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Telling Through Type: Typography and Narrative in Legal Briefs

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Telling Through Type: Typography and Narrative in Legal Briefs

Derek H. Kiernan-Johnson*

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Introduction

Most lawyers today self-publish, using the same word-processing software they use for composition, and letting their software's default settings determine their documents' typography. Those settings, however, are not

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optimized for legal writing. And lawyers who rely on software defaults, especially in documents submitted to courts, do so at their peril. As Chief Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit has explained, “Desktop publishing does not imply a license to use ugly or inappropriate type and formatting—and I assure you that Times New Roman is utterly inappropriate for long documents It is designed for narrow columns in newspapers, not for briefs.”¹

So brief writers must make choices. Existing commentary on legal writing and typography² helps explain what these choices are and how to make them. Consciously or not, this commentary has been framed in general and neutral terms: how can brief writers improve the typography of their briefs, whatever the content of those briefs might be and irrespective of the context in which they are written. And by “improved” typography, what we typically mean are such neutral (-sounding) goals as better legibility and readability and increased reader comprehension and retention.

But not every text, or part of every text, wants to be comprehended easily or later remembered. Much of the art of brief writing (and legal persuasion more generally) involves highlighting the good and de-emphasizing the bad. Lawyers strive to stifle meaning as often as they seek to create it. As former appellate advocate and now Chief Justice John G. Roberts once put it, “Judges have no interest in the court reaching a ‘wrong’ result, but fifty percent of clients *do*.”³

1 Frank H. Easterbrook, Speech, *Challenges in Reading Statutes* (Chi., Ill., Sept. 28, 2007) (available at <http://lawyer-sclubchicago.org/docs/Challenges.pdf>) (accessed Feb. 27, 2010). As James Felici has noted, “Times is probably used inappropriately more than any other typeface today. Ironically, it’s no longer commonly used in newspapers, not even the Times.” James Felici, *The Complete Manual of Typography: A Guide to Setting Perfect Type* 70 (Peachpit Press 2003).

2 At the almost certain risk of leaving something out and with apologies for doing so, this existing commentary includes Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. ALWD 108, 112 (2004) [hereinafter Robbins, *Painting with Print*]; Raymond P. Ward, *Writer’s Corner: Good Writing, Good Reading: Advice on Typography*, DRI For the Defense 60 (Jan. 2005); Seventh Circuit, *Requirements and Suggestions for Typography in Briefs and Other Papers*, <http://www.ca7.uscourts.gov/rules/type.pdf> (accessed Feb. 28, 2010); Richard K. Neumann, Jr., & Sheila Simon, *Document Design*, http://www.aspenlawschool.com/books/neumann.simon_legal-writing/premium/default.asp (online supplement to *Legal Writing* (Aspen 2008) (accessed Mar. 5, 2010); Wayne Schiess, *Schiess’s Basic Document Design for Lawyers*, <http://www.utexas.edu/law/faculty/wschliess/legalwriting/2008/07/schiess-basicdocument-design-for.html> (accessed Mar. 5, 2010); Raymond P. Ward, *The Right Tool for the Job* 16 Certworthy (Winter 2008); Bryan A. Garner, *The Redbook: A Manual on Legal Style* § 4 (2d ed. 2006); Bryan A. Garner, *Legal Writing: Pay Attention to the Aesthetics of Your Pages*, Student Law. 14–16 (May 2008); Bryan A. Garner, *The Aesthetics of Your Pages*, in *Garner on Language and Writing* 98–101 (ABA 2009); Matthew Butterick, *Typography for Lawyers*, <http://www.typography-forlawyers.com/> (accessed Jan. 18, 2010); Linda L. Morkan, *Appellate Advocacy, The Gestalt of Brief Writing: Visual Rhetoric in the Appellate Brief*, DRI For the Defense 27 (July 2008) (available at <http://www.rc.com/publications/Morkan.pdf>); Gerald Lebovits, *Document Design: Pretty in Print—Part I*, 81 N.Y. St. B. J. 64 (March/April 2009); Gerald Lebovits, *Document Design: Pretty in Print—Part II*, 81 N.Y. St. B. J. 64 (May 2009); Peter Friedman, *Yes, Lawyers Need to Be Experts in Design and Typography, Too* (June 30, 2009), <http://blogs.geniocity.com/friedman/2009/06/yes-lawyers-need-to-be-experts-in-design-and-typography-too/> (accessed Feb. 25, 2010).

3 John G. Roberts, Jr., *Thoughts on Presenting an Effective Oral Argument*, Sch. L. in Rev. 1997, 7–1 (Natl. Sch. Bds. Assn. 1997) (emphasis in original).

This article explores one content-driven, context-specific way that typography might be used in legal briefs: to reinforce, complement, and independently create narrative meaning. Part I outlines those aspects of contemporary typography most germane to legal briefing. Part II offers six examples of how these principles might be used. The first few examples are “easy” cases—soft touches that are likely to be low risk, unlikely to offend, but mild in their potential impact—such as imitating Supreme Court typography or reflecting a law office’s brand identity through typeface choice. The next cases explore how, in ways perhaps more meaningful to authoring lawyers and their clients than to the judges who read their briefs, typography might further outsider narratives or reflect character and point of view. The fifth case suggests ways that typography might augment a brief’s narrative trajectory and help clothe a progressive legal argument in traditionalist clothing. The final example explores how typography might be used negatively (and perhaps inappropriately and unethically) to thwart an opposing party’s narrative goals and obscure the meaning of inconvenient facts and law. For, as master typographer and author Robert Bringhurst has warned, “Typography is an art that can be deliberately misused. It is a craft by which the meanings of a text (or its absence of meaning) can be clarified, honored and shared, or knowingly disguised.”⁴

Part I: Typography

“Typography,” like “law,” is an enormous field evading easy definition.⁵ One approach, sufficient here, frames typography as the mechanical notation and arrangement of language.⁶

As the *mechanical* notation of language, typography differs from non-mechanical lettering arts such as calligraphy and graffiti. But typography is not purely mechanical in its expression, and instead reflects a “continual tension between the hand and the machine, the organic and the geometric, the human body and the abstract system.”⁷ As explored in Part II, these rationalist vs. humanist tensions parallel those found in American law, such as legal formalism vs. legal realism, rules vs. standards, text vs. purpose, and law as grid vs. law as energy.

⁴ Robert Bringhurst, *The Elements of Typographic Style* 17 (3d ed., Hartley & Marks 2005).

⁵ E.g. Phil Baines & Andrew Haslam, *Type & Typography* 6–7 (2d ed., Waston-Guption Publications 2005).

⁶ *Id.* at 10.

⁷ Ellen Lupton, *Thinking with Type: A Critical Guide for Designers, Writers, Editors, and Students* 13 (Princeton Architectural Press 2004).

As the *arrangement* of language, typography encompasses more than just the shapes of language's letters, extending to the crucial spaces within, between, and around letters, words, and blocks of text. This interplay between figure and ground occurs at each stage and level of typography, from the earliest stages of initial type design to the final stages of document publication, and from the smallest detail of interior individual lettershape (such as the contours of the "loop" on the bottom story of a lowercase "g") to the highest level of overall document structure.

Much of the typography falling under this definition is not relevant to legal writing. And much of that typography relevant to various types of legal texts, such as contracts, demand letters, statutes, opinions, disclaimers, and so on, is not relevant to legal briefing. Legal briefing imposes several serious constraints on typographical decision making. The sources of these constraints include audience needs and expectations, the nature of the text appearing in briefs, and, to a much lesser extent than most authors of briefs might think, typographical constraints imposed by court rules.⁸

These constraints take off the table some of the major design choices relevant to typography in other contexts. Things such as paper size, weight, construction, and color; text orientation and text color; and the number and width of columns are all fairly immutable, frozen in late 20th Century, typewriter-era office conventions.⁹ The paper, for example, must be white, 8.5 x 11-inch office stock, with text appearing in "portrait" (vertical) orientation in a single, wide, centered column of black text. While there are exceptions, such as the smaller, "booklet" format mandated by United States Supreme Court Rule 33,¹⁰ these basic layout limitations are either set by rule or, if not, so established by convention that deviating from them, even to dramatically enhance legibility and readability or for other noble typographic, economic, or even environmental reasons,¹¹ is, for now, impracticable.

Setting aside, for now, portions of a legal brief such as its cover page, signature block, and even its headings, most of a brief involves running,

⁸ Not all court rules are as stringent as they are remembered or imagined to be. See e.g. Fed. R. App. P. 32 (requiring briefs to "be set in a plain, roman style," permitting either 14-point or larger proportional or 10.5 characters/inch monospaced typeface, permitting sans-serif type in headings and captions, allowing italics or boldface for emphasis, italics or underlining for case names, and permitting courts by local rule or orders in particular cases to relax these requirements); Robbins, *Painting with Print*, *supra* n. 2, app. (outlining "all federal appellate and state court rules affecting typography used in briefs"); Butterick, *supra* n. 2, app.

⁹ Cf. Felici, *supra* n. 1, at 80 (discussing effect of typewriter conventions on the typography of business documents generally).

¹⁰ See U.S. Sup. Ct. R. 33.

¹¹ See Ruth Anne Robbins, *Conserving the Canvas: Reducing the Environmental Footprint of Legal Briefs by Re-Imagining Court Rules and Document Design Strategies*, 7 J. ALWD 193 (2010) (making several typographic recommendations for decreasing briefing's environmental impact) [hereinafter Robbins, *Conserving the Canvas*].

extended text. This affects its typography significantly. Extended text should not, usually, draw attention to itself. Setting such text, sometimes called “detail” or “micro” typography,¹² is a subtle craft, the artistry of which “comes in offering the information in such a way that the reader doesn’t get sidetracked into thinking about the fact that someone had to carefully prepare every line, paragraph, and column into structured pages.”¹³ And detail typography often achieves this goal—most readers read without consciously noticing the typographical features of what they are reading.¹⁴

A. Letters

Detail typography can be thought of as involving the shaping—and spacing—of letters, words, and lines of text.¹⁵ “Letters,” as used here, means more than just the standard 26 letters of the modern Latin alphabet. It includes other “characters” or “glyphs” such as Arabic numerals (or “figures” in typographic parlance) as well as other alphabetic characters such as punctuation marks.¹⁶

A collection of related letters may be called either a “typeface” or a “font.” These terms are sometimes used interchangeably,¹⁷ and the meaning of “font” is itself in flux as a result both of changing usage and advances in digital typographical technology.¹⁸ The terms will not be used interchangeably here. Instead, this article will follow a distinction between “typeface” (or just “face”) as the *design* of a set of letters and “font” as the *particular physical or digital manifestation* of that design.¹⁹ No further distinctions will be made here, such as those that could be and sometimes are made between “fonts” of different widths (such as condensed or extended), different weights (such as light or bold), or sizes (such as Times New Roman 10 and Times New Roman 12).²⁰

12 See e.g. Jost Hochuli, *Detail in Typography* 7 (Charles Whitehouse trans., Hyphen Press 2008) (“detail” typography); Victoria Squire, *Getting It Right with Type: The Dos and Don’ts of Typography* 10 (Laurence King Publ. 2006) (“microtypography”).

13 Erik Spiekermann & E.M. Ginger, *Stop Stealing Sheep & Find Out How Type Works* 15 (2d ed., Peachpit Press 2003).

14 Gerard Unger, *While You’re Reading* 11 (Mark Batty Publisher 2007).

15 See e.g. Hochuli, *supra* n. 12, at 5; Lupton, *supra* n. 7, at 9.

16 This is not the only way to define these terms and this approach does gloss over certain distinctions that might be useful in a different context. See e.g. the distinction between “character” and “glyph” in Felici, *supra* n. 1, at 297, 305.

17 See e.g. Alex W. White, *Thinking in Type: The Practical Philosophy of Typography* 202 (Allworth Press 2005) (including glossary entry for “font” notes “[a]lso called Face, Typeface, and in England, *Fount* (though pronounced *font*)”); Unger, *supra* n. 14, at 214 (index listing for “font” listing reads “[s]ee typefaces”).

18 Baines & Haslam, *supra* n. 5, at 6; Felici, *supra* n. 1, at 10–13.

19 The approach used here is similar to that used by Felici. See Felici, *supra* n. 1, at 29–30. The word “font” “comes from an early French word meaning ‘molding’ or ‘casting.’” *Id.* at 10.

20 Among others, Rob Carter, Ben Day, Philip Meggs, and Victoria Squire make this latter, size-based distinction. See Rob Carter, Ben Day, & Philip Meggs, *Typographic Design: Form and Communication* 33 (4th ed., John Wiley & Sons 2007)

As an example of this distinction in action, Hermann Zapf's typeface Palatino (1948) has been digitally rendered many times, sometimes carefully, respectfully, and legitimately, and sometimes less so and through alleged "piracy."²¹ One example of the latter is the font Book Antiqua, a "core"²² font featured in early Microsoft products that has been called a "knockoff" and a "ripoff,"²³ but that Microsoft now bundles as a legitimate, properly licensed example of Zapf's design, the font Palatino Linotype, which functions well both as a display face and as a text face.²⁴

1. Lettershapes

Letters are the basic building blocks of writing, and they come in a wide range of shapes. These shapes can make the letters "stand at attention next to each other like soldiers or [make them] dance gracefully on the line."²⁵ Despite their diversity, we recognize the many variations of lettershapes effortlessly and unconsciously. As Unger puts it, "Letterforms appear to have been laid down as patterns in our brains so that we can trust them implicitly, just as we can our knowledge of the language we speak and the information we use for moving our feet."²⁶

Which lettershapes we recognize as letterforms, and are able to read in extended text, is largely a matter of culture and experience.²⁷ Blackletter lettershapes, such as those in the core Windows font **Old English Text** **MT**, were once easily recognizable to Western readers and were used to

.....
 (defining "font" as "a set of characters of the same size and style containing all the letters, numbers, and marks needed for typesetting") (emphasis added) [hereinafter Carter et al., *Typographic Design*]; Squire, *supra* n. 12, at 16 ("The term 'font' relates to a specific size and style of a given typeface.") (emphasis added).

21 Bringhurst, *supra* n. 4, at 239–40. "Piracy" is in quotes because legal protection for digital font files is currently different from and less than that for other digital creations that are usually the subject of digital piracy. See Jacqueline D. Lipton, *To © or Not to ©? Copyright and Innovation in the Digital Typeface Industry*, 43 U.C. Davis L. Rev. 143 (2009).

22 "Core" fonts are those fonts that have been bundled with a wide variety of operating systems and software programs such that they are likely to be found on almost all computers. See Felici, *supra* n. 1, at 298. While some core fonts are well designed, they are often less than ideal for printing and are the subject of intense criticism. See e.g. Butterick, *supra* n. 2, at "Operating system fonts" (railing against operating-system fonts for several reasons, including that many are optimized for screen display) (accessed Jan. 18, 2010). So that readers may view for themselves and otherwise experiment with as many of the fonts discussed in this article as possible, this article strives to use core fonts in its examples and diagrams.

23 E.g. John Butler, *The Palatino FAQ* (1998), <http://www.mindspring.com/~fez/palatino/palfaq1.0.txt> ("knockoff") (accessed Jan. 18, 2010); Luc Devroye, *More on the Palatino Story* (Nov. 30 2002), <http://cg.scs.carleton.ca/~luc/palatino2.html> ("rip-offs") (accessed Jan. 18, 2010); see also Hermann Zapf, *Alphabet Stories: A Chronicle of Technical Developments* 71 (2d ed., RIT Cary Graphic Arts Press 2008).

24 Bringhurst, *supra* n. 4, at 239–40; MS Corp., *Microsoft Typography: Palatino Linotype–Version 5.00*, <http://www.microsoft.com/typography/fonts/font.aspx?FMID=1624> (accessed Jan. 18, 2010). Like Times New Roman, Century Schoolbook, and other core fonts, Palatino Linotype's widespread availability makes it a reliable choice in terms of interoperability.

25 Spiekermann & Ginger, *supra* n. 13, at 45.

26 Unger, *supra* n. 14, at 10.

27 *Id.* at 42–43.

set extended texts such as the Gutenberg Bible.²⁸ Today, although we can recognize these letterforms, it takes more effort, even conscious effort. Thus, today these faces are not used for extended text but rather reserved for display-size single words or phrases, such as in the nameplates for **Traditional, Established Newspapers**.

Yet there are still many letterforms used in extended texts that we read effortlessly, without noticing their component letterforms. Take, for instance, the word “page” set in two typefaces designed and used for extended text, Bruce Rogers’s Centaur (1916) and Paul Renner’s Futura (Book weight) (1928):²⁹

page

Centaur

page

Futura

The shapes of each of these letters, their angles, contrasts, components, the spaces in and around them, are quite different. The Centaur emulates the right-handed scribe’s pen, and it is organic and quite rhythmic. Read it again while paying attention to how your eye moves across the letterforms. The Futura, in contrast, is highly geometric, suggesting not the scribe’s hand but rather the engineer’s protractor. Within each letter and across the word, the lines are almost perfectly uniform in thickness, and they are formed from almost perfect circles and rectangles. Notice also that the Centaur “a” is a two-story construction while the Futura “a” is one story and that the Centaur “g” features a closed bottom loop while the Futura “g” does not. The Centaur “e” has a sloping bar and a wide aperture, while the Futura “e” has a horizontal bar and a very narrow aperture.

Despite these differences, we read text set in both types of faces effortlessly and unconsciously, in books, in magazines, at the airport, and on the highway. Few of us can recall the shape of the “a,” “g,” or “e” on even those texts most familiar to us, such as our business card, the nameplate outside our door, or our favorite magazine. This says something both about the flexibility and power of the reading mind and about the degree

28 Baines & Haslam, *supra* n. 5, at 125. Page images and selected passages from The Gutenberg Bible can be viewed online at Harry Ransom Ctr., *Exhibitions*, <http://www.hrc.utexas.edu/exhibitions/permanent/gutenberg/> (accessed Feb. 28, 2010).

29 Philip Meggs & Rob Carter, *Typographic Specimens: The Great Typefaces* 91 (John Wiley & Sons 1993) (Centaur); Theodore Rosendorf, *The Typographic Desk Reference* 109 (Oak Knoll Press 2009) (Futura).

to which typographic choices can operate invisibly and affect us without our knowledge. As Unger observes, “of all the things we use every day, letters must surely be the ones we most often use unconsciously.”³⁰

a. Basic Anatomy

There are many aspects of and components to letterform. Several of the most significant ones appear in this diagram:



Goudy Old Style

Before examining the specific letterforms above, notice the three vertical divisions in the diagram (marked by horizontal lines). The lowest one is the “baseline,” an invisible line upon which all capital letters and many lowercase letters within a particular typeface sit.³¹ The next highest line is the “x-height line,” which will be discussed momentarily. The final, top line marks the “capline,” an invisible line sitting at the top of most capital letters.³² “Cap height” is thus a measure of the height of the capital letters from the baseline to the capline.³³ The tops and bottoms of the “H” in “Holmesian” illustrate the cap height.

Cap height is not the same thing as point size (a “point” is a unit of measure generally equal to $1/72$ of an inch).³⁴ A “12-point font” will not have a cap height of 12 points. Instead, its cap height, along with other measures such as the baseline position, will vary based on its particular design.³⁵ Point size is instead a larger, somewhat arbitrary measure, reaching, based on the particular design, from a little bit below the bottom of the very lowest “descender” (the bottom of the “y” and “p” in “type”) up

³⁰ Unger, *supra* n. 14, at 11.

³¹ Carter et al., *Typographic Design*, *supra* n. 20, at 304; Rosendorf, *supra* n. 29, at 87. The term “uppercase” comes from traditional metal typesetting: two wooden cases were used to store the metal type, the top for capital letters and the bottom for small letters. Squire, *supra* n. 12, at 15.

³² Carter et al., *Typographic Design*, *supra* n. 20, at 304; Rosendorf, *supra* n. 29, at 88.

³³ *Id.*

³⁴ “Generally” because there are several, competing systems for defining a point, as well as a debate over whether the point should continue to be a relevant unit of measure at all. See e.g. Baines & Haslam, *supra* n. 5, at 93–94; Felici, *supra* n. 1, at 22–24.

³⁵ Felici, *supra* n. 1, at 30–31.

to a little bit above the very highest “ascender” (the tops of the “l” and “t” in the diagram).³⁶

The final major vertical measure, more important than cap height and much more important than point size, is “x-height.” A typeface’s x-height is the height, measured from the baseline, of those lowercase letters that lack ascenders or descenders.³⁷ In “Holmesian type,” such letters are all those other than the previously mentioned “H,” “l,” “t,” “y,” and “p.” “X-height” is the common term because, unlike other letters without ascenders or descenders, the lowercase “x” almost always has a flat top and bottom, making it an easy and reliable measure.³⁸

X-height varies widely from typeface to typeface, greatly affecting faces’ appearance. Compare, for example, two fonts at the exact same point-size, Eric Gill’s Perpetua (1928) and Wadsworth A. Parker’s Bookman Old Style (c. 1900):³⁹

pdx

Perpetua

pdx

Bookman Old Style

Among other differences, the letters in the Bookman look larger than those in the Perpetua. That’s because Bookman has a larger x-height than Perpetua as well as shorter ascenders and descenders.⁴⁰ Thus, while point size may be a sentimental “reminder of a historical convention,”⁴¹ it is not the most meaningful measure in contemporary digital typography (or in court rules governing briefs’ typography).

Look closely at the “pdx” example above: notice that in both fonts, although the tops and bottoms of the “p” and “d” look like they are the same height as the “x,” they in fact spill slightly over the baseline and x-

³⁶ See Squire, *supra* n. 12, at 14. The phrase “Holmesian type” has no other significance than that it was created by the author to demonstrate, in a short space, a large number of typographic features within a typeface.

³⁷ Carter et al., *Typographic Design*, *supra* n. 20, at 311; Rosendorf, *supra* n. 29, at 96.

³⁸ Carter et al., *Typographic Design*, *supra* n. 20, at 311.

³⁹ Meggs & Carter, *supra* n. 29, at 61 (Bookman) & 293 (Perpetua). The term “pdx” was chosen not only because it illustrates well the differences between ascenders, descenders, and x-height, but also because it is the airport code for Portland, Oregon, where this paper was first presented.

⁴⁰ Although there is a relationship between x-height and the length of ascenders and descenders in this example, that isn’t a necessary correlation. See Felici, *supra* n. 1, at 36.

⁴¹ Spiekermann & Ginger, *supra* n. 13, at 55.

height-line, an optical adjustment needed to make them appear identical in height. Lettershapes are “full of optical corrections calculated to counter undesirable optical phenomena.”⁴² Look back at the “Holmesian type” diagram and notice others: the crossbar in the “H” is thinner than the letter’s stems and sits slightly below the x-height line, the top of the ascender on the “l” breaks through the cap line, upper aperture of the “s” is smaller than the lower aperture, and so on. These details are important because, “[l]ike all two-dimensional shapes perceived by the eye, letters too are subject to the laws of optics. The decisive element in assessing their formal qualities is thus not any kind of measuring instrument, but the healthy human eye.”⁴³

Because the way a letter appears to the human eye varies with the letter’s size (or, more accurately, with its perceived size based on viewing distance), different sizes of the same typeface should, ideally, be designed differently. Although physical type blocks were cut with these optical effects in mind, most digital font files available today are not optically balanced, but instead use the same algorithm to create the same lettershape at all sizes.

Things have, however, started to improve. More and more digital type foundries are issuing typefaces in multiple, optically adjusted sizes.⁴⁴ Even typefaces that do not come in an elaborate set of optically sized digital fonts often feature a “text” or “book”⁴⁵ optical size meant for setting extended text, sometimes indicated in the font name by the word “text,” such as in František Štorm’s John Baskerville Text (2000) or by the approximate number in point size for which the design was intended, such as Linotype’s Times Ten (1988, based on the design attributed to Stanley Morison).⁴⁶ Some digital type foundries even design different versions of

⁴² Unger, *supra* n. 14, at 155–56; see also Hochuli, *supra* n. 12, at 12–20 (discussing and illustrating various types of optical corrections). The number and difficulty of optical corrections and adjustments needed in designing typefaces for the Latin alphabet is compounded by that alphabet’s complex history. See e.g. David Sacks, *Language Visible: Unraveling the Mystery of Our Alphabet from A to Z* (Broadway Books 2003); Laurent Pflughaupt, *Letter by Letter: An Alphabetical Miscellany* 17–19 (Princeton Architectural Press 2007). The principle of optical adjusting predates typography and is inherited from fields such as calligraphy. Felici, *supra* n. 1, at 5.

⁴³ Hochuli, *supra* n. 12, at 15.

⁴⁴ Adobe, for instance, carries many optically adjusted typefaces, many in four optical sizes and some in five. See Adobe, *Optical Size*, <http://www.adobe.com/type/topics/opticalsize.html> (accessed Jan. 18, 2010).

⁴⁵ This is slightly different than the *weight* category “book,” which is usually used to refer to a font weight within a typeface that is heavier than “light” but “slightly lighter than roman.” Squire, *supra* n. 12, at 17.

⁴⁶ Identifont, *John Baskerville Text*, <http://www.identifont.com/show?55U> (accessed Jan. 18, 2010); Identifont, *Times Ten*, <http://www.identifont.com/show?WR> (accessed Jan. 18, 2010). Although naming cues and manufacturers’ point-size suggestions for optically adjusted fonts are good guidelines, they are not absolute. For it is the perceived size of a letterform, not its actual size, that matters. Thus, when master type designer Matthew Carter was asked to design a new typeface for the signs around the campus of Yale University, he did not design a typeface in “display” proportions, something that other, less thoughtful designers might have done, given that the letterforms on the signs would be several inches in height. See Aegir

typefaces for use with different kinds of paper and printing technology.⁴⁷

b. Technological Challenges

All of these advances are, however, aimed at professional typesetters and assume texts that will be carefully printed on paper with ink. Most briefs, however, are not professionally set (or even professionally edited), and more and more, they may be read not on paper but on computer screens. This creates two related challenges, and as explained in Part II, it provides potential narrative opportunities.

First, there is the difference between the printed page and the computer screen. The screen, with its grid of pixels and backlighting, is a different medium than the page, with its ink-absorbing textures and reliance on reflected light. This cannot help but affect design considerations, just as do differences between the artistic media of stained glass and watercolor. Thus, type-design choices made for one often do not translate well into the other.⁴⁸ This has caused at least one commentator, typographer turned lawyer Matthew Butterick, to rail against the use of screen-optimized fonts in legal briefs.⁴⁹ This assumes, however, that the readers of legal briefs currently read those briefs (and will continue to read briefs) on the page rather than on the screen.⁵⁰

The second challenge involves the limitations of today's popular word-processing software programs. Although "the PC is not a typewriter,"⁵¹ it is also not a professional printing press. More precisely, although top-end professional layout software gives designers and printers access to the best in digital typography, common word-processing programs do not, and in fact they may pervert good typography without the user's knowledge.

Hallmundur, *Genuine Imitations*, <http://ilovetypography.com/2009/06/03/genuine-revivals-matthew-carter-on-typeface-revivals/> (accessed Feb. 28, 2010). Instead, Carter designed letterforms in proportions more typical of the tiny text used to set captions. *Id.* Why? Because "[s]igns, Carter explained, have much in common with captions; they tend to get viewed from a distance, under less than ideal lighting conditions and from various angles, so are often at the limit of what the eye can perceive." *Id.* Similar concerns animated Adrian Frutiger's famous, highly legible sans face Frutiger (1975)—the font in which this issue's headings are set—which he created for the signage at the Charles de Gaulle Airport in Rossey, France. Meggs & Carter, *supra* n. 29, at 163. As Felici reminds us, "[g]ood typesetters trust their eyes, not their tools." Felici, *supra* n. 1, at 111.

⁴⁷ See Hoefler & Frere-Jones, *Which Grade Do I Need?*, http://www.typography.com/ask/recentTopic.php?rtID=89_ (accessed Jan. 18, 2010).

⁴⁸ The Windows core font Constantia, however, represents a notable attempt by its designer, John Hudson, to bridge this divide and create a text face suitable for both the screen and page. See Ascender Fonts, *Constantia Font Family*, <http://www.ascenderfonts.com/font/constantia-family.aspx> (accessed Jan. 18, 2010).

⁴⁹ Butterick, *supra* n. 2.

⁵⁰ The environmental impacts of this change are discussed in Robbins, *Conserving the Canvas*, *supra* n. 11.

⁵¹ See Robin Williams, *The PC is Not a Typewriter* (Peachpit Press 1992); see generally Robbins, *Painting with Print*, *supra* n. 2 (discussing implications of this change for legal writers).

Chief among these perversions is the Frankensteinian manipulation of the letterforms to create such things as fake, or scaled, smallcaps and italics. Although not all readers of legal briefs will consciously notice when letterforms have been digitally scaled, those who do notice may respond in the same visceral, judgmental way that those who notice minor citation or grammatical imperfections do.⁵² And even those brief readers who do not, at a conscious level, notice such things may not be wholly immune from their presence or absence.

True smallcaps are not simply smaller versions of capital letters but rather individually crafted and balanced letterforms designed to harmonize with the weight and x-height of the lowercase letters within that typeface.⁵³ Most OpenType digital font files produced today include true smallcaps letters in their character sets. But many common word-processing programs still do not permit users to access these features. Microsoft Word, for instance—even the upcoming release of Word 2010—does not let users access the true smallcaps contained in their computer’s font files.⁵⁴ Microsoft Word does not alert users to this lack of access but instead surreptitiously creates artificial smallcaps by shrinking and squishing capital letterforms.

Likewise, true italics are not simply slanted roman letterforms but a distinct group of letterforms with their own shapes and rhythms.⁵⁵ While common word-processing programs do generally allow access to these features, when a particular font lacks an italic, the same surreptitious substitution will occur—this time, a bending of the roman version in the hopes of making it appear italicized.⁵⁶

The differences between roman and true italic letterforms can be seen in the core font Goudy Old Style (based on Frederick Goudy’s 1915 design):⁵⁷

52 See, for instance, Butterick’s spirited discussion of scaled smallcaps at “Small caps,” in Butterick, *supra* n. 2.

53 E.g. Carter et al., *Typographic Design*, *supra* n. 20, at 310; Felici, *supra* n. 1, at 197.

54 Microsoft Word 2010 will also not permit users to access true superscripts and subscripts. Microsoft Publisher 2010, however, will. Microsoft’s decision to allow full access to OpenType features in Publisher but not Word was based on the differing degrees of sophistication of typical Word versus typical Publisher users. Coding complexities related to interoperability may cause certain OpenType characters to occasionally be formatted incorrectly. Although typical users of Publisher might be expected to recognize and fix such glitches, typical users of Word might not. Microsoft does, however, encourage the creation of third-party add-ons to Word that would give those who wish to have them access to these features. E-mail from Stuart Stuple, Program Manager, Microsoft, to author (Sept. 29, 2009) (copy on file with author). Until that time, those who both compose and publish documents in Word can continue to use expert sets, e.g. ParaType, *Terminology*, <http://www.paratype.com/help/term/terms.asp?code=130> (accessed Apr. 28, 2010), or try products such as FontFont’s “office” fonts, see FontShop, *Office FontFonts*, http://www.fontshop.com/fontlist/n/fontfonts_in_office_format/ (accessed Apr. 28, 2010).

55 Baines & Haslam, *supra* n. 5, at 60; Hochuli, *supra* n. 12, at 20.

56 Hochuli, *supra* n. 12, at 20–21.

57 Meggs & Carter, *supra* n. 29, at 219; see also MS Corp., *Microsoft Typography: Goudy Old Style—Version 1.51*, <http://www.microsoft.com/typography/fonts/font.aspx?FMID=981> (accessed Apr. 28, 2010).

Shade and a cooling zephyr

Shade and a cooling zephyr

Goudy Old Style

Every italic of every letter is different (the “a,” “e,” “h,” and “r,” most dramatically), less wide, and the italic as a whole flows and moves in a way that the roman letter cannot, and in a way that the roman letter would still not be able to flow and move were it merely electronically altered and tilted. Software programs can also surreptitiously scale fonts’ weight (bold or light) as well as their width, stretching or squishing them to create artificial condensed and expanded versions of those faces.

These techniques might have been forgivable work-arounds in the early days of word-processing, but they are inexcusable today. Things will change, but only, as Felici notes, if the “public continues to demand better.”⁵⁸

c. Numbers and Symbols

Like alphabetic characters, numerals must also be given shape. Because they are Arabic in origin, their overall shape differs from the Greek- and Roman-based shapes of the Latin alphabet, adding challenge to the type designer seeking to create a coherent, uniform typeface. Numerals also come in both lowercase and capital forms. Lowercase numerals, called “old-style” or “text” figures, are set to a typeface’s x-height, and contain ascenders and descenders.⁵⁹ They therefore “sit comfortably alongside” lowercase letters and (true) smallcaps.⁶⁰ Capital numerals, called “lining” or “display” figures, are, like capital letters, uniform in height. Like allcaps text, these tall, blocky forms catch the reader’s eye, “jump[ing] out in running text, looking too big among their lowercase neighbors.”⁶¹ Notice the difference here in John Hudson’s *Constantia* (2003):⁶²

58 Felici, *supra* n. 1, at 19.

59 *E.g.* Squire, *supra* n. 12, at 52.

60 *Id.*

61 Felici, *supra* n. 1, at 199. Numerals can also be either proportionally spaced or monospaced. (For an explanation of these terms see footnote 91, *infra*.) Monospaced (or “tabular”) numerals are useful for number-heavy applications such as accounting ledgers and train schedules,

where vertical alignment in columns is important. For the running text of legal briefs, however, proportional numerals are best. Microsoft Word 2010 allows users to switch between these two types of numerals.

62 Although Microsoft Word 2010 does grant users access to both of these sets of numerals in *Constantia*, earlier versions of Word do not.

By 1607, 49 out of every 100 did so By 1607, 49 out of every 100 did so

Constantia

When crafting numerals, a type designer must think not only about how they will generally look alongside alphabetic letters in the same typeface, but also about how particular combinations will appear. If they are too similar, they can be mistaken for one another,⁶³ decreasing the typeface's legibility.⁶⁴

In addition to alphabetic letters and numerals, there are analphabetic characters, such as punctuation marks, diacritics, and symbols. These, too, must be given shape, although they are often overlooked and are “notorious for poor design.”⁶⁵ In addition to being given the correct dimensions for their typeface—not too dark, not too skinny, too symmetrical, too big—the forms of analphabetic characters must be consonant with those of the typeface. Describing this challenge in terms of typefaces' historical and aesthetic connotations (Renaissance vs. Enlightenment), typographer and author Robert Bringhurst explains that

Baskerville, which is an eighteenth-century neoclassical typeface, requires a Neoclassical asterisk: one with an even number of lobes, each in symmetrical teardrop form. But a twentieth-century neohumanist face like Palatino requires an asterisk with more calligraphic character—

63 Combinations typically mistaken for one another include the numeral “0” and the capital “O,” and the numeral “1” and the lowercase “l.” This is a special concern for texts that involve lots of numbers near or interspersed with letters, such as accounting ledgers (and legal citations). Erik Spiekermann's typeface *Axel* (2009), designed for use in spreadsheet applications such as Microsoft Excel, strives to make similar letter-pair and letter-number pair combinations more distinct from one another than they are in widely used system fonts. FontShop, *Axel: A New Typeface by Erik Spiekermann*, <http://www.fontshop.be/details.php?entry=386> (accessed Jan. 18, 2010).

There does not yet appear to be a typeface designed specifically for use in English-language legal briefs. As Robbins opined in 2004, “[p]erhaps someday, a group interested in furthering legal writing will commission such a font.” Robbins, *Painting with Print*, *supra* n. 2. Any type designers, judges, practitioners, scholars, or others interested in pursuing such a project are encouraged to contact the author.

64 The English words “legibility” and “readability,” two other terms often used interchangeably (and for which there is often only a single equivalent in other languages), are best thought of as distinct concepts. Baines & Haslam, *supra* n. 5, at 125; Unger, *supra* n. 14, at 20. Legibility involves “the ease with which letters can be distinguished from one another . . . readability is a broader term that refers to comfort: if you can read a newspaper for a long stretch at a time, it is readable.” Unger, *supra* n. 14, at 20 (citing Walter Tracy, *Letters of Credit: A View of Type Design* 30–32 (London 1986)); see also Felici, *supra* n. 1, at 104 (“*Legibility* refers to a reader's ability to easily recognize letterforms and the word forms built from them . . . [while] *[r]eadability* refers to the facility and comfort with which text can be comprehended.”) (emphasis in original).

65 Bringhurst, *supra* n. 4, at 76.

sharper, slightly asymmetrical lobes, more likely five than six in number, showing the trace of the broadnib pen.⁶⁶

How well this is done depends on the particular version of Baskerville and Palatino being considered. Here's an illustration using the Mac OS core font Baskerville and Palatino Linotype:

*****Neoclassical Asterisks*****

Baskerville

*****Neohumanist Asterisks*****

Palatino Linotype

This brings us to the next topic, lettershape taxonomy.

d. Taxonomy

There are thousands upon thousands of typefaces available in digital form today, with new designs coming on the market constantly.⁶⁷ The online font superstore FontShop, for instance, carries over 100,000 Latin-alphabet fonts and publishes a monthly newsletter devoted to each month's new releases.⁶⁸ This intense level of innovation and output creates an organizational challenge: how should all these typefaces be organized?

There have, since the early 19th Century, been several approaches to describing and organizing typefaces,⁶⁹ "all of [which are] too involved for anyone but the most devoted typomaniac."⁷⁰ Bringhurst follows a broadly historical approach, organizing typefaces by period of origin (Renaissance, Baroque, Enlightenment, etc.), which can mean either the time period during which the typeface was actually designed or, in the case of historical revivals, the period the typeface seeks (or perhaps simply appears) to re-create or evoke.⁷¹

⁶⁶ *Id.* at 77.

⁶⁷ Baines & Haslam, *supra* n. 5, at 51.

⁶⁸ "We carry over 100,000 fonts in every style and category," FontShop, *Main Classifications*, <http://fontshop.com/fonts/category/> (accessed Jan. 18, 2010); e.g. FontShop, *News* (May 2009), <http://www.fontshop.com/blog/newsletters/may09a/> ("Hundreds of new fonts shine in our showroom this month. So many, in fact, that we'll have to split the announcement into two newsletters.") (accessed Jan. 18, 2010); see also Intl. Typeface Corp., *ITC Impressions Newsletter*, <http://www.itcfonts.com/impressions> (accessed Jan. 18, 2010).

⁶⁹ Baines & Haslam, *supra* n. 5, at 50.

⁷⁰ Spiekermann & Ginger, *supra* n. 13, at 53.

⁷¹ Bringhurst, *supra* n. 4, at 12.

Typefaces changed through history not only because of the different ideals, aesthetics, and prejudices of those time periods, but also because of the different technology used to produce non-mechanical, written script.⁷² From the very beginning of typography in the West,⁷³ type designers have strived to re-create the flow and idiosyncrasies of handwritten text.⁷⁴ Thus Gutenberg's famous Bible reproduced the "erratic texture" of the black-letter handwriting of its day by "creating variations of each letter as well as numerous ligatures."⁷⁵ Thus, too, the reference in the Bringhurst quotation above to "the trace of the broadnib pen."⁷⁶

This gradually evolved into a different aesthetic, one based on Enlightenment and Neoclassical ideals of geometry, balance, and proportion. Thus Bringhurst's reference to "a Neoclassical asterisk: one with an even number of lobes, each in symmetrical teardrop form."⁷⁷ The nationalism of the Romantic era also had its impact,⁷⁸ as did the fallout from the postwar period, leading to attempts at "neutral" faces such as Helvetica.⁷⁹

Bringhurst urges typographers, when choosing type for a particular project, to "[c]hoose a face whose historical echoes and associations are in harmony with the text."⁸⁰ Thus, a movie poster that seeks to evoke the ancient Western world might be set in Carol Twombly's TRAJAN, a face modeled after the famous, ancient, hand-chiseled Trajan's Column in Rome. A new translation of Dante? A Venetian Renaissance face, such as Centaur. And for the Federalist Papers or a founding father's biography, a neoclassical English typeface, such as one based on the designs of William Caslon (1692–1766) or the designs of Ben Franklin's friend John Baskerville (1706–1775).⁸¹ And so on.

Unger, however, argues that "[t]here is no need for texts and letterforms to be quite so literally linked."⁸² More important are the "atmospheric values" of a particular typeface, such as "sober," "friendly," "restless," "classical," "business-like," or "hard."⁸³

72 See *id.*

73 Although moveable type was created in the West in the 1450s, it was China's Bi Sheng who invented it first, more than 300 years before Gutenberg, back in the 1040s. *Id.* at 119.

74 Lupton, *supra* n. 7, at 13.

75 *Id.*; see also Zapf, *supra* n. 23, at 123 (noting that there were 290 characters used in the composition of the Gutenberg Bible).

76 Bringhurst, *supra* n. 4, at 77.

77 *Id.*

78 See Steven Heller & Louise Fili, *Typology: Type Design from the Victorian Era to the Digital Age* 18–193 (Chronicle Books 1999).

79 A quick, visual history is explored in the documentary film *Helvetica* (Gary Hewitt 2007) (motion picture). For a broader discussion of post-war Swiss typography, see Robin Kinross, *Modern Typography: An Essay in Critical History* 146 (2d ed., Hyphen Press 2004).

80 Bringhurst, *supra* n. 4, at 98.

81 *Id.* at 333, 334.

82 Unger, *supra* n. 14, at 141.

83 *Id.* at 141–42. Unger credits his use of the term "atmospheric values" to G.W. Ovink, *Legibility, Atmosphere-Value, and Forms of Printing Type* (Leiden 1938). Unger, *supra* n. 14, at 142 n. 1.

One problem with the historical approach is that not all typefaces are historical specimens or revivals; many blend anatomical characteristics of several time periods or are animated by concerns independent of historical form. Times New Roman, for instance, is a “historical pastiche,” with “a humanist axis but Mannerist proportions, Baroque weight, and a sharp, Neoclassical finish.”⁸⁴ Typeface history is also inexorably tied up with nationalism and its associated prejudices. Such limitations have led to competing descriptive systems based on metrics such as weight, contrast, and utility.⁸⁵

Despite the limitations of the historical approach, it will loosely be followed here.⁸⁶ The nine major categories of typefaces relevant to legal briefing under this approach can be called:

<i>humanist</i>	<i>humanist sans serif</i>	<i>slab-serif</i>
<i>old-face</i>	<i>transitional sans serif</i>	<i>wedge/hybrid serif</i>
<i>transitional</i>	<i>geometric sans serif</i>	
<i>modern</i>		

Here are examples of the first four:

<i>Humanist</i> (Centaur MT)	Oh, frogpads vile
<i>Old-Face</i> (Garamond Premier)	Oh, frogpads vile
<i>Transitional</i> (Adobe Caslon)	Oh, frogpads vile
<i>Modern</i> (Bodoni Twelve ITC)	Oh, frogpads vile

Notice, for instance, in the “O” the progression from a dynamic, calligraphic style, with varying stroke thickness and oblique axes, to a more balanced, symmetrical, and ultimately abstract and idealized style. A similar progression can be seen in the three categories of sans serif faces relevant to legal briefing:

84 Bringhurst, *supra* n. 4, at 97.

85 These systems include Catherine Dixon’s impressive taxonomy, described in Baines & Haslam, *supra* n. 5, at 52–55.

86 This overall approach is similar to that used in Lupton, *supra* n. 7. Transitional faces are called “transitional” because they lie between the beginning of the 18th Century, when “old-style typefaces . . . were dominant,” and the end of that century, by which time “the modern styles . . . prevailed.” Meggs & Carter, *supra* n. 29, at 31.

Humanist Sans (Gill Sans) Oh, frogpads vile

Transitional Sans (Helvetica LT) Oh, frogpads vile

Geometric Sans (Futura) Oh, frogpads vile

Although sans serif, or unserifed, letters “have a history at least as long, and quite as distinguished, as serified letters,” the typographical history of sans serif faces is more recent.⁸⁷ The three categories above (the sans faces relevant to extended text in legal briefs)⁸⁸ are 20th Century innovations that loosely incorporate the aesthetics of the humanist, old-face, transitional, and modern serif categories.⁸⁹ Notice, for instance, how the “a” moves from a sharply handwritten form to a more idealized but still fluid shape and then a geometric abstraction.

The next category, slab serifs (also called, or subsets of which are also called, “Egyptian” and “Clarendon”), has features of both serifs and sans faces. Compared to the extreme contrast and thin serifs of the modern serifs, slab serifs have, like sans faces, very even stroke weights but “heavy, slablike serifs,”⁹⁰ as seen in the core font **Rockwell** and Erik Spiekermann’s **Unit Slab**:

Slab Serif (Rockwell) Oh, frogpads vile

Slab Serif (Unit Slab) Oh, frogpads vile

⁸⁷ Bringhurst, *supra* n. 4, at 255.

⁸⁸ Some readers may wonder why sans faces are included here at all. Although often repeated, the claim that sans serif fonts should not be used in extended text, that they are not as legible as serif typefaces, is not entirely true. Certain sans faces may be less legible than certain serif faces, but they are not categorically so. Setting aside legibility, serifs may, however, affect readability, by acting as what Unger has called “a kind of attention safety net.” Unger, *supra* n. 14, at 166. Ultimately, however, as master typographer Zuzana Licko has noted, “[t]ypefaces are not intrinsically legible. Rather, it is the readers’ familiarity with faces that accounts for their legibility. Studies have shown that readers read best what they read most.” Zuzana Licko, *Do You Read Me?*, in 15 *Émigré* 12 (1990) (quoted in Unger, *supra* n. 14, at 43). Thus, as more and more readers of legal texts read more and more documents set in sans serif faces, such as the core font Calibri, notions of both legibility and readability in sans faces may change.

⁸⁹ Lupton, *supra* n. 7, at 42. The history is more complex than that, but outside the scope of this article.

⁹⁰ *Id.*

“Monospaced” typefaces such as *Courier* are often slab serif in form, but, despite traditions and even court rules to the contrary, monospaced fonts are not appropriate for legal briefing.⁹¹

The final category, wedge or hybrid serifs, is also a catchall for typefaces that are not clearly serified or unserified.⁹² Many such typefaces are designed to combine aspects or advantages of several styles, such as the legibility-enhancing features of both serifs and sans. Examples include Hermann Zapf’s *Optima*, which thickens slightly near its terminals; the core font *Constantia*, which contains moderate wedges; and Gerard Unger’s *Swift*, whose wedges are more explicit:

Hybrid Serif (Optima) Oh, frogpads vile

Wedge Serif (Constantia) Oh, frogpads vile

Wedge Serif (Swift) Oh, frogpads vile

Although perhaps not as crucial to typography as type designers might like to think,⁹³ typeface choice is nevertheless important. Choosing a typeface is also the most tangible, and enjoyable, part of document design. While necessary, typeface choice is not sufficient by itself, as even the best typeface for a project will fall flat if its components are not well spaced.

91 Monospaced typefaces all have the same horizontal measure. Thus the “box” in which a wide letter, such as a capital “M” sits, is the same width as the box in which a skinny letter, such as a lowercase “i” sits. Typefaces that are not monospaced are instead proportionally spaced. Such faces are sensitive to letterforms’ different widths. The capital “M” and “W” are not squished but given appropriate berth, and the svelte lowercase “i” and “l” are allowed to shine. In contrast, the uniform width of monospaced letters makes it difficult for the eye to grasp wordshape, and creates the possibility for miscues. In addition to legibility and readability concerns, monospacing simply amounts to letterform abuse. Erik Spiekermann and E.M. Ginger have described its effect in Procrustean terms: “the *i* is stretched on the rack, while the *M* suffers claustrophobia.” Spiekermann & Ginger, *supra* n. 13, at 125 (emphasis in original). While monospacing was necessary in the early typewriter era, and monospaced faces retain some utility as draft fonts or for purposes such as software coding, they have no place in final, published legal texts. See e.g. Robbins, *Painting With Print*, *supra* n. 2, at 120–21; Robbins, *Conserving the Canvas*, *supra* n. 11. Those that feel nostalgic for or simply like the look of monospaced faces such as *Courier* are encouraged to try proportionally spaced slab faces that recall typewriter text without duplicating its limitations, such as Joel Kaden and Tony Stan’s proportionally spaced *American Typewriter* (1974).

92 Christopher Perfect & Gordon Rookledge, *Rookledge’s Classic International Typefinder: The Essential Handbook of Typeface and Selection* 12 (Phil Baines ed., Laurence King Publ. 2004).

93 E-mail from Erik Spiekermann to author (July 30, 2009) (copy on file with author) (citing Kevin Larson et al., *Measuring the Aesthetics of Reading in People and Computers XX—Engage: Proceedings of HCI 2006* v. 20, 41–56 (Nick Bryan-Kinns et al. eds., Springer 2007)); see also Dawn Shaikh, *Psychology of Onscreen Type: Investigations Regarding Typeface Personality, Appropriateness, and Impact on Document Perception* (unpublished Ph.D. thesis, May 2007, Wichita St. U.) (available at <http://soar.wichita.edu/dspace/handle/10057/1109> (accessed Jan. 18, 2010)).

2. Letterspacing

Letterspacing, or “interletter spacing,” is the space between letters.⁹⁴ It is distinct from the space within a letter, such as that inside the bowl of a lowercase “a.” Letterspacing can be adjusted in two ways: through tracking and through kerning.

“Tracking” involves adjusting the space between all the letters in a line or block of text.⁹⁵ Decreasing the tracking of a line or block of text will make it appear tighter and more dense, while increasing it will make the text appear looser and more open. For example, the author used tracking to change the letterspacing in the last sentence. The tracking in the first clause of that sentence was decreased by 1/2 point while the tracking in the second clause was increased by 1/2 point.

Unlike tracking, which affects an entire line of text, “kerning” involves increasing or decreasing (usually decreasing) the horizontal space between specific letter combinations.⁹⁶ When letters are not properly kerned, readers have difficulty discerning which letters are meant to form into which words. Thus good kerning can make a text easier to read, and less likely to be glossed over, while bad kerning, or deliberately inappropriate kerning, may help obscure those portions of a text an author wishes to de-emphasize. This “dark side” to typography can also be exploited through wordshaping and wordspacing.

B. Words

1. Wordshapes

Typographers have long thought that when experienced or “adult” readers read, their eyes do not perceive individual letters but rather the shapes of whole words, or at least parts of them, focusing especially on the top parts of words.⁹⁷ This has been said to be the reason why text set in capital letters (“ALLCAPS”) appears to be so difficult to read—each word’s shape,

⁹⁴ Carter et al., *Typographic Design*, *supra* n. 20, at 307.

⁹⁵ *Id.* at 311.

⁹⁶ *Id.* at 307. Letter combinations that often require intensive kerning are those where the slope or angle of one letter would, were the next letter not moved closer to its boundary or even within it, create the optic perception of too much space between the two letters. “AV” and “Yo” are typical combinations. Squire, *supra* n. 12, at 62. As part of the digital font-designing process, typographers will determine and assign a default kerning value to each letter combination. See White, *supra* n. 17, at 65. The font file will thus “know” to space “AV” differently than “AM” or “AA” and will do so if kerning is enabled in the program (for example, Microsoft Word permits this). Advanced programs, such as Adobe InDesign and Quark Xpress, will offer different kerning options, showing the default kerning setting for each letter pair, and allowing the user to adjust them one by one.

⁹⁷ Hochuli, *supra* n. 12, at 23; see also Colin Wheildon, *Type & Layout: Are You Communicating or Just Making Pretty Shapes* 63 (Worsley Press 2005).

both bottom and top, is the same as that of every other one; the overall wordshape is always the same: a big, blocky, rectangle.⁹⁸

Although this “word shape” model of word recognition makes a certain amount of intuitive sense, current reading research suggests that the way we read the shape of the words is slightly different than previously thought.⁹⁹ It is true that a wordshape that calls undue attention to itself can, like a textual miscue, slow down or derail the reader, interrupting rhythm and flow.¹⁰⁰ Nevertheless, we seem to perceive a set of letters simultaneously—using letter-level information and context to guess what word we have just read before moving on.¹⁰¹ This all occurs extremely quickly, with letters “flash[ing] through the visual cortex . . . at the rate of four to five words a second, and it is in that time that language and meaning are extracted from them almost instantaneously.”¹⁰²

The brain’s reading process also causes experienced readers to skip large numbers of words. Word length appears to be one factor, with our eyes rarely skipping words eight or more letters long but skipping about 75% of words that are two to three letters long.¹⁰³ Influenced perhaps by differences in word length, there is also a distinction between content words—such as nouns, verbs, and adjectives—and function words—such as articles, prepositions, and conjunctions: our eyes skip 15% of content words and 65% of function words.¹⁰⁴

Although the specific outlines of words do not appear to be as important as once thought, words’ “color” (their relative lightness or grayness)¹⁰⁵ and size may be significant. For instance, words in running text that are **darker** or **larger** than their peers may call attention to themselves. This can affect the rhythm of the eyes’ movement across the page, its pattern of “saccades.”¹⁰⁶

98 See e.g. Robbins, *Painting with Print*, *supra* n. 2, at 115–18 (citing early readability studies for chapter entitled “Stop screaming at me in rectangles: Why capital letters just don’t work”).

99 See Kevin Larson, *The Science of Word Recognition (Or How I Learned to Stop Worrying and Love the Bouma)*, <https://www.microsoft.com/typography/ctfonts/WordRecognition.aspx> (accessed Jan. 18, 2010) (summarizing recent psychological studies that critique the traditional “Bouma,” wordshape model of reading and that favor instead a parallel-letter-recognition model).

100 Felici has compared well-ordered type to a “metronome” for readers. Felici, *supra* n. 1, at 104.

101 *Id.* at 103–04.

102 Unger, *supra* n. 14, at 134.

103 Keith Rayner, *Eye Movements and Attention in Reading, Scene Perception, and Visual Search*, 62 Q.J. Experimental Psychol. 1457, 1461 (2009).

104 *Id.*

105 White, *supra* n. 17, at 27.

106 A concise explanation of saccades and a summary of what eye-movement researchers currently know about them is found in Rayner, *supra* n. 103, at 373–74.

We read using only a small part of our retina, the fovea, which can focus on only a small part of a text.¹⁰⁷ During this time, a “fixation” or “fixation pause,” the brain appears to process the letter- and word-forms, and then, after having identified the word(s), it moves on to another part of the text, again and again in a series of jumps called “saccades.”¹⁰⁸ If, upon landing on a new place in the text, the brain is unable to process what it has read, it jumps back, in “regression saccades,” to see what it has missed.¹⁰⁹

The typographer who wants a text, or part of text, to be read efficiently and understood deeply keeps these principles in mind; so too does the typographer who wants a text, or part of a text, to be skimmed past and quickly forgotten.

Typographers have always been deeply interested in how readers read, and although some current research does challenge long-held typographic assumptions about that process, most research confirms “not invariably, but surprisingly frequently—long-known rules of typography.”¹¹⁰ Like other master crafts, such as violin-making and legal persuasion, although typography finds confirmation and direction from empirical science, it has historically been informed by and continues to find guidance from additional sources.

Whether lowercase, smallcaps, or allcaps, individual lettershapes must be crafted with an eye towards not only how they will appear in abstract pairs but also how they will appear in specific words. One goal driving these decisions can be legibility in extended texts, the motivation behind American type designer William Dwiggins’s “M-formula” that he incorporated into Caledonia (1938).¹¹¹ Goals more artistic, whimsical, and even ornithological may also come into play, such as those behind Unger’s Swift (1985). According to Unger, when designing Swift, he “wanted to give it something of the way these birds [swifts] fly: fast and with unpredictable twists and turns. At the same time I wanted to incorporate some core journalistic virtues: sharpness, clarity, and independence.”¹¹²

The opposite, however, is also true: the shape of words within a given typeface can be used to inhibit the purpose for which a text is intended. A typeface designed for use in a newspaper may be designed to create word-shapes that force the eye forward, that encourage light, quick reading, skimming.¹¹³ A brief writer who wants the reader to skim certain portions

107 See Unger, *supra* n. 14, at 64.

108 *Id.*

109 Hochuli, *supra* n. 12, at 8.

110 *Id.* at 9.

111 Unger, *supra* n. 14, at 111.

112 *Id.* at 112.

113 See Felici, *supra* n. 1, at 130. The practical constraints and concerns guiding newspaper typography, like those affecting the typography of cheap paperback novels,

of that brief, such as information that must be included in the brief but that does not favor the writer's client or advance the brief's narrative, might be tempted to use a newspaper typeface in those portions of the text. Or, more subtly, the writer might use the same face but vary the tracking or kerning to encourage skimming and inefficient saccades. Reader experience may also depend, for good or ill, on wordspacing.

2. Wordspacing

Just as letterspacing (or "interletter spacing") involves setting or manipulating the space between letters, wordspacing (or "interword spacing") involves setting or manipulating the space between words.¹¹⁴ This is different than tracking, discussed above, which involves varying the space between all the component letters within a word, line, or block of text. Just as they are given default kerning pairs, fonts are often assigned default wordspacing, although these defaults are often set too wide.¹¹⁵

Two of the major choices affecting wordspacing are hyphenation and justification ("H&J" in typographic shorthand).¹¹⁶

Unjustified, or "ragged," text is set with (mostly) even spacing between words.¹¹⁷ Text that is ragged right, or flush left, will be flush—or even with—the left margin, but ragged with the right. The length of each line will be determined by the words in that line, with some lines ending a little bit earlier than others. In contrast, text that is justified, or set "flush left, flush right," will be evenly aligned on both the left and right margins.¹¹⁸ Bringhurst argues that the choice of whether or not to justify text should be content-driven: "does the text suggest the continuous unruffled flow of justified prose, or the continued flirtation with order and chaos evoked by flush-left ragged-right composition?"¹¹⁹

Justified text presents more word-spacing challenges than unjustified text.¹²⁰ A software system's default wordspacing settings, for example (especially when automatic hyphenation is not enabled) can cause huge wordspaces to appear in some lines of justified text. This can startle and derail the reader who had previously been engaged intimately or immediately with the text. More subtly, poor justification can create vertical or

infuriate typographers. Spiekermann and Ginger, for instance, claim that "[n]ewspaper typography has created some of the very worst typefaces, typesetting, and page layouts known to mankind." Spiekermann & Ginger, *supra* n. 13, at 38.

114 Carter et al., *Typographic Design*, *supra* n. 20, at 307, 311.

115 In those cases, Alex White recommends setting wordspacing at about 60% to 80% of the default. White, *supra* n. 17, at 67–68.

116 Felici, *supra* n. 1, at 133.

117 Carter et al., *Typographic Design*, *supra* n. 20, at 311.

118 *Id.* at 307.

119 Bringhurst, *supra* n. 4, at 23.

120 Squire, *supra* n. 12, at 76.

diagonal white-space patterns, or “rivers” on the page, preventing the eye from proceeding in an orderly way across each horizontal line of text but instead requiring the eye to take a detour down the middle of the page.¹²¹

While less of a concern in the case of unjustified text, wordspacing still is a factor there, as words spaced too far apart, even in unjustified text, may create “river” problems.¹²² In contrast, words set too close together create a different readability problem—the reader may have trouble distinguishing one word from another.¹²³

One of the main tools used to improve wordspacing problems in both justified and unjustified text is hyphenation. It is, however, an imperfect tool, what Felici has called “a necessary evil.”¹²⁴ A complete discussion of hyphenation, let alone the larger technique and art of H&J, is beyond the scope of this article.¹²⁵ What is important here is that H&J decisions affect or are intended to affect the meaning and reception of a text. They are part of the “craft by which the meanings of a text (or its absence of meaning) can be clarified, honored, and shared, or knowingly disguised.”¹²⁶ So too with line length and linespacing.

C. Lines

Whether justified or unjustified, lines of text must fit within some sort of horizontal boundary. This horizontal measure is called “measure” or “line length.”¹²⁷ The complementary vertical measure of the distance between lines of text is called “linespacing.”¹²⁸

Outside the constraints of legal briefing, typographers have many linespacing choices. As a general principle, those seeking to maximize the readability of extended texts in English aim for a line length of 18 to 24 picas¹²⁹ (3 to 4 inches), which accommodates about 10 to 12 words, or

¹²¹ Carter et al., *Typographic Design*, *supra* n. 20, at 310.

¹²² Squire, *supra* n. 12, at 76.

¹²³ *Id.*

¹²⁴ Felici, *supra* n. 1, at 141.

¹²⁵ For those readers who are interested, a good introduction to the subject appears in *id.* at 133–63 (“Chapter 10: Controlling Hyphenation and Justification.”).

¹²⁶ Bringhurst, *supra* n. 4, at 17.

¹²⁷ Carter et al., *Typographic Design*, *supra* n. 20, at 308. Although “measure” and “line length” are, in a technical sense, slightly different things, see e.g. Felici, *supra* n. 1, at 115, and while that distinction has some merit, the author will ignore it for purposes of this article.

¹²⁸ Carter et al., *Typographic Design*, *supra* n. 20, at 308.

¹²⁹ Line length is typically expressed in “picas,” which are typographic units equal to 12 points; there are thus typically 72 points, or 6 picas, per inch. For the reason behind this “typically” qualifier, see *supra* note 34.

about 60 to 70 characters, in text size (9 to 12 point) type.¹³⁰ Books are typically small enough—and, more importantly, horizontally skinny enough—for this goal to be achieved within a single column of text. Magazines, in contrast, being larger and broader, are always set in several columns. So too with other professionally printed documents, such as judicial opinions published in West reporters. Legal briefs—at least most of them—are set in single columns like books, but on magazine-size pages. These factors create a line length well outside the recommended zone,¹³¹ and they all but eliminate line-length choices that might affect narrative.

Line length's complementary vertical measure is linespacing. As noted earlier, the height of individual letters and words is a matter both of a font's somewhat arbitrary point height and its more meaningful x-height. The height of entire lines of text—the amount of vertical space from line to line—is usually set equal to or greater than the point height of the text's font. Otherwise, different lines' descenders and ascenders would occasionally bang into one another. Additional space beyond point height was traditionally called “leading,” (pronounced “LED-ing”) in reference to the use of strips of lead used to create that space.¹³² In modern digital typesetting, leading numbers usually refer not to the extra space between lines of text but to the overall total distance between the lines.¹³³ In other words, it means the same thing as linespacing.

Like font size, linespacing is usually measured in points. Terms such as “single-spacing” and “double-spacing” have no fixed meaning and vary based on the software program, and version of that program, in which those terms appear. Although a variety of variables affect linespacing choices, for extended text, a linespacing of around 115% to 125% of the point size is often ideal, although the longer the line, the more linespacing it generally will need.¹³⁴ Excessive linespacing, such as “doublespacing” or linespacing of 200% to 250%, detracts from readability, as does too little

130 Carter et al., *Typographic Design*, *supra* n. 20, at 79. This advice does vary slightly. See e.g. Hochuli, *supra* n. 12, at 60 n. 32. Felici uses a mathematical approach, seeking a measure in picas that is no more than three times the size of the type in points (3:1), with an ideal ratio between 2:1 or 2.5:1. Felici, *supra* n. 1, at 120. So too with leading: to determine approximately how much extra lead to add, he advises dividing the measure in picas by the size of the type in points. *Id.* at 121.

131 As noted, the recommended zone is 18 to 24 picas (3-4 inches). In a legal brief set on 8.5- x 11-inch paper in portrait orientation with 1-inch margins, the measure clocks in at a whopping 39 picas (6.5 inches). This not only makes for too many words per line, decreasing readability and increasing reader fatigue, but creates another problem: it makes text-size type appear too small. Some courts have noticed, and have tried to compensate for this by mandating huge point sizes, with 12- or even 14-point minimums. This approach is not ideal for readability or economics and environmental impact. See Robbins, *Painting with Print*, *supra* n. 2 (readability); Robbins, *Conserving the Canvas*, *supra* n. 11 (economic and environmental impacts).

132 Carter et al., *Typographic Design*, *supra* n. 20, at 307.

133 Felici, *supra* n. 1, at 309.

134 Hochuli, *supra* n. 12, at 47; accord Bringhurst, *supra* n. 4, at 39.

linespacing; in either case the ability of the eye to move from the end of the last line to the beginning of the next is made more difficult.

Within the range of appropriate (or at least not intentionally difficult to read) linespacing, tighter spacing may give the text a more tense, more urgent feel, while looser spacing may give it a more open, relaxed feel. Thus linespacing is one more way that typography can affect the meaning and feel of a text.

Part II: Narrative

A. Introduction

Law and narrative scholarship has, over the last two decades,¹³⁵ grown increasingly popular. As it has done so, it has not been immune to the lexical imprecision¹³⁶ and semantic debates¹³⁷ typical of emerging, cross-disciplinary fields. It will suffice for this article to define three key terms—“rhetoric,” “narrative,” and “story”—and outline two key concepts—narrative’s “common components” and “typical trajectory.”

“Rhetoric,” as used here, means, simply and broadly, “the art of persuasion.”¹³⁸

As for “narrative,” what is meant is more than just “story” or even “storytelling.” Instead, as Peter Brooks has framed it, narrative “appears to be one of our large, all-pervasive ways of organizing and speaking the world—the way we make sense of meanings that unfold in and through time.”¹³⁹ Thus, as noted by Steven Winter, narrative “corresponds more

135 Two starting points for this development could be viewed as Robert Cover’s *Nomos and Narrative* (1983) and the Michigan Law Review’s 1989 storytelling issue. See Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?*, 18 Yale J.L. & Human. 1, 1 n. 1 (2006).

136 See e.g. Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 Buff. L. Rev. 141, 144–45 (1997) (“[This imprecision is] one of the stickiest problems in the debates concerning legal storytelling: the lack of agreed-upon definitions for the vocabulary legal scholars have drawn from the field of literary criticism. . . . The basic literary critical vocabulary has been taken to be self-evident. In particular, the words ‘story,’ ‘rhetoric,’ and ‘narrative’ are assumed to be of no lexical complexity and are often used interchangeably”). This difficulty is not confined to legal scholarship. See Gérard Genette, *Narrative Discourse: An Essay in Method* 25 (Jane E. Lewin trans., Cornell U. Press 1980) (“We currently use the word *narrative* [récit] without paying attention to, even at times without noticing, its ambiguity. . .”).

137 See e.g. Ruth Anne Robbins, *An Introduction to Applied Storytelling and to This Symposium*, 14 Legal Writing 3, 14 (2008) (raising, but leaving for another day, the issue of whether “storytelling” or “narrative” is the better term for describing the focus of “Applied Legal Storytelling” scholarship).

138 Baron & Epstein, *supra* n. 136, at 146. As Baron and Epstein note, this usage goes back to Aristotle. *Id.*; see also Stanley Fish, *Rhetoric*, in *Critical Terms for Literary Study* 203, 206 (Frank Lentricchia & Thomas McLaughlin eds., 2d ed., U. Chi. Press 1995). Two good primers on rhetoric and legal writing include Kristen Konrad Robbins-Tiscione’s *Rhetoric for Legal Writers: The Theory and Practice of Analysis and Persuasion* (West 2009) and Michael R. Smith’s *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* (2d ed., Aspen 2008).

139 Peter Brooks, *The Law as Narrative and Rhetoric*, in *Law’s Stories: Narrative and Rhetoric in the Law* 14, 14 (Peter Brooks & Paul Gewirtz eds., Yale U. Press 1996).

closely to the manner in which the human mind makes sense of experience than does the conventional, abstracted rhetoric of law.”¹⁴⁰

Baron and Epstein, following Seymour Chatman’s dualist, structuralist approach,¹⁴¹ distinguish between “narrative” in this sense and “stories,” which are “‘the what of narrative,’ to which other elements of narrative such as character, setting, point of view, and so on, remain subservient.”¹⁴²

Narrative’s common components, characterized elsewhere as “central elements”¹⁴³ or as tools within a “literary tool kit,”¹⁴⁴ include things such as setting, conflict, character, point of view, theme, and plot, all or some of which may be part of a particular story within a larger narrative structure.

Narrative’s typical trajectory can be viewed as consisting of five major stages:

1. an **initial steady state** grounded in the ordinariness of things,
2. that gets disrupted by a **trouble** consisting of circumstances attributable to human agency or susceptible to change by human intervention,
3. in turn evoking **efforts** at redress or transformation, which succeed or fail,
4. so that the steady state is **restored** or a new (**transformed**) steady state is created,
5. and the story concluded by drawing the then-and-there of the tale that has been told into the here-and-now of the telling through some **coda**—say, for example, Aesop’s characteristic **moral of the story**.¹⁴⁵

¹⁴⁰ Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 Mich. L. Rev. 2225, 2228 (1989).

¹⁴¹ See Seymour Chatman, *Story and Discourse: Narrative Structure in Fiction and Film* 9 (Cornell U. Press 1978).

¹⁴² Baron & Epstein, *supra* n. 136, at 147 (quoting Chatman, *supra* n. 141, at 9); accord Gerald Prince, *A Dictionary of Narratology* 58, 93 (U. Neb. Press 1989); but see e.g. Kendall Haven, *Story Proof: The Science Behind the Startling Power of Story* 9–10 (Libs. Unlimited 2007) (relying upon *Webster’s Collegiate Dictionary* to posit an almost opposite definitional structure). Baron and Epstein use Sophocles’ *Oedipus Rex* to demonstrate this narrative/story distinction:

Oedipus Rex is comprised of many individual stories: of the curse on Laius and Jocasta, of their binding Oedipus’s feet and leaving him on a hillside to die, of the shepherd who rescues him and took him to Corinth, of Oedipus’s killing several men at a crossroads (one of whom is, unbeknownst to him, his father), of Oedipus’s solving the riddle of the sphinx, of Oedipus’s marriage to his own mother. These stories are embedded in a frame story in which Thebes is gripped by plague. Together, these interwoven stories, concluding with Jocasta’s suicide, Oedipus’s self-blinding and exile, and the end of the Theban plague, comprise a narrative of the relation between transgression and punishment. The narrative consists of the cumulative effects of these separate stories as their aggregate meaning comes to light. By organizing discrete stories and constructing their “point,” narrative is interactive and social; it represents one collective way of knowing things, one communal mechanism for grasping the world.

Baron & Epstein, *supra* n. 136, at 147–48.

¹⁴³ Melody Richardson Daily, *Damages as Narrative*, 2004 J. Disp. Resol. 21, 23 (2004).

¹⁴⁴ Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 Leg. Writing 127, 138 (2008).

¹⁴⁵ Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practices*, 15 Leg. Writing 3, 18 (2009) (crediting Anthony G. Amsterdam & Jerome Bruner, *Minding the Law* 113–14 (Harv. U. Press 2000)) (emphasis amended).

This typical trajectory is found not only in textual narratives but also in many other forms of communication and expression, such as an orchestral composition, a work of art, or even an orchestral composition about a work of art.¹⁴⁶

The remainder of Part II will explore how the typographical choices might affect narrative in legal briefs, whether by reinforcing a narrative component or stage already in the text, complementing that component or stage or itself independently creating narrative meaning not present in the text. It will do so by examining six increasingly complex, risky, and troubling hypothetical cases.

B. Cases

1. Follow the Leaders

An attorney who wishes to improve the typography of her briefs, having read thus far, feels a bit overwhelmed. She's also been frightened by the strength of Chief Judge Easterbrook's aversion to bad typography in briefs, and especially his contempt for Times New Roman.¹⁴⁷

Unwilling to lose herself among the hundreds of thousands of digital fonts available, let alone attempt to vary the typography of each brief she writes based on its particular narrative circumstances, she chooses to follow the lead of the Office of the Solicitor General and the Supreme Court of the United States, both of which set their texts in fonts from the Century family (Century Expanded and Century Schoolbook, respectively),¹⁴⁸ and the latter of which requires that briefs submitted to it be set in such a font.¹⁴⁹

146 See e.g. Arvo Pärt, *Lamentate for Piano & Orchestra* (subtitled an "homage to Anish Kapoor and his sculpture 'Marsyas'") (ECM Recs. 2005) (CD).

147 Easterbrook, *supra* n. 1.

148 Briefs of the Office of the Solicitor General, set in Century Expanded, are available in .pdf form at <http://www.usdoj.gov/osg/briefs/search.html> (accessed Mar. 5, 2010), and slip opinions of the Supreme Court of the United States set in Century Schoolbook are available in .pdf form at <http://www.supremecourtus.gov/opinions/opinions.html> (accessed Mar. 5, 2010).

149 U.S. Sup. Ct. Rule 33(1)(b) ("The text of every booklet-format document, including any appendix thereto, shall be typeset in a Century family (e.g., Century Expanded, New Century Schoolbook, or Century Schoolbook)."). A short aside (story-within-a-story?) about the Century family of typefaces: American typographer Lynn Boyd Benton debuted Century in 1896, and his son, Morris F. Benton, created several variations, including a slightly wider version, Century Expanded (1900), and a "schoolbook" version, with exaggerated, hyper-legible features designed for children and other novice readers, Century Schoolbook (1915). Meggs & Carter, *supra* n. 29, at 99.

The American legal community's enthusiasm for a turn-of-the-century schoolbook font may strike some as a bit odd. What could be further from the sunny, see-spot-run prose of children's books than the sober, thick, gravitas-laden exposition in legal briefs and judicial opinions? Who could be more different from the novice readers for whom schoolbook faces are designed than the seasoned, expert readers of judicial opinions? How Century Schoolbook came to its place of prominence in legal writing is a story for another day. That it does occupy that place may be another example where, however it got there, Licko's maxim that "readers read best what they read most," *supra* n. 88, might explain its continuing appeal and utility to certain brief readers.

Our attorney finds, with delight, that several fonts in the Century family are already bundled with her existing software, and thus she chooses one and sticks with it for all her briefs. As for letterspacing and wordspacing, she turns on her software's automatic kerning feature and then leaves it alone. Then, by changing the default side margins from 1 inch to 1.25 inch, she reduces the line length a bit, from 6.5 inches to 6 inches, and by turning on her software's automatic hyphenation feature (and then leaving it alone), she softens the ragged right edge

While these changes could be viewed as simple acts of content-neutral, context-independent "good" typography, they also could be viewed as a very light, unobjectionable case of the application of typographic techniques to advance narrative goals. Through her font choice, she has made her briefs look like Supreme Court opinions or Solicitor General briefs, and in so doing, she could be seen as claiming for her briefs the character of those institutions, their ethos, their personalities.¹⁵⁰ She is also helping to create a certain setting, a certain mood, one that for her readers may suggest both familiarity and authority. And all of this in a way that most judges would not only find unobjectionable but even commendable and pleasing.

2. Corporate Rebranding

A law firm has recently undergone a rebranding process with a consulting firm. After many long meetings, and perhaps an off-site retreat, the firm has reached consensus about how it will frame its identity, values, traditions, and aspirations. It may have, for instance, decided to see itself as strong, aggressive, and smart; as caring, trusted, and thoughtful; or as traditional, established, and conservative. The firm has approved a new logo, new motto, and new mission statement to reflect this identity. The consultants have also redesigned the firm's website, letterhead, business cards, and other communication media, using not only the firm's new logo and color scheme but also a typeface chosen (or even designed from scratch) to reflect the firm's identity.

.....

Familiarity, however, eventually has its drawbacks, as shown by the rise, fall (and retro/ironic resurgence) of Helvetica. *See* sources cited in *supra* n. 79. Because of the effect of familiarity, of over-exposure, the fate of Times/Times New Roman (1932), as told by Matthew Butterick, might one day be that of Century Schoolbook: "familiarity breeds contempt. Given its position as the ultimate default font, the appearance of Times in a book, document, or advertisement connotes a certain apathy—it says 'I submitted to the font of least resistance.' Times is not a font choice so much as the absence of a font choice, like the blackness of deep space is not a color. To look at Times is to gaze into the void." Butterick, *supra* n. 2. But Century Schoolbook and other faces in the Century family are not there yet, and probably won't be for a while, especially if readers continue to read copies of briefs and opinions other than the typeset originals, such as electronic copies from West and Lexis. Or if readers adjust the typography of electronic texts to suit their own preferences.

¹⁵⁰ This idea starts to bleed into issues of "voice." *See* J. Christopher Rideout, *Voice, Self, and Persona in Legal Writing*, 15 *Leg. Writing* 67 (2009). How briefs' typography might affect the briefs' voice, as opposed to narrative, is a topic for another article.

It would be a small step for the firm to use that typeface, or an appropriate complementary text face, in its briefs. A suitable employee within the firm (or the consultants, if they are still around) could create software defaults, templates, and style sheets to effectuate this transition, and the firm could offer training to make this easy for even the most tech-averse, Luddite senior partner.

In so doing, the firm's briefs would, through their typography, say something about the law firm, about its personality, its character. Depending on the size of the firm, its branding presence, and the frequency with which it (or its branded images) appear before the court to which a particular brief is submitted, this decision might even reinforce those aspects of the firm's identity in the court's mind.

3. Outsider Advocacy

A legal advocacy organization represents an "outsider" group, one that the law has traditionally ignored or even disadvantaged. In addition to giving that group voice through "outsider narratives" in amicus briefs, the organization might use typography to reflect or empower its client group in those briefs.

It might, for instance, use a typeface designed by a member of the outsider group or a face designed to critique the face from which it drew inspiration. Thus, rather than choosing a traditional Baskerville face, with all of its 18th Century, masculine, Anglo-American colonialist connotations, the organization might choose *Mrs Eaves* (2005), Zuzana Licko's fresh take on the Baskerville form, named after John Baskerville's wife, Sarah Eaves.¹⁵¹ Another organization might find inspiration in the story behind Storm Type's *Comenia* (2005), a schoolbook face that was designed to honor the shapes of accents in Czech script (something that faces designed by English speakers often neglect) and through its design help "motivate children to love their mother tongue."¹⁵²

Similarly, an organization devoted to advocating for traditional, old-fashioned American values and sensibilities might choose a sturdy, 20th Century slab serif such as *American Typewriter* or the core font *Rockwell*.

Each of these organizations' typeface choices could be supported by corresponding spacing decisions aimed at reflecting both the organization's and its clients' character and point of view. Tight, even, static spacing for some, and more open, varied, dynamic spacing for others.

151 See e.g. Zuzana Licko, *Mrs Eaves*, <http://www.emigre.com/EFfeature.php?di=109> (accessed Jan. 18, 2010).

152 See Stormtype Fontclub, *Comenia: School Typeface System*, <https://www.stormtype.com/typefaces-fonts-shop/pdf.php?pdf=F92> (accessed Jan. 18, 2010).

The rhetorical impact of some of these choices on the court might be slight or even non-existent, even for amicus briefs. But they need not have such an impact—the concern here is not typography and rhetoric but typography and narrative. As crucial as the relationship between text and audience is in briefing, it is not the only relationship: there is also text and author, text and client, text and law, and even text and text itself. That something claimed in a brief does not ultimately affect the court's disposition of a case does not mean that it is not significant. The benefits of advancing outsider narratives, of giving voice and expression to outsider identities, are not measured solely through formal legal outcomes.

4. High-Tech Expertise

A high-tech company finds itself in frequent litigation. It must defend its intellectual property rights against infringers, U.S. Patent and Trade Organization (USPTO) bureaucrats, and a cast of other meddlers. Its legal briefs often appeal to the company's expertise: "Trust us—we know this particular industry and this specialized area of law—the folks at the USPTO did get it wrong, that mom & pop shop is infringing our IP," and so on.

These sorts of rhetorical appeals can be thought of as involving two narrative components: character and point of view. The character the company seeks to claim for itself is that of the trusted expert (rather than that of the overreaching corporation, anonymous patent applicant, or bad citizen) and the company seeks to persuade the court to adopt that point of view (rather than some other point of view such as that of the government regulator, objective observer, or poor plaintiff).

Typography can help achieve these goals. What does tech expertise look like? What journals, magazines, advertising, media out in the world (or relevant area for the company) speak from that place? What is the typography of magazines such as *Wired* or *Make* or websites such as Slashdot or Gizmodo? Depending on the particular court or administrative body the tech company is arguing before, the typography of its pleadings could go quite far in a contemporary, tech-y direction. The text could be set in a blocky, rectangular slab serif or a transitional or geometric sans, perhaps with slashed zeros ("0"). The text could use asymmetrical columns, headings in decimal-system style (such as "2.1.5") that are offset in the margins, and so on. If the court or administrative body is likely to read the pleading in electronic format, then the company might use a dark blue or purple (rather than black) color for the text or include interactive content such as scroll-over footnotes and "live" citations. The design might not be quite so extreme, and it would have to be done thoughtfully

and conservatively to be effective, but if done well, the design could both focus and augment the brief's narrative agenda.

5. A Progressive in Traditionalist Clothing

A civil liberties organization has, for some time, been hoping to push an area of constitutional law in a progressive direction, to expand it to cover a new set of circumstances that the framers could have never envisioned. The organization has finally found the correct plaintiff and the facts are just perfect. The organization files suit in federal district court.

Just one problem: the suit gets assigned to the wrong judge. He's a formalist, an originalist, a self-avowed strict constructionist, with a very modest view of a judge's role and an instinctive distrust of change. So the organization does what it can within the text of its brief to frame things in a way that will resonate with this judge. As part of this strategy, although the organization's progressive goals involve the "energy aesthetic," the brief is framed within the "grid aesthetic."¹⁵³

The energy aesthetic and the grid aesthetic, as formulated by Pierre Schlag, are two of the four "recurrent forms that shape the creation, apprehension, and identity of [American] law."¹⁵⁴ According to Schlag,

In the grid aesthetic, law is pictured as a two-dimensional area divided into contiguous, well-bounded legal spaces. These spaces are divided into doctrines, rules, and the like. Those doctrines, rules, and the like are further divided into elements, and so on and so forth. The subjects, doctrines, elements, and the like are cast as "object-forms." They exhibit the characteristic features of objects: boundedness, fixity, and substantiality. They have insides and outsides that are separated by well-marked boundaries. The resulting structure—the grid—feels solid, sound, determinate. Law is etched in stone. The grid aesthetic is the aesthetic of bright-line rules, absolutist approaches, and categorical definitions.

In the energy aesthetic, law is cast in the image of energy. Conflicting forces of principle, policy, values, and politics collide and combine in sundry ways. Precedents expand or contract in accordance with the push and pull of policy and principle. Legal rules, principles, policies, and values have magnitudes *that must be* quantified, measured, and compared. Movement and flux are the orders of the day.¹⁵⁵

¹⁵³ See Pierre Schlag, *The Aesthetics of American Law*, 115 Harv. L. Rev. 1047, 1051 (2002).

¹⁵⁴ *Id.* at 1051. The other two are the perspectivist aesthetic and the dissociative aesthetic. *Id.*

¹⁵⁵ *Id.* at 1051–52.

As Schlag notes, “[t]he collision of the grid aesthetic and the energy aesthetic is well known in terms of various binary oppositions: Legal Formalism vs. Legal Realism, Rules vs. Standards, Formal Reasoning vs. Functionalism, and Formalism vs. Instrumentalism.”¹⁵⁶

In narrative terms, the civil liberties organization will attempt to establish a setting, a theme, and, in terms of narrative trajectory, a steady state of the grid. Thus, the claim the organization brings, the relief it seeks, is not novel or unusual but rather quite ordinary, falling squarely within well-established preexisting categories. The “trouble,” in the advancing narrative trajectory, is the defendant, who is resisting its constitutional obligations and preventing the plaintiff’s claim from being put neatly in its proper, pre-existing hole. The judge, as a character, isn’t really being asked to do anything other than to umpire this match, police the boundaries, and allow the law to cause the plaintiff’s claim to prevail.

The organization could bend its brief’s typography towards this aesthetic and advance this narrative in several ways. First, typeface. Something deliberate, objective, more rationalist than humanist. Something suggestive of harmony, symmetry, dignity, and tradition. Given the judge’s originalist bent, something evocative of early Anglo-American history, something Bringham-inspired typographers might use for the Federalist Papers or a founding father’s biography: a Caslon or Baskerville. Caslon was the type used to print the Declaration of Independence, and Benjamin Franklin, the statesman, inventor, and printer, was a strong promoter of the typefaces of his friend, John Baskerville.¹⁵⁷ Bringham describes John Baskerville’s designs as corresponding “very closely to the federal style in American architecture. They are as purely and unperturbedly Neoclassical as the Capitol Building, the White House, and many other federal and state edifice.”¹⁵⁸

The letter-, word-, and linespacing could also appeal to the grid with careful, even kerning, mathematical linespacing, and meticulously crafted full-justified text. Ragged-right set text, which Bringham describes as evoking “the continued flirtation with order and chaos,”¹⁵⁹ would be shunned, or perhaps it would be used only when presenting the other party’s position. There, not only might the text be right-ragged, but the spacing less regular, less stable.

156 *Id.* at 1104.

157 See Olga Baird, *John Baskerville and Benjamin Franklin: Two Men of Letters* 44, <http://www.search.revolutionary-players.org.uk/content/files/99/97/333.rtf> (accessed Feb. 27, 2010).

158 Bringham, *supra* n. 4, at 129.

159 *Id.* at 23

6. The Internal Investigation

A former employee of a large corporation sues, claiming that her former manager sexually harassed her at the branch office in Miami. The company's corporate headquarters in New York had investigated her allegations, but found insufficient proof to take action against the manager. The company moves for summary judgment.

The briefs on the motion might involve dueling narrative trajectories. The plaintiff might wish to claim as the initial steady state a safe, productive, harassment-free workplace. The main trouble that disrupts this steady state would, initially, be the manager's harassment, left unchecked and uncorrected by the company. Through the plaintiff's efforts, she would put the court in a position to restore the initial steady state or at least transform the current trouble into something positive, such as legal vindication and money damages. The moral of the story would be a familiar one.

The company would seek to establish a different narrative trajectory. The steady state is a well-run corporation, free from frivolous lawsuits or judicial intervention into its internal affairs; this is a place where internal investigations are thorough, even-handed, and accurate. The trouble is not the alleged harassment but rather the lawsuit, which threatens the efforts the company has made and continues to make to prevent and redress sexual harassment in its workplaces. The goal is to have the court dismiss the suit, thus restoring the steady state of a well-run company with adequate internal procedures that make judicial intervention unnecessary.

Various narrative components will be in contention. Is the main setting the site of the harassment (the Miami branch office) or the site of the investigation (the corporate headquarters in New York)? In terms of conflict, is this a conflict that pits harassed employee against harassing manager and indifferent mega-corporation or one that instead pits adequate internal investigation against unneeded judicial interference? Competing legal aesthetics might also come into play.

The corporation here might be tempted to use typography not only to advance its own narrative goals but also to thwart those of the other party. And not just by eclipsing the other party's narrative with the power of its own. In the facts section, when recounting, where the corporation must, the sordid details of what happened in Miami, the corporation might not want the text to be as legible, readable, and easy to comprehend and retain as possible. Instead, the corporation might want the reader's eyes to move quickly, skimming over the facts, digesting little. The brief might use scaled italics, smallcaps, and boldface, or uppercase, monospaced numerals, display faces at text sizes, inconsistent kerning, and other tech-

niques to add “static” or “noise” to the text.¹⁶⁰ So too with the law—when adverse precedent is discussed, the typography might encourage the reader to skim. And when seeking to characterize the opposing party’s argument as incoherent, strained, or muddled, the typography might help make the argument not only sound so but also appear so.

And when the text returns to the “good” part, perhaps under a new subheading at the top of a fresh page, the typography would be clean, clear, easy to understand, with spacing that causes the reader’s eyes to move at a predictable and gentle andante. Trouble averted, the steady state restored. When the court finishes reading the brief, something about the plaintiff’s case might feel awkward and strange, while something about the defendant’s case might feel comfortable and right. An experienced trial judge used to trusting her instincts, the court knows which way to rule. She just isn’t sure how she reached that decision.

Conclusion

As noted in the introduction, the existing commentary on law and typography has been framed in general and neutral terms: how can brief writers improve their briefs’ typography, irrespective of the content of those briefs or the context in which they are written? This article has striven to expand that commentary by examining one particular context-dependent, content-driven way that typography might be used in legal briefs: in its relationship to narrative.

The initial, easier cases prove the basic point: typography can be used in legal briefs in this way. Narrative components such as setting, character, and point of view, as well as the stages of the typical narrative trajectory, can all be advanced through typographic choice. But how far should typography go? What is the appropriate relationship between typography, context, and content in legal briefs? What should brief writers and readers take from Bringhurst’s warning that “typography is an art that can be deliberately misused. It is a craft by which the meanings of a text (or its absence of meaning) can be clarified, honored and shared, or knowingly disguised”?¹⁶¹ That normative issue is outside the scope and word-limit constraints of this particular article.

It’s also an issue that may remain theoretical. Briefing is a very high-stakes business. The attorney who, for instance, uses standard Times New

¹⁶⁰ The effect of aural static or white noise on listener perception is recounted in Jonah Lehrer’s popular *How We Decide* 206–07 (Houghton Mifflin Harcourt 2009).

¹⁶¹ Bringhurst, *supra* n. 4.

Roman, without kerning, without hyphenation and justification, and with scaled smallcaps and italics in one portion of a brief, but well-spaced and well-set Times Ten in another, risks both that the subtlety of his or her efforts—or the efforts of his or her firm’s graphic designer or printer—will be lost on the court and have no marginal persuasive impact, and the much greater risk that someone will notice and call the attorney out.¹⁶² Much safer to stick to traditional, fairly transparent, text-based methods of emphasis and de-emphasis.¹⁶³

Yet the impact of typography cannot be ignored, and the failure to make typographic choices is a choice itself—a choice that cannot help but have consequences.¹⁶⁴ For, to quote Bringhurst again, “[t]ypography is to literature as musical performance is to composition: an essential act of interpretation, full of endless opportunities for insight or obtuseness.”¹⁶⁵

162 Cf. *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 73 (N.J. 1960) (“The type used in the printed parts of the form became smaller in size, different in style, and less readable toward the bottom. . . . These two paragraphs are the least legible and the most difficult to read in the instrument, but they are most important in the evaluation of the rights of the contesting parties.”).

163 Transparency is important. Most of the typography appropriate to legal briefs is deliberately “invisible,” crafted to operate at an unconscious or subconscious level. Other rhetorical techniques, while perhaps subtle, are more transparent. Thus, when a brief writer attempts to persuade by using an analytical technique, such as attempting to distinguish adverse authority, the judge may recognize that rhetorical move for what it is. So too with a textual narrative technique such as using point of view to organize a facts section. But the judge will almost certainly be unaware of any well-crafted typographical rhetorical techniques used in a brief.

164 See e.g. Butterick, *supra* n. 2.

165 Bringhurst, *supra* n. 4, at 19.