

# Legal Writing and Disciplinary Knowledge-Building: A Comparative Study

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## I. Introduction

In recent decades, many scholars have studied professional academic writing in the disciplines to better understand how the textual practices of different disciplines reflect particular forms of knowledge-building activity.<sup>1</sup> Based on the work of philosophers in the Anglo-American and Continental

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<sup>1</sup> See e.g. Charles Bazerman, *Shaping Written Knowledge: The Genre and Activity of the Experimental Article in Science* (U. Wis. Press 1988) [hereinafter Bazerman, *Shaping Written Knowledge*]; Tony Becher, *Academic Tribes and Territories: Intellectual Enquiry and the Cultures of Disciplines* (Open U. Press 1989); Susan Peck MacDonald, *Professional Academic Writing in the Humanities and Social Sciences* (S. Ill. U. Press 1994); Richard Ohmann, *English in America: A Radical View of the Profession* (Oxford U. Press 1976); Stephen Toulmin, *Human Understanding: The Collective Use and Evolution of Concepts* (Princeton U. Press 1972) [hereinafter Toulmin, *Human Understanding*]; Charles Bazerman, *What Written Knowledge Does: Three Examples of Academic Discourse*, 11 Phil. Soc. Sci. 361 (1981) [hereinafter Bazerman, *What Written Knowledge Does*]; Davida Charney, *A Study in Rhetorical Reading*, in *Understanding Scientific Prose* (Jack Selzer ed., U. of Wis. Press 1993); Jeanne Fahnestock, *Rhetoric of Science: Enriching the Discipline*, 14 Technical Commun. Q. 277 (2005); Jeanne Fahnestock & Marie Secor, *The Rhetoric of Literary Criticism*, in *Textual Dynamics of the Professions* (Charles Bazerman & James Paradis eds., U. Wis. Press 1991); Christina Haas, *Learning to Read Biology: One Student's Rhetorical Development in College*, 11 Written Commun. 43 (1994); David Kolb, *Learning Styles and Disciplinary Differences*, in *The Modern American College* (Arthur W. Chickering ed., Jossey-Bass, Inc. 1981); Greg Myers, *The Social Construction of Two Biologists' Proposals*, 2 Written Commun. 219 (1985); Jane Rymer, *Scientific Composing Processes: How Eminent Scientists Write Journal Articles*, in 2 *Advances in Writing Research* 211 (David Jolliffe ed., Greenwood Publ. Group 1988); Sharon Stockton, *Writing in History: Narrating the Subject of Time*, 12 Written Commun. 1 (1995); James E. Warren, *Literary Scholars Processing Poetry and Constructing Arguments*, 23 Written Commun. 202 (2006); Laura Wilder, *The "Rhetoric of Literary Criticism" Revisited*, 22 Written Commun. 76 (2005).

hermeneutic traditions as well as the work of scholars studying how knowledge is generated in disciplinary communities, such studies have arrived at a general consensus that the textual practices of professional academic writing in the sciences and the humanities tend to occupy opposite ends of a knowledge-building continuum, the sciences more abstract and communal in their knowledge-building activities, the humanities more particularistic and individualistic, and the social sciences somewhere in the middle.<sup>2</sup> This recent scholarship has not significantly studied legal writing, however, which has received little rhetorical study from legal scholars themselves.<sup>3</sup> During the last

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<sup>2</sup> See e.g. Bazerman, *Shaping Written Knowledge*, *supra* n. 1; Becher, *supra* n. 1; MacDonald, *supra* n. 1; Ohmann, *supra* n. 1; Toulmin, *Human Understanding*, *supra* n. 1; Bazerman, *What Written Knowledge Does*, *supra* n. 1; Kolb, *supra* n. 1.

<sup>3</sup> See e.g. Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* 1 (Palgrave Macmillan 1987) ("Despite the glaringly obvious fact that both legal theory and legal practice are, and have always been, heavily dependent upon the tools of rhetorical and linguistic analysis, no coherent or systematic account of the relationship of law to language has ever been achieved.") [hereinafter Goodrich, *Legal Discourse*]; Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. Leg. Educ. 155, 166 (1999) ("Although legal reading processes have been studied, little research has focused on legal writing processes."); Christine B. Peak, Susan M. Reinhart & Ann Sinsheimer, *A Preliminary Analysis of Law Review Notes*, 19 English for Specific Purposes 197, 198 (2000) (expressing surprise to find "little relevant research" on the writing of research or seminar papers in law schools); Judge Alex Kozinski, *Foreword*, in Eugene Volokh, *Academic Legal Writing: Law Review Notes, Seminar Papers, and Getting on Law Review* 2 (2d ed., Found. Press 2005) ("This book fills a void in the legal literature . . ."); Deborah L. Rhode, *Legal Scholarship*, 115 Harv. L. Rev. 1327, 1327 (2002) ("On the relatively infrequent occasions like this one, when we are explicitly invited to discuss legal scholarship, . . ."); Barbara J. Shapiro, *Classical Rhetoric and the English Law of Evidence*, in *Rhetoric & Law in Early Modern Europe* 54 (Victoria Kahn & Lorna Hutson eds., Yale U. Press 2001) ("Given the long-standing association between law and rhetoric, there has been surprisingly little real study of the impact of rhetoric on the Anglo-American legal tradition."); Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Scholarship*, 76 Va. L. Rev. 1545, 1555 (1990) (describing his examination of the discipline-specific rhetoric of law as a "preliminary investigation"); Frances J. Ranney, *Reading, Writing, and Rhetoric: An Inquiry Into the Art of Legal Language* 7 (unpublished Ph.D. dissertation, Feb. 1998, Miami University) (microformed on UMI No. 9804361) (available at 58 Dissertation Abstracts Intl. 3115A) ("Only a small portion of current legal scholarship draws substantially on rhetoric, in either its ancient or modern formulations."). Similarly, in significant respects legal discourse analysis has only recently begun to emerge as a field of inquiry. See e.g. Heikki E.S. Mattila, *Comparative Legal Linguistics* 6 (Christopher Goddard trans., Ashgate Publg. 2006) ("In the modern sense, legal linguistics is a discipline that has only recently become established."); Roger W. Shuy, *Discourse Analysis in the Legal Context*, in *The Handbook of Discourse Analysis* 437 (Deborah Schiffrin, Deborah Tannen & Heidi E. Hamilton eds., Blackwell 2001) ("In the 1990s, forensic linguistics, in the broader sense, seems to have flowered, with important general collections of articles on language and law, and books on the language of the courtroom, bilingualism in the courtroom, and aircraft communication breakdown.") (citations omitted); Gail Stygall, *Narrative Discourse Analysis and Legal Texts*, in *Discourse Studies in Composition* 262 (Ellen Barton & Gail Stygall eds., Hampton Press 2002) ("[T]ypically, we have studied neither legal discourse nor narrative in professional settings."); Ronald R. Butters, *Forensic Linguistics Comes of Age*, 68 Am. Speech 109 (1993) (reviewing *Language in the Judicial Process* (Judith N. Levi and Anne Graffam Walker eds., Plenum

half century, legal studies has embraced the work of numerous other disciplines—including economics, political science, moral philosophy, literary theory, Marxism, gender studies, cultural studies, cultural anthropology, structuralism, and poststructuralism, among others. Because of this disciplinary inclusiveness, the knowledge-building activities reflected in the textual practices of legal writers present a particularly interesting and potentially challenging subject for comparison with other disciplines.<sup>4</sup> Such comparative studies are not only likely to increase our understanding of the discipline-specific rhetoric of law,<sup>5</sup> but may also contribute to the study of the relationship between professional writing and disciplinarity generally.

In this article, I examine Susan Peck MacDonald's recent study of disciplinary knowledge-building in *Professional Academic Writing in the Humanities and Social Sciences* and apply the methods used in her study and other studies of professional writing in the disciplines to analyze a sample of law review and journal articles involving a discrete legal question that is currently emerging in the United States and internationally, specifically, how and when arbitration may be compelled in disputes involving nonsignatories to an arbitration agreement. The purpose of this study is to identify the knowledge-building activities of a discrete legal discourse community and to compare the knowledge-building activities of that community to the knowledge-building activities of professional writing in other disciplines in order to identify the position the law review and journal articles occupy on the disciplinary knowledge-building continuum.<sup>6</sup> In my conclusion, I also offer reflections on the findings of the study and its implications for the application of interdisciplinary studies to legal writing.

## II. The Disciplinary Continuum and Legal Studies

Susan Peck MacDonald's *Professional Academic Writing in the Humanities and Social Sciences*, which received the Conference on College Composition and Communication's Best Book Award in 1995, provides a useful starting point for a comparative study of the relationship between the textual practices and

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Press 1990) and Roger W. Shuy, *Language Crimes: The Use and Abuse of Language Evidence in the Courtroom* (Blackwell 1993)).

<sup>4</sup> See Richard A. Posner, *Legal Scholarship Today*, 115 Harv. L. Rev. 1314, 1316 (2002) [hereinafter Posner, *Legal Scholarship Today*].

<sup>5</sup> As Gerald Wetlaufer has recently noted, this may provide insight into important features of the law itself, including the law's "urge to reduction and certainty," "the sufficiency and consequences of our narrative practices," "how we lawyers constitute ourselves through our rhetoric," "the idiosyncratic ways in which we privilege certain academic disciplines while shunning others and the further ways in which we transform those disciplines to which we grant our attention," as well as "important questions about legal pedagogy." Wetlaufer, *supra* n. 3, at 1552–53.

<sup>6</sup> See MacDonald, *supra* n. 1; Fahnestock & Secor, *supra* n. 1; Wilder, *supra* n. 1.

knowledge-building activities of professional academic writing in the disciplines.<sup>7</sup> MacDonald builds on the work of Anglo-American philosophers in the hermeneutic tradition, such as Thomas Kuhn, Stephen Toulmin, and Richard Rorty, and on prior disciplinary studies by Charles Bazerman, Tony Becher, David Kolb, and Richard Ohmann, all of whom focus on process and community in the social construction of disciplinary knowledge.<sup>8</sup> The work of these scholars emphasizes the process by which a community of practitioners “gives reasons for its choices, carries on negotiation and persuasion within the community, and selects some problems and solutions as superior to others on the basis of shared disciplinary understandings.”<sup>9</sup> MacDonald claims that this focus enables us to understand “situational variations in academic writing more clearly,” but “only if we identify cohesive discourse communities.”<sup>10</sup> Accordingly, MacDonald concludes that case studies of discrete disciplinary subfields are particularly useful to understanding how disciplinary knowledge is constructed because by allowing us to “isolate discourse communities of writers who read, cite, and are influenced by each other’s work,” such case studies increase the possibility of identifying a working discourse community “rather than merely an abstract ‘community’ that may have no consistent patterns of common communication.”<sup>11</sup> MacDonald proposes that a focus on the textual practices of such discourse communities provides greater descriptive power to discourse analysts, easier access for novices trying to enter the discourse of a community, better pedagogical methods for professionals trying to initiate novices into a discourse community, and better methods for professional writers to reflect on their writing practices than would a focus on philosophies, interpretations, or concepts alone.<sup>12</sup>

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<sup>7</sup> See generally Ellen L. Barton, *Empirical Studies in Composition*, 59 *College English* 815 (1997) (reviewing MacDonald, *supra* n. 1, and related works); *Book Review*, 47 *College Composition & Commun.* 439 (1996) (reviewing MacDonald, *supra* n. 1).

<sup>8</sup> See MacDonald, *supra* n. 1, at 13. For specific works studying the disciplinary continuum on which MacDonald bases her methodology, see Bazerman, *Shaping Written Knowledge*, *supra* n. 1; Becher, *supra* n. 1; Toulmin, *Human Understanding*, *supra* n. 1, at 95 (discussing Oliver Wendell Holmes, Jr.’s *The Common Law* and Edward H. Levi’s *Introduction to Legal Reasoning* regarding the legal reasoning of common law judges and noting that “we shall be characterizing the general processes by which conceptual populations develop historically, in the same kind of way that common-law historians have characterized the historical development of legal concepts”). Tony Becher builds on Charles Bazerman’s work regarding universalism and particularism in academic discourse, and both Bazerman and Becher build on Thomas Kuhn’s conclusion in *The Structure of Scientific Revolutions* that scientific knowledge is shaped by the interactions of members of academic communities. See Bazerman, *Shaping Written Knowledge*, *supra* n. 1, at 4 n. 3; Becher, *supra* n. 1, at 10, 13–14; Thomas Kuhn, *The Structure of Scientific Revolutions* (U. Chi. Press 1962).

<sup>9</sup> MacDonald, *supra* n. 1, at 13.

<sup>10</sup> *Id.* at 13.

<sup>11</sup> *Id.* at 13–14.

<sup>12</sup> See *id.* at 7.

To illustrate this approach to disciplinary knowledge-building, MacDonald analyzes the textual practices of professional academic writing in the disciplinary subfields of infant attachment psychology, colonial New England social history, and Renaissance New Historical literary criticism. She frames her analysis by initially positing that the textual practices of academic discourse communities may be considered on a continuum reflecting the degree to which the communities foreground their knowledge-building goals and practices as reflected in the following text-level patterns of variation:

- variations from disciplinary compactness to disciplinary diffuseness,
- variations in explanatory versus interpretive goals,
- variations from conceptually driven to text-driven in the relation between generalization and particular, and
- variations in the degree of epistemic self-consciousness explicit in the texts.<sup>13</sup>

According to MacDonald, these text-level patterns of variation primarily relate to the degree of particularism in the subject of inquiry, the humanities being more concerned with particulars and the sciences with abstract universals.<sup>14</sup> In the sciences, research areas are typically generated through a small number of well-defined problems simultaneously pursued by a wide array of researchers with the goal of reaching a consensus, and MacDonald calls such problem-centered, communal inquiries of the sciences “compact,” compared with the “diffuse” disciplines of the humanities, in which scholars more often re-interpret and re-evaluate a relatively discrete set of texts using new critical and historical lenses with the goal of reaching a wide range of alternative interpretations.<sup>15</sup> According to MacDonald, researchers in the sciences also tend to provide general explanations of phenomena compared with the more individualistic interpretations of the humanities.<sup>16</sup> Further, because in the sciences researchers are generally guided by conceptual issues rather than by phenomenal material such as texts, the sciences are more “conceptually driven” than the humanities, which tend “to be rooted in phenomena, data, or texts which are potentially worth knowing about for their

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<sup>13</sup> *Id.* at 14, 21–22.

<sup>14</sup> *See id.* at 19, 25.

<sup>15</sup> *Id.* at 22–27 (“Richard Ohmann has argued, for instance, that because science is arranged in a hierarchy of theories linked to central questions, specialists may work upon very small parts of those problems for the sake of improving the generality and economy of theories. . . . Literary research, Ohmann argued, works on different principles because there is no system of central principles by which to order and condense phenomena—nor would literary scholars want to do away with the complexity or uniqueness of literary works.”) (citing Ohmann, *supra* n. 1, at 9, 13); *cf.* Warren, *supra* n. 1, at 224 (“Rather than allowing the professional discourse to direct their research, these [literary] scholars said they jealously guard the originality of their enquiries, only later considering how their results might fit into a body of existing knowledge.”).

<sup>16</sup> *See* MacDonald, *supra* n. 1, at 32–36.

own sake.”<sup>17</sup> Therefore, MacDonald proposes that the relationship between abstract conceptualizations and particular phenomena in the sciences and the humanities may be diagrammed as, respectively, a triangle and an inverted triangle, the sciences moving “down the ladder of abstraction from concept to particular data” and the humanities moving from particulars “upward to a broadening set of abstract conceptualizations (the inverted triangle).”<sup>18</sup> In addition, the sciences reflect a high degree of what MacDonald calls “epistemic accounting,” which refers to the use of language explicitly directed toward the knowledge-building goals of a disciplinary community, by, for example, explicitly identifying the problem under study, prior research and the state of the community’s knowledge regarding the problem, and a shared conceptual terminology compared to the more narrative or anecdotal approach of the humanities.<sup>19</sup>

MacDonald first reviewed the articles in her study for these text-level patterns of variation, but also conducted an analysis of the relative particularism or abstraction of the nouns in the subject position of the sentences in the articles to compare with the text-level patterns of variation.<sup>20</sup> Because the text-level patterns of variation are created through language, MacDonald proposes that we should expect to find traces of these text-level patterns at the sentence level, and sentence-level differences having consequences at the text level, in a reciprocal relation.<sup>21</sup> She argues that the continuum of particularism and abstract universalism in the knowledge-building activities of academic disciplines suggests forms of analysis particularly suitable to the analysis of sentence subjects because the sentence subject is “the syntactic element that creates a sense of agency; it is the most important spot for determining what a writer is writing *about* and how questions about epistemology, construction, or agency enter into the writer’s thinking,” and decisions about how to represent agency become particularly complex in disciplinary contexts where there are numerous options for who or what should be the focus of agency.<sup>22</sup> Accordingly, MacDonald quantitatively analyzed the appearance of sentence subjects containing phenomenal and epistemic referents and found that “taken together, these sentence-level findings parallel the text-level tendencies: . . . the differing emphasis on negotiating knowledge claims within a research community and the differing degrees of [generalization and] particularism.” MacDonald claims this finding shows “some of the potential of this method for examining how

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<sup>17</sup> *Id.* at 35–37.

<sup>18</sup> *Id.* at 40, 45 (“[T]he particulars of literary texts are complex enough to enable divergent abstractions to be built upon them,” while infant attachment researchers “have been able to abstract ‘attachment’ from the complexity of phenomena in order to examine its role.”).

<sup>19</sup> *See id.* at 12, 47–50.

<sup>20</sup> *See id.* at 147.

<sup>21</sup> *See id.*

<sup>22</sup> *Id.* at 148–49, 152 (emphasis in original).



approaches to knowledge making may vary in ways that are parallel at text- and sentence-level.”<sup>23</sup>

Since at least the late 1960s and early 1970s, if not before, legal studies have embraced scholarship from both ends of the disciplinary continuum posited by scholars such as Toulmin, Bazerman, Becher, MacDonald, and others, in a proliferation of “interdisciplinary” legal studies ranging from the application of literary theory to law by Law and Literature scholars, to the application of economics to law by Law and Economics scholars, to the application of the theories and methodologies of numerous other disciplines.<sup>24</sup> Prior to this interdisciplinary trend, however, the task of “doctrinal” legal scholarship was, in the words of Richard Posner, simply to “extract a doctrine from the line of cases or from statutory text and history, restate it, perhaps criticize it or seek to extend it, all the while striving for ‘sensible’ results in light of legal principles and common sense.”<sup>25</sup> Although this form of legal scholarship, known as “doctrinal” to distinguish it from the “anti-doctrinal,” interdisciplinary variety, has significantly declined in prominence in the legal academy in the wake of the interdisciplinary trend, it nonetheless remains a prevalent form of legal scholarship today in terms of the quantity of publication in articles, treatises, casebooks, and textbooks.<sup>26</sup> Thus, in the leading law reviews more titles such as “The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines,” or “The *Kerr* Principle, State Action, and Legal Rights,” appear than titles such as “The Value of Irony: Legal Orthodoxy and Henry James’s *Washington Square*,”<sup>27</sup> and many have claimed that interdisciplinary studies have even less influence on

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<sup>23</sup> *Id.* at 169.

<sup>24</sup> See Posner, *Legal Scholarship Today*, *supra* n. 4; see also Richard A. Posner, *Law and Literature* (rev. & enlarged ed., Harv. U. Press 1998) [hereinafter Posner, *Law and Literature*].

<sup>25</sup> Posner, *Legal Scholarship Today*, *supra* n. 4, at 1316; cf. Robert W. Gordon, *Lawyers, Scholars, and the “Middle Ground,”* 91 Mich. L. Rev. 2075, 2080 (1993) (“Currently a good deal of legal scholarship and teaching simply carries on the ‘classical’ project of trying to find a theory that will effectively organize and rationalize the cases better than the official doctrine does.”); Christopher D. Stone, *From a Language Perspective*, 90 Yale L.J. 1149, 1154 (1981) (“The base level [of legal scholarship], commanding the bulk of the energy, aims at conventional intellectual housekeeping: summarizing, unveiling common underlying elements, smoothing apparent inconsistencies and propounding advances and retreats, usually within modest bounds.”).

<sup>26</sup> David A. Hollander, *Interdisciplinary Legal Scholarship: What Can We Learn From Princeton’s Long-Standing Tradition?*, 99 Law Lib. J. 771, 774 (2007) (“Although the doctrinal method was attacked as early as the 1880s (by Oliver Wendell Holmes, among others), it became the standard of legal education and scholarship, and today remains, if no longer dominant, a largely prevalent methodology.”); Posner, *Legal Scholarship Today*, *supra* n. 4, at 1317, 1321; Rhode, *supra* n. 3, at 1339.

<sup>27</sup> Don Herzog, *The Kerr Principle, State Action, and Legal Rights*, 105 Mich. L. Rev. 1 (2006); Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 Tex. L. Rev. 277 (2007); Ticien Marie Sassoubre, *The Value of Irony: Legal Orthodoxy and Henry James’s Washington Square*, 95 Cal. L. Rev. 1027 (2007).

legal practice, so that Richard Posner is not alone in concluding that the long-term viability of interdisciplinary legal scholarship “depends on the ability of the practitioners of this scholarship to influence practice, rather than merely to circulate their ideas within the sealed network of a purely academic discourse.”<sup>28</sup>

One example of such interdisciplinary legal scholarship, the Law and Literature movement, began as a field of organized study in the 1970s, but did not fully emerge as an interdisciplinary movement until the 1980s.<sup>29</sup> In 1973, James Boyd White invited his students “to see what the lawyer does as a literary activity, as an enterprise of the imagination.”<sup>30</sup> The Law and Literature movement has since supported a wide range of scholarship on the importance of narrative and oral forms of discourse, textual interpretation, and contextualization and empathy in law, leading “away from a view of law as formal, mechanized rule-making, and . . . instead toward all the possibilities, probabilities, ambiguities and doubts that life possesses.”<sup>31</sup> In addition, Law

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<sup>28</sup> Posner, *Legal Scholarship Today*, *supra* n. 4, at 1317; *cf.* Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?* 18 *Yale J.L. & Human.* 1, 2, 28 (2006) (“I am not aware that all this story talk has made any difference to legal actors. . . . What [the law and literature] movement] might better do, I believe, is demonstrate to legal studies that it has analytic instruments in its toolkit that might actually be of some use with the legal plumbing.”); Mark Tushnet, *Legal Scholarship in the United States: An Overview*, 50 *Modern L. Rev.* 804, 814 (1987) (“[W]hatever is the case in legal theory, by far the bulk of a practising lawyer’s work proceeds on the assumption that the stated legal rules are clear enough to justify a firm prediction about what is likely to happen,” which suggests that the allied disciplines “face no insurmountable barriers to expanding their role in law schools,” but have “marginal application to legal practice.”).

<sup>29</sup> See Posner, *Law and Literature*, *supra* n. 24; James Boyd White, *The Legal Imagination* (U. Chi. Press 1973); Julie Stone Peters, *Law, Literature, and the Vanishing Real: On the Future of an Interdisciplinary Illusion*, 120 *Publications Modern Lang. Assn.* 442, 443 (2005). Although initially an American phenomenon, the Law and Literature movement has expanded to include significant British and European scholarship. See *e.g.* Michael Freeman & Andrew Lewis, *Law and Literature* (Oxford U. Press 1999); Ian Ward, *Law and Literature: Possibilities and Perspectives* (Cambridge U. Press 1995); Melanie Williams, *Empty Justice: One Hundred Years of Law, Literature and Philosophy* (Cavendish 2002); Anne Simonin, *Eloge de l’eclectisme: Penser le Champ “Droit et Littérature” à partir des listes de “Legal Novels” (1900–1987)*, 37 *Textyles* 12 (2007). The European Network for Law and Literature was recently founded by a judge and law professor in the Netherlands and a literary scholar in Germany, Erasmus University Rotterdam, *European Network for Law and Literature*, <http://www.eurnll.org/> (last accessed June 19, 2009), and the University of Bergen recently founded the Nordic Network for Law and Literature, with participants from legal and literary institutions in Finland, Norway, Sweden, and Denmark, NordForsk, *Rett og Litteratur—Law and Literature*, <http://littrett.uib.no/index.php?ID=Nyheter&lang=Eng> (last accessed June 19, 2009). European academic journals have also prominently featured Law and Literature scholarship in special editions such as that of the journal *Cycnos* of the University of Nice Sophia Antipolis, which published a special edition on “Droit et Littérature” in 2002. 19 *Cycnos* (2002).

<sup>30</sup> White, *supra* n. 29, at xix.

<sup>31</sup> Robert L. Hayman & Nancy Levit, *Jurisprudence: Contemporary Readings, Problems, and*



and Literature scholars have advocated that because law is inherently involved in the creation and interpretation of texts, legal writing may benefit from a study of the literary imagination and the methods of literary criticism.<sup>32</sup> Applications of storytelling to legal argument have coalesced in the Applied Legal Storytelling movement, which held its first conference in July 2007,<sup>33</sup> and the Law and Literature movement has recently expanded into the broader disciplinary formation of Law, Culture, and the Humanities, as scholars have recognized that humanistically oriented legal studies share common interests.<sup>34</sup>

In contrast to the more humanistic approach to law recognized by the Law, Culture, and the Humanities movement, for centuries formalist legal scholars have approached law as a science, advocating precisely the sort of “formal, mechanized rule-making” activity that Law and Literature scholars have critiqued. The key concept of legal formalism is the belief that judges deduce legal decisions from statutes, rules, and precedents by using formal logic, particularly syllogistic reasoning.<sup>35</sup> Hans Kelsen is particularly emblematic of this view, describing his Pure Theory of Law as “objectivist and universalistic,” its aim

to conceive each individual [legal] phenomenon in its systematic context with all others—to conceive in each part of the law the function of the total law. . . . [T]he law is an order, and therefore all legal problems must be set and solved as order problems. In this

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*Narratives* 267 (West 1994).

<sup>32</sup> See e.g., *id.* at 268 (“Storytelling is not limited to depictions of law in fiction, but instead incorporates stories into law. In law review articles and essays, legal books and speeches—media previously characterized by a formal, objective style and depersonalized technical discourse—authors are telling stories . . . .”); Joel R. Cornwell, *Languages of a Divided Kingdom: Logic and Literacy in the Writing Curriculum*, 34 John Marshall L. Rev. 49, 51, 75 (2000) (“Legal Writing must contribute to a new interdisciplinary study of law by cultivating literary imagination and incorporating interpretive methods of literary criticism,” and “Legal Writing courses, if they are to be taught well, must contain a strong element of literary criticism.”); Wendy Nicole Duong, *Law Is Law and Art Is Art and Shall the Two Ever Meet? Law and Literature: The Comparative Creative Processes*, 15 S. Cal. Interdisc. L.J. 1, 2 (2005–06) (“Law can benefit from the craft of the literary art, and can borrow therefrom.”); Walker Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U. L. Rev. 915, 915 (1961) (“[C]ertain terms and attitudes familiar to modern students of literature and language can be of direct and practical use to writers of legal compositions.”); Posner, *Law and Literature*, *supra* n. 24, at 266 (“It might not be the worst method of teaching legal writing to assemble an anthology of descriptions of legal doctrine found in works of imaginative literature.”); Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 Va. L. Rev. 1351, 1392 (1986) (“[B]ecause . . . [law] is a technique tied to the creation and interpretation of texts, the practice of law can gain from sympathetic engagement with literature.”).

<sup>33</sup> See e.g., Brian J. Foley, *Applied Legal Storytelling, Politics, and Factual Realism*, 14 Leg. Writing 17 (2008).

<sup>34</sup> See Peters, *supra* n. 29, at 451.

<sup>35</sup> See Hayman & Levit, *supra* n. 31, at 11; Chaim Perelman, *Law, Logic, and Epistemology*, in *Justice, Law, and Argument* (William Kluback trans., D. Reidel 1980).

way legal theory becomes an exact structural analysis of positive law, free of all ethical-political value judgments.<sup>36</sup>

Similarly, many English and American jurists have approached law as a science, including Edward Coke, Francis Bacon, William Blackstone, James Kent, Joseph Story, John Austin, and Christopher Columbus Langdell.<sup>37</sup> Indeed, formalism has been a perennial impulse in legal history, leading to such grand systematic statements of the law as Justinian's *Institutes* and Blackstone's *Commentaries*, influencing generations of jurists.<sup>38</sup>

Accordingly, for purposes of studying the disciplinary knowledge-building activities of legal discourse, it may be useful to consider the Law, Culture, and the Humanities movement as representative of the humanities and to consider legal formalism as representative of the sciences on the disciplinary knowledge-building continuum proposed by scholars such as Toulmin, Bazerman, Becher, MacDonald, and others. In proposing this comparison, however, it is important to recognize that important distinctions exist between the formalist approach to law as a science and the empirical and logical sciences.<sup>39</sup> A jurist does not observe physical phenomena like an empirical scientist or verify the truth of normative propositions through

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<sup>36</sup> Hans Kelsen, *Pure Theory of Law* 191–92 (Max Knight trans., U. Cal. Press 1989); see also Iain Stewart, *The Critical Legal Science of Hans Kelsen*, 17 J. L. & Socy. 273 (1990).

<sup>37</sup> See Stephen M. Feldman, *American Legal Thought From Premodernism to Postmodernism: An Intellectual Voyage* 52 (Oxford U. Press 2000); Hayman & Levit, *supra* n. 31, at 12; Richard T. Bowser & J. Stanley McQuade, *Austin's Intentions: A Critical Reconstruction of His Concept of Legal Science*, 29 Campbell L. Rev. 47, 82 (2006); Howard Schweber, *The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 L. & Hist. Rev. 421, 421–22, 426–28 (1999).

<sup>38</sup> See Daniel J. Boorstin, *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries Showing How Blackstone, Employing Eighteenth-Century Ideas of Science, Religion, History, Aesthetics, and Philosophy, Made of the Law at Once a Conservative and a Mysterious Science* 3 (Beacon Press 1941) ("In the fourteen centuries since Justinian's *Institutes*, Blackstone's *Commentaries* are the most important attempt in western civilization to reduce to short and rational form the complex legal institutions of an entire society. And Justinian's role in the reception of the civil law in western Europe was Blackstone's in the reception of the common law in America."); see also Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* 10 (Oxford U. Press 1992) ("Every complex legal system presents a structure of classification and categorization that reveals many of its dominant concerns and points of tension and contradiction."); Mattila, *supra* n. 3, at 7 ("Legal research science goes back to Rome and, as to research methods, to ancient Greece. This involved creating a conceptual system of law, which presupposes clarifying connections between concepts."); cf. Bowser & McQuade, *supra* n. 37, at 82 ("Legal scholars should assist the legal enterprise in shaping a genuine legal science, the order of notions of the law using forms apt for law itself.").

<sup>39</sup> See Norberto Bobbio, *The Science of Law and the Analysis of Language*, in *Law and Language: The Italian Analytical School* 22, 35 (Zenon Bankowski, Simona Stirling & Anne Pirrie trans., Deborah Charles Publications 1997) (noting "the long standing disquiet jurists have always felt in comparing their own inquiry with what, at different times, has been acknowledged as science").

experience. Instead, according to legal formalists, the truth value of legal propositions lies in their correspondence to “certain ethical principles accepted as criteria to regulate action in a particular society.”<sup>40</sup> Unlike the empirical and logical sciences, legal scholars “are not attempting to describe an allegedly objective reality, and most of them are not even attempting to discover real meanings embedded in authoritative texts,” but instead their goal is “to address prescriptions to public decision-makers.”<sup>41</sup> What formalist jurisprudence has in common with the sciences is not empirical methods or formal logic, but the critical function of constructing a rigorous language of well-defined terminology and rules for the use of language, such that jurisprudence becomes “essentially an analysis of language, more precisely of the language through which the legislator expresses himself through normative propositions.”<sup>42</sup> For this reason, many legal scholars have compared legal theory to linguistics, a “system of norms conceived as a grammar of legal validity,”<sup>43</sup> and Peter Goodrich has even argued that modern formalist jurisprudence parallels the development of formalism in modern linguistics.<sup>44</sup> Bearing these distinctions in mind, however, these positions

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<sup>40</sup> *Id.*

<sup>41</sup> Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 Mich. L. Rev. 1835, 1854 (1988); cf. Lloyd L. Weinreb, *Legal Reason: The Use of Analogy in Legal Argument* 141 (Cambridge U. Press 2005) (“There are a number of reasons to reject so doctrinaire (if not, indeed, mechanical) a view of the judicial function, not least its tendency to treat the prescriptive content of the law and the descriptive statements of science as equivalent.”); Bobbio, *supra* n. 39, at 35 (“It is precisely because these propositions are normative, that is, they regulate future behavior and do not represent something that has already happened, that they have a purely ideal rather than an actual truth.”).

<sup>42</sup> Bobbio, *supra* n. 39, at 35, 37–38 (“We can see how it is possible to move from a conception of science as a means of getting at the truth to one which aims at a systematic and rigorous reordering of concepts for practical ends. Legal research on property can be described as rigorous when all the rules which we consider necessary in order to be able to use the word have been established.”); cf. Feldman, *supra* n. 37, at 53 (“To American jurisprudents, law was a science because, most important, it was a rational system of principles.”); Cornwell, *supra* n. 32, at 70 (“Legal language . . . maintains a comparatively high level of abstraction, and connotes a scientific method.”).

<sup>43</sup> Goodrich, *Legal Discourse*, *supra* n. 3, at 39; see also Bobbio, *supra* n. 39, at 36, 41, 43 (“[L]egal analysis is conducted within the narrowly circumscribed limits of a particular language. The rules of transformation are determined in advance, independently of the jurist’s will. This is what we mean when we say that legal language is a closed language.”); Cornwell, *supra* n. 32, at 70 (“To the formalist, the objective quality of the rule of law depends upon the proper translation of a human conflict into legal concepts which then determine judgments as a matter of formal relations within a larger system of concepts, all represented, however imperfectly, in human language.”); George P. Fletcher, *The Grammar of Criminal Law: American, Comparative, and International* vol. I, 8 (Oxford U. Press 2007).

<sup>44</sup> See Goodrich, *Legal Discourse*, *supra* n. 3, at 35; but cf. Bernard S. Jackson, *Making Sense in Jurisprudence* 127 (Deborah Charles Publications 1996) (noting that Jean Piaget’s interpretation of Kelsen emphasizes dynamic features of Kelsen’s thought in contrast to Goodrich’s emphasis of static features and concluding that both interpretations are “eminently debatable”).

within legal studies provide useful analogues for purposes of comparing various forms of legal writing to other forms of academic writing on the knowledge-building continuum posited by scholars such as Toulmin, Bazerman, Becher, MacDonald, and others in their studies of the disciplines.<sup>45</sup>

### III. The Articles Studied

Fourteen articles published between 1995 and 2007 in various law reviews and law journals in the United States were selected for this study and are listed in Appendix A. I selected the articles because they constitute a discrete disciplinary subfield of legal scholars addressing a newly emerging legal question, specifically, how and when arbitration may be compelled in disputes involving nonsignatories to an arbitration agreement, including issues related to multiparty and class arbitrations. Because the articles all examine the same newly emerging legal question, they are particularly well suited to comparing the disciplinary knowledge-building activities of a discrete legal discourse community with the knowledge-building activities of various disciplines studied previously. Most of the articles in the sample provide biographical information on their authors, who are primarily active legal practitioners employed in law firms, government agencies, or legal industry organizations,<sup>46</sup> but also include two law professors,<sup>47</sup> two law

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<sup>45</sup> Cf. Hayman & Levit, *supra* n. 31, at 267 (“At one end of the spectrum are textualists, who suggest that legal texts have stable meanings, which afford little or no room for the infusion of any personal values of the interpreter. Texts, according to this view, are capable of only a narrow range of possible legitimate interpretations. At the other extreme are those who argue that texts, and perhaps all utterances, are subject to various indeterminacies of meaning. Some of these theorists contend that no objective meaning resides within texts, but that meaning is manufactured significantly or exclusively by the interpreter. In the middle are those who maintain that there are some social, contextual, and linguistic constraints on interpretation.”); Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* 23 (U. Chi. Press 1999) (discussing the “dialectic of the abstract and the particular” in legal scholarship).

<sup>46</sup> See Michael H. Bagot, Jr., & Dana A. Henderson, *Not a Party, Not Bound? Not Necessarily: Binding Third Parties to Maritime Arbitration*, 26 Tul. Mar. L.J. 413 (2002); Michael F. Hoellering, *Consolidated Arbitration: Will It Result in Increased Efficiency or an Affront to Party Autonomy*, 52 Dis. Res. J. 41 (Jan. 1997); James M. Hosking, *Non-Signatories and International Arbitration in the United States*, 20 Arb. Intl. 289 (2004) [hereinafter Hosking, *Non-Signatories and International Arbitration*]; James M. Hosking, *The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent*, 4 Pepp. Dis. Res. L.J. 469 (2004) [hereinafter Hosking, *The Third Party Non-Signatory's Ability to Compel*]; Carolyn B. Lamm & Joceyl A. Aqua, *Defining the Party—Who Is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*, 34 Geo. Wash. Intl. L. Rev. 711 (2002–03); Jan Paulsson, *Arbitration Without Privity*, 10 ICSID Rev. 232 (1995); John M. Townsend, *Nonsignatories and Arbitration: Agency, Alter Ego, and Other Identity Issues*, 3 ADR Currents 19 (Sept. 1998); Dwayne E. Williams, *Binding Nonsignatories to Arbitration Agreements*, 25 Fran. L.J. 175 (2006).

<sup>47</sup> See Anthony M. DiLeo, *The Enforceability of Arbitration Agreements By and Against Nonsignatories*, 2 J. Am. Arb. 31 (2003); Bernard Hanotiau, *Problems Raised by Complex Arbitrations*

students,<sup>48</sup> and one Ph.D. candidate with a prior J.D.<sup>49</sup> The articles vary widely in length, with the shortest a mere four pages<sup>50</sup> and the longest a book-length 159 pages.<sup>51</sup> I also selected five of the articles as a representative subsample for purposes of conducting a quantitative analysis of their sentence subjects according to the methodology used by Susan Peck MacDonald in *Professional Academic Writing in the Humanities and Social Sciences*.<sup>52</sup> The five articles in the subsample not only cover a range of dates and authors representative of the sample as a whole, but a comparison of their text- and sentence-level features with those of the other articles in the sample indicates sufficient similarity for purposes of the study.

#### IV. Methods of Analysis

I began the study by reviewing the entire sample for the text-level patterns of variation in disciplinary knowledge-building that Susan Peck MacDonald identified in *Professional Academic Writing in the Humanities and Social Sciences* based on the earlier work of Thomas Kuhn, Stephen Toulmin, Charles Bazerman, Tony Becher, and others. I then analyzed the nouns in the subject position of all of the sentences in the subsample following MacDonald's method of analyzing sentence subjects for purposes of comparison with the text-level patterns. MacDonald classifies sentence subjects into two general categories: phenomenal subjects, which consist of "the material that the researcher studies," and epistemic subjects, which consist of "the methods, conceptual tools, and previous research that the researcher brings to bear on that material."<sup>53</sup> She further subdivides the phenomenal category into

- Class 1 ("Particulars"), referring to specific people, places, or objects, usually named individuals;
- Class 2 ("Groups"), referring to generalized or grouped nouns; and
- Class 3 ("Attributes"), referring to the attributes, properties, action, behavior, or motivations and thoughts of the nouns in Classes 1 and 2.

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*Involving Multiple Contracts—Parties—Issues*, 18 J. Intl. Arb. 251 (2001).

<sup>48</sup> See Michael P. Daly, Student Author, *Come One, Come All: The New and Developing World of Nonsignatory Arbitration and Class Arbitration*, 62 U. Miami L. Rev. 95 (2007); Jeff DeArman, Student Author, *Resolving Arbitration's Nonsignatory Issue: A Critical Analysis of the Application of Equitable Estoppel in Alabama Courts*, 29 Cumb. L. Rev. 645 (1998–99).

<sup>49</sup> See Matteo M. Winkler, *Arbitration Without Privity and Russian Oil: The Yukos Case Before the Houston Court*, 27 U. Pa. J. Intl. Econ. L. 115 (2006).

<sup>50</sup> See Charles Lee Eisen, *What Arbitration Agreement? Compelling Non-Signatories to Arbitrate*, 56 Dis. Res. J. 40 (July 2001).

<sup>51</sup> See Hanotiau, *supra* n. 47.

<sup>52</sup> The subsample includes Daly, *supra* n. 48; DiLeo, *supra* n. 47; Townsend, *supra* n. 46; Williams, *supra* n. 46; and Winkler, *supra* n. 49.

<sup>53</sup> MacDonald, *supra* n. 1, at 157.

She further subdivides the epistemic category into

- Class 4 (“Reasons”), referring to “all-purpose abstractions and words used in reasoning such as ‘reasons,’ ‘argument,’ ‘evidence,’ ‘significance,’ or ‘findings’ ”;
- Class 5 (“Research”), referring to scholars in the field, whether generalized or named;
- Class 6 (“Isms”), referring to schools of thought such as Marxism or Historicism; and
- Class 7 (“Audience”), referring to subjects like the generalized “we” and “one” or “you.”<sup>54</sup>

I applied MacDonald’s classifications to my analysis of the sentence subjects in the subsample. As MacDonald herself is careful to point out, these classifications are not intended to be evaluative, nor are they intended to be ends in themselves, or self-explanatory, but instead serve as “points of departure for identifying and then interpreting patterns that would otherwise be obscured by differences in content or similarities in syntax,” for identifying “representational choices rather than underlying truths.”<sup>55</sup>

In order to compare the conclusions reached by using MacDonald’s methodology with the conclusions that might be reached using the methods of other studies of professional academic writing in the disciplines, I also compared the articles in the sample to studies published by Jeanne Fahnestock and Marie Secor in 1991 and Laura Wilder in 2005, which identified the forms of argument that most frequently appeared in literary criticism.<sup>56</sup> In the classical rhetoric tradition, commonly used lines of argument, or “structurally predictable elements” used in argument, are referred to as *topoi*, and those applicable to unique rhetorical situations, known as “special *topoi*,” refer to specific lines of argument that both invoke the shared assumptions of a discrete discourse community and simultaneously create that community.<sup>57</sup> Based on this theory of the special *topoi* of discrete discourse communities,

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<sup>54</sup> See *id.* at 158.

<sup>55</sup> See *id.* at 156.

<sup>56</sup> Fahnestock & Secor, *supra* n. 1; Wilder, *supra* n. 1.

<sup>57</sup> Fahnestock & Secor, *supra* n. 1, at 84; see also Wilder, *supra* n. 1, at 84. See generally Aristotle, *Rhetoric* 1358<sup>a</sup> (W. Rhys Roberts trans., Modern Lib. 1954); Michael H. Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage* 27 (Ashgate Publg. 2005). Similarly, in *The Uses of Argument*, Stephen Toulmin introduced the technical terminology of a “field of arguments,” in which the data and conclusions of two or more arguments are of the same logical type, and describes the standards for evaluating arguments as *field-dependent* when they vary from one field to another. Stephen Toulmin, *The Uses of Argument* 14–15 (Cambridge U. Press 1958) [hereinafter Toulmin, *The Uses of Argument*]. In addition, Toulmin referred to the standards for drawing conclusions from particular data as “warrants,” noting that “the data we cite if a claim is challenged depend on the warrants we are prepared to operate with in that field, and the warrants to which we commit ourselves are implicit in the particular steps from data to claims we are prepared to take and to admit.” *Id.* at 98–100.



Fahnestock, Secor, and Wilder identify the following special *topoi* of literary argument based on their study of articles published in the field of literary criticism:

- (1) “Appearance/reality,” in which a critic argues for a dualism in a literary text, “the perception of two entities: one more immediate, the other latent; one on the surface, the other deep; one obvious, the other the object of search”;<sup>58</sup>
- (2) “Ubiquity,” in which a critic claims to have found something in a literary text that no one else has seen, “and to find it everywhere”;<sup>59</sup>
- (3) “Paradox,” in which a critic seizes upon the “unification of apparently irreconcilable opposites in a single startling dualism”;<sup>60</sup>
- (4) “*Contemptus mundi*,” in which a critic assumes an aspect of “despair over the condition and course of modern society”;<sup>61</sup>
- (5) “Paradigm,” in which a critic elucidates a structure in a literary text that provides form to otherwise congruent verbal concepts, “a kind of template fitted over the details of a literary text to endow them with order”;<sup>62</sup>
- (6) “Social justice,” in which a critic seeks in an assumed connection between a literary text and the world certain avenues toward social justice through advocating social change;<sup>63</sup>
- (7) “Mistaken critic,” in which a critic argues that previous critics have repeatedly overlooked some aspect of a literary text;<sup>64</sup> and

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<sup>58</sup> Fahnestock & Secor, *supra* n. 1, at 84–85.

<sup>59</sup> *Id.* at 87 (“[George] Wright, [in ‘Hendiadys and *Hamlet*,] finds the same rhetorical figure, hendiadys, everywhere in *Hamlet* (66 times to be exact) as well as precisely counted appearances of it in other plays.”).

<sup>60</sup> *Id.* (“Carr and Knapp notice that Zoffany’s portrayal of MacBeth and Lady MacBeth depicts them as they ‘both advance toward and recoil from each other, their mutual attraction and antipathy held at equilibrium . . .’”).

<sup>61</sup> *Id.* at 88.

<sup>62</sup> *Id.* at 89 (“All articles that find an Oedipal complex in a particular short story, or a Jungian archetype in a drama, or Lacanian ‘others’ everywhere, apply macroparadigms.”).

<sup>63</sup> Wilder, *supra* n. 1, at 99 (“For Burton, Faulkner’s Compsons exemplify failed readers as well as failed lives from whose experience we can profitably learn . . .”).

<sup>64</sup> *Id.* at 101.

(8) “Context,” in which a critic presumes that previously overlooked historical details should be brought to bear on the interpretation of a literary text.<sup>65</sup>

I applied Fahnestock, Secor, and Wilder’s definitions of these special *topoi* of literary argument to my analysis of the *topoi* in the sample to determine if the writers in the sample employed any of these forms of literary argument.

## V. Analysis of the Text-Level Patterns of Variation and Sentence Subjects in the Sample

On the text level, the articles in the sample reflect highly compact, explanatory, and conceptually driven patterns of variation with a high epistemic accounting. The articles primarily attempt to distill conceptually clear formulations of legal rules and doctrines from a variety of legal authorities that have addressed the arbitrability of disputes involving nonsignatories in response to a dramatic recent increase in nonsignatory arbitrations both domestically and internationally, including growing numbers of multiparty and class arbitrations.<sup>66</sup> Anthony DiLeo, for example, claims that “a significant part of the case law addressing these questions has been decided in the past three years,” and

the purpose of this review is to discern principles from a number of the key decisions addressing these issues under both federal and state law, and to *distill rules of applicability* so that practitioners can

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<sup>65</sup> *Id.* at 104 (“Albrecht justifies his paradigmatic application of Kenneth Burke’s work to Ralph Ellison’s by stating that these two writers knew each other and admired each other’s work.”).

<sup>66</sup> See Bagot & Henderson, *supra* n. 46, at 414 (“We write because maritime lawyers . . . should be forewarned.”); Daly, *supra* n. 48, at 33 (“The implications and ramifications of such a scenario reflect real questions and concerns facing the international arbitration community today . . .”); DiLeo, *supra* n. 47, at 33 (“[I]mportant judicial opinions continue to add to the body of law on this question.”); Hanotiau, *supra* n. 47, at 302 (“In a great number of cases, national courts and arbitral tribunals have been confronted with the issue of whether . . .”); Hosking, *Non-Signatories and International Arbitration*, *supra* n. 46, at 289 (“Far from being merely theoretical, the questions raised by the aforementioned scenario are in fact highly relevant to the contemporary practice of international commercial arbitration.”); Hosking, *The Third Party Non-Signatory’s Ability to Compel*, *supra* n. 46, at 475 (“[B]road approaches imperil the continued credibility of international arbitration . . .”); Lamm & Aqua, *supra* n. 46, at 711 (“The number of international arbitrations occurring under the auspices of the American Arbitration Association (AAA) has increased dramatically . . .”); Paulsson, *supra* n. 46, at 254–56 (“We are witnessing an explosive proliferation of texts seeking to provide legal security for investments across borders. . . . It is dramatically different from anything previously known in the international sphere. It could presage an epochal extension of compulsory arbitral jurisdiction . . .”).

appropriately advise clients as to the drafting of agreements and pleadings.<sup>67</sup>

Almost all of the articles identify and analyze a common set of legal theories that apply to the nonsignatory problem (e.g., agency, estoppel, alter ego/veil piercing, incorporation by reference, and assumption),<sup>68</sup> immediately and explicitly frame the problem studied in their introduction with virtually no narrative or anecdote,<sup>69</sup> and meticulously cite the prior law and scholarly

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<sup>67</sup> DiLeo, *supra* n. 47, at 33 (emphasis added); cf. Townsend, *supra* n. 46, at 19 (indicating that his aim is “to *distill* general rules for predicting how . . . cases will be resolved”) (emphasis added).

<sup>68</sup> See Bagot & Henderson, *supra* n. 46, at 436 (discussing agency, estoppel, alter ego/veil piercing, incorporation by reference, and assumption); Daly, *supra* n. 48, at 98–102 (discussing incorporation by reference, assumption, veil piercing/alter ego, equitable estoppel/third-party beneficiary, and assignment/succession); DeArman, *supra* n. 48 (discussing third-party beneficiary and equitable estoppel); DiLeo, *supra* n. 47, at 33–34 (discussing alter ego/corporate veil piercing, incorporation by reference, assumption by conduct, equitable estoppel, agency, successors in interest, and third-party beneficiary); Eisen, *supra* n. 50 (discussing alter ego or veil-piercing, incorporation by reference, assumption, agency, and equitable estoppel); Hanotiau, *supra* n. 47 (discussing representation and agency, third-party beneficiary, estoppel, and incorporation by reference); Hosking, *Non-Signatories and International Arbitration*, *supra* n. 46 (discussing assignment, incorporation by reference, third party beneficiary, agency, estoppel/equitable estoppel, and the “group of companies” doctrine); Hosking, *The Third Party Non-Signatory’s Ability to Compel*, *supra* n. 46, at 482 (discussing incorporation by reference, assumption, agency, veil-piercing/alter ego/group of companies doctrine/consortium/joint venture, estoppel, assignment, novation, succession by operation of the law, subrogation, and third party beneficiary, and concluding that the factual criteria necessary to extend an arbitration agreement to nonsignatories were “already indicative of well-recognized legal doctrines”); Lamm & Aqua, *supra* n. 46 (discussing veil piercing, alter ego, agency, assumption, and estoppel); Townsend, *supra* n. 46 (discussing incorporation by reference, assumption by conduct, third-party beneficiary, agency, equitable estoppel, and piercing the corporate veil or alter ego); Williams, *supra* n. 46 (discussing incorporation by reference, assumption, agency, veil-piercing/alter ego, and estoppel).

<sup>69</sup> With only two limited exceptions, the first sentence of each article either identifies the problem studied or a conceptual principle of law as a prelude to identifying the problem. See e.g. Hosking, *Non-Signatories and International Arbitration*, *supra* n. 46 (“For many years arbitration practitioners have grappled with the problem of what to do with a ‘non-party’ or more particularly a ‘non-signatory’ . . . .”); Lamm & Aqua, *supra* n. 46 (“The number of international arbitrations occurring under the auspices of the American Arbitration Association (AAA) has increased dramatically over the past few years.”); Townsend, *supra* n. 46 (“While an arbitration agreement may require the parties to arbitrate disputes within the reach of the agreement, it is not always apparent who those parties are.”); Williams, *supra* n. 46 (“When a franchise-related agreement contains a mandatory arbitration clause, the scope of the clause may present a critical threshold issue . . . .”). Cf. Feak, Reinhart & Sinsheimer, *supra* n. 3, at 204–05 (noting that of the forty law review notes studied, all published in 1993 in the *Michigan Law Review*, *Stanford Law Review*, and *Columbia Law Review*, only 29% opened with narratives such as hypotheticals, stories, or discussions of cases, while 45% opened with discussions of an act, law, or legal principle and topic generalizations).

commentary on the problem in voluminous footnotes.<sup>70</sup> Like what MacDonald called the “external exigency” in infant attachment psychology articles,<sup>71</sup> the articles in the sample foreground a problem-centered, conceptually driven, and explanatory approach to their subject rather than a focus on phenomena, data, or texts. This reflects that what is at stake in the articles is “causal explanation within their disciplinary discourse,” a feature more characteristic of writing in the sciences than in the humanities.<sup>72</sup>

Perhaps not surprisingly, the vast majority of the sentence subjects in the subsample consist of references to legal materials such as laws, judicial opinions, and legal theories, and to individuals who advance legal arguments or state binding legal opinions, such as legislators, judges, arbitrators, parties, and scholarly commentators. Because the former type of sentence subjects—legal materials such as laws, judicial opinions, and legal theories—consist of reasons, evidence, or findings relating to specific legal conclusions, I classified them as Class 4 (“Reasons”) subjects according to MacDonald’s sentence-subject classifications. Because the latter type of sentence subjects—individuals who advance legal arguments or state binding legal opinions—function as references to researchers in other disciplines, I classified them as Class 5 (“Research”). Representative examples are listed in Table 1.

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<sup>70</sup> The average number of footnotes in the sample is 178, ranging from 24 footnotes in Eisen, *supra* n. 50, to 548 footnotes in Hosking, *The Third Party Non-Signatory’s Ability to Compel*, *supra* n. 46.

<sup>71</sup> MacDonald, *supra* n. 1, at 57.

<sup>72</sup> *Id.* at 55.

**Table 1: Examples of Common Sentence Subjects in the Sample**

Class 4: Reasons	Class 5: Research
“Section 2 of the Federal Arbitration Act (‘FAA’) declares . . .”	“The 2nd Circuit found . . .”
“ <i>CD Partners, LLC v. Grizzle</i> . . . illustrates . . .”	“The court reasoned . . .”
“Equitable estoppel is usually used . . .”	“Conflicting early authorities suggested . . .”
“This body of federal substantive law is enforceable . . .”	“. . . most federal courts of appeal have determined . . .”
“These theories of contract and agency law affirm . . .”	“The <i>McCarthy</i> court noted . . .”
“. . . agency theory should apply . . .”	“Other courts have differed as to . . .”
“The doctrine of incorporation by reference is probably the least controversial . . .”	“. . . one dissenting member of the court would have applied . . .”
“. . . well-settled principles of common law dictate . . .”	“. . . the court interpreted agency theory strictly . . .”
“. . . the question of arbitrability is reserved to the courts . . .”	“. . . the court employed a two-step analysis . . .”
“Agency logic has been applied . . .”	“The buyer argued that . . .”

The predominance of these two types of sentence subjects in the subsample reflects an ongoing conversation among a community of jurists regarding commonly identified legal problems that unite their discourse, a feature more characteristic of the disciplinary compactness of the sciences than the disciplinary diffuseness of the humanities.<sup>73</sup> The articles in the sample frequently cite and critique the legal arguments and opinions of legislators,

<sup>73</sup> See e.g. Daly, *supra* n. 48 (citing eight other articles in the sample and other scholarly commentaries); Hanotiau, *supra* n. 47, at 253 n. 1 (citing thirty-five scholarly commentaries in the first footnote, including Townsend, *supra* n. 46); Hosking, *Non-Signatories and International Arbitration*, *supra* n. 46, at 290 (noting that “perhaps reflecting an increased awareness of this issue, there is a growing body of commentary on the topic,” and citing six other articles in the sample and other scholarly commentaries); Hosking, *The Third Party Non-Signatory’s Ability to Compel*, *supra* n. 46 (citing seven other articles in the sample and other scholarly commentaries); Lamm & Aqua, *supra* n. 46 (citing three other articles in the sample and other scholarly commentaries).

judges, arbitrators, parties, and scholarly commentators interchangeably, sometimes even those from foreign jurisdictions,<sup>74</sup> and it is noteworthy in this regard that some legal scholars have commented on the similarity between the discursive methods of doctrinal legal scholarship and judicial opinions. Edward Rubin has noted, for example, that doctrinal legal scholars “tend to think of themselves as judges, and to speak like judges,”<sup>75</sup> believing they are “engaged in a joint enterprise with the judiciary, and that their role [i]s to assist judges in their interpretive task.”<sup>76</sup> Similarly, Richard Posner has noted that doctrinal legal scholarship is generally “aimed squarely at the profession at large, particularly judges and lawyers,”<sup>77</sup> and Geoffrey Wilson has commented that law schools have never had a monopoly on legal scholarship, much of which occurs in the daily work of lawyers:

It is the function of counsel in their preparation and presentation of their cases to develop arguments which are themselves the product of and contributions to legal scholarship, even when they are not successful in the particular case. Although new developments appear as judicial decisions they may often be the result of the acceptance of a version of the law put forward by counsel and it is clearly at the point when counsel is preparing a case that there is the greatest stimulus to the thinking in the context of the facts of particular cases that lies at the heart of English law-making.<sup>78</sup>

The articles in the sample follow this model of a joint enterprise among legislators, judges, arbitrators, parties, and scholarly commentators, reflecting the sort of disciplinary compactness which, as MacDonald describes, “can

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<sup>74</sup> See e.g. DiLeo, *supra* n. 47, at 46 (“The defendant sole shareholder affirmatively asserted that he was the alter ego of the signatory corporation and thus had the right to compel arbitration.”); Hosking, *The Third Party Non-Signatory’s Ability to Compel*, *supra* n. 46, at 479 (“Until recently, the only broad-ranging discussion of non-signatory issues occurred at two conferences . . .”), 540 (“There has been a sea change of opinion and attitude as exemplified by the 1979 Act in England, the 1982 and 1999 amendments in Hong Kong and the adoption of the model law in Hong Kong and other jurisdictions . . .”), 563 (“[C]ourts and arbitrators have increasingly marginalized these concerns.”); Lamm & Aqua, *supra* n. 46, at 716 (“U.S. courts have adopted a view in strong consensus with the AAA and other arbitral institutions . . .”); Paulsson, *supra* n. 46, at 250 (“This is a dramatic step, and one that runs counter to the sovereign-rights ideology that has characterized the past discourse of a number of States that have now signed the Energy Charter Treaty.”); Williams, *supra* n. 46, at 177 (“Other courts have differed as to the reach and force of these precedents.”).

<sup>75</sup> Rubin, *supra* n. 41, at 1859.

<sup>76</sup> *Id.* at 1861.

<sup>77</sup> Posner, *Legal Scholarship Today*, *supra* n. 4, at 1320.

<sup>78</sup> Geoffrey Wilson, *English Legal Scholarship*, 50 *Modern L. Rev.* 818, 834–35 (1987) (“Nor is the contribution of lawyers and judges confined to the role they play in litigation. Legal scholarship is being pursued every day in the chambers of counsel and in the offices of firms of solicitors, whether in the giving of advice or the creation of new forms, or in the course of negotiations with the Inland Revenue, or discussions with clients.”).



only result from lengthy, sustained attention to the same problems by an extensive group of researchers who collect data in the same conceptually driven manner and build on, refine, and dispute each others' work."<sup>79</sup>

The results of the sentence-subject analysis of the subsample are listed in Table 2. The results reflect a highly disproportionate breakdown of 76.4% epistemic subjects and 23.6% phenomenal subjects. As in MacDonald's study, these results confirm the compact and epistemic features visible on the text level. It is apparent from these results that the writers in the sample mainly talk *about* the methods, conceptual tools, and prior findings of other jurists regarding the nonsignatory problem, not about phenomena, data, or texts worth knowing for their own sake. The Class 5 ("Research") category predominates, with 38.2% of all sentence subjects, closely followed by the Class 4 ("Reasons") category, with 37.6% of all sentence subjects, reflecting a close examination of legal authorities and their findings as well as the controversies and conflicts among them in an effort to refine well-developed legal theories to meet new circumstances. As MacDonald notes of the textual practices in scientific disciplines, "the criteria for deciding what counts as evidence, for classifying behavior . . . , and for accepting or refuting other researchers' explanations are all driven by the top-level theories in the field," and the frequent appearance of epistemic subjects in the subsample reflects a similarly heavy emphasis on epistemic self-consciousness.<sup>80</sup>

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<sup>79</sup> MacDonald, *supra* n. 1, at 67; cf. Toulmin, *Human Understanding*, *supra* n. 1, at 95 (comparing the processes of conceptual development in the sciences to the development of legal concepts by common law judges).

<sup>80</sup> *Id.* at 71.

Table 2: Distribution of Sentence Subjects in the Subsample (by percentages)

	Townsend (1998)	DiLeo (2003)	Williams (2006)	Winkler (2006)	Daly (2007)	Combined
Phenomenal Classes						
Class 1: Particulars	1.4%	13.8%	3.0%	8.9%	1.1%	6.8%
Class 2: Groups	15.0%	7.5%	24.9%	7.6%	16.7%	13.9%
Class 3: Attributes	<u>0.0%</u>	<u>0.2%</u>	<u>1.0%</u>	<u>1.8%</u>	<u>11.4%</u>	<u>2.9%</u>
	16.4%	21.5%	28.9%	18.3%	29.2%	23.6%
Epistemic Classes						
Class 4: Reasons	31.4%	21.2%	36.7%	58.7%	40.6%	37.6%
Class 5: Research	50.7%	51.1%	34.3%	23.1%	28.5%	38.2%
Class 6: Isms	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
Class 7: Audience	<u>1.4%</u>	<u>0.2%</u>	<u>0.0%</u>	<u>0.0%</u>	<u>1.8%</u>	<u>0.6%</u>
	83.5%	72.5%	71.0%	81.8%	70.9%	76.4%

The epistemic focus of the sample is also reflected in the large amount of argument regarding the definition and classification of legal phenomena in the sample. John Townsend, for example, writes of a case in which the Constitution and Rules of the New York Stock Exchange were considered equivalent to a contract of which a claimant could be a third-party beneficiary,<sup>81</sup> Jan Paulsson traces in detail the emergence of a particularly broad definition of “investment” in bilateral investment treaties,<sup>82</sup> and Michael Bagot and Dana Henderson write that “whether a party is a direct or incidental beneficiary could be quite determinative” of the arbitrability

<sup>81</sup> Townsend, *supra* n. 46, at 20.

<sup>82</sup> Paulsson, *supra* n. 46, at 238–39.

question.<sup>83</sup> This taxonomic concern is also reflected in the familiar legal fictions according to which phenomena are “presumed” or “deemed” to fall within certain legal classifications, or in which certain classifications are “imputed” to legal actors,<sup>84</sup> and in the belief that legal concepts form part of a structure or system of law, using hierarchic language to describe particular laws as “superseded,” “preempted,” or “subsumed” by others.<sup>85</sup> In addition, the articles frequently employ the trope of territoriality, describing disputes as within the “scope,” “reach,” “confines,” or “boundaries” of legal authority, which may in turn be “extended” or “expanded” to “include,” “cover,” or “encompass” particular cases, or instead may be “restricted,” “limited,” or “eroded.”<sup>86</sup> Representative examples of these forms are listed in Table 3.

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<sup>83</sup> Bagot & Henderson, *supra* n. 46, at 444.

<sup>84</sup> See e.g. Bagot & Henderson, *supra* n. 46, at 452 (“Ocean bills of lading may be deemed contracts of adhesion and should be strictly construed against the carrier.”); DeArman, *supra* n. 48, at 656 (“[W]here an arbitration agreement is ambiguous or unclear as to what disputes are arbitrable or to whom the agreement covers, there is a presumption that the disputes and/or parties in question are included under the arbitration agreement.”); Williams, *supra* n. 46, at 176 (“They impute the requisite contractual intent to a nonsignatory based upon findings that . . .”).

<sup>85</sup> See e.g. DiLeo, *supra* n. 47; Hoellering, *supra* n. 46.

<sup>86</sup> The historical roots of territoriality in the law are to some extent primordial. According to *Bouvier's Law Dictionary*, the word “territory” is derived from *terreo*, and “is so called because the magistrate within his jurisdiction has the power of inspiring a salutary fear.” *Bouvier's Law Dictionary*, “Territory” (rev. 6th ed., Childs & Peterson 1856); cf. Ernest Weekley, *An Etymological Dictionary of Modern English*, “Territory” (Gen. Publ. Company 1967) (noting that the word “territory” may be derived from *terrere*, *territ-*, “to frighten, ‘warn off’”).

**Table 3: Examples of Definition, Classification, and Scope in the Sample**

Definition and Classification	Scope
“... the court concluded that ‘parties’ did not mean ‘guarantors’ ...”	“The scope of the Act’s application is practically limited ...”
“‘Investment’ is defined in Article 1139 to include. ...”	“... contend that arbitral clauses should receive a restrictive interpretation ...”
“A Circuit split exists with regard to the definition of ‘agreement in writing’ ...”	“The 3rd Circuit has been particularly resistant to extending the corporate veil theory ...”
“The arbitral awards and court decisions ... may be subdivided into some nine different factual patterns which may themselves be put into two groups ...”	“... may attempt to bring a nonsignatory within the agreement’s reach ...”
“This broad definition goes beyond the everyday meaning of the word investment.”	“However, there is still room for movement within the confines of this limitation.”
“The authors’ distinction between ‘obligations’ and ‘rights subject to conditions’ is highly ambiguous.”	“These developments could further erode party autonomy ...”
“The FAA applies to ‘maritime transactions,’ defined as including ...”	“... the Fifth Circuit declined an opportunity to expand on the limits of the <i>Grigson</i> analysis ...”
“... ‘evidencing a transaction involving commerce’ was the functional equivalent of the phrase ‘affecting commerce’ ...”	“... the very broad scope of the Federal Arbitration Act.”
“...the court interpreted ‘relationships which result from this contract’ to include...”	“...may still be unclear as to whether the agreement covers...”
“...it was not for the U.S. courts to decide whether or not the Ukraine was ... an alter ego...”	“...courts have differed as to the reach and force of these precedents.”
“The children were not found to fall under either category and were thus not bound to arbitration.”	“Drafting language that is more inclusive will tend to bind parties...”

Definition and Classification	Scope
<p>“. . . estoppel is regularly recognized as a ‘general principle of international law’ or, more arguably, a rule of the <i>lex mercatoria</i> (again subsumed within a larger ‘good faith’ principle).”</p> <p>“All three jurisdictions have as their Grundnorm . . . a test based on . . .”</p>	<p>“. . . some standard form contracts provide their own contractual term delineating the boundaries of third party involvement . . .”</p> <p>“. . . arbitration encompasses the resolution of multiparty disputes . . .”</p>

Similar efforts to introduce system into law arose early in the western legal tradition, with the legal theorists of ancient Rome employing Greek dialectic to define and classify numerous cases decided under the Roman *jus civile*, and these efforts have continued through the centuries.<sup>87</sup> The reductive tropes of metonymy and synecdoche have long been part of this effort to reduce law to system through terminological and conceptual systems, and as one writer notes, contemporary legal discourse is pervaded by a hierarchy of metonymies that “tends to prioritize whichever legitimating device is most

<sup>87</sup> In Cicero’s *De Oratore*, for example, Crassus outlines his long-held plan of dividing the entire common law [*jus civile*] into its general classes, which are very few, and next distributing what I may call the subdivisions of those classes, and after that making plain by definition the proper significance of each, then you will have a complete art of the common law, magnificent and copious but neither inaccessible nor mysterious.

Cicero, *De Oratore* 1.190 (E.W. Sutton trans., Loeb Classical Lib. 2001). Compare Cicero, *De Inventione* 1.32 (H.M. Hubbell trans., Loeb Classical Lib. 2000) (“Conciseness in the partition [of an argument] is secured if only *genera* of things are given and they are not confused and mixed with their *species*.”) with Kenneth F. Oettle, *Carefully Craft Your Sets and Subsets*, 11 Scribes J. Leg. Writing 133 (2007–08) (“A topic always worth visiting is sets and subsets—categories, big and small; groups; lists. Items in a list should generally be coordinate to, not more or less inclusive than, other items in the list.”). See also Feldman, *supra* n. 37, at 53 (“Baconianism was apparent in the attention that the [early American] treatise writers gave to classifying and systematizing American law.”); Bruce W. Frier, *The Rise of the Roman Jurists: Studies in Cicero’s Pro Caecina* 160–62 (Princeton U. Press 1985) (discussing the importance of Roman jurist Quintus Mucius Scaevola’s use of normative definitions and categories to the development of the *jus civile*); Mattila, *supra* n. 3, at 66 (“Definitions of terms are especially typical of a developed legal system. . . . The popularity of [*definitio per genus et differentiam*] is largely explained by the fact that the legal system is based on classifications. It follows that it is important to show classes and sub-classes in definitions.”); Clarence Morris, *How Lawyers Think* 75–94 (Kessinger 1937) (devoting an entire chapter of a book on legal thought to “Classification and Definition”); Frederick A. Philbrick, *Language and the Law: The Semantics of Forensic English* 49 (Macmillan 1949) (“One of the best ways to get a firm grip of the outlines of a subject—and who has to do this more often than a lawyer?—is to think about the possible definitions of what seem to be the important words used in it.”).

reductive and most convenient in disposing of an issue.”<sup>88</sup> Similarly, MacDonald notes that the newly emerging disciplinary subfield of infant attachment psychology reflects increased refinement and elaboration of conceptual classifications as “the relation between generalization and particular evolved over the course of attachment research.” The authors of the infant attachment psychology articles MacDonald studied were able to “discuss explicitly the drawbacks and virtues of classification and could advocate their classification system as contributing to progress within their research field,”<sup>89</sup> and the articles in the sample engage in a particularly developed discourse on the value of legal classifications applicable to the nonsignatory problem, reflecting the activity of researchers refining a new area of knowledge.

For purposes of comparison, the results of MacDonald’s analysis of the sentence subjects in the infant attachment psychology, colonial New England social history, and Renaissance New Historical literary criticism articles she studied are listed in Table 4. Compared with MacDonald’s results, the proportion of phenomenal and epistemic sentence subjects discovered in the subsample of arbitrability articles most closely resembles the proportions of such sentence subjects in the infant attachment psychology articles studied by MacDonald. MacDonald discovered a total of 62.1% epistemic sentence subjects in the infant attachment psychology articles, an even lower epistemic weight than the 76.4% in the subsample of arbitrability articles. The infant attachment psychology articles also reflect a much higher proportion of Class 4 than Class 5 sentence subjects, with 49% Class 4 subjects but only 12% Class 5 subjects. This may reflect the fact that infant attachment psychology was a newly emerging disciplinary subfield during the period in which the articles were published with less research to address,<sup>90</sup> but the arbitrability articles in the subsample also constitute a newly emerging area of study. As mentioned above, Anthony DiLeo, for example, claims that a significant part of the case law addressing the new arbitrability problem was decided in the three years that preceded his article.<sup>91</sup> The contrast between the relative proportions of Class 5 sentence subjects in the infant attachment psychology articles and the arbitrability articles in the subsample may also reflect the importance of the everyday work of lawyers and judges in the development of conceptual legal knowledge, as jurists confronting the nonsignatory problem were able to easily identify common legal concepts that could be applied to new circumstances and rapidly develop a wide array of potential solutions, reflecting a high degree of disciplinary compactness.

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<sup>88</sup> Judith A. Harris, *Recognizing Legal Tropes: Metonymy as Manipulative Mode*, 34 Am. U. L. Rev. 1215, 1219, 1222 (1985).

<sup>89</sup> MacDonald, *supra* n. 1, at 61.

<sup>90</sup> See *id.* at 53–73 (tracing the emergence of infant attachment psychology across a twenty- to thirty-year period).

<sup>91</sup> See DiLeo, *supra* n. 47, at 33.



**Table 4: MacDonald (1994) Distribution of Sentence Subjects in Disciplinary Samples (by percentages)**

	Psychology	History	Literature
Phenomenal Classes			
Class 1: Particulars	0.1%	6.0%	30.0%
Class 2: Groups	27.0%	44.0%	10.0%
Class 3: Attributes	<u>11.0%</u>	<u>26.0%</u>	<u>44.0%</u>
	38.1%	76.0%	84.0%
Epistemic Classes			
Class 4: Reasons	49.0%	15.0%	7.0%
Class 5: Research	12.0%	6.0%	5.0%
Class 6: Isms	0.1%	0.0%	0.2%
Class 7: Audience	<u>1.0%</u>	<u>3.0%</u>	<u>4.0%</u>
	62.1%	24.0%	16.2%

Among the phenomenal categories in the subsample, the higher proportion of Class 1 (“Particulars”) subjects in the articles by Anthony DiLeo and Matteo Winkler primarily reflects the different practices of these legal scholars in their description of the factual background of cases. In the DiLeo and Winkler articles, the facts are more frequently described through the names of particular persons, organizations, or institutions, such as “Mr. Drewery,” “General Electric Capital Corporation,” or “the Russian Ministry of Finance,” rather than through generalized or group descriptions such as “several insurance companies,” “the franchisor,” or “the plaintiff.” Two of the articles in the sample even reflect the practice of substituting letters for the parties, a practice familiar to most law students and commonly found in written arbitral awards. For example, as Bernard Hanotiau describes a particular legal scenario, “it is generally agreed that when X transfers to Y a contract containing an arbitration clause which it has concluded with Z, if a dispute arises it is Y and not X that has the right to start the arbitration

proceedings against Z,” and as James Hosking describes the facts of one case, “C sues A (and/or B)—A (and/or B) seeks stay of litigation claiming that C is a party to the arbitration clause, *i.e.* seeks to compel C to arbitrate.”<sup>92</sup> This form of factual analysis attempts to remove all particularization from the facts and present them in a highly abstract form approximating symbolic logic.

Significantly, relatively few of the sentence subjects in the subsample contain Class 3 (“Attributes”) compared to the literary criticism articles studied by MacDonald, which contain 44% of Class 3 subjects. The Class 3 subjects in Michael Daly’s law review note, the highest proportion in the subsample, primarily reflect references to various arbitration activities in what at times becomes a historical study of the logistical, or non-legal, aspects of arbitration practice. The Class 2 (“Groups”) subjects in Michael Daly’s law review note still outweigh the Class 3 subjects, unlike the literary criticism articles studied by MacDonald, and the Class 2 subjects also outweigh the other phenomenal categories in the subsample as a whole, which contains 13.9% of Class 2 subjects compared with a relatively insignificant 2.9% of Class 3 subjects. These results reflect that the writers in the articles rarely talk *about* the attributes, properties, action, behavior, or motivations of people, places or objects, which form the primary subject of the literary criticism articles MacDonald studied. Although the New England social history articles contain the greatest proportion of Class 2 sentence subjects, the relative proportion of the phenomenal classes in Michael Daly’s law review note more closely approximate the proportion of phenomenal categories in the infant attachment psychology articles than the New England social history articles.

## VI. Analysis of the Sample for the *Topoi* of Literary Argument

Of the special *topoi* of literary argument identified by Jeanne Fahnestock, Marie Secor, and Laura Wilder,<sup>93</sup> the sample contains significant examples of the appearance/reality, social justice, and mistaken critic *topoi*, but not the ubiquity, paradox, *contemptus mundi*, paradigm, and context *topoi*. The appearance/reality *topos* appears most frequently. In fact, the question of how and when arbitration may be compelled in disputes involving nonsignatories itself reflects a form of the appearance/reality *topos* insofar as the question implies that a more complex reality may underlie the apparently simple rule that a party must sign an agreement to be bound by it. For example, Charles Eisen’s article begins with the sentence, “it frequently surprises those involved in business transactions to learn that they may be bound to arbitrate a dispute while never having signed an arbitration agreement,”<sup>94</sup> John Townsend writes

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<sup>92</sup> Hanotiau, *supra* n. 47, at 263; Hosking, *The Third Party Non-Signatory’s Ability to Compel*, *supra* n. 46, at 488.

<sup>93</sup> See Fahnestock & Secor, *supra* n. 1; Wilder, *supra* n. 1.

<sup>94</sup> Eisen, *supra* n. 50, at 42.

that “while an arbitration agreement may require the parties to arbitrate disputes within the reach of the agreement, it is not always apparent who those parties are,”<sup>95</sup> and Anthony DiLeo discusses the legal theories under which arbitration agreements may bind nonsignatories in a section entitled “Beyond the Intuitive.”<sup>96</sup>

The appearance/reality *topos* also takes other forms in the sample, however. Bernard Hanotiau writes, for example, that “even if they are not clearly expressed, for obvious reasons, concerns of equity very often underlie the reasoning of courts,” and that a third party in one particular case is a third party “in appearance only, and in fact seems to be the soul, the inspiration, to put it bluntly, the mastermind of the contracting party.”<sup>97</sup> Similarly, James Hosking writes that the statement of a general rule of law in an English contract treatise “masks a vociferous debate in the English courts,” and that although another legal provision “may appear straightforward, the need to establish the facts relevant to jurisdiction to make orders can give rise to complications.”<sup>98</sup> The appearance/reality *topos* also appears in the form of reclassifying legal claims, such as John Townsend’s description of a court’s conclusion “that the tort claims against the manager were actually claims of a breach of the manager’s contractual obligations.”<sup>99</sup> Similarly, the appearance/reality *topos* is found in the form of rule/exception, such as in James Hosking’s discussion of exceptions to the strict privity of contract doctrine in England, France, and the United States,<sup>100</sup> or in Michael Bagot’s and Dana Henderson’s review of the exceptions to the written agreement requirement “in the hopes that those seeking to maintain their litigation rights will not inadvertently subject themselves to arbitration.”<sup>101</sup>

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<sup>95</sup> Townsend, *supra* n. 46, at 19.

<sup>96</sup> DiLeo, *supra* n. 47, at 44.

<sup>97</sup> Hanotiau, *supra* n. 47, at 278, 281.

<sup>98</sup> Hosking, *The Third Party Non-Signatory’s Ability to Compel*, *supra* n. 46, at 539, 549; cf. Williams, *supra* n. 46, at 178 (“Although third-party beneficiary theory bears a superficial resemblance to direct benefits estoppel . . . , the two theories are distinct.”).

<sup>99</sup> Townsend, *supra* n. 46, at 2; cf. Hanotiau, *supra* n. 47, at 257 (“On the other hand, it may happen that those who are formal signatories of the agreement are not the real parties to it. . . .”), 261 (“What appears in the first place to be a bi-party arbitration may become a multiparty arbitration. . . . Thus, . . . we have what appears on the face of it to be two separate contracts.”).

<sup>100</sup> See Hosking, *The Third Party Non-Signatory’s Ability to Compel*, *supra* n. 46, at 510 (in England, “the privity doctrine was the subject of much criticism and legislators and judges continuously extended the range of exceptions to it”).

<sup>101</sup> Bagot & Henderson, *supra* n. 46, at 417, 435 (“Although the FAA and the Convention require a written agreement to arbitrate, courts have been increasingly willing to enforce exceptions to such requirements . . . .”); see also Daly, *supra* n. 48, at 95 (“Although arbitration is a contractual matter based on party consent, exceptions to this rule . . . .”); DeArman, *supra* n. 48, at 646 (“Although a nonsignatory generally has no rights or duties regarding an arbitration clause among contracting parties, jurisdictions have recognized a few exceptions to the general

Despite these examples of the appearance/reality *topos*, however, the particular form this *topos* takes in the sample differs significantly from the spatial metaphors Jeanne Fahnestock and Marie Secor discovered in literary criticism articles, “of a surface with something underneath, of solids that can be probed, of layers that can be peeled away to reveal deeper layers.”<sup>102</sup> This difference may in part reflect the fact, acknowledged by Fahnestock and Secor, that the appearance/reality *topos* is not unique to literary criticism or any other discipline but is a general *topos* applicable to all disciplines, perhaps even “the fundamental assumption of criticism.”<sup>103</sup> Chaim Perelman and Lucie Olbrechts-Tyteca, for example, identify “appearance-reality” as a general form of dissociative argumentation,<sup>104</sup> and its appearance in the sample does not appear to constitute a particularly literary form of argument.

Compared with the appearance/reality *topos*, the social justice and mistaken critic *topoi* are perhaps surprisingly less prominent in the sample. Although Michael Bagot and Dana Henderson argue that “to force a party who has not consented to arbitrate deprives that party of important constitutional and statutory rights and may result in a gross miscarriage of justice,”<sup>105</sup> social justice arguments do not frequently appear in the sample and are generally less explicit. Similar to the appearance/reality *topos*, the particular form the social justice arguments take in the sample also differs from those in the literary criticism articles studied by Laura Wilder, primarily in the connection between text and world. In the literary criticism articles Wilder studied, the social justice *topos* relies on an assumed connection between a literary text and the world to explore avenues to social justice through advocating social change, by, for example, examining the social lessons that can be learned from literary characters. But the connection between a legal text and life is more direct than metaphoric, and its relationship to justice more apparent than assumed, bearing little resemblance to the particular form of the social justice *topos* Wilder identified. Given the close relationship between law and justice, it may even be surprising that the social justice *topos* does not appear more prominently in the sample, an absence perhaps explained by the formalist ideal of an “exact structural analysis of positive law, free of all ethical-political value judgments.”<sup>106</sup>

The mistaken critic *topos* appears only slightly more prominently than the social justice *topos* in the sample, but like both the appearance/reality and

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rule.”); Lamm & Aqua, *supra* n. 46, at 720 (“Tribunals normally prohibit intervention or joinder by non-signatories where . . . . An important exception to this broad rule, however, provides . . . .”).

<sup>102</sup> Fahnestock & Secor, *supra* n. 1, at 85–86.

<sup>103</sup> *Id.* at 85–86 (“These metaphors, and the word choices they inspire, probably reveal as much about how the mind works as they do about literary discourse . . . .”).

<sup>104</sup> Chaim Perelman & Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* 415–19 (John Wilkinson & Purcell Weaver trans., U. Notre Dame Press 1969).

<sup>105</sup> Bagot & Henderson, *supra* n. 46, at 415.

<sup>106</sup> Kelsen, *supra* n. 36, at 192.

social justice *topoi*, the mistaken critic *topos* assumes a form that does not appear to be distinctly literary. James Hosking writes that “courts have failed to pay adequate attention to standard contract doctrine,” and “routinely overlook th[e] distinction” between estopping a nonsignatory as opposed to a signatory claimant. Michael Bagot and Dana Henderson recommend that arbitration statutes be applied as written “without the judicial gloss that has accumulated over the past few decades,” and Jeff DeArman criticizes the Alabama Supreme Court for making “wholly inconsistent decisions.”<sup>107</sup> Other articles evaluate whether existing law is effective and implicitly critique lawmakers by providing prescriptive advice,<sup>108</sup> but many of the articles merely provide tactical advice to practicing lawyers without any evaluation of mistakes of legal critics.<sup>109</sup> Because legal scholars have distinguished doctrinal legal scholarship from the natural and social sciences, on the one hand, and literary scholarship, on the other, by doctrinal legal scholarship’s “prescriptive voice,” noting that “the interpretation of doctrine generally serves as a basis for prescription, rather than an independent goal of scholarship,”<sup>110</sup> it may not be surprising that the articles in the sample reflect a certain amount of critique incident to a prescriptive voice. In addition, Laura Wilder notes that the emergence of the mistaken critic *topoi* in the literary criticism articles she studied may itself suggest a recent shift within literary studies toward “epistemic and socially negotiated practices.”<sup>111</sup> Thus, the mistaken critic *topos*, like the appearance/reality *topos*, does not appear to reflect a special *topos* of literary argument but a general *topoi* applicable to many disciplines.

Perhaps more fundamentally, however, the underlying basis of the *topoi* of literary argument is markedly different from the interpretive approach of the articles in the sample. The underlying basis of the *topoi* of literary argument identified by Jeanne Fahnestock and Marie Secor is that “meaning is never obvious or simple,” but instead “literature is complex and . . . to understand it requires patient unraveling, translating, decoding, interpreting, and

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<sup>107</sup> Bagot & Henderson, *supra* n. 46, at 461; Hosking, *The Third Party Non-Signatory’s Ability to Compel*, *supra* n. 46, at 493, 533–34; DeArman, *supra* n. 48, at 675.

<sup>108</sup> See Daly, *supra* n. 48, at 123 (“In the event of a class arbitration involving nonsignatory class members who do not consent to arbitrate, there are two possible ways to resolve the dispute without abandoning the concept of consent.”); Hoellering, *supra* n. 46, at 49 (“[I]t seems sensible to explore whether a workable consolidation/joiner mechanism cannot be incorporated in institutional rules.”); Hosking, *Non-Signatories and International Arbitration*, *supra* n. 46, at 303 (“[O]ne should be vigilant not to damage the legitimacy of arbitration by undermining the essential requirement of consent.”); Hosking, *The Third Party Non-Signatory’s Ability to Compel*, *supra* n. 46, at 587 (“Consent is too fundamental a concept to sacrifice for the sake of the fleeting satisfaction of having done justice in the particular circumstances.”).

<sup>109</sup> See DiLeo, *supra* n. 47; Eisen, *supra* n. 50; Hanotiau, *supra* n. 47; Lamm & Aqua, *supra* n. 46; Townsend, *supra* n. 46; Williams, *supra* n. 46.

<sup>110</sup> Rubin, *supra* n. 41, at 1847–49.

<sup>111</sup> Wilder, *supra* n. 1, at 102.

analyzing.”<sup>112</sup> As Gerald Wetlaufer notes in his study of legal rhetoric, “literature is likely to celebrate and explore the problematic, the uncertain, the ambiguous, the subjective, the irrational, the insoluble.”<sup>113</sup> In Fahnestock’s and Secor’s study of literary criticism articles, they found no articles “praising the simplicity of a work, or its transparency, or its uncomplicated optimism, or the ease with which meaning is plucked from its surface.”<sup>114</sup> By contrast, the arbitrability articles in the sample seek to reduce a wealth of data to a simple set of legal rules. As Richard Posner has explained of legal reasoning, “though much of law is about coping with complexity, about simplifying overly complex law, you cannot simplify intelligently if you cannot master complexity.”<sup>115</sup> Wetlaufer similarly finds in his study of legal rhetoric that the goal of a good lawyer is not “to provoke thought but . . . to provoke closure,” and to “speak about texts as if their meanings were clear and uncontroversial and as if they had, and could only have, one true meaning.”<sup>116</sup> If there is a fundamental *topos* in the sample of arbitrability articles, it is the reduction of complexity and the closure of controversies, a form of thought completely foreign, even antithetical, to the literary criticism articles studied by Fahnestock and Secor.<sup>117</sup> These findings confirm the conclusion that the

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<sup>112</sup> Fahnestock & Secor, *supra* n. 1, at 89–90 (“Meaning is never obvious or simple for, if it were, the texts under scrutiny would not be literature and therefore would not be worthy of unraveling, decoding, etc.”); cf. Bazerman, *What Written Knowledge Does*, *supra* n. 1, at 48 (“The literary audience, concerned with private aesthetic experience, must find the critic’s comments . . . enriching the experience of reading; evocation of the richest experience is persuasion.”).

<sup>113</sup> Wetlaufer, *supra* n. 3, at 1564 (“If the purpose of a judicial decision is to close what has been open, the motive behind literature is likely to be the desire to open what has been closed.”)

<sup>114</sup> Fahnestock & Secor, *supra* n. 1, at 90 (“Thus reality is always more complex than appearance, surfaces by definition have underlying depths, the multiplying vision of ubiquity complicates perspective on a text, paradoxes turn unities into nodes of tension, the *contemptus mundi* topos creates discomfort with a decaying world, and paradigms, which ought to simplify by creating structure, actually complicate by disclosing previously unsuspected relations.”).

<sup>115</sup> Posner, *Legal Scholarship Today*, *supra* n. 4, at 1322.

<sup>116</sup> Wetlaufer, *supra* n. 3, at 1551–52, 1558–59 (“I will identify the rhetoric of law in terms of a linked set of rhetorical commitments. These include commitments to a certain kind of toughmindedness and rigor, to relevance and orderliness in discourse, to objectivity, to clarity and logic, to binary judgment, and to the closure of controversies,” as well as to “hierarchy and authority, to the impersonal voice, and to the one right (or best) answer to questions and the one true (or best) meaning of texts.”); cf. Chaim Perelman, *The Use and Abuse of Confused Notions*, in *Justice, Law, and Argument* 98 (Heather Relihan trans., Springer 1980) (“The judge who must pronounce the law, each time that he is competent to render a decision, cannot declare, like the mathematician, that a problem is irresolvable: He must both decide and justify his decision. He is granted, by this very fact, the power to interpret the text in such a way as to eliminate obscurities, antinomies and gaps in the law.”).

<sup>117</sup> The structure of one of James Hosking’s articles may best exemplify this reductive goal:

Section III summarizes and compares each of the theories identified as applied by courts and arbitrators in each of the subject jurisdictions; Section IV considers



articles in the sample more closely resemble writing in the sciences than in the humanities as reflected in the analysis of the text-level patterns of variation and sentence-subject analysis.

## VII. Comparison of the Sample to Narrative Literature Reviews

In significant ways, the articles in the sample closely resemble the narrative literature reviews of the sciences. In scientific disciplines, narrative literature reviews serve valuable theory-building goals by, among other things, enabling researchers to consider broad conclusions that may never come within the scope of a single investigation.<sup>118</sup> Similarly, as Deborah Rhode has

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factors other than the legal theories that impact on the position of the third party non-signatory; Section V offers broad conclusions from the comparative project. Section VI draws on these conclusions to identify seven possible “solutions” to the third party problem. The appropriateness of these solutions is then analyzed in Section VII through the filter of the various jurisprudential theories of arbitration. As a result of this investigation, Section VIII concludes that the preferable option is a solution constrained by domestic contract law and warns that broader approaches imperil the continued credibility of international arbitration.

Hosking, *The Third Party Non-Signatory's Ability to Compel*, *supra* n. 46, at 474–75; *see also e.g.* Bagot & Henderson, *supra* n. 46, at 460–61 (“If arbitration is to be a consensual arrangement, involving the relinquishment of substantial rights, the favored approach should be one that binds nonparties to arbitration only when such parties (1) have notice of the arbitration provision and (2) agree to same either before entering into a transaction implicating the arbitration or by thereafter ratifying the arbitration agreement.”); DiLeo, *supra* n. 47, at 34 (“[T]he Article outlines proactive steps by which arbitrators and practitioners can reduce the uncertainty in light of the current law.”); Hanotiau, *supra* n. 47, at 256 (“I therefore propose to bury once and for all this obsolete principle of restrictive interpretation of arbitral clauses, one of the last relics of the ice age of arbitration.”); DeArman, *supra* n. 48, at 677 (“[I]t is only by adopting this pro-arbitration interpretation that a court will coincide with the FAA’s strong federal policy.”).

<sup>118</sup> *See* Roy F. Baumeister & Mark R. Leary, *Writing Narrative Literature Reviews*, 1 Rev. Gen. Psychol. 311, 313 (1997). According to the *Publication Manual of the American Psychological Association*:

Review articles, including meta-analyses, are critical evaluations of material that has already been published. By organizing, integrating, and evaluating previously published material, the author of a review article considers the progress of current research toward clarifying a problem. In a sense, a review article is tutorial in that the author:

- defines and clarifies the problem;
- summarizes previous investigations in order to inform the reader of the state of current research;
- identifies relations, contradictions, gaps, and inconsistencies in the literature; and
- suggests the next step or steps in solving the problem.

Am. Psychol. Assn., *Publication Manual of the American Psychological Association* 7 (5th ed., Am. Psychol. Assn. 2001); *see also* Greg Myers, *Stories and Styles in Two Molecular Biology Review Articles*, in *Textual Dynamics of the Professions: Historical and Contemporary Studies of Writing in Professional*

explained, well-done doctrinal legal writing helps practicing lawyers, judges, and policymakers better understand relevant legal authority and assess its implications, and “systematic surveys of legal claims and decisions can be particularly useful in identifying the capacities and constraints of prevailing regulatory frameworks.”<sup>119</sup> These goals are reflected in the rhetorical practices of the articles in the sample, which consider theoretical and policy considerations related to legal developments and trends in the law that may be obscured in individual cases. Michael Daly, for example, “considers the extent to which the traditional model of an international arbitral dispute, rooted in a consensual arbitration agreement between two parties, has been expanded and possibly distorted” by various legal authorities,<sup>120</sup> Bernard Hanotiau conducts a transnational review of cases and commentary on multiparty arbitration and concludes that the “total liberalization of arbitration in many western countries” indicates changing perceptions of the arbitral institution as the “natural judge” for international disputes, warranting more liberal interpretation of arbitration agreements,<sup>121</sup> and James Hosking “summarizes and compares each of the theories identified as applied by courts and arbitrators” in England, France, and the United States.<sup>122</sup>

Of the goals of narrative literature reviews identified by Roy Baumeister and Mark Leary—developing and evaluating theories, surveying the state of knowledge on a topic, identifying problems in a particular research area, and providing historical accounts of theory and research on a topic<sup>123</sup>—the articles in the sample particularly reflect the goals of surveying the state of knowledge on a topic and providing historical accounts of related legal theories. They less frequently reflect the goals of developing and evaluating legal theories and identifying problems in the law, however. John Townsend, for example, merely “surveys the current approaches to compelling arbitration when nonsignatories are involved,”<sup>124</sup> and several articles in the sample survey developments in the law believed to be of interest to parties in future disputes,<sup>125</sup> but none of these articles makes any effort to identify problems in the law or evaluate or develop legal theories.

## VIII. Conclusion

This study not only illustrates that the knowledge-building activities of the sample of law review and journal articles studied more closely resemble professional academic writing in the sciences than in the humanities, which

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*Communities* 45, 51, 67 (Charles Bazerman & James Paradis eds., U. Wis. Press 1991).

<sup>119</sup> Rhode, *supra* n. 3, at 1339–40.

<sup>120</sup> See Daly, *supra* n. 48, at 96.

<sup>121</sup> Hanotiau, *supra* n. 47.

<sup>122</sup> Hosking, *The Third Party Non-Signatory's Ability to Compel*, *supra* n. 46, at 475.

<sup>123</sup> See Baumeister & Leary, *supra* n. 118, at 312.

<sup>124</sup> Townsend, *supra* n. 46, at 19.

<sup>125</sup> See Eisen, *supra* n. 50; Lamm & Aqua, *supra* n. 46; Williams, *supra* n. 46.

may not be particularly surprising, but also identifies specifically how the legal writing in the sample resembles writing in the sciences. The study further suggests why this resemblance exists by illustrating the highly compact, explanatory, conceptually driven, and epistemically self-conscious features of the sample. In both the text-level patterns of variation and the sentence subjects, the articles in the sample reflect a sustained discourse among jurists who seek to build on, refine, and dispute each others' conclusions regarding the application of well-developed concepts to a newly emerging legal question. The writers' concern with rigorous definition and classification of legal phenomena appears to reflect the influence of legal formalism, which views law as a science seeking to develop an ordered "system of norms conceived as a grammar of legal validity" to inform prescriptive analysis,<sup>126</sup> and the articles exhibit virtually none of the forms of literary argument identified in studies of literary criticism but instead reflect a concerted effort to "master complexity," "simplify intelligently," and "provoke closure"<sup>127</sup> rather than to explore the complexity of phenomena, data, or texts for their own sake.

The parallels between legal and scientific discourse go well beyond the textual practices illustrated in this study, however. As Gerald Wetlaufer notes, "the *particular* rhetoric that law embraces is the rhetoric of foundations and logical deductions," a rhetoric "that relies, above all else, upon the denial that it is rhetoric that is being done,"<sup>128</sup> and Peter Brooks has noted that despite the close historical ties between law and rhetoric, "the professionalization of law and legal education has over time tended to obscure the rhetorical roots of legal practice" to foster a view of legal discourse as "complete, autonomous, and hermetic."<sup>129</sup> Significantly, this "anti-rhetoric" of legal discourse closely parallels the conventional view of modern scientific discourse, which condemns figurative language in favor of clear exposition, claiming to be "a kind of windowpane, through which, if we keep it clean enough, we can see the world plainly," a view which has recently been challenged by studies in the rhetoric of science that reveal numerous rhetorical strategies in scientific discourse.<sup>130</sup> This view of scientific discourse as non-

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<sup>126</sup> Goodrich, *Legal Discourse*, *supra* n. 3, at 39.

<sup>127</sup> Posner, *Legal Scholarship Today*, *supra* n. 4, at 1322; Wetlaufer, *supra* n. 3, at 1551–52.

<sup>128</sup> Wetlaufer, *supra* n. 3, at 1554, 1591 ("While we are in the profession of rhetoric, our chosen rhetoric is the antirhetoric of foundations, logical deductions, unification, objectivity, and closure.").

<sup>129</sup> Brooks, *supra* n. 28, at 20.

<sup>130</sup> Davida Charney, *A Study in Rhetorical Reading: How Evolutionists Read "The Spandrels of San Marco"*, in *Understanding Scientific Prose* 203–05 (Jack Selzer ed., U. Wis. Press 1993); cf. Michel Foucault, *The Order of Things* 304 (Pantheon Books 1970) ("[F]or those who wish to achieve a formalization, language must strip itself of its concrete content and leave nothing visible but those forms of discourse that are universally valid . . . ."); Randy Allen Harris, *Introduction*, in *Landmark Essays on Rhetoric of Science: Case Studies* (Randy Allen Harris ed., Lawrence Erlbaum Assocs. 1997) (reviewing the history of the study of rhetorical strategies in the sciences and concluding that "scientists argue, and their arguing is absolutely central to their success: science

rhetorical has its origins in the scientific revolution of the late sixteenth and early seventeenth centuries, particularly in the agenda set by Francis Bacon and the Royal Society of London, the scholastic method of Peter Ramus, and the rationalism of Rene Descartes,<sup>131</sup> and the objective and universalist rhetoric of English jurisprudence emerged at roughly the same time, with the scholasticism of Peter Ramus and Omar Talon.<sup>132</sup> Thus, despite the close historical ties between law and rhetoric, Brooks has noted that like science, contemporary legal discourse views rhetoric “as something of a scandal in a field that wants to believe that it is rooted in irrefutable principles and that it proceeds by its own special methodology.”<sup>133</sup>

In light of the close historical ties between modern legal and scientific discourse, it is not surprising to find a close resemblance between the textual practices and knowledge-building activities of certain forms of legal and scientific discourse, but it is important to make explicit the basis and effects of this resemblance as well as the ways in which legal and scientific discourse differ. It is first important to reiterate MacDonald’s caution that the methods of analysis used in this study are not intended to be evaluative, nor are they intended to be ends in themselves, or self-explanatory, but instead to serve as points of departure for identifying and then interpreting patterns that would otherwise be obscured and for identifying “representational choices rather than underlying truths.”<sup>134</sup> The textual practices of the sample of law review and journal articles in this study are unlikely to reflect those of all legal discourse, including in particular various forms of interdisciplinary legal writing, but also including disciplinary subfields of law that may make different representational choices in response to problems and goals unique to their discourse community. In Tony Becher’s 1989 book *Academic Tribes and Territories: Intellectual Enquiry and the Cultures of Disciplines*, he concludes based on a study of British and American legal academics that law occupies an

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is rhetorical”).

<sup>131</sup> Charney, *supra* n. 1, at 203; Jean Dietz Moss, *Prolegomenon: The Revival of Practical Reasoning, in Rhetoric and Praxis: The Contribution of Classical Rhetoric to Practical Reasoning* 7–8 (Jean Dietz Moss ed., Catholic U. Am. Press 1986) (describing how Cartesian rationalism and the empiricism of the Royal Society of London displaced the practical reasoning of the classical rhetoric tradition “to make of ‘scientific method’ a new golden rule by which all other reasoning was to be measured”).

<sup>132</sup> Peter Goodrich, *Ars Bablativa: Ramism, Rhetoric, and the Genealogy of English Jurisprudence*, in *Legal Hermeneutics: History, Theory, and Practice* (Gregory Leyh ed., U. Cal. Press 1992) (“In its polemical guise Ramism privileged dogmatics and gave pride of place to the custodial art of memory. Method organized the subject matter of any given discipline to the end of teaching and transmitting a series of dogmatic truths.”); cf. Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* 123 (Weidenfeld & Nicolson 1990) (“[Law printing] made possible what the Ramist Abraham Fraunce termed a ‘logic of law,’ by which he meant a systematic presentation of general concepts under which particular rules of law might be subsumed.”).

<sup>133</sup> Brooks, *supra* n. 28, at 20; cf. Goodrich, *Legal Discourse*, *supra* n. 3, at 88.

<sup>134</sup> See *id.* at 156.

“intermediate” ground between convergent and divergent academic disciplines and cannot be unequivocally categorized as a convergent discipline primarily due to the divide between legal academics over “whether law departments ought to concentrate on the content of their subject (black letter law), or should aim to place it in its social context (the socio-logical approach), or indeed to view it from a predominantly sociological perspective (the sociology of law movement).”<sup>135</sup> The articles in this study reflect the convergent disciplinarity of a relatively doctrinal focus on black letter law, but studies of other disciplinary subfields within law may reflect different patterns of knowledge-building activity.

What is important is to identify discrete legal discourse communities and their textual practices in order to understand the particular form that community’s knowledge building takes. This focus on process and community in the construction of disciplinary knowledge in discrete legal discourse communities may not only help reconstruct the rise of the formalist method in law and the univocal discourse of legal authority that Peter Goodrich has argued can be found only “in the reading of the history of the excluded discipline and in the delineation of the terms of its repression,”<sup>136</sup> but may also explain why humanistic knowledge cannot be employed in legal writing without carefully examining its formal implications, as Richard Hyland aptly admonishes:

The real difficulties of legal writing . . . are far more serious than technical problems of prose style; they are the irrelevancies that reveal the absence of disciplined thought. Out of sentimentalism, for example, some lawyers write statements of facts ‘like a novelist,’ in order to win the judge’s sympathy. Yet the pity in the tale vanishes when judges attempt to subsume the facts under a rule of law and are left on their own to discover which facts are legally relevant.<sup>137</sup>

What Hyland identifies in this passage is the critical lapse that occurs when legal writing fails to recognize the compact, explanatory, conceptually driven,

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<sup>135</sup> Becher, *supra* n. 1, at 156 (“This uncertainty over what the discipline is or ought to be makes it inappropriate to categorize academic law as a highly convergent field.”); cf. Toulmin, *Human Understanding*, *supra* n. 1, at 394 (“[T]he failings of a defective legal system are similar to the failings of ‘diffuse’ and ‘would-be’ sciences.”).

<sup>136</sup> Goodrich, *Legal Discourse*, *supra* n. 3, at 88; cf. Brooks, *supra* n. 28, at 21 (“[T]he law’s recognition of its repressed narrative content and form generally comes in a negative manner, as denial. The bar of repression keeps the narrativity of the law under erasure.”).

<sup>137</sup> Richard Hyland, *A Defense of Legal Writing*, 134 U. Pa. L. Rev. 599, 613, 620 (1986) (“Of course, the law too tells its stories. But it isolates from the story the legally relevant facts and subsumes them under a rule of law.”); cf. Douglas Litowitz, *Legal Writing: Its Nature, Limits, and Dangers*, 49 Mercer L. Rev. 709, 721, 738 (1998) (“[A] certain amount of legal terminology and a certain formal style of legal writing are inevitable in a highly complicated society.”).

and epistemically self-conscious features of a particular legal discourse community that it seeks to enter.

Peter Brooks has also recently recognized this problem in his proposal that the analytic study of legal narratives through a “legal narratology” may be more beneficial than literary studies to those who have to make legal sense of “what happened” in actual cases.<sup>138</sup> Because narratology, like law, suffers from the critiques of being excessively formal and deductive in its approach,<sup>139</sup> however, Brooks’s call for a legal narratology highlights both the disjunction between certain humanistic and legal discourses and the embedding within narratives of their own formal structures.<sup>140</sup> Similarly, Robert Weisberg has recently advocated increased attention to the relationship between law, narrative, and history, building on Hayden White’s discussion of Hegel’s *Lectures on the Philosophy of History* in which Hegel states that law, narrative, and history are intimately related because “where there is no rule of law, there can be neither a subject nor the kind of event that lends itself to narrative representation.” This statement of Hegel’s leads White to suspect that “narrative in general, from the folktale to the novel, from the annals to the fully realized ‘history,’ has to do with the topics of law, legality, legitimacy, or, more generally, authority,”<sup>141</sup> and not unlike Brooks’s call for a legal narratology, Weisberg proposes that legal narrative be placed within the context of recent debates in narrative historiography,<sup>142</sup> a disciplinary subfield that appears particularly well suited to legal writers struggling with the relationship between explanatory and narrative forms, the construction of agency and causality, reconciling conflicting views and information regarding historical events, and the relationship between objectivity and empathy in

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<sup>138</sup> Brooks, *supra* n. 28, at 25.

<sup>139</sup> See e.g. *Routledge Encyclopedia of Narrative Theory* ix, 378–79 (David Herman, Manfred Jahn & Marie-Laure Ryan eds., Routledge 2005) (“Narratology, stemming from French structuralism and semiotics and working primarily between traditional humanistic disciplines, was the first rigorously formal attempt to isolate story as story and consolidate narrative ubiquity by building a heuristic pan-narrative model,” but some critics “began to distrust the entire enterprise itself, questioning narratology’s deductive methodology, excessively formalist, text-based perspective, and hidden presuppositions . . .”).

<sup>140</sup> Cf. Stygall, *supra* n. 3, at 259 (“[T]he understanding of narrative most widely articulated in composition and rhetoric draws heavily on a literary conception, even though such a conception masks the importance of narrative in professional and everyday texts.”).

<sup>141</sup> Hayden White, *The Content of the Form: Narrative Discourse and Historical Representation* 12–13 (Johns Hopkins U. Press 1990); Robert Weisberg, *Proclaiming Trials as Narratives: Premises and Pretenses*, in *Law’s Stories: Narrative and Rhetoric in the Law* (Peter Brooks & Paul Gerwitz eds., Yale U. Press 1996).

<sup>142</sup> Weisberg, *supra* n. 147, at 75 (“I will end by placing legal narrative in the broader context of recent debates about the role of narrative in historical scholarship. The key themes of this historiographic debate have been the relation between supposedly objective historical narration and frankly fictional literary narrative, and the role of narrative in describing and promoting cultural identity.”).



writing about trauma.<sup>143</sup> The inherently forensic property of narrative warrants significantly more attention for what it may teach us about the connection between narrative choices and legal discourse.

Further study should also be made of the extent to which the compact, explanatory, conceptually driven, and epistemically self-conscious features illustrated in this study appear in other legal discourse communities and how different legal discourse communities negotiate these and other forms of knowledge-building activity. Such studies promise to offer those occupying different positions on the knowledge-building continuum better understanding of the problems and goals reflected in other textual practices and thereby benefit those who seek to apply interdisciplinary knowledge to legal writing in a manner that is relevant not only to “the sealed network of a purely academic discourse,”<sup>144</sup> but to legal practice, and perhaps provide legal writers with the “rhetorical adroitness” Richard Posner has claimed even our finest jurists lack.<sup>145</sup> Such adroitness requires an appreciation of both the literary and formal features of legal discourse, and to choose the most effective combination of these features, legal writers must understand the problems and goals of the particular discourse communities in which they write.

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<sup>143</sup> Cf. e.g. Charles Anderson & Kate Day, *Engaging With Historical Source Work: Practices, Pedagogy, Dialogue*, 5 Arts & Humanities Higher Educ. 243, 256 (2006) (finding that history students were taught to display an agentic approach toward historical sources, an “active, questioning stance,” much like the approach taken by “prosecuting attorneys”); Caroline Coffin, *Learning to Write History: The Role of Causality*, 21 Written Commun. 261 (2004); Susan De La Paz, *Effects of Historical Reasoning Instruction and Writing Strategy Mastery in Culturally and Academically Diverse Middle School Classrooms*, 97 J. Educ. Psychol. 139 (2005); Dominick LaCapra, *Writing History, Writing Trauma*, in *Writing and Revising the Disciplines* 147 (Jonathan Monroe ed., Cornell U. Press 2002); Jean-François Rouet, M. Anne Britt, Robert A. Mason & Charles A. Perfetti, *Using Multiple Sources of Evidence to Reason About History*, 88 J. Educ. Psychol. 478 (1996); Stockton, *supra* n. 1, at 61 (noting the importance of emplotment, or assembling events into a plot, to the causal explanation in historical writing and that “it is precisely this practice of emplotment that is excluded from literary studies”); Jennifer Wiley & James F. Voss, *Constructing Arguments From Multiple Sources: Tasks That Promote Understanding and Not Just Memory for Text*, 91 J. Educ. Psychol. 301 (1999).

<sup>144</sup> Posner, *Legal Scholarship Today*, *supra* n. 4, at 1317.

<sup>145</sup> Richard A. Posner, *Legal Writing Today*, 8 Scribes J. Leg. Writing 35, 37 (2001–02).



### **Appendix A: Arbitrability Articles Used in the Study**

Michael H. Bagot, Jr., & Dana A. Henderson, *Not a Party, Not Bound? Not Necessarily: Binding Third Parties to Maritime Arbitration*, 26 Tul. Mar. L.J. 413 (2002).

Michael P. Daly, Student Author, *Come One, Come All: The New and Developing World of Nonsignatory Arbitration and Class Arbitration*, 62 U. Miami L. Rev. 95 (2007).

Jeff DeArman, Student Author, *Resolving Arbitration's Nonsignatory Issue: A Critical Analysis of the Application of Equitable Estoppel in Alabama Courts*, 29 Cumb. L. Rev. 645 (1998-99).

Anthony M. DiLeo, *The Enforceability of Arbitration Agreements By and Against Nonsignatories*, 2 J. Am. Arb. 31 (2003).

Charles Lee Eisen, *What Arbitration Agreement? Compelling Non-Signatories to Arbitrate*, 56 Dis. Res. J. 40 (July 2001).

Bernard Hanotiau, *Problems Raised by Complex Arbitrations Involving Multiple Contracts—Parties—Issues*, 18 J. Intl. Arb. 251 (2001).

Michael F. Hoellering, *Consolidated Arbitration: Will It Result in Increased Efficiency or an Affront to Party Autonomy*, 52 Dis. Res. J. 41 (Jan. 1997).

James M. Hosking, *Non-Signatories and International Arbitration in the United States*, 20 Arb. Intl. 289 (2004).

James M. Hosking, *The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent*, 4 Pepp. Dis. Res. L.J. 469 (2004).

Carolyn B. Lamm & Joceyln A. Aqua, *Defining the Party—Who Is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions*, 34 Geo. Wash. Intl. L. Rev. 711 (2002-03).

Jan Paulsson, *Arbitration Without Privity*, 10 ICSID Rev. 232 (1995).

John M. Townsend, *Nonsignatories and Arbitration: Agency, Alter Ego, and Other Identity Issues*, 3 ADR Currents 19 (Sept. 1998).

Dwayne E. Williams, *Binding Nonsignatories to Arbitration Agreements*, 25 Fran. L.J. 175 (2006).

Matteo M. Winkler, *Arbitration Without Privity and Russian Oil: The Yukos Case Before the Houston Court*, 27 U. Pa. J. Intl. Econ. L. 115 (2006).