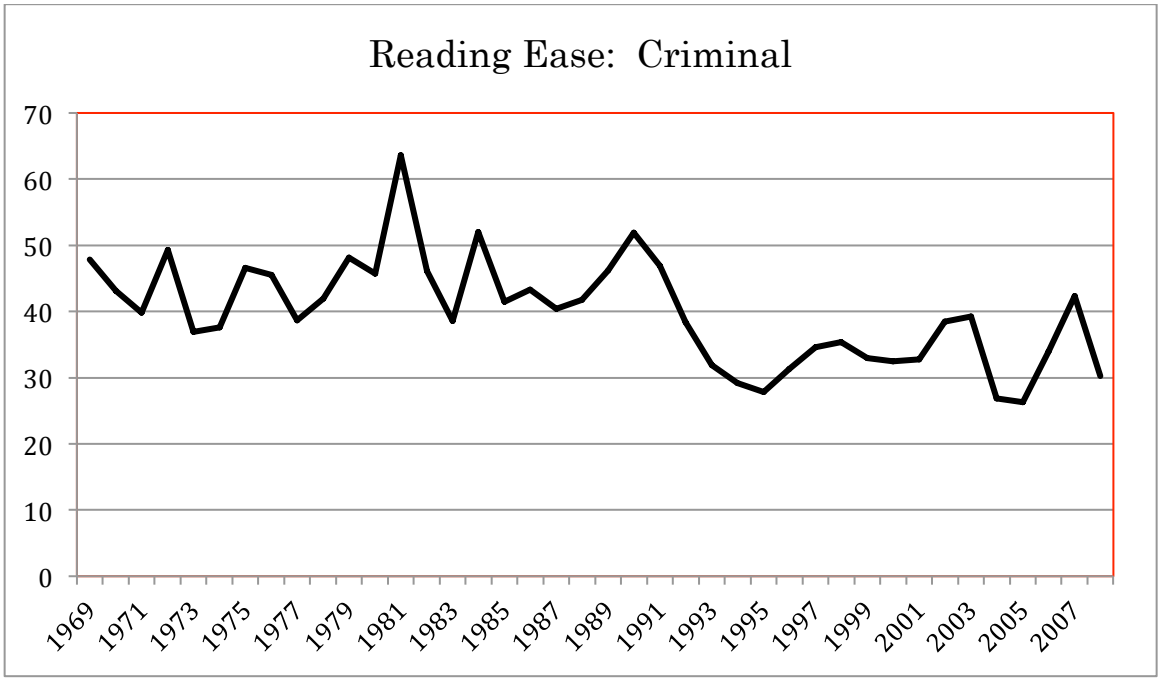

Figure 5.

The civil scores begin in 1969 with 46.3 and cross the 45 threshold rarely thereafter, reaching a peak in 1990 with 55 and after a score of 48.5 in 1991 and 48.8 in 1992 the scores recede into the 20s and 30s, reaching a low point in 2000 with a score of 22.2. The criminal scores begin in 1969 with 47.9, reach their peak in 1981 with a score of 63.6, and reach their last score higher than 45 in 1991, with a score of 46.9. The Reading Ease scores for both civil and criminal briefs are as follows:

Reading Ease: Civil

1969	46.3
1970	36.4
1971	40.4
1972	39.8
1973	40
1974	48.7
1975	39.4
1976	36.3
1977	35.9
1978	45.8
1979	44.8
1980	49
1981	42.2
1982	34.2
1983	44.8
1984	43.9
1985	42.8
1986	44.2
1987	46.2
1988	38
1989	44
1990	55
1991	48.5
1992	48.8
1993	37.4
1994	31.2
1995	31.8
1996	27.7
1997	37.3
1998	32.6
1999	24.9
2000	22.2
2001	28.1
2002	27.4
2003	24.2
2004	33.3
2005	33.5
2006	28.6
2007	43.1
2008	41.1

Reading Ease: Criminal

1969	47.9
1970	43.1
1971	39.8
1972	49.3
1973	36.9
1974	37.6
1975	46.6
1976	45.5
1977	38.7
1978	42
1979	48.1
1980	45.7
1981	63.6
1982	46.1
1983	38.6
1984	52
1985	41.5
1986	43.3
1987	40.4
1988	41.8
1989	46.2
1990	51.9
1991	46.9
1992	38.4
1993	31.9
1994	29.2
1995	27.8
1996	31.3
1997	34.6
1998	35.4
1999	33
2000	32.5
2001	32.8
2002	38.5
2003	39.2
2004	26.9
2005	26.3
2006	33.9
2007	42.3
2008	30.3

The downward trend, signifying less plain writing, is more readily discernible in the decade averages. The average civil score for the decade from 1969-1978 is 40.9, with an improvement to 43 as the average for the decade between 1979-1988, 39.4 for the decade between 1989-1998, and 30.6 for the decade between 199-2008. Figure six shows the civil scores in chart form:

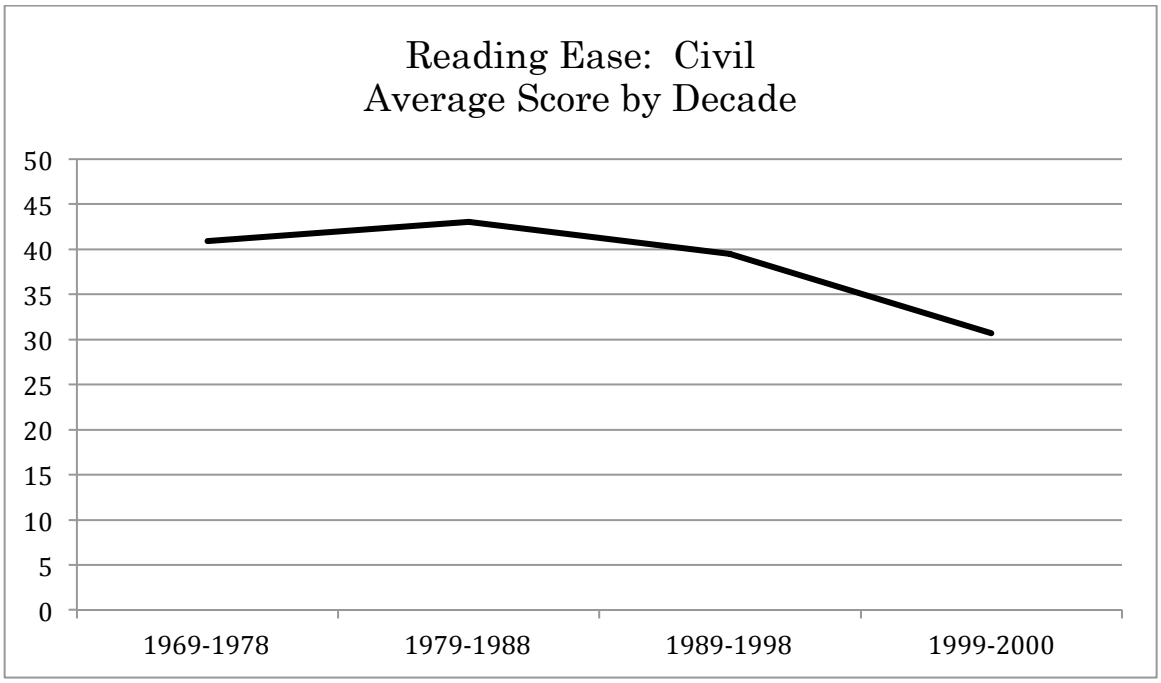

Figure 6.

The briefs with criminal law as their focus show a similar trajectory, with an average score of 42.7 in the decade between 1969-1978, a sharper improvement than civil briefs for the decade between 1979-1988, with a score of 46.1, and then a steeper drop than civil cases, to 37.3 in the decade between 1989-1998, and 33.5 in the decade between 1999-2008. Figure seven shows a chart reflecting the criminal brief scores

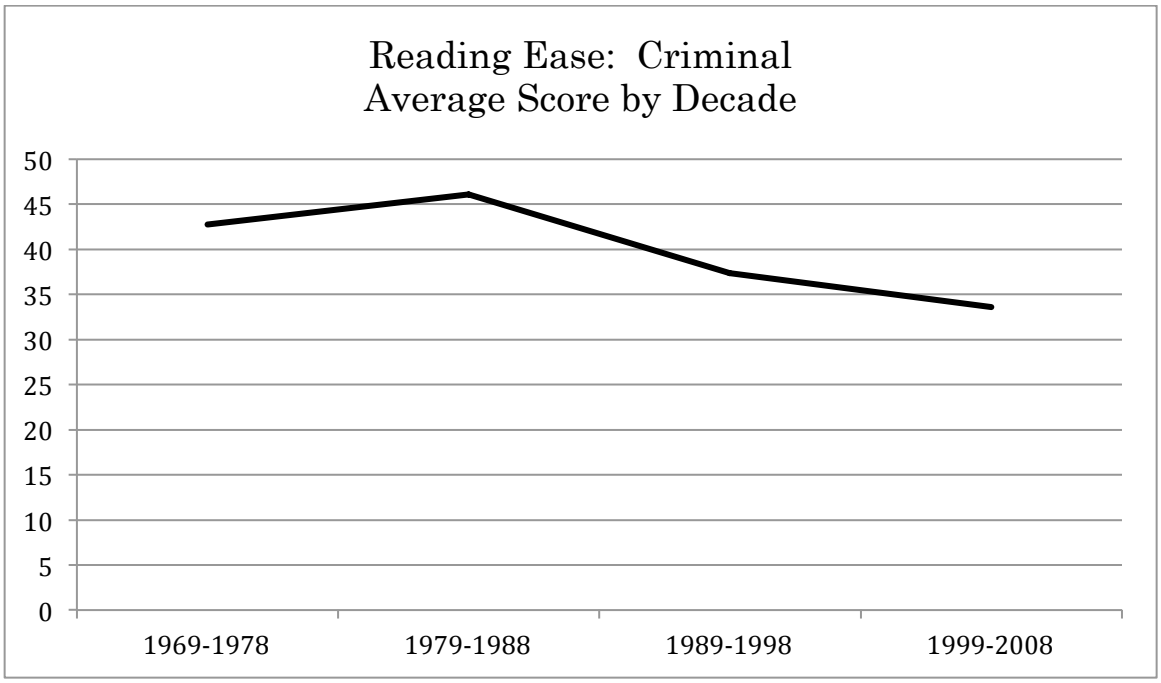

Figure 7.

2. Grade Level

The trajectory of the Grade Level variant of the Flesch-Kincaid test should be exactly the opposite of the Reading Ease trajectory, marking the transition from higher grade level (less plain) to lower grade level (more plain) writing. Figure eight shows the ideal trajectory of Grade Level scores over the study's forty year time span, again showing a relatively flat decade and then a steady decrease in Grade Level scores as legal writing education becomes more established in the legal academy and places more graduates into law firms and government positions where they put the Plain English principles of the academy into practice:

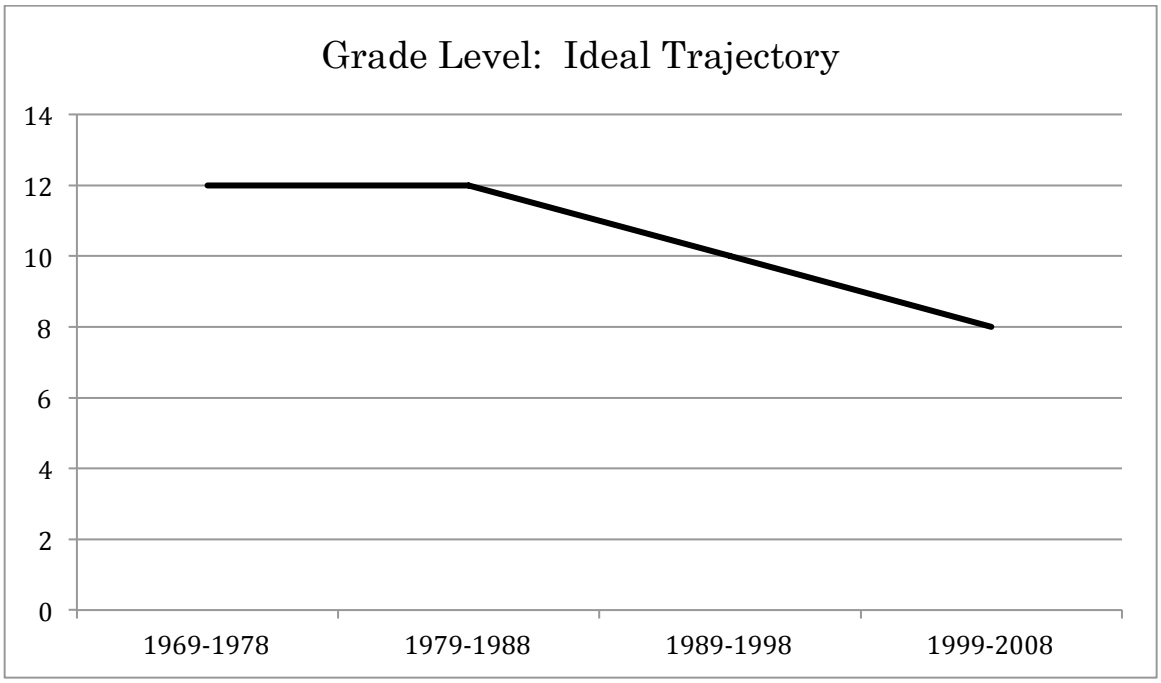

Figure 8.

By contrast, but consistent with the Reading Ease scores, Figure nine shows the actual trajectory of actual Grade Level scores, taken by decade:

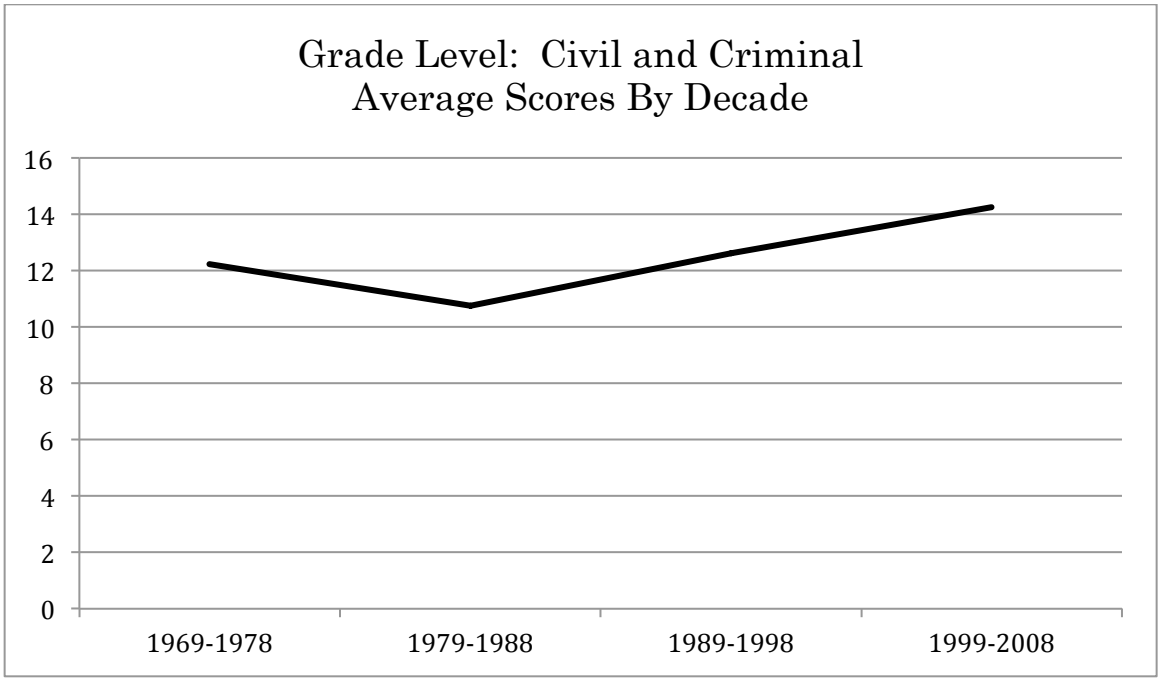

Figure 9.

The average grade level score for 1969-1978, the first decade of the study, was 12.2, with a dip to 10.7 in the second, 1979-1988, decade, and then a steady rise in grade level score, from 12.6 in the 1989-1998 decade, and 14.2 in the 1999-2008 decade.

As with the Reading Ease scores, the trajectory of Grade Level scores can be seen when viewed year by year, as shown in Figure ten:

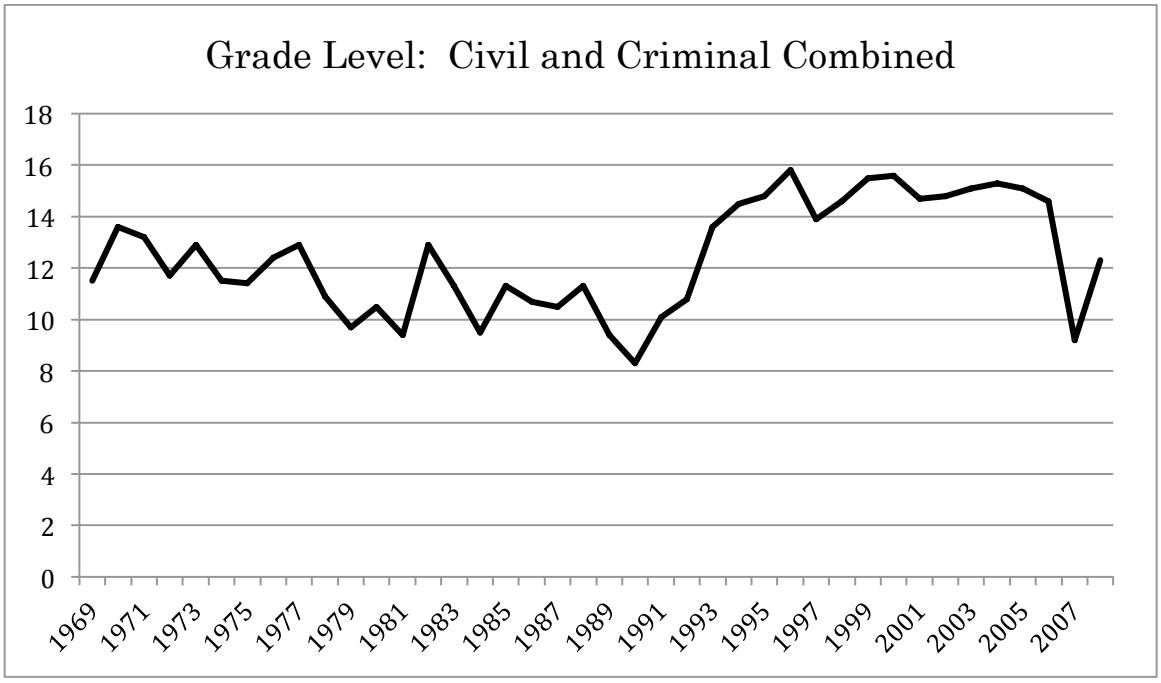

Figure 10.

The study begins in 1969 with a score of 11.5, and then reflects an improving trend through 1990, where the low score of 8.3 is achieved. The next year, however, the reverse of that trend begins to assert itself, with the score jumping to 10.1 in 1991 and reaching the peak score of 15.8 in 1996. The study records five additional scores higher than 15: in 1989 (15.5), 2000 (15.6), 2003 (15.1), 2004 (15.3), and 2005 (15.1), and with the exception of one starting dip to 9.2 in 2007, scores stay at or above the levels found in the 1970s, before the influence of legal writing education could have had an effect on lawyer writing. The Grade Level combined scores for both civil and criminal briefs are as follows:

Grade Level: Civil and Criminal Scores Combined

1969	11.5
1970	13.6
1971	13.2
1972	11.7
1973	12.9
1974	11.5
1975	11.4
1976	12.4
1977	12.9
1978	10.9
1979	9.7
1980	10.5
1981	9.4
1982	12.9
1983	11.3
1984	9.5
1985	11.3
1986	10.7
1987	10.5
1988	11.3

1989	9.4
1990	8.3
1991	10.1
1992	10.8
1993	13.6
1994	14.5
1995	14.8
1996	15.8
1997	13.9
1998	14.6
1999	15.5
2000	15.6
2001	14.7
2002	14.8
2003	15.1
2004	15.3
2005	15.1
2006	14.6
2007	9.2
2008	12.3

As with the Reading Ease scores, while there are differences between Grade Level scores of briefs drafted for civil and criminal matters, both share the same general trajectory. The civil briefs begin with a score of 11.6 in 1969 and remain at about that level for more than two decades, rising to 14.8 the next year but returning to 11.4 in 1973, dropping to 10 in 1978 and returning to 11.8 in 1981, rising to 15.6 in 1982, dropping to 10.4 the next year, and coming back to 11.5 in 1988. After a two year drop in score, to 9.3 in 1989 and the low score of 8 in 1990, the scores begin a steady climb thereafter, to a high score of 17 in 2003, followed by a drop to 9.3 in 2007 and 9.7 in 2008. Figure eleven charts the scores for civil cases

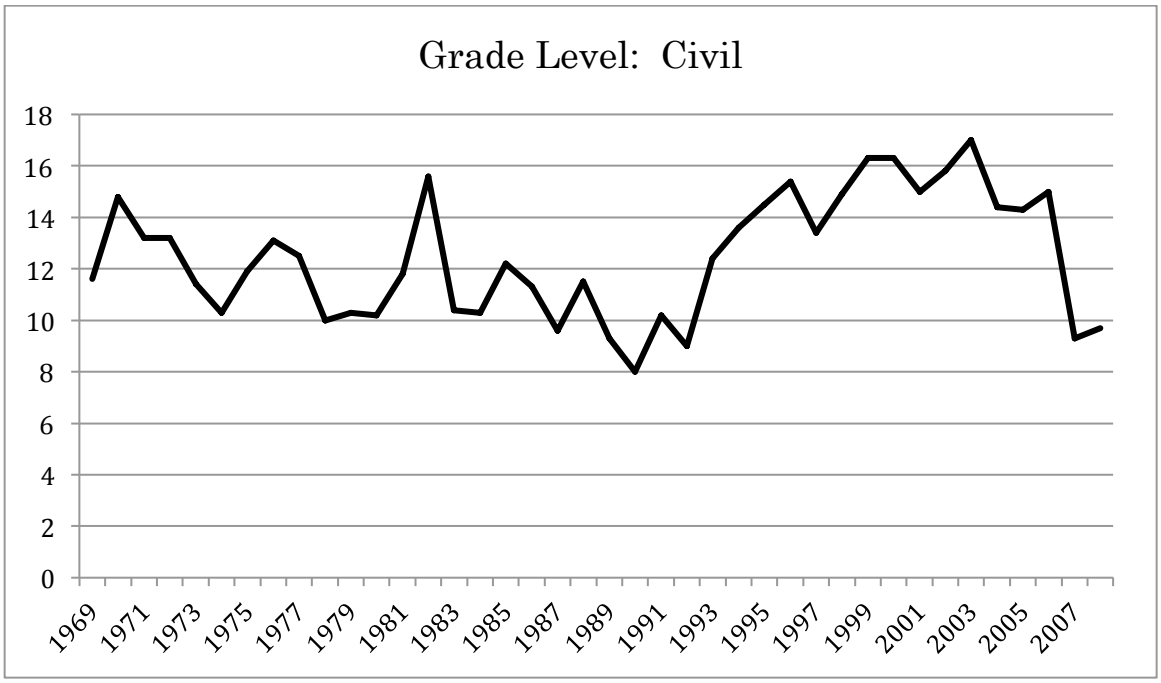

Figure 11.

The briefs filed in criminal cases begin with a score of 11.3 in 1969, and as with the civil scores, return to around that score for two decades, with a high score of 14.4 in 1973, a low score of 7 in 1981, and a score of 11.3 in 1987 and 11.2 in 1988. After a quick drop to the second lowest score recorded -- 8.7 in 1990 -- the scores get trend higher, peaking in 1996 and again in 2004 with scores of 16.2. After a similar dip to that shown in the civil scores in 2007, with a score of 9.2, the last year of the study shows a criminal brief grade level score of 15. Figure twelve charts the scores for criminal cases

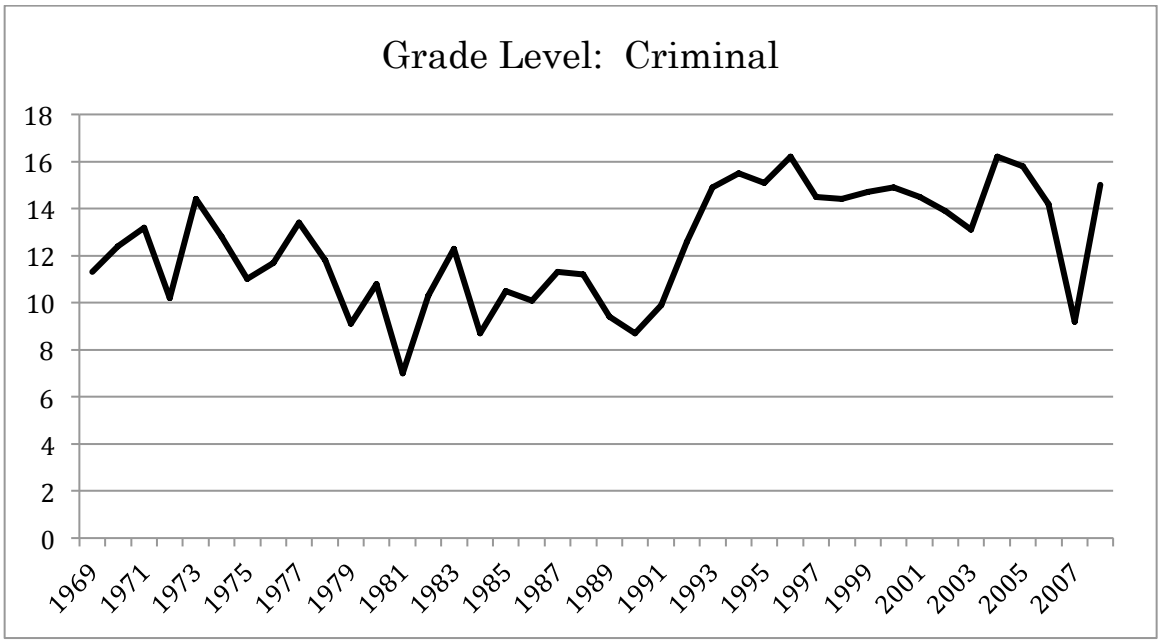

Figure 12.

The Grade Level scores for both civil and criminal briefs are as follows:

Grade Level: Civil

1969	11.6
1970	14.8
1971	13.2
1972	13.2
1973	11.4
1974	10.3
1975	11.9
1976	13.1
1977	12.5
1978	10
1979	10.3
1980	10.2
1981	11.8
1982	15.6
1983	10.4
1984	10.3
1985	12.2
1986	11.3
1987	9.6
1988	11.5
1989	9.3
1990	8
1991	10.2
1992	9
1993	12.4
1994	13.6
1995	14.5
1996	15.4
1997	13.4
1998	14.9
1999	16.3
2000	16.3
2001	15
2002	15.8
2003	17
2004	14.4
2005	14.3
2006	15
2007	9.3
2008	9.7

Grade Level: Criminal

1969	11.3
1970	12.4
1971	13.2
1972	10.2
1973	14.4
1974	12.8
1975	11
1976	11.7
1977	13.4
1978	11.8
1979	9.1
1980	10.8
1981	7
1982	10.3
1983	12.3
1984	8.7
1985	10.5
1986	10.1
1987	11.3
1988	11.2
1989	9.4
1990	8.7
1991	9.9
1992	12.6
1993	14.9
1994	15.5
1995	15.1
1996	16.2
1997	14.5
1998	14.4
1999	14.7
2000	14.9
2001	14.5
2002	13.9
2003	13.1
2004	16.2
2005	15.8
2006	14.2
2007	9.2
2008	15

As with the Reading Ease scores, the trend can perhaps more readily be seen in the decade averages. Figure thirteen shows the average for civil scores, beginning with the 1969-1978 decade's score of 11.2, an almost unchanged average score of 11.3 in the 1979-1988 decade, and then an increase to 12 in the 1989-1998 decade, and 14.3 in the 1999-2008 decade.

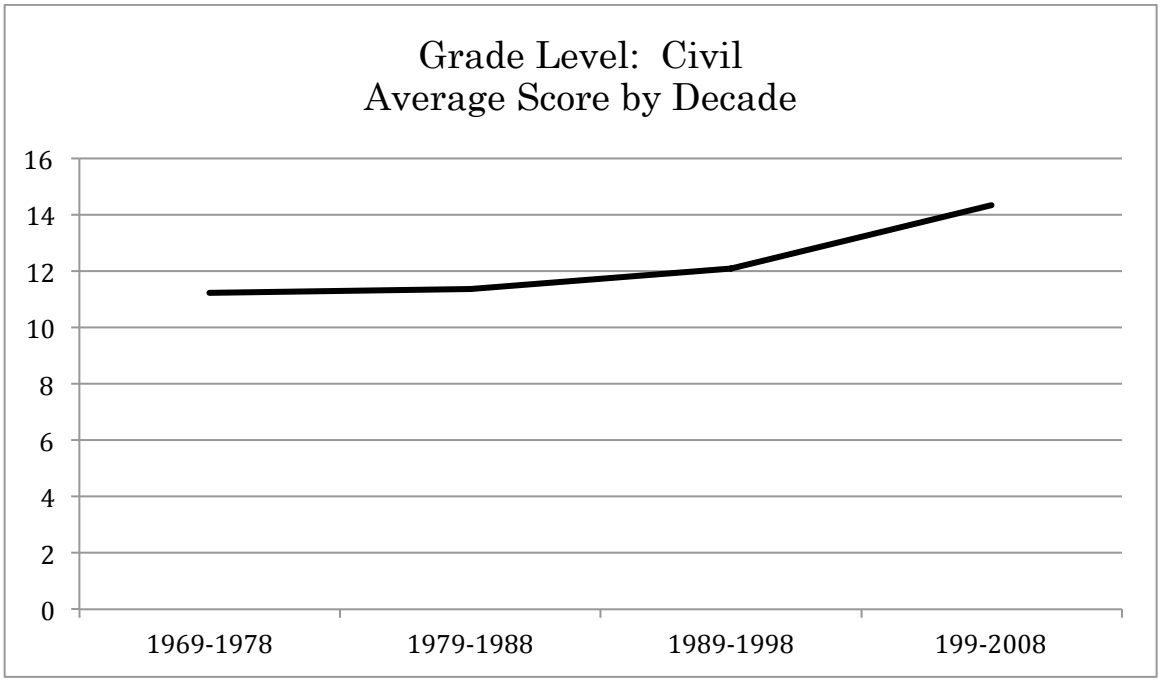

Figure 13.

The criminal brief scores show an improvement in grade level scores for the first two decades of the study, from 12.2 in the 1969-1978 decade to 10.1 in the 1979-1988 decade. Thereafter, though, the same trend as the civil scores can be seen, with a score of 11.6 in the 1989-1998 decade and 14.1 in the 1999-2008 decade. Figure fourteen charts the decade average for grade level criminal scores

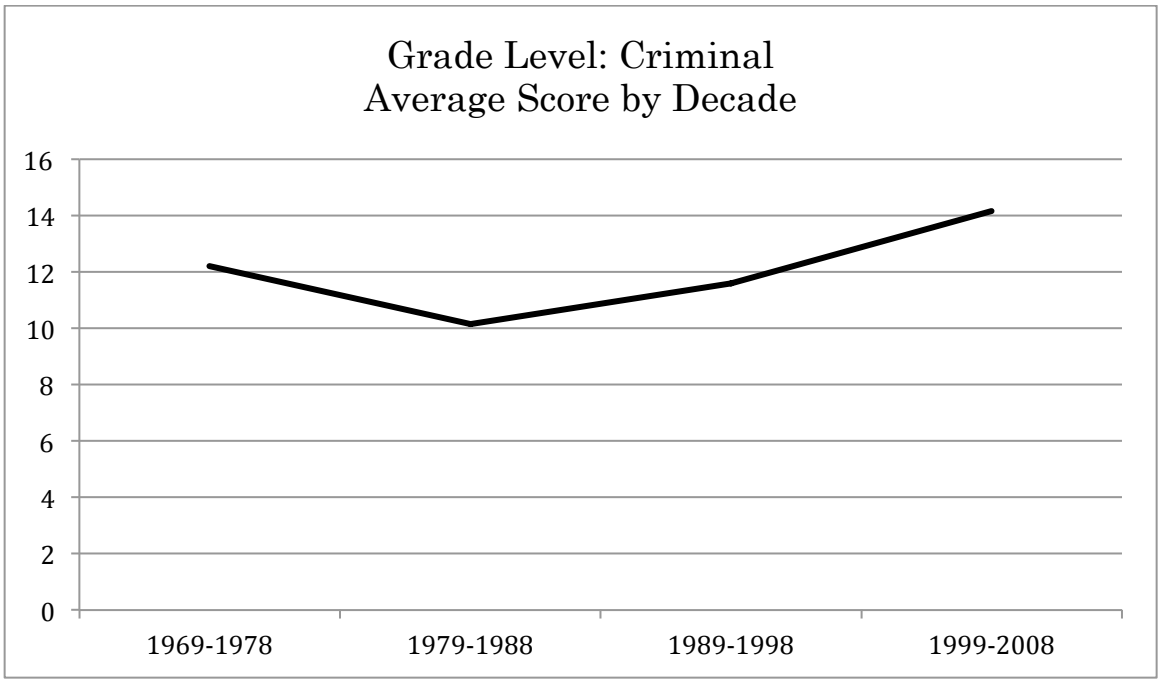

Figure 14.

3. Average Words Per Sentence

One of the principal tenets of Plain English is that a sentence should contain as few words as possible.[67] Although opinions can differ as to how short an ideal sentence should be, at least one legal writing textbook recommends sentences of "no more than twenty to twenty-five words."[68]

The study's per decade average scores show, however, that after a decline in the 1970s, briefs filed in the New York Court of Appeals have been getting wordier since the late 1980s. Figure 15 shows that the average score for the decade 1969-1978 was 17.8 words per sentence, dropping to 15.9 words in the 1979-1988 decade, and then climbing to 20.4 words in the 1989-1998 decade and 34.7 words in the 1999-2008 decade.

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67 *See*, Pratt, *supra*. n. 53 and accompanying text ("short direct sentences for important information . . . [and] no unnecessary words.")

68 Clary & Lysaught, *supra*, n. 52, at 99. Wydick recommends that the average sentence length should be below twenty-five words, while acknowledging that some sentences will be longer. Wydick, *supra* n. 50, at 38. George Gopen sounds an important cautionary note, however, when he observes that "[w]ell-written sentence longer than 22 words -- all the way up to 200 words -- can ring clear as a bell. A badly constructed 10-word sentence can cause major confusions." Gopen, *supra* n. 15, at xxx.

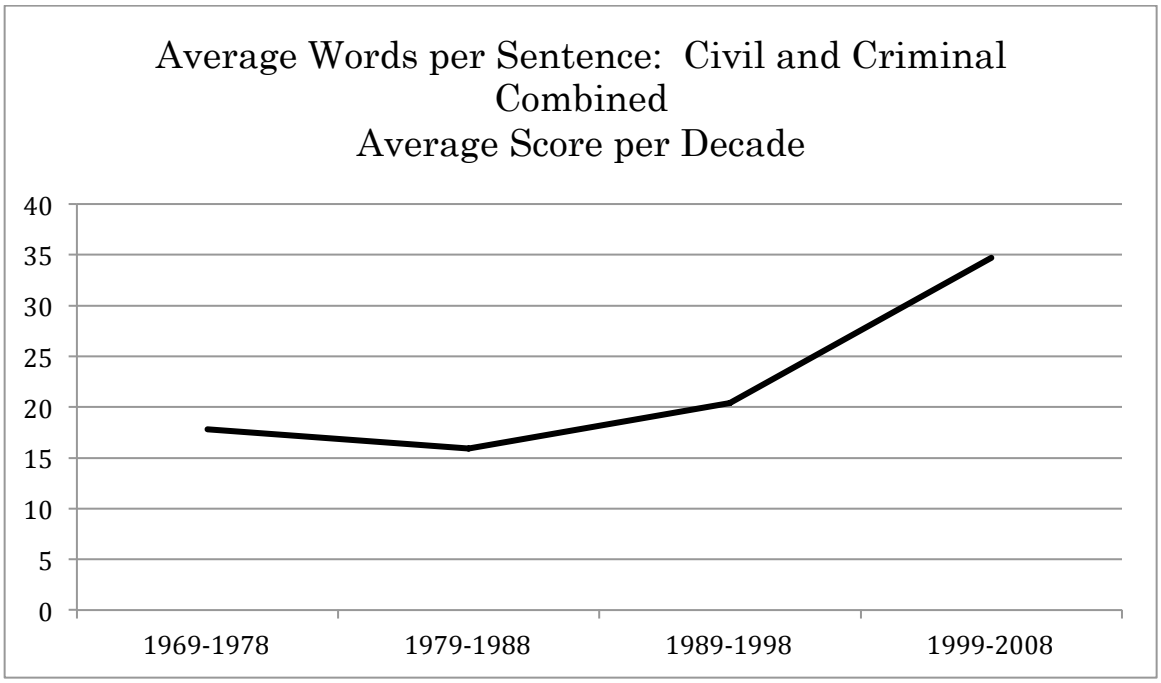

Figure 15.

The study shows that the combined civil and criminal briefs followed the Plain English recommendation of staying below twenty to twenty-five words in the 1970s and 1980s, and then have become steadily more wordy since. In 1969, the first year of the study, briefs had an average of 21.7 words per sentence, and that number climbed to 27.7 the next year. Thereafter, though, the average number of words per sentence dropped steadily to a low of 10.9 in 1989. The number started to climb in the next year, jumping from 15.8 in 1992 to 26.3 the next year, and reaching a high of 33.6 in 2004. The last two years of the study showed a precipitous drop in the average number of words in a sentence, from 27.4 in 2006 to 8.3 in 2007 and 18.1 in 2008. The trend for the last two decades, however, suggests that these two years were anomalous. Figure 16 charts the average words per sentence for both civil and criminal briefs.

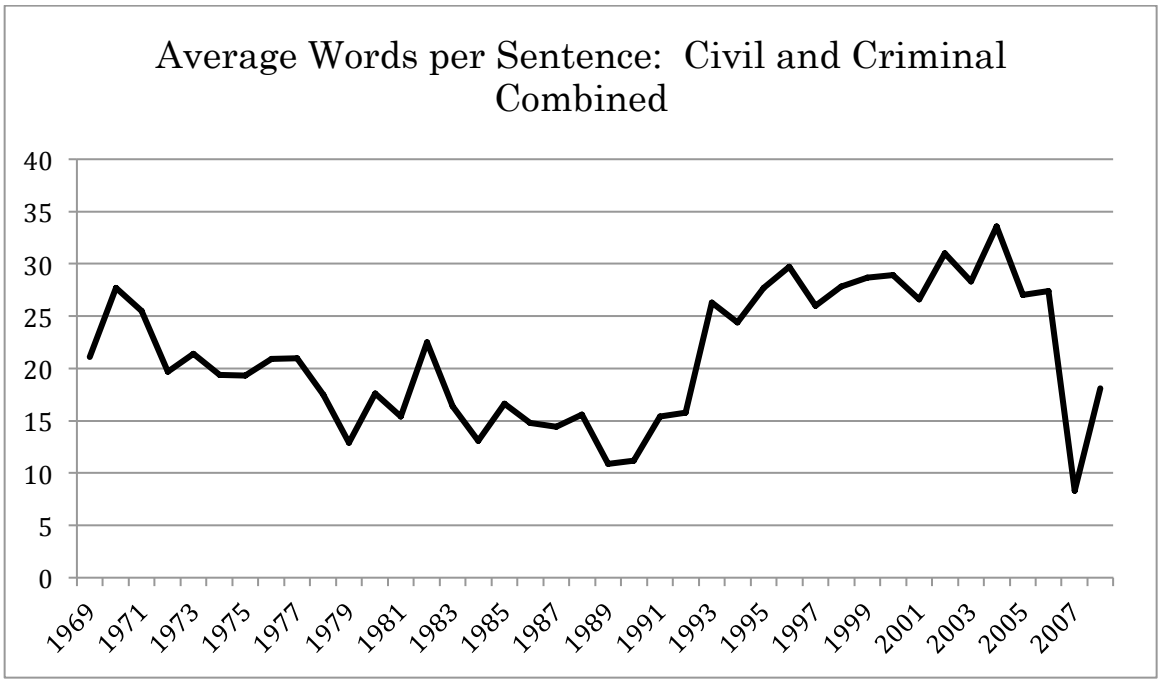

Figure 16.

The combined average word scores for civil and criminal briefs are as follows:

Average Words per Sentence: Civil and Criminal Combined

1969	21.1
1970	27.7
1971	25.5
1972	19.7
1973	21.4
1974	19.4
1975	19.3
1976	20.9
1977	21
1978	17.5
1979	12.9
1980	17.6
1981	15.4
1982	22.5
1983	16.4
1984	13.1
1985	16.6
1986	14.8
1987	14.4
1988	15.6

1989	10.9
1990	11.2
1991	15.4
1992	15.8
1993	26.3
1994	24.4
1995	27.7
1996	29.7
1997	26
1998	27.8
1999	28.7
2000	28.9
2001	26.6
2002	31
2003	28.3
2004	33.6
2005	27
2006	27.4
2007	8.3
2008	18.1

Civil and criminal briefs both follow similar tracks, with briefs getting less wordy during the first decade of the study and then getting progressively more wordy thereafter. Civil briefs started at an average of 20.1 words per sentence, climbing to a high of 29.7 words in the next year and then dropping over the next twenty years, with one notable leap to 29.7 words in 1992, to a low of 9.2 words in 1989. After that, the average number of words in civil briefs climbed from 10.5 words in 1990 to a peak of 32.7 words in 2003. The last two years of the study showed a drop from 25.4 words in 2006 to 8.9 words in 2007 and 9.2 words in 2008. Figure 17 shows the average number of words per sentence for civil briefs.

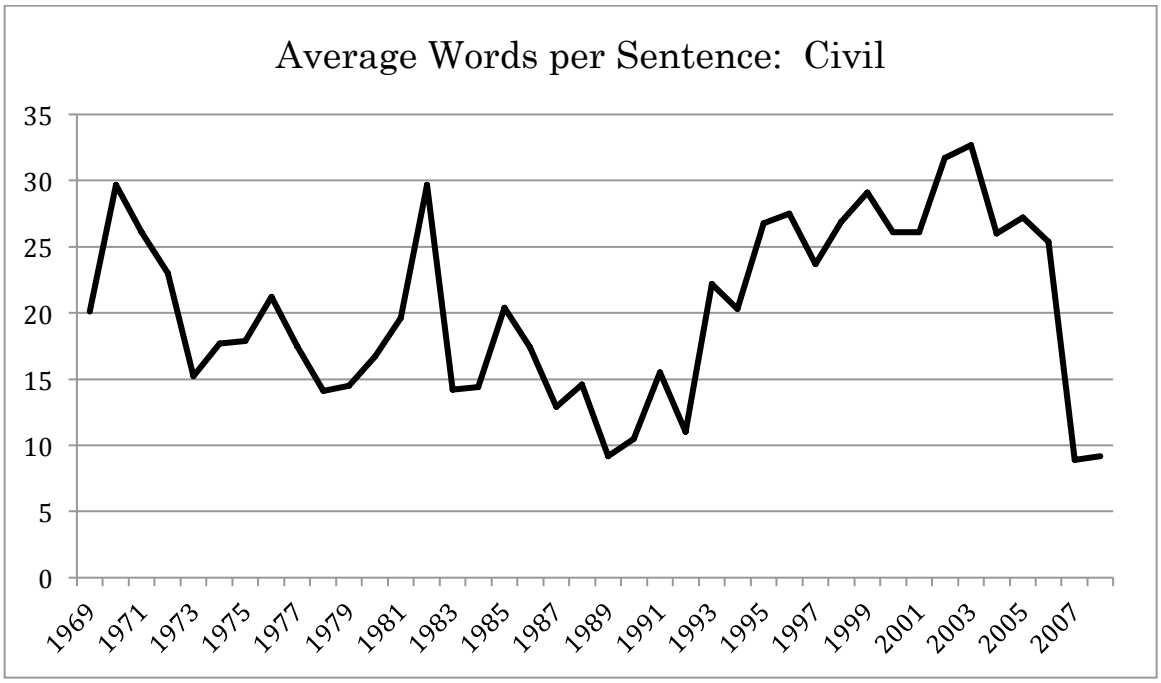

Figure 17.

A similar pattern is evident in the criminal brief scores, with a starting average of 22.1, rising to 27.7 in 1973 and then dropping gradually to a low of 9.6 in 1990, jumping to 15.3 the next year and climbing to an average high of 41.2 words per sentence in 2004. As with the civil briefs, criminal briefs experienced a downward leap in average word scores towards the end of the study, with scores falling from 29.4 in 2006 to 7.7 in 2007, but then rebounding to a score of 26.9 in 2008, the last year of the study. Figure 18 charts the average word score per year in criminal briefs.

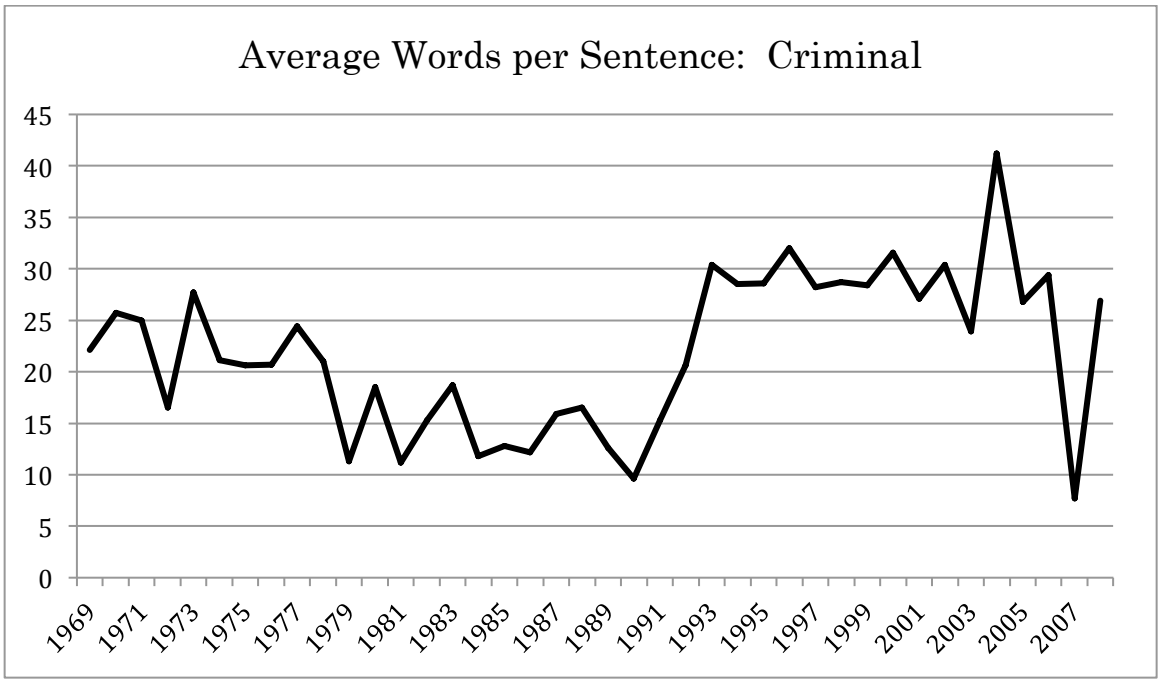

Figure 18.

The average words per sentence scores for civil and criminal briefs are:

Average Words per Sentence: Civil

1969	20.1
1970	29.7
1971	26.1
1972	23
1973	15.2
1974	17.7
1975	17.9
1976	21.2
1977	17.5
1978	14.1
1979	14.5
1980	16.7
1981	19.6
1982	29.7
1983	14.2
1984	14.4
1985	20.4
1986	17.4
1987	12.9
1988	14.6
1989	9.2
1990	10.5
1991	15.5
1992	11
1993	22.2
1994	20.3
1995	26.8
1996	27.5
1997	23.7
1998	26.9
1999	29.1
2000	26.1
2001	26.1
2002	31.7
2003	32.7
2004	26
2005	27.2
2006	25.4
2007	8.9
2008	9.2

Average Words per Sentence: Criminal

1969	22.1
1970	25.7
1971	25
1972	16.5
1973	27.7
1974	21.1
1975	20.6
1976	20.7
1977	24.4
1978	21
1979	11.3
1980	18.5
1981	11.2
1982	15.3
1983	18.7
1984	11.8
1985	12.8
1986	12.2
1987	15.9
1988	16.5
1989	12.6
1990	9.6
1991	15.3
1992	20.6
1993	30.4
1994	28.5
1995	28.6
1996	32
1997	28.2
1998	28.7
1999	28.4
2000	31.6
2001	27.1
2002	30.4
2003	23.9
2004	41.2
2005	26.8
2006	29.4
2007	7.7
2008	26.9

Given the fluctuations in yearly averages, the trend towards more words per sentence can best be seen in the decade averages shown in Figure 18, starting at 20.2 in the 1969-1978 decade, dropping to 17.4 in the 1979-1988 decade, and then climbing, first a little -- to 18.4 in the 1989-1998 decade -- and then more sharply, to 24.2 in the 1999-2008 decade.

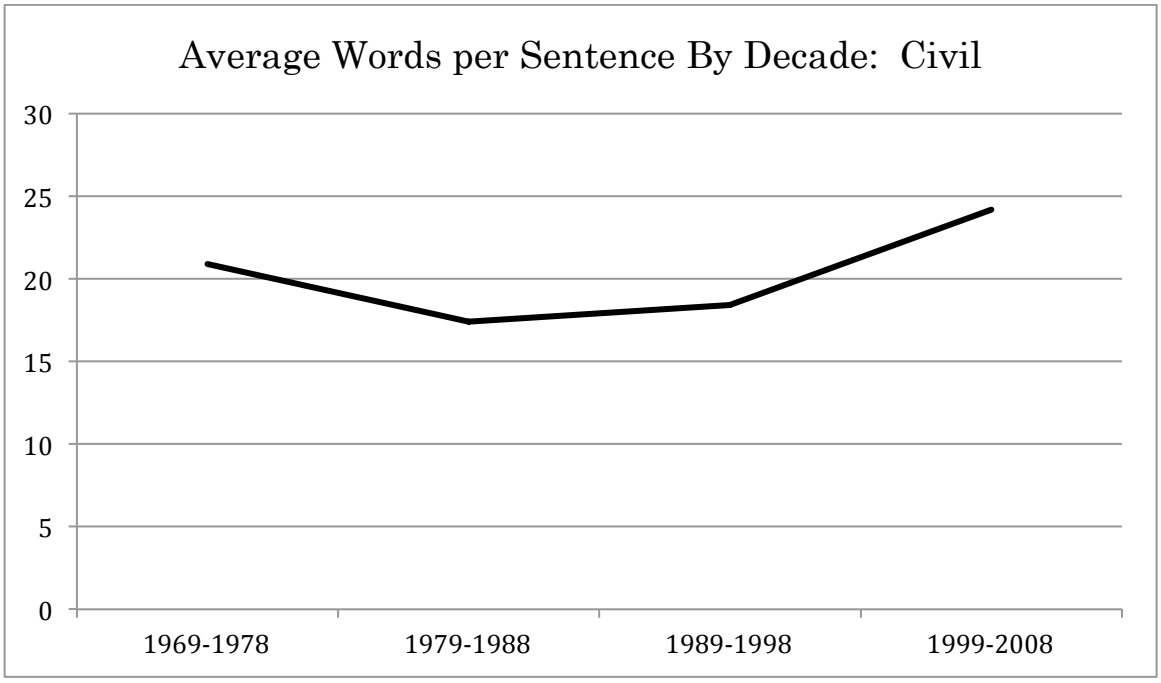

Figure 19.

As with the civil briefs, the initial trend in criminal briefs towards fewer average words per sentence, and the later reversal of that trend, can best be seen in the decade average scores, with a starting number of 22.5 for the 1969-1978 decade, falling to 14.4 in the 1979-1988 decade, and then climbing sharply to 23.4 in the 1989-1998 decade and climbing again to an average of 27.3 words per sentence in the 1999-2008 decade. Figure 20 charts the average decade scores.

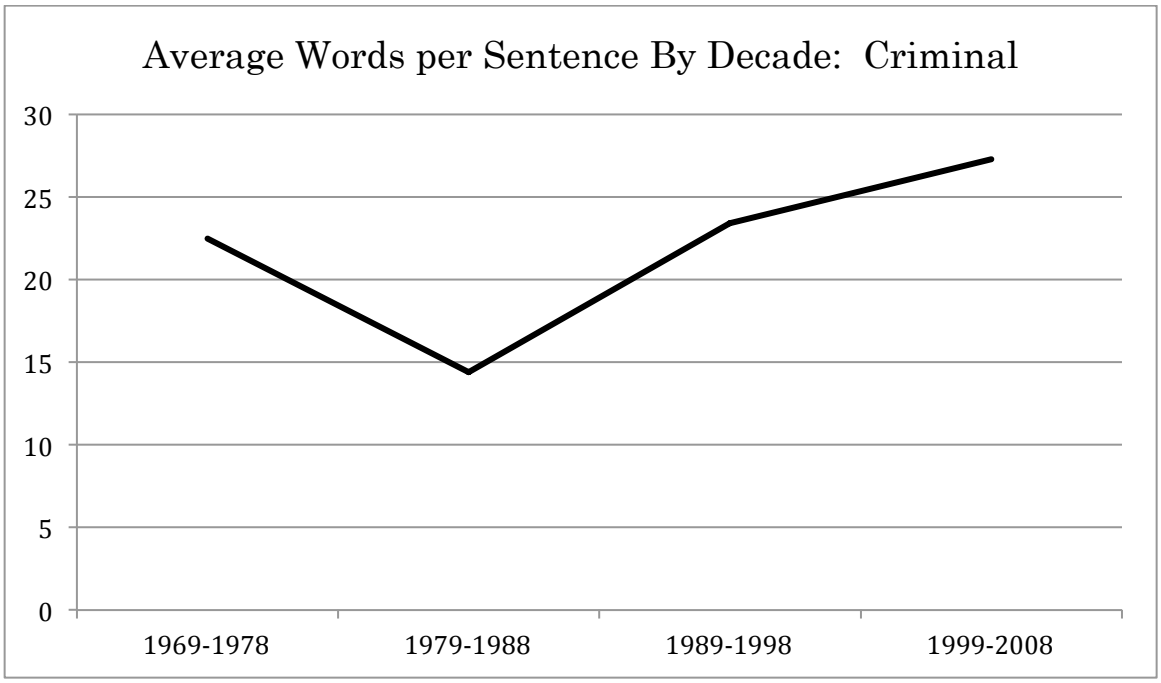

Figure 20.

4. Average Sentences Per Paragraph

Another central pillar of the Plain English movement is that paragraphs should be short. Although "short" is, of course, a relative concept, at least one legal writing textbook puts a suggested upper limit of eight to ten sentences on paragraphs.[69] While that number assumes that the writer has also followed the advice to keep the number of words per sentence down, the good news is that the study suggests that legal writers are aware of the wearying effects of long paragraphs and have been consistently careful to keep the average number of sentences per paragraph low, and substantially lower than the recommended maximum of eight to ten sentences.

In fact, over the forty years of briefs considered by the study, the average number of sentences per paragraph has only increased by one sentence, from 3.29 sentences in the 1969-1978 decade, through 3 sentences per paragraph in the 1979-1988 decade, and up to 4.2 sentences in the 1989-1998 decade, a number that was maintained during the 1999-2008 decade.

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69 Clary & Lysaught, *supra* n. 52, at 99.

Figure 21 shows the results of the average scores by decade. The changes look more dramatic than they are because of the sensitivity of the scale.

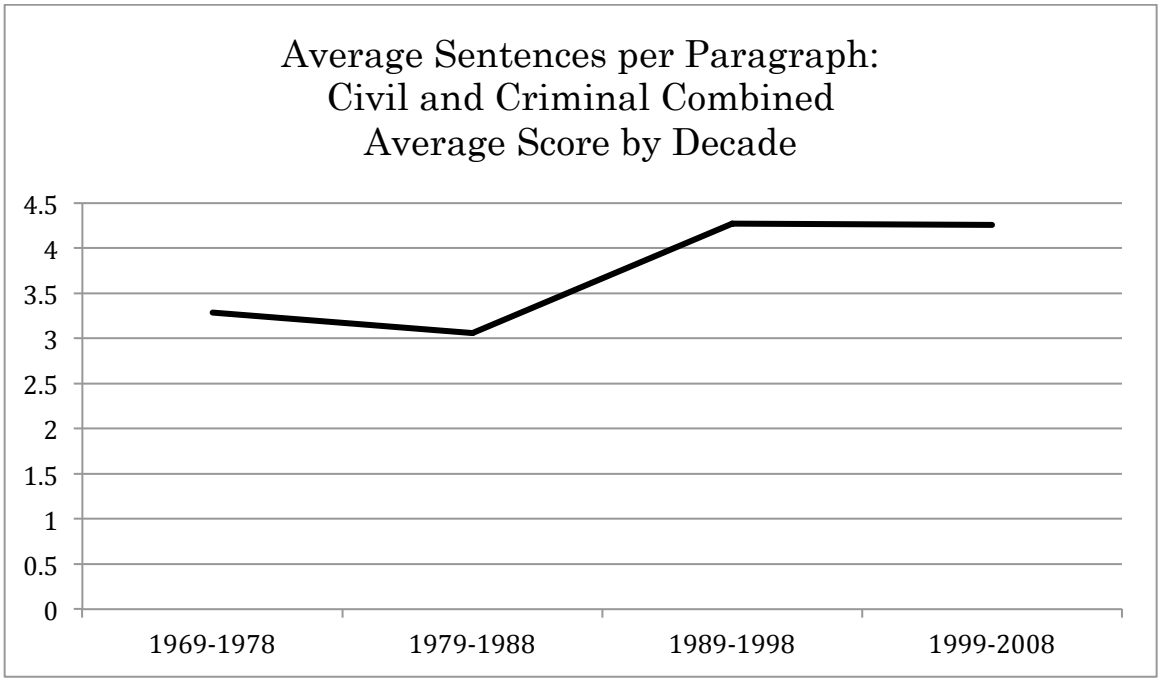

Figure 21.

Similarly, while the year-to-year averages look to have more dramatic peaks and valleys, the numbers do not reflect significant changes. The combined civil and criminal scores begin in 1969 with 2.9 sentences per paragraph, and stay around the three sentences per paragraph number until 1990, when there is a one year spike to 6.6 sentences. The number of sentences per paragraph drops back to 3.2 in 1991 and then rises to 4.2 in 1994, hovering thereafter around the 4 sentences per paragraph level. Figure 22 shows the average year-to-year scores.

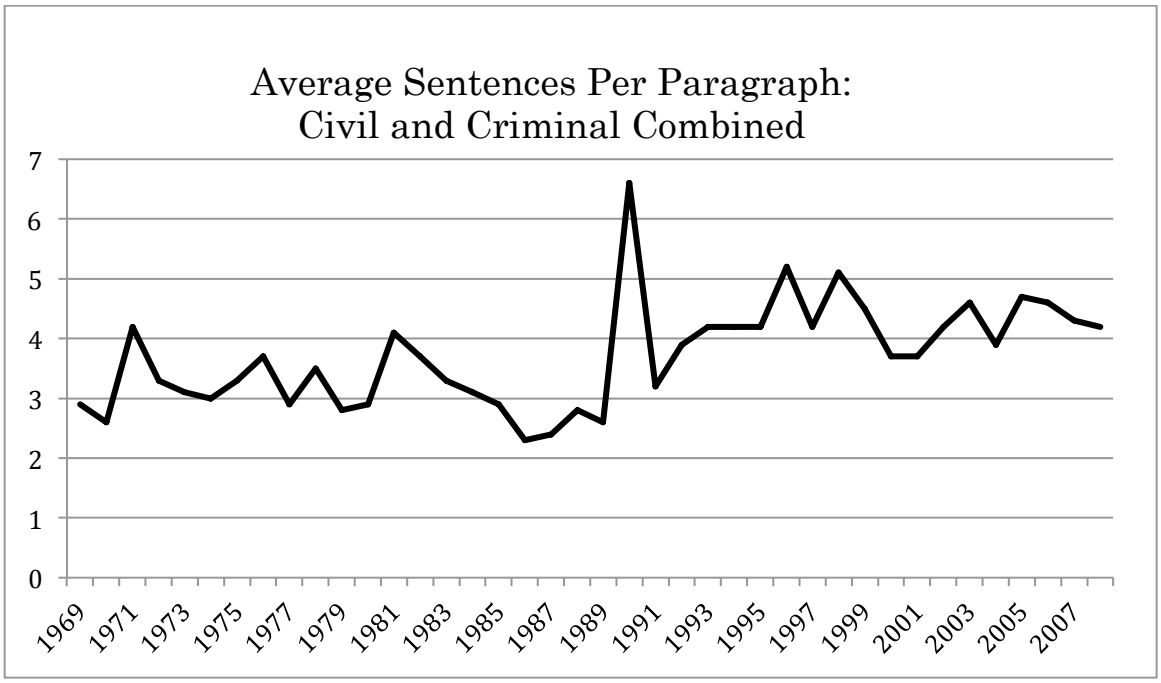

Figure 22.

These averages are reflected in both the civil and criminal brief analysis. For civil briefs, the average number of sentences per paragraph begins at 3 in 1969, drops to 2.3 in both 1979 and 1980, jumps to 4.2 in 1981 and 4.1 in 1982, and then drops back to an average of around 3 sentences per paragraph in 1983 (3.4). The highest number of sentences is recorded in 1990, with 6.7 sentences per paragraph, and the numbers then fall back to 2.6 in 1991, and hover around a 3 sentences per paragraph average during the 1990s, increasing to an average of 4 sentences per paragraph in the 2000s. Figure 23 shows the results of the civil brief analysis.

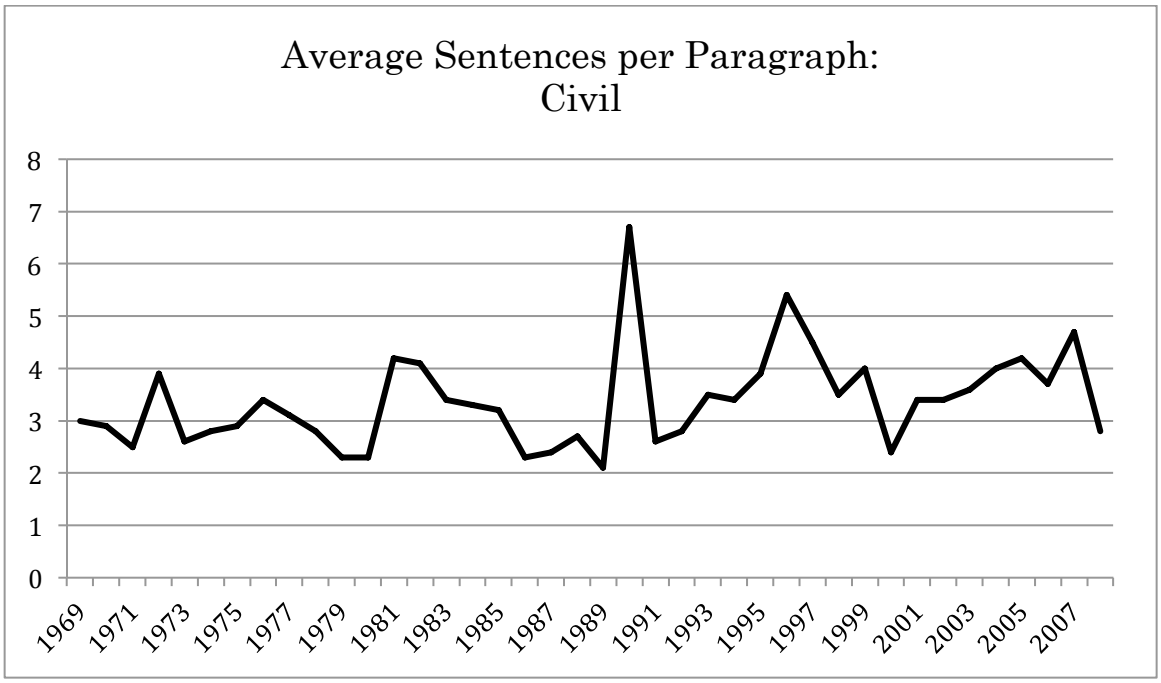

Figure 23.

Figure 24 shows the decade average scores, reflecting slightly more than a half sentence increase, from 3 sentences per paragraph during the twenty years between 1969 and 1988, and a 3.6 average in the twenty years between 1989 and 2008.

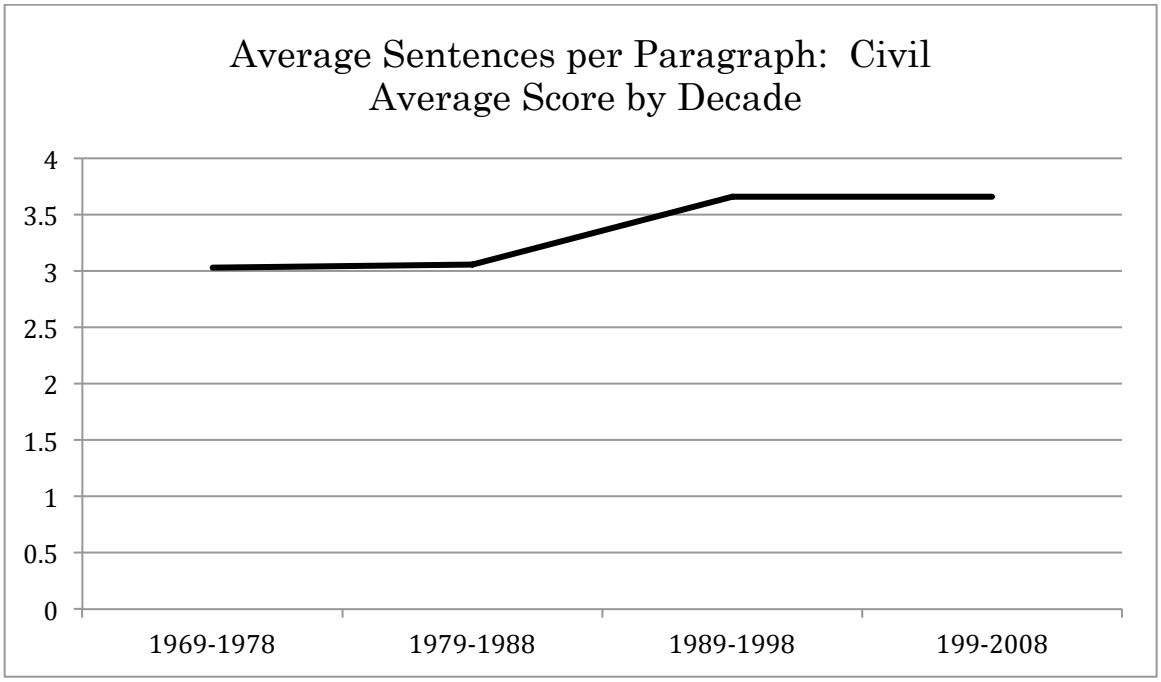

Figure 24.

The criminal brief results are similar, with a starting number of 2.7 in 1969, a leap to 5.0 sentences per paragraph in 1971, and a falling back to 2.7 sentences the next year. As with civil briefs, 1990 produces a spike, with an average number of 6.5 sentences per paragraph, although the high point for criminal briefs is reached in 1998, with an average of 6.7 sentences per paragraph, with the numbers receding thereafter. Figure 25 shows the average sentences per paragraph for criminal briefs.

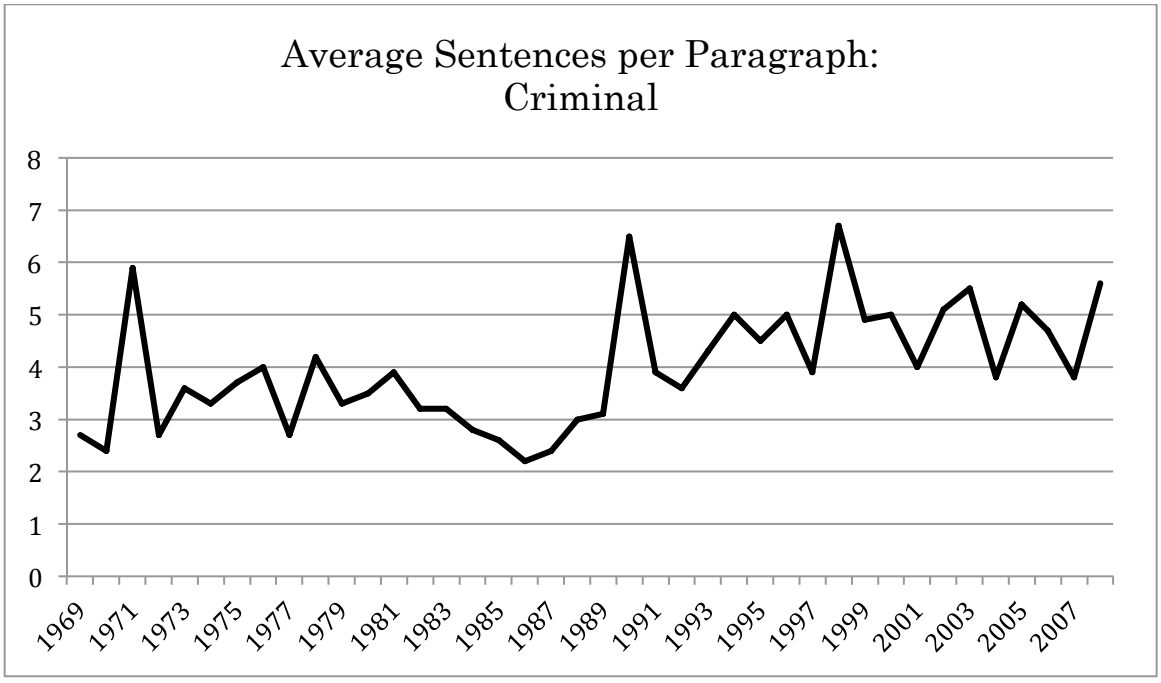

Figure 25.

As with civil briefs, the decade averages are relatively constant, with an average of 3.5 sentences per paragraph in the 1969-1978 decade, 3 in the 1979-1988 decade, 4.3 in the 1989-1998 decade, and 4.7 in the 1999-2008 decade. Figure 26 shows these decade average scores.

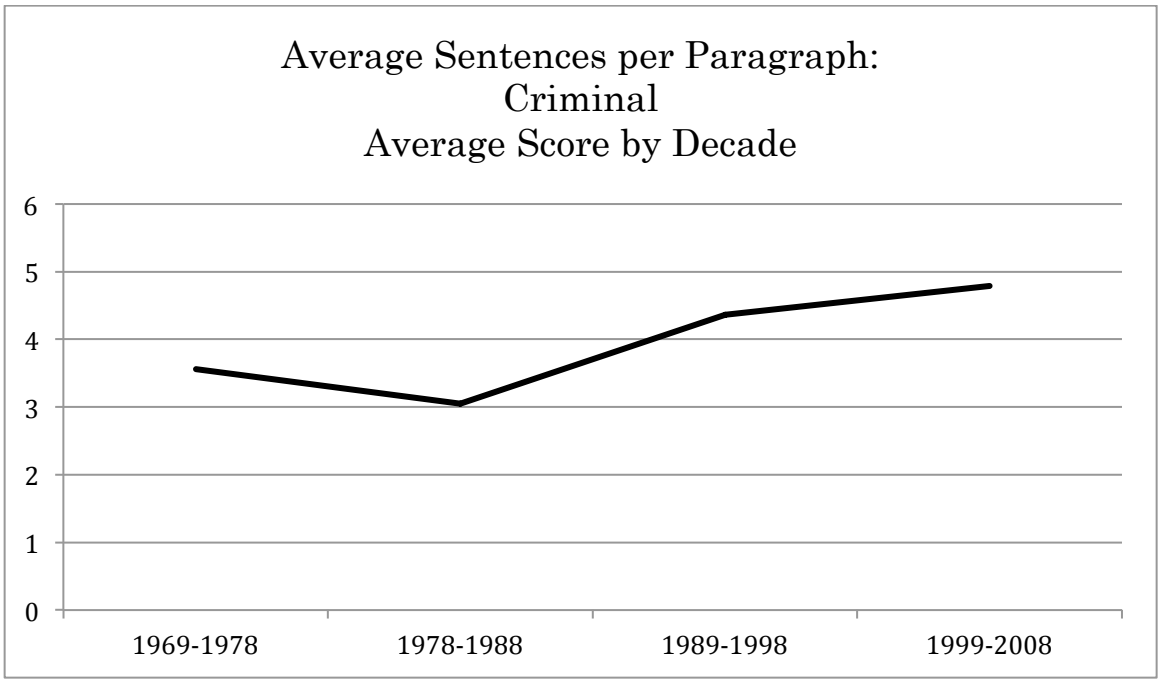

Figure 26.

5. Incidence Of Passive Voice

The final aspect of lawyer writing studied was the incidence of passive voice occurring in a brief, expressed as a percentage of the whole sample. Legal writing instructors, like most writing instructors, prefer the active voice over the passive.[70] One reason often given for this preference is simple expediency: the active voice takes fewer words than the passive, and is therefore a simple way of cutting down the number of words in a document.[71] Some writing instruction texts offer more colorful reasons for avoiding the passive voice. Stephen King, for example, claims that the passive voice is "safe. There is no troublesome action to contend with. . . ."[72]

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70 *See, e.g.* Pratt, *supra* n. 53, at 247.

71 *See, e.g.* Wydick, *supra* n. 50, at 29-30 ("[O]ne good reason to prefer the active voice is economy -- the active voice takes fewer words.")

72 Stephen King, ON WRITING: A MEMOIR OF THE CRAFT, 123 (2000). King continues "I think unsure writers also feel the passive voice somehow lends their work authority, perhaps even a quality of majesty. If you find instruction manuals and lawyers' torts majestic, I guess it does." *Id*. George Gopen, however, once again takes an important contrary position, noting that "[t]he passive is not only as good as the active: It is better than the active in all situations in which the passive voice does a better job than the active. It becomes our task to teach what those situations are and how to handle them." Gopen, *supra* n. 15, at xxiv.

The study suggests that, in general, lawyers appear to have heeded the Plain English message about passive voice. The combined decade scores for both civil and criminal briefs show that passive voice use is decreasing, with the sampled portions of briefs registering a 14.3 percentage of passive voice in the 1969-1978 decade, a drop to 9.5 percent in the 1979-1988 decade, and then a modest but stable increase to 11.6 percent in the 1989-1998 decade and 11.8 in the 1999-2008 decade. Figure 27 shows these scores.

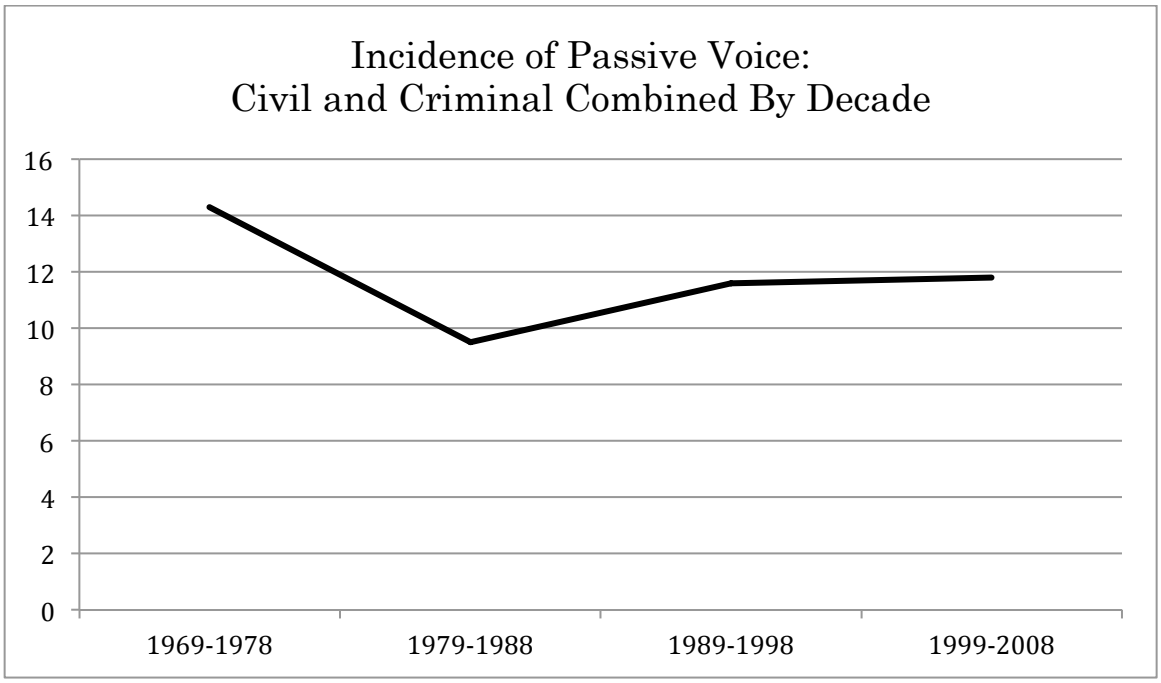

Figure 27.

As one might expect, the year-to-year scores show considerably more fluctuation, beginning in 1969 with 17.2 percent, dropping to a remarkable low of 1.5 percent in 1990, and then rebounding to 20.6 percent in 1997 and 22.1 percent in 2006, followed by a drop to 5.3 percent the next year. Figure 28 shows these year-to-year scores.

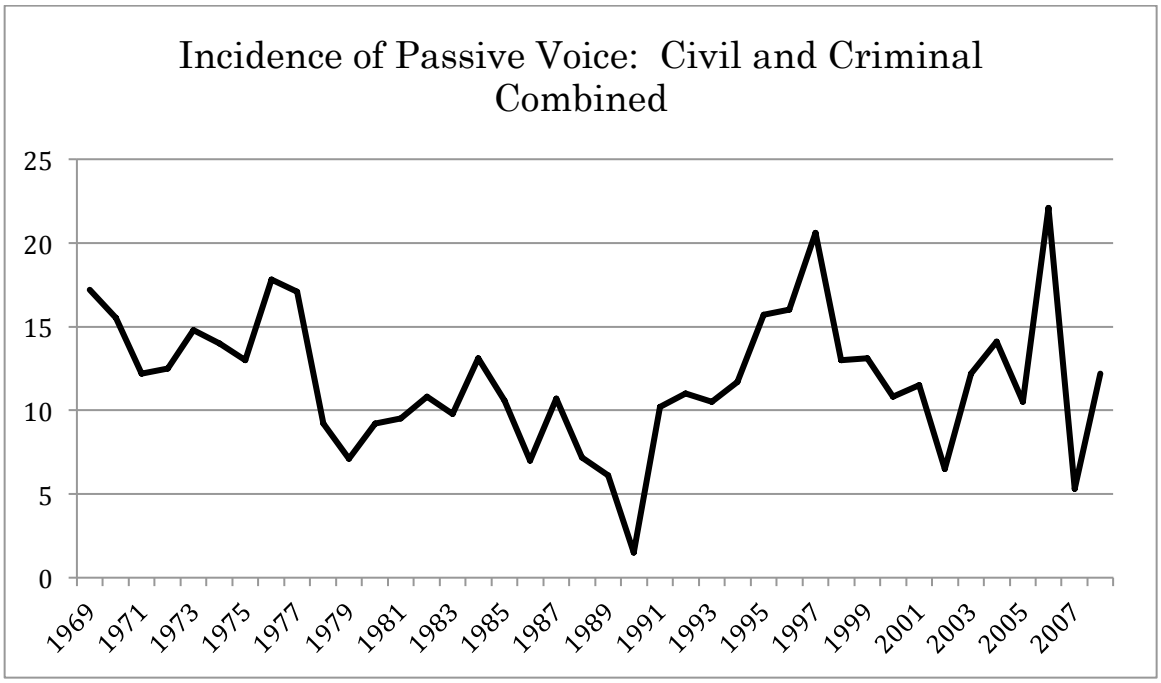

Figure 28.

The civil brief scores reflect this pattern, starting at 25.2 percent in 1969 and oscillating, sometimes dramatically, as in the six year span beginning in 1971, which had a score of 14 percent, followed by 9 in 1972, 15.2 in 1973, 11.2 in 1974, 9.2 in 1975, and 17.2 in 1976. The score dropped to a low of 2 percent in 1990, and reached a high of 27 percent in 2006. Figure 29 shows this up-and-down trend.

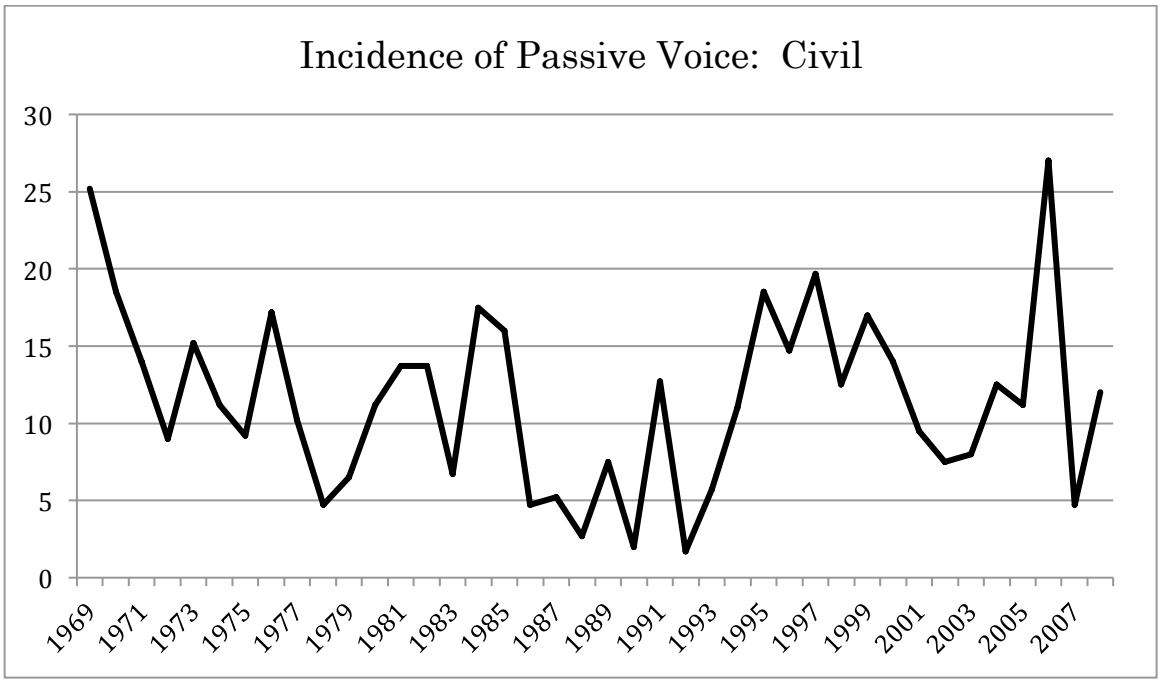

Figure 29.

The decade averages smooth out these year-by-year differences and show that in the 1969-1978 decade, the sampled civil briefs had an average passive voice incidence of 13.4 percent, dropping to 9.8 percent in the 1979-1988 decade, and then climbing to 10.6 percent in the 1989-1998 decade and 12.3 percent in the 1999-2008 decade. Thus passive voice use in civil briefs, while still greater in the most recent decade than it was in the previous two, is still lower than it was in the first year of the study. Figure 30 reflects these scores.

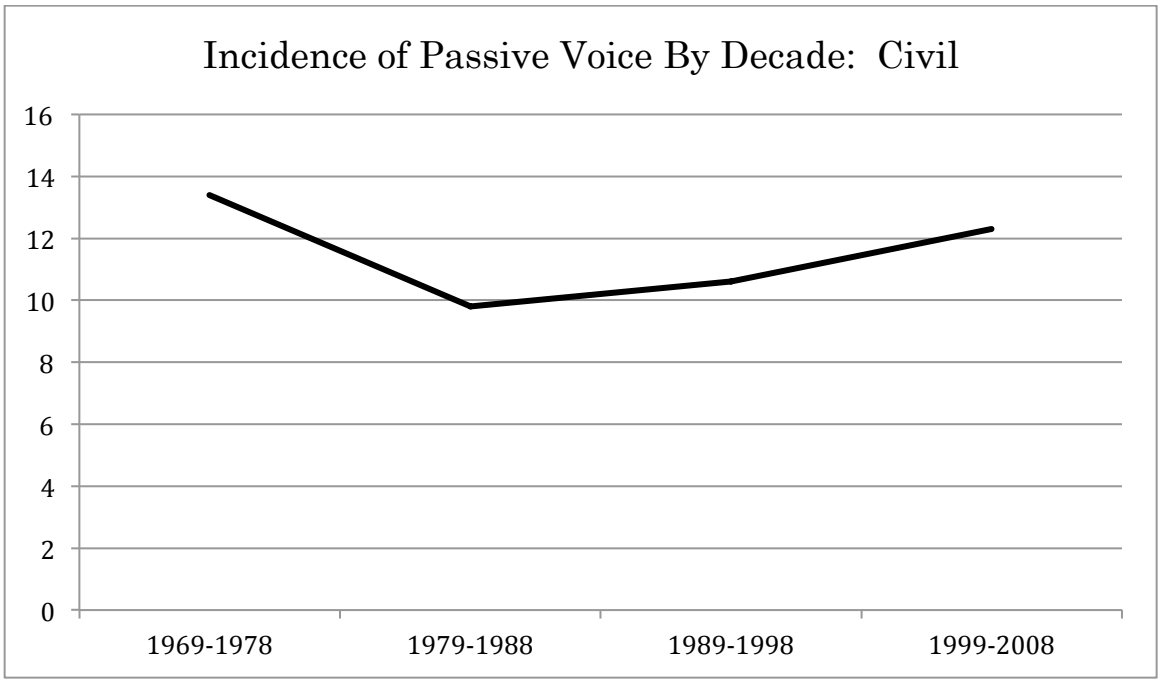

Figure 30.

The year-by-year average criminal brief scores show a slightly different pattern, with an initial score of 9.2 percent in 1969, rising to a high of 24 percent in 1977 and falling to 5.2 percent in 1981. After a drop to 1 percent in 1990,[73] the percentages rebound to 20.2 percent in 1992 and 21.5 percent in 1997 before settling back down, although the seven year period between 2001 and 2007 shows surprising volatility, with 13.5 percent in 2001, 5.5 percent in 2002, 16.5 percent in 2003, 15.7 percent in 2004, 9.7 percent in 2005, 17.2 percent in 2006, and 6 percent in 2007. Figure 31 shows the year-to-year scores for passive voice use in criminal briefs.

[73] The frequency with which 1990 appears in the study's results with scores that differ from the averages in the years surrounding it suggests something anomalous with the briefs selected for that year.

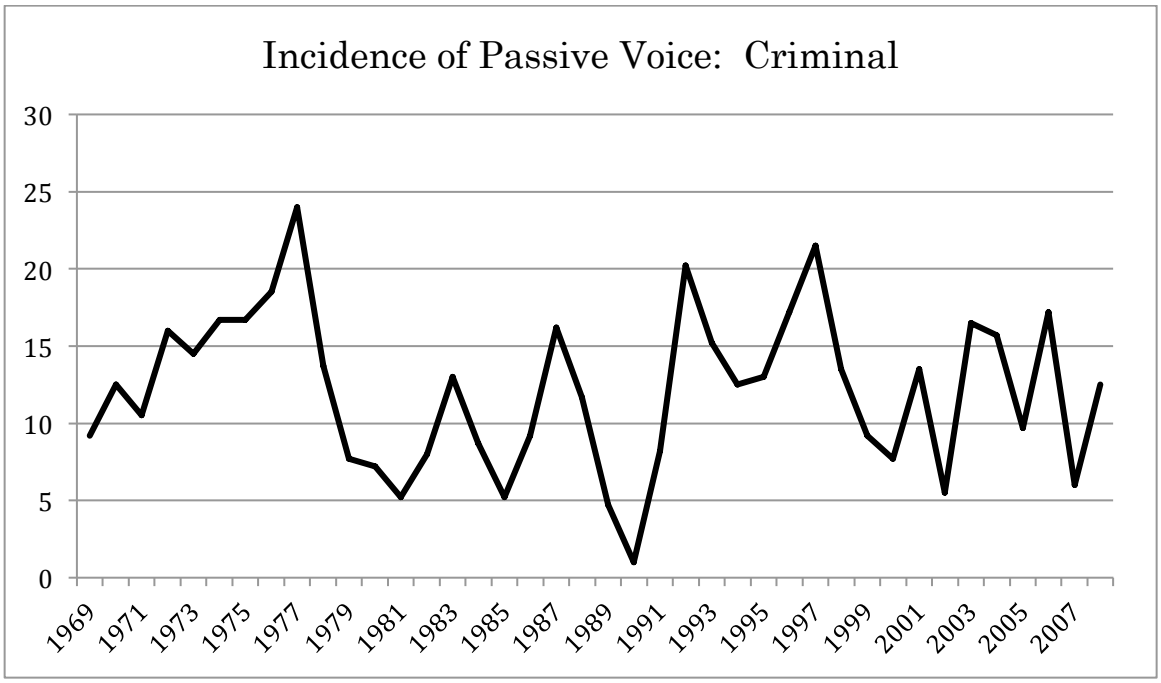

Figure 31.

Once again, the average decade scores show a clearer picture of the trend towards less use of the passive voice, with 15.2 percent in the 1969-1978 decade, 9.2 percent in the 1979-1988 decade, a jump to 12.7 percent in the 1989-1998 decade, and then a slight falling-off to 11.3 percent in the 1999-2008 decade. Figure 32 shows these scores.

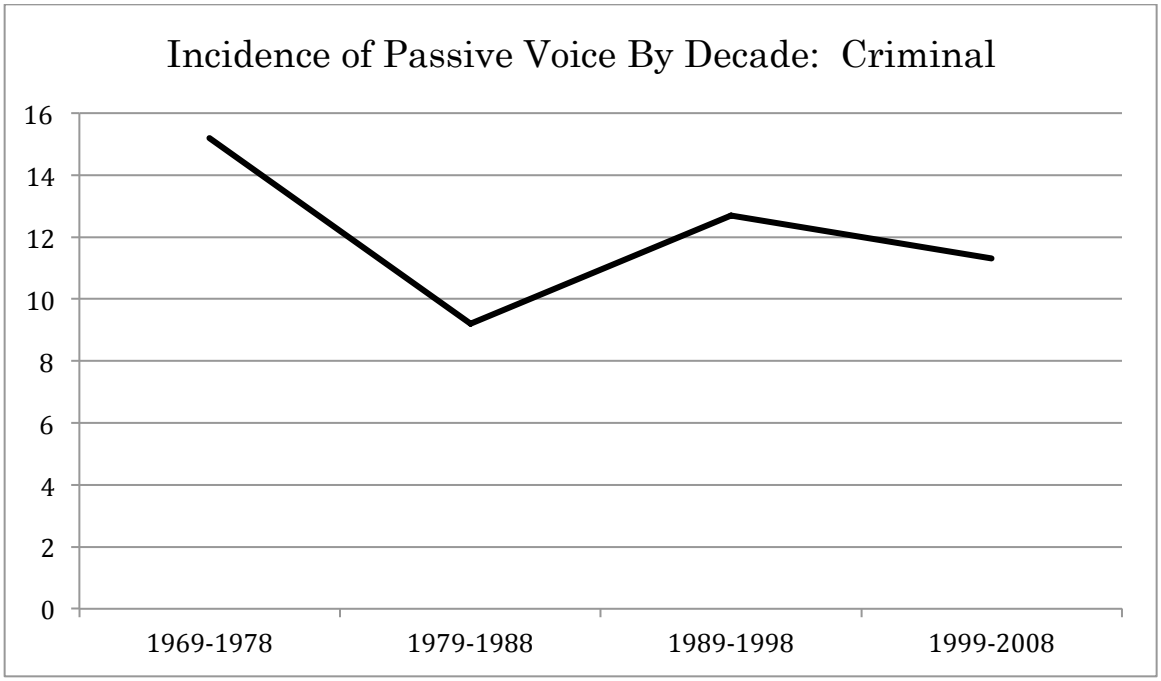

Figure 32.

ANALYSIS

It would be easy to use this survey's results to support a Chicken-Little-like concern that the legal writing sky is falling, but that would be a mistake. The numbers reflected in this study are not intended to be statistically significant, and they only represent a snapshot taken of one court. Accordingly, they should not be thought of as representing the state of legal writing across all practice areas in every jurisdiction in the country.

But the survey's results should not be minimized either. The court involved is attended by lawyers from many law schools -- located in New York state and located elsewhere -- and the numbers mirror the anecdotal observations of lawyers and judges that lawyer writing is not improving, despite the efforts of legal writing faculty to inculcate Plain English principles into the writing techniques of graduating law students. Moreover, the fact that the results are generally consistent between civil and criminal practitioners suggests that the survey's results are capturing something going beyond doctrinal genre expectations.

In fact, at first glance, the numbers generated by this study might lead an observer to believe that the increased emphasis on legal writing education in the American legal academy over the past 25 years had, at best, done nothing to improve lawyer writing, and at worst, had actually helped to make the situation worse. But closer reflection makes clear that there are many reasons a writer might adopt a particular writing style when drafting an appellate brief that this study does not take into account and that the study cannot support any causal conclusions for its results.

Perhaps the most important thing to remember while considering the study's results is that any form of writing is difficult to do well, and persuasive legal writing is a particularly difficult skill to master. A lawyer seeking to convince a court of a position in writing must employ rhetorical and narrative strategies, emphasizing positive facts and law and minimizing unfavorable facts and law, while bound by strict ethical and regulatory constraints. Lawyers are further limited by genre expectations that place practical limits on how experimental they can be when trying to write persuasively. Persuasive written advocacy is certainly not a task that can be mastered in the short time allotted to legal writing programs in law schools.[74]

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[74] Every year, the Association of Legal Writing Directors and the Legal Writing Institute conduct a survey of legal writing programs. The survey's results show that in the Fall of 2010, legal writing programs received an average of 2.38 credit hours. Association of Legal Writing Directors & Legal Writing Institute, REPORT OF THE ANNUAL LEGAL WRITING SURVEY, at iv (2011). The Spring 2011 average was 2.31. Forty-eight schools reported a required class in the fall of a student's second year, with an average of 2.08 credit hours, and fifteen schools had required classes in the spring of a student's second year, averaging 2.20 credit hours. *Id*. Eight schools reported a required class in the fall of a student's third year, averaging 2.62 credit hours, and six schools had required courses in the spring of a student's third year, averaging 2.17 credit hours.

Even were legal writing to get substantially more time on the academic curriculum,[75] though, it is unclear how much this would help; law practice exerts time, cost, and consequential pressures that can only be simulated to a degree by law schools, and in any case, becoming a fluent and accomplished legal writer would almost certainly take longer than the three years of a traditional law degree, no matter how much time a student could devote to learning the skill.[76]

And not all law students come to law school displaying the same degree of writing competence. Criticisms of the quality of incoming law student writing skills are not new. In 1959, Arthur Vanderbilt observed that there was "well-nigh universal criticism respecting the inability of [incoming]

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[75] It is unclear how much time would be desirable. The ABA Sourcebook states that "legal writing courses should be assigned at least the same number of credits as each of the other doctrinal first-year courses, and a strong argument can be made that legal writing courses should be assigned more. In the majority of law schools, the legal writing course is the only one in the first-year curriculum that teaches students the skill of researching and analyzing legal problems and then expressing their analyses in law practice documents. To teach these important skills in a sophisticated manner, legal writing faculty need a course with enough credits to allow for sufficient in-class and out-of-class time to introduce and practice these skills -- including drafting and redrafting documents. ABA SOURCEBOOK, *supra* n. 7, at 78. But because a law school's total number of credit hours is finite, any credit time added to legal writing courses must come from somewhere else. The core doctrinal courses are crucial, especially in the first year of law school where most legal writing programs are also situated, and it is important to allow upper-class students some time to pursue areas of the law that are of particular interest to them. Adding a writing component to doctrinal classes is one possible solution, but not all doctrinal teachers have the time, patience, or skill necessary to make a meaningful improvement in law student writing. It is easy to say that legal writing should get more time in law schools, but more difficult to say from where that time should come.

[76] There seems to be a growing understanding that it takes ten thousand hours of practice to achieve "mastery" in a subject. "In study after study, of composers, basketball players, fiction writers, ice skaters, concert pianists, chess players, master criminals, and what have you, this number comes up again and again. Ten thousand hours is equivalent to roughly three hours a day, or twenty hours a week, of practice over ten years." Daniel J. Levitin, THIS IS YOUR BRAIN ON MUSIC: THE SCIENCE OF A HUMAN OBSESSION, 193 (2006). This could be achievable for graduating law students, had they received intensive, constant, writing instruction during the eight years of their high school and undergraduate education, but that is an unreasonable expectation. And, of course, not every person who spends even this amount of time practicing a skill gets to the level Levitin is talking about. As he notes, "this doesn't address why some people don't seem to get anywhere when they practice, and why some people get more out of their practice sessions than others." *Id*. Nonetheless, the amount of practice necessary to become even moderately adept at a skill such as legal writing is substantially more than can be provided in a law school curriculum.

law students to think straight and to write and speak in clear, forceful, attractive English."[77] And writing in 1969, the first year of the current study, Albert Blaustein noted that law schools

> have put the major blame on the failure of high school and college English composition teachers to send a better trained writer on to the graduate schools. But, to their credit, the law schools do more than assign blame, By now, practically every law school has some kind of legal writing program designed to produce better lawyer-writers. Yet no one is satisfied.[78]

Blaustein is not quite right. The students themselves are quite satisfied with their writing skills, at least when they enter law school. In a survey I conducted of students from several law schools in the summer of 2006, more than 70% of responders ranked their writing skills as "strong" or "very strong," while just over 13% of responders ranked their skills as "average" or "weak."[79] The survey noted how much the students had written recently and in their previous academic careers,[80] concluding that

> [a]lmost one quarter of responding students indicated that they only prepared one draft of papers [as undergraduates], meaning that they had little or no experience in the editing, proofreading, and rewriting skills most legal writing teachers identify as

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77 Arthur T. Vanderbilt, *A Report on Prelegal Education*, 25 N.Y.U.L. REV. 199, 209 (1950).

78 Albert P. Blaustein, *On Legal Writing*, 18 CLEV.-MARSHALL L. REV. 237, 239 (1969). Blaustein had already expressed his own level of dissatisfaction with law student writing. "Virtually all legal writing is atrocious!" *Id*., at 237. As noted *supra*, it was not until the publication of the MacCrate report, twenty-three years after Blaustein's article appeared, that legal writing education in the American legal academy became an established and separate part of the first year curriculum. *Supra*, n. 10 and accompanying text.

79 Ian Gallacher, *"Who Are These Guys?": The Results of a Survey Studying the Information Literacy of Incoming Law Students,* 44 CAL. WESTERN L. REV. 151, 172 (2007). The students were also asked to evaluate their spelling, grammar, and punctuation skills and reported similar confidence, with 57% reporting their spelling skills as "very strong" or "strong" and 26% ranking their spelling as "average" or "weak" and only 1% ranking their spelling skills as "poor." *Id*. For grammar, 65% ranked themselves as "very strong" or "strong" and 18% as "average" or "weak" and 0.4% as "poor." *Id*. For punctuation, 59% ranked themselves "very strong" or "strong," 24% as "average" or "weak," and 0.2% as "weak." *Id*. To put it mildly, the students' self-evaluation is at odds with the impressions of many of those who must work to help students improve their writing skills.

80 *Id*. at 172-178 and accompanying notes.

> crucial to generating polished and technically correct writing. . . . Even when drafts were prepared, 20% of responding students indicated that they "never" submitted drafts to their teachers, and almost 15% indicated that they "never" discussed drafts with teachers or teaching assistants. This was so even though slightly more than 20% of responding students indicated that they had taken six or more classes that focused primarily on writing and 57.7% indicated that they had taken between one and five such classes.[81]

These survey results caused me to speculate that incoming law students' over-estimation of their writing skills might lead to unhappiness with their legal writing course and its teachers,[82] and it might also be the case that a misguided overconfidence in their writing skills might cause law students to diminish the value of the writing instruction they receive in law school. And that would, in turn, perhaps cause lawyers to misjudge the importance of continuing to work on improving their writing skills while in practice

In their study of how legal writing is perceived, Susan Kosse and David ButleRitchie suggested twelve possible reasons for poor legal writing in practice, suggesting that lawyers do not write well:

1. because they did not take a writing class in law school.
2. because law schools devalue legal writing classes.
3. because they do not get enough practice in law schools
4. because poor writing promotes their economic interest.
5. because of inertia.
6. because of deficiencies in their early education
7. because the profession offers very little continuing education on improving writing skills.
8. because of time and financial constraints.
9. because they do not know they write badly.
10. because of the Generation X factor (in the case of new lawyers).
11. because of technology.
12. because they do not write regularly.[83]

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81 *Id.* at 188.

82 *Id.* at 187.

83 Kosse and ButleRitchie, *supra* n. 18, at 93.

Some of these reasons do not advance the discussion far. It might have been true, or example, that many lawyers in the past did not take a legal writing class in law school, but it is unlikely that most lawyers who graduated since the rise of legal writing as a recognized discipline within the American legal academy,[84] and especially since the MacCrate Report's emphasis on the importance of legal writing skills, have not taken at least one writing class in law school.[85] Similarly, while the problems of legal writing's status within the legal academy are well documented,[86] and some students, at least, are doubtless persuaded by these status issues to take their legal writing studies less seriously than otherwise they might, it seems unlikely that this is a significant cause of this study's results.[87]

But while some of the Kosse and ButleRitchie factors might not be at issue, the present study also suggests that other items on their list might indeed be at play. For example, the generational shift in the lawyer population might well be reflected in the survey. Generation X, in its broadest definition, "sweeps in those individuals born between 1961 and 1981."[88] That means that apart from a few advanced members of the cohort, Generation X law students started arriving in law schools in 1982, when they

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84 Legal writing was recognized as a teaching category in 1947. Kosse and ButleRitchie, *supra* n. 18, at 93, citing, Marjorie Dick Rombauer, *First Year Legal Research and Writing: Then and Now*, 25 J. LEGAL EDUC. 538, 540 (1973). The more helpful date for the advent of legal writing as a recognized discipline, though, is 1984, the date of the first Legal Writing Institute. *Supra*, n. 1.

85 It is possible, though, that the inadequacy of legal writing education prior to its establishment as a recognized discipline in the legal academy has a continued effect on the quality of contemporary legal writing because of older lawyers' inability to recognize that they do not write as well as they think they do and their influence on more junior lawyers' writing.

86 *See*, *supra*., n. 9.

87 By asserting this, I recognize that I am disagreeing with Professors Kosse and ButleRitchie, who claim that "[t]he effect of [status problems for legal writing teachers] on legal writing cannot be overestimate." Kosse and ButleRitchie, *supra* n. 18, at 95.

88 Joan Catherine Bohl, *Generations X and Y in Law School: Practical Strategies for Teaching the "MTV/Google Generation,"* 54 LOY. L. REV. 775, 778 (2008), citing, Tracey L. McGaugh, *Generation X in Law School: The Dying of the Light or the Dawn of a New Day?*, 9 LEG. WRITING 119, 120 (2003).

were 21 years old, and were beginning to enter practice three years later, in 1985. Allowing for a few years in order for these junior lawyers to gain the seniority necessary to draft appellate briefs in New York's Court of Appeals, one might expect to see their work reflected in the study beginning in around 1988.

And the study does suggest that some change happened around this time. The combined civil and criminal Reading Ease score, for example, reaches a peak of 53.4 in 1990 and drops steadily from then for several years: 47.7 in 1991, 43.6 in 1992, 34.6 in 1993, 30.2 in 1994, 29.8 in 1995, and 29.5 in 1996.[89] Scores rebound somewhat thereafter -- 36 in in 1997 and 34 in 1998 -- but never again ascend to pre-1991 averages.[90]

As one would expect, the Grade Level scores show a similar trend, with a low score of 8.3 in 1990 and then a steady increase for the next several years -- 10.1 in 1991, 10.8 in 1992, 13.6 in 1993, 14.5 in 1994, 14.8 in 1995, and 15.8 in 1996 -- before a slight fallback to 13.9 in 1997 and 14.6 in 1998.[91] Thereafter, scores remain consistently higher than they had pre-1990, with the exception of a one-time dip to 9.2 in 2007.[92]

Professors Kosse and ButleRitchie's observation that neither law students nor practitioners write enough to refine and improve their writing skills is also doubtless correct and significant. Finding ways to allow law students to write more carefully supervised work while in law school, and finding ways to allow new lawyers to continue to write in a supervised environment once they reach practice[93] would likely help to produce better results than the study observed.

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89 *See*, Figure three, *supra*.

90 *Id*.

91 *See*, Figure ten, *supra*.

92 *Id*.

93 Professors Kosse and ButleRitchie note that "[n]ew lawyers in large firms are often given drudge tasks of research or discovery review that require little in the way of complex writing skills." Kosse and ButleRitchie, *supra*, n. 18, at 101. And while some might disagree with the observation that legal research could be grouped in the category of "drudge tasks," and others might note that what is true of large law firms might not be true of smaller firms

There might also be a technological explanation for some of the study's results. The observed decline in Reading Ease scores, and the parallel increase in the Grade Level scores, begins at roughly the same time that the traditional dictate-and-type model of document creation in law offices was being replaced by the current word processor model.[94] It is possible that the move from a model where a lawyer and assistant worked together to create a document to a model in which the lawyer can, if so desired, act as sole writer, editor, proofreader, and publisher of the document has led to a deterioration in standards.[95] The ability to make more rapid changes in a document, and to wait until later before a document is locked into final form, might also make it possible for a lawyer to spend less time on reflection and editing and more time in the document's primary drafting stage, thereby leading to a less polished final product, suggesting still further that time and financial constraints might indeed be significant reasons for the way lawyers write.

Most significantly, though, Professor Kosse and ButleRitchie's suggestion of "inertia" in law practice could explain why the message of Plain English appears not to being heard by the practice community. As Kosse and ButleRitchie note, "a junior member in a firm may be reluctant to write clearly and concisely in the senior partners write in a more labored style. And some clients may insist on the 'traditional' style of writing."[96] And Professor Wayne Schiess observes that "[i]t's easier to drag out the old form,

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or solo practices, it is likely true that all lawyers, new and less new, would benefit from writing more. On the other hand, if the documents on which law students and new lawyers work are not reviewed carefully with a view to improving the lawyers' writing, more writing could simply solidify bad practices, making poor lawyer writing more entrenched.

94 IBM began to market the Personal Computer, or PC, in 1981. Apple began to sell its Macintosh (or Mac) computers in 1984.

95 I am grateful to Michael Brown for this observation.

96 Kosse and ButleRitchie, *supra* n. 18, at 98. Professors Kosse and ButleRitchie also identify the "reliance on forms and existing documents, including poor organization, insufficient analysis, and arcane language and legalese" as other examples of inertia that might cause poor contemporary legal writing. *Id*.

copy it, and file it. It's harder to justify the cost or the time to reformat the old form into contemporary style and revise it into plain language."[97]

Both Professors Kosse and ButleRitchie and Professor Schiess use the word "inertia" to describe this phenomenon, but perhaps "choice" would be better or, at least, more accurate. The role of time and expense, observed by Professor Schiess, is hardly a minimal one, and in contemporary law practice, it is entirely possible that a lawyer might consider the cost -- to both the client and to the lawyer, in terms of lost time to perform other tasks, of preparing multiple drafts of a document and seeking to refine the writing style until it is as plain and clear as possible -- with the benefit to be gained by such refinement. As rational economic actors, behaving in their own enlightened self-interest, lawyers would likely seek to improve their writing only if they believed that the benefit would outweigh the costs, leading to the possibility that they are aware of, but are unconvinced by, the claims of Plain English advocates.

If this is the case, the fate of Plain English in the law is likely to be an unhappy one. Lawyers will only change their writing style if they believe that the penalty for failing to do so will be so severe that it is in their best economic or professional interests to do so. Assuming that their documents are sufficient competent to escape censure from a court, most lawyers would -- correctly -- assume that judges will decide a case based on the facts and the law, not on the lawyer's writing style. Accordingly, without the threat of actual negative consequences attaching to their poor writing, lawyers have little incentive to improve their writing, even if they know judges are ill-satisfied with the way they write.

Or perhaps lawyers are unconscious of how their writing is perceived by clients and judges and do not realize they write badly. The present generation of lawyers, at least, appear to have entered law school with an

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[97] Wayne Schiess, *When Your Boss Wants It The Old Way*, 12 SCRIBES J. LEG. WRITING 163, 164 (2008-2009).

unrealistic belief that they are good writers.[98] If law school did not alter that belief, then those students might enter practice with the same, exaggerated, belief in their writing abilities.

After all, the lawyers who drafted the documents analyzed in this study continue to write in much the same style as lawyers have always written. If so, perhaps this false perception might be the reason why lawyers give little attention to continuing to improve their writing skills. Put simply, if lawyers think they write well, they likely will see no reason to improve skills they already believe to be adequate.

And it might simply be the case that lawyers do not like the idea of Plain English. George Gopen has likened legal language to its guild symbol, or "livery,"[99] and Robert Benson has noted that legalese is "at best a symbol of alienation and at worst a tool to intimidate and exploit the public."[100] A more benign way of expressing this notion is David Crump's point that "[o]ne of the legitimate functions of formal language is to convey dignity, solemnity, and gravity. . . ."[101] If lawyers want to use language as an extra-communicative sign of their profession, then no amount of persuasion that Plain English is a more effective way of writing will likely stop them.

The study, then, offers the tantalizing prospect of providing data to support some long-held beliefs about the reasons for poor lawyer writing. But such a prospect is a chimera, a mirage that cannot form itself into a tangible

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98 *See, supra*, n. 79 and accompanying text.

99 Gopen, *supra* n. 17, at 339.

100 Robert W. Benson, *The End of Legalese: The Game is Over,* 13 N.Y.U. REV. L. & SOC. CHANGE 519, 522 (1985). Benson also remarks that "just as it is obvious to every school child who has ever scrawled a dirty word on the chalkboard that language is power, so it ought to be obvious to all of us that lawyers' language is power exercised by a power elite and that the stakes in it are real and very high." *Id*. at 520.

101 Crump, *supra* n. 48, at 734. Professor Crump makes clear in his article that he is speaking against the use of plain English in "preservation" documents, such as provisions in a commercial contract. *Id*. at 716. Even Professor Crump acknowledges the role of plain English in "persuasion" documents like appellate briefs. *Id*. But he contradicts himself when he argues against redrafting litigation documents such as complaints in a plain English style, which he contends could be expensive "without improving the function of the pleading." *Id*. at 742.

reality. Is the reason for a decrease in writing standards generational? Technological? Cultural? Perhaps a result of the decline in reading standards that has been observed by the National Endowment for the Arts?[102] A change in the way writing is taught in American schools? Choice? Ignorance? Other factors? A combination of factors? The survey cannot answer these questions, limiting itself to a description of effect without being able to suggest cause.

Equally, the survey does not allow for any conclusions about the effect of legal writing programs on the observed changes in legal writing. While a positive result might have been attributable to legal writing training, particularly if it was directly correlated in time to the change, the negative results observed by the study cannot be similarly attributed to legal writing training. It is much more likely, in fact, that the numbers would have been substantially worse had legal writing programs not been doing what they could to improve writing standards among law students.

Accordingly, while the data suggest that writing in the studied briefs underwent a change in the late 1980s and early 1990s from which it has not yet recovered, the study cannot allow a researcher to tell if that change was the result of pedagogical decisions made years before, of technological or generational changes over which teachers have no control, or for some unidentified reason. And while speculation over potential causes might be interesting, it is ultimately fruitless unless some additional research can more specifically identify the reasons for the observed changes in lawyer writing.

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[102] NAT'L ENDOWMENT FOR THE ARTS, READING AT RISK: A SURVEY OF LITERARY READING IN AMERICA (2004), available at http://www.nea.gov/pub/readingatrisk.pdf

CONCLUSION

The present study appears to flatly contradict the optimistic assessment of the Coleman/Phung study that "[a] gradual historical trend towards plainer writing is revealed over recent decades."[103] There are several possible reasons for this disparity, including methodological differences and the use of a corpus of documents from different jurisdictions. But even the Coleman/Phung study revealed equivocal results when studying the "argument" section of its studied briefs, the same part of the brief analyzed in this study.[104] So while the Coleman/Phung study suggests that lawyers are writing their Statement of Facts in a more "plain" style, especially in documents filed before the Supreme Court, it does not necessarily contradict this study's findings that the same cannot be said for the analysis section of briefs, especially in those filed before the New York Court of Appeals.

While this survey identifies an effect, it cannot point to a particular cause. But while the survey might not support causal conclusions for its results, it does allow for some more definite suggestions about possible solutions to the effects it records. Most significantly, while some, or perhaps even all, the problems causing a decline in the quality of lawyer writing might be outside the control of legal writing programs, the survey's results nonetheless suggest that the role of legal writing programs in the legal academy should be reviewed and substantially enhanced. If the problem is the quality of writing education our students are receiving before they enter law schools, then law schools should consider expanding the role of legal writing programs to engage students before they come to law school.[105] And

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103 Coleman and Phung, *supra* n. 19, at 103.

104 *Id*. at 97.

105 This is not a new suggestion for me. I proposed that law schools should do this in a 2007 article discussing the results of survey that suggested that incoming law students overestimated their information literacy skills. Gallacher, *supra* n. 79, at195-196. My proposal then was based on the relatively unhappy results of a survey of incoming law students that suggested that incoming law students "have information literacy deficits that will affect them throughout their career in law school and on into the practice of law, and that they are unaware that such deficits exist. *Id*. at 192. I noted also that "[t]he data

law schools might also consider enhancing their entrance standards in order to emphasize the crucial importance of skillful writing.[106] Difficult though both of these steps might be to implement, it is worth remembering that, for most lawyers, the legal writing classes they take in the first year of law school are the last formalized writing instruction they will ever get. Viewed in that light, finding ways of improving their writing before they come to law school seems to be a crucial step along the path of improving lawyer writing.

Most importantly, though, in order to help to improve the quality of written work product produced by practicing lawyers, law schools should consider expanding their pedagogical reach to include their alumni, in an attempt to counteract the potential effects of lawyer inertia or choice and poor practice habits on lawyer writing. Every practicing lawyer is an alumnus of a law school and the study suggests that a substantial number could use help to improve their writing skills.[107] Technological developments in recent years make it possible for law schools to offer such help to their

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suggest that law schools are not fixing the students' problems." *Id*. at 193. What was true then is even more true now, given the results of the present study. There are many ways in which law schools might involve themselves in improving the writing skills of students before they come to law school, but almost all of them will require law schools to shed jurisdictional concerns and help students who might not ultimately matriculate at their institutions. It might be difficult to persuade law school and university administrations to expend any effort on behalf of students who might not become tuition-paying members of their institutions, but the long-term cost of not doing anything to improve the quality of incoming student writing across the board is surely greater than the short-term benefit of only working with those students who pay tuition to a particular school.

[106] Of course, the danger of taking such a step unilaterally is that students, being sophisticated consumers of education, will simply avoid the schools that make writing a core part of their application process and apply instead to schools with application standards that are more tied to objective results like undergraduate GPA and LSAT scores. And even suggesting that law schools unite to make writing skill a priority in the applications process is to acknowledge the futility of such a proposal. Yet the alternative to not taking bold action is to accept the possibility of writing standards slipping still more in the years ahead.

[107] Such a suggestion supposes that alumni would be willing to accept help with their writing, or would have time to participate in whatever writing support process a law school could put into place. Even those who might not take advantage of the opportunities offered by their law schools, however, would surely appreciate that the school had not forgotten its obligations to its students once they became alumni.

alumni base,[108] even when those alumni might be geographically dispersed and unable, or unwilling, to return to the campus.

Such an approach would require resources, of course, both in terms of people and technology. And teachers devoted to such activities could not also be expected to maintain full teaching loads within the institution. But given the current turbulent times for legal education,[109] a law school that could demonstrate to its alumni and to its students' prospective employers that it had a dedicated commitment to the long-term improvement of its alumni's writing might well be able to carve out a niche the sets it apart from other, less involved, law schools.

All of this suggests a central role for legal writing faculty in all stages of a lawyer's development, from before entry into law school, through the three years of intense study in law school, and on into practice, as lawyers strive to improve their skills. Practitioners -- or, to give them their alternative title -- alumni, should insist that law schools do as much as possible to support the development and maintenance of highly-skilled legal writing faculty who can help the entire law school community, faculty and

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[108] To even speak of current technology is to render oneself obsolete, since the available technological resources will surely have changed and improved from the time of writing to the time of reading. Without mentioning specific tools then, the advent and improvement of web-based technology, including video conferencing and group document commenting software, allows for almost unlimited possibilities of providing writing instruction to people in offices across town from a law school or across the country. Using such technology to teach law school classes is currently restricted by the American Bar Association's standards on distance-learning. ABA Section on Legal Education and Admissions to the Bar, 2011-2012 Standards and Rules of Procedure for Approval of Law Schools, Standard, Standard 306 provides, in part "(d) A law school shall not grant a student more than four credit hours in any term, nor more than a total of 12 credit hours, toward the J.D. degree for courses qualifying under this Standard; (e) No student shall enroll in courses qualifying for credit under this Standard until that student has completed instruction equivalent to 28 credit hours toward the J.D. degree; (f) No credit otherwise may be given toward the J.D. degree for any distance education course" available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_standards_chapter_3.authcheckdam.pdf. But no such restrictions apply to non-degree courses that might be offered to alumni. Such possibilities are also available to law schools seeking to deliver writing support to pre-law school students.

[109] *See, e.g.*, Annie Lowrey, *Law Of Averages: Why The Law School Bubble Is Bursting,* Slate (March 18, 2011), available at http://www.slate.com/articles/business/moneybox/2011/03/law_of_averages.html

students, to improve lawyer writing. And they have a reasonable expectation that the law schools which took so much in tuition from them when they were students, and who now seek their financial support now they are practicing lawyers, will not consider their educational responsibilities to end once the students have crossed the stage at Commencement.

The data in this study might not suggest that legal writing education is at fault for an apparent failure to improve the quality of legal writing, but they do suggest that the anecdotal reports about the poor nature of legal writing are correct. The entire legal academy -- not just one segment of that academy -- has the ability, and arguably, the responsibility, to work at arresting the decline in practitioner writing standards and to make an affirmative change in the quality of legal writing in practice. Making the institutional commitment necessary to effect such changes might require time, energy, and cost, but the potential institutional and societal benefits to be garnered from such efforts are too substantial to be ignored., and failure to make such a commitment could exacerbate the problems currently facing the legal academy, to the detriment of all.