THE VERMONT BAR JOURNAL 226

Summer 2021, Volume 47, No. 2





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"Summer Reflection" Photo: Jennifer Emens-Butler



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PRESIDENT'S COLUMN

What I Did On My Summer Vacation, or How I Was Unexpectedly Given A Horse and How She Is a Good Example of Doing a Job You Like



I never had to write a "What I Did on My Summer Vacation" essay when I was in school. Now seems like a great time to give it a whirl.

I had all sorts of plans to write a highminded column for this quarter's journal about civility, and how lawyers shouldn't be jerks. But it's summer, and today is sunny. It's much nicer to enjoy the beauty of the Vermont summer before the green leaves turn golden, than it is to think about civility in the legal profession. I was also thinking apple pie sounds good, which is a sure sign that fall is nearly here, and I ought to appreciate summer while I can. Although, I really like pie, so I might just be thinking about pie. I have even ranked my favorite pies.¹

Pies aside, I wanted to share my favorite thing that happened in my life this summer. Actually, I need to back up a little bit. It's a well-known fact about me that in addition to loving pie, I also love horse racing. I'm involved in horse ownership with a couple different partnerships. In 2017 our stable bought a feisty chestnut filly named English Soul.

Chestnut fillies and mares are known to have attitudes. Not all of them do, of course, but it's enough of a stereotype that people who spend time with horses can explain the attitude by simply shrugging and saying, "chestnut mare."

English Soul is beautiful. In the sun she shines like a new penny. She's got a big

white blaze on her face, and one white stocking on her left hind leg. I could look at her all day. It was also clear right out of the gate that she fit the chestnut filly attitude stereotype. Her first trainer let her forelock and mane grow long. Sometimes she'd give her head a bit of a toss, shaking her strawberry-colored forelock and mane back. If she was a human she would have looked like a glamorous, but unapproachable movie star. The ownership partners all joked she had the best hair on the track. We also joked that she kept all her power in her mane, and when she tossed it like that all the other horses would be afraid of her.

She also has a little bit of red in the sclera around her eye, and when she looks sideways she looks angry. She probably isn't, but she seems like she's giving the evil eye. The forelock, the hair toss, and the reddened side-eye creates an overall impression of intimidation.

When she was stabled at Saratoga or Belmont my husband and I would go visit her at her barn when we would go to the races. She would entertain visitors, but being a chestnut filly, had an attitude about it. The partners often joked that if you went to see her you'd have to count to make sure you had all your fingers when you left, because chances were good she'd nip at you. We didn't care; we'd go see her anyway. She'd let us know when she was ready to end the visit. She's good at boundaries.



I once referred to her as a "basket of sass." Even though her attitude was a little bit difficult, we really liked her, and she quickly became our favorite horse. My husband liked her so much he had a painting of her made as a Christmas gift. It's on our living room wall, and sometimes when we walk in, we say, "hi, Soul!"

Our partnership sold her at auction in 2019, which made us a little bit sad. However, the very (I mean, very) nice farm in Kentucky that owns her father bought her, likely hoping to breed her. We knew she'd have a good life there. They raced her a few more times; she did well in a big race at Churchill Downs. My husband and I coincidentally happened to be visiting New Orleans in late 2019 one day when she raced at Fair Grounds. We were the only ones there cheering for her. It was a rainy, windy, day, and we stood on the track apron yelling "Go, Soul! Go, Soul!" She didn't win but we were happy to see her.

In 2020 a woman tweeted a pretty photo she took of a random horse, grazing on a farm in Kentucky. It took about twenty minutes before someone figured out it was English Soul.² It was a gleeful moment in an otherwise dreadful year. We had confirmation that our favorite horse was living the good life, munching on all the grass she could handle. In April 2021 we went to Kentucky for the Derby, and asked the farm if we could visit English Soul while we were there. They agreed, and on a gray, windy, raining-sideways kind of day, we drove to Lexington to visit our friend.

We learned that due to a physiological

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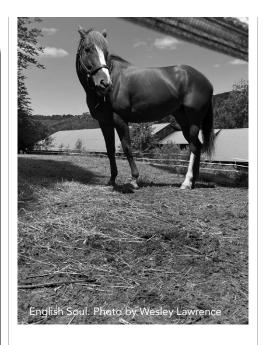
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issue she couldn't breed so they were going to see if she could race again. We mentioned to her new trainer that we'd love to know how things go and where she ends up.

On June 27 we went to the orchard. My husband sometimes lacks my zeal for u-pick orchards, so he checked his phone while I picked more cherries than I probably should have. English Soul's trainer, who we had just met in late April, tracked us down via Twitter, and let us know she couldn't race anymore. He wondered if we "might be interested" in taking her.

We took a little time to think about it, because it never occurred to us that this horse – who we watched race, and who we cheered for to win – might someday become our horse. A week or so, and a few phone calls later, we got word that she was on her way from Lexington to Saratoga, and that the horse transport company would even drive her the extra two hours to her destination in Vermont. And on July 7, our friend, Soul, walked off a van in Windsor County, Vermont and officially became our horse.³

We told our former racing partners that she's ours. They were over the moon that she's got a good home with people who care about her. They ask us if she's still got



attitude. They ask us if we're afraid of her. They ask us if she's bitten off our fingers yet.

And the answer to all those questions is no. She's none of those things anymore. She's sweet and kind, and a bit of a love. She has boundaries and we respect them. But she's happy. She's going to get a new job (I'd like her to be a model or maybe star in some commercials so she can help pay for some of her training and board, but I'm not sure how to become a "horse model agent"). We don't know if we can ride her yet, and if we can, it'll take quite a bit of patience and work to get there. She goes fast. I'd like to go a lot less fast. But for now, she's happy just being our horse.

Now, what does this have to do with the practice of law? Probably more than you'd think.

Now that I know Soul in her post-racing life, I wonder if she didn't especially like being a race horse, even though she was good at it. She's a model employee. She shows up. She listens to instructions. She does what's asked of her to get the job done. Her old job included running as fast as she could once in a while. Sometimes she won. She won a couple really big races, and a couple times she won by huge margins. Sometimes she didn't win. Her job wasn't always the glamour of running in a race; it also involved a lot of everyday drudgery, like waking up really early to train, and spending most of her day in a stall. When she was racing she always tried as hard as she could. Sometimes the job took a toll on her, and we've got the vet bills to prove it. All this sounds quite a bit like being a lawyer, honestly.

Given her demeanor and all her attitude when she was racing, I get the sense she would show up and do the job, but that she'd rather have been doing some-

thing else. She's very smart, so we know she can learn something new. We're going to help her find the right job to do. We've got an expert trainer we trust who will help both us and Soul figure out her next job. Now that she knows she's going to be doing something different she's much happier. The hair toss is still there, but maybe now it's less about attitude and more about feeling good. The red side-eye is just how she's constructed, so that isn't going anywhere. But she doesn't nip. She doesn't grab. She doesn't totally understand how to do new horse things yet, but she's learning and she's trying hard. The chestnut mare stereotype is followed by, "but she's so sweet."

And sometimes that's what happens to lawyers, too. There are lots of different ways to be a lawyer. We all do different things. Sometimes, though, we start doing one thing, and realize there may be prettier, greener pastures that suit us better for where we are in our lives and in our careers. And if we make a change that's fine; nobody's required to do the same thing forever. We think Soul, in her own way, told her trainer (her boss, if you will), that she needed a new career, and he recognized that. Lucky for us (and her!) we get to help her with that.

I tell this story partly because I'm very excited about English Soul unexpectedly becoming our horse. I tell it also because she's a good example of working hard, but also knowing when to change course if that's needed, because sometimes that's what we need to do to be our best.

Elizabeth Kruska, Esq. is current President of the Vermont Bar Association. She maintains a solo practice in Woodstock, concentrating in the areas of criminal defense, family and juvenile law and is an adjunct professor at Vermont Law School.

² For folks who don't know, horse Twitter is a real thing. It is a weird, wonderful slice of society. It's also pretty tightly-knit. The fact it took twenty whole minutes to identify the horse is the shocking part of all this.

³ I'll observe here that I can't get a pizza delivered in my part of Vermont, but apparently getting a horse delivered in less than a day all the way from Kentucky only takes three texts and a couple phone calls.



¹ EK's official pie ranking: 1. Sour Cherry; 2. Pumpkin; 3. Apple; 4. Key lime; 5. The Berry Pies (blueberry, cranberry, strawberry-rhubarb, grape, etc.); 6. The Cream Pies (coconut, banana, lemon, chocolate, etc.); 7. Peach; 8. Literally every other kind of pie other than nut pies; 9. Getting hit by a car; 10. Nut pies. This may be controversial. Make your own pie ranking.

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PURSUITS OF HAPPINESS Living Like a Charm Quilt: An Interview with Mary Ashcroft



JEB: For those of you who read our last pursuits of happiness column, you will recall a request for nominations of people who were occupying themselves during the pandemic by honing new skills, perhaps learning languages, dances or art techniques, but alas we received no nominations! Perhaps everybody was busy this summer finally getting out and pursuing their own happiness, however commonplace those pursuits may be. But whenever we approach a potential interviewee, we often hear: "but what I do isn't really all that interesting."

Now, Mary Ashcroft has said this many times, but Mary Ashcroft does a lot. Varied and interesting things. So I am very excited about today as I have been trying to interview Mary for years. So Mary, I want to try to interview you about *all* the things you do outside of the practice of law, including some of them that are law related, like serving on a select board. So maybe we start there.

MA: Yes, I'm chair of the Rutland Town Select Board.

JEB: And that alone could keep you busy enough on top of a regular practice, right?

MA: Why yes, I've already done a phone call this morning about town business, did some stuff over the weekend on it and missed my small, Maine vacation last week because of town business since we were one place in the state that was projected to flood after Henri.

JEB: And so you stayed back to make sure you had everything in order?

MA: Yes, although I was wondering what exactly I could do during an actual flood, but still, I helped make sure we were prepared to respond.

JEB: Of course, there is much to be done beyond the physical lifting for sure. A lot of lawyers in Vermont do serve on their select board or advise local entities, putting their legal talents to use.

MA: Certainly. It's what we encourage our incubator lawyers to do, which is to get out there and become involved in your community. A lot of lawyers are on various town boards, select boards, planning commissions, boards of civil authority that hear tax appeals, zoning boards of adjustment, development review boards, and on and on doing so much work in their communities.

JEB: Haven't you done a lot of those things through the years?

MA: I grew up on the other side of the state in the Town of Rockingham and I was a zoning administrator there, working with the zoning board and the planning commission. And I was health officer too.

JEB: Oh, Health Officer. I wasn't aware— I'll just add that to your list! Was this before you became a lawyer?

MA: Yes, it was right after college before I went to law school.

JEB: So when did you move to Rutland Town and the farm?

MA: I went to law school and I came home to an open seat in the legislature when the town Democrats nominated me. So I became a state representative and met my future husband in the legislature. I later decided that I would move over to his side of the state to his farm. He couldn't move the farm to Bellows Falls. So I moved over to Rutland.

JEB: Ah yes. It's easier to move people than farms. I was remiss in starting with town service -- I didn't even mention that

you used to serve in the state legislature as well. How many years did you serve?

MA: I was in the legislature for three years and then worked on Madeline Kunin's campaign then becoming her first legislative liaison.

JEB: Wow. That's amazing.

MA: I've hit all three branches of government.

JEB: A true Vermonter. Well now would these be called pursuits of happiness outside of the practice of law even though so much is law-related? They keep you intellectually busy and generally busy, in addition to your 'day job', correct?

MA: I like staying busy, staying active and doing different things. So that's what keeps me happy. I'm also in the Rutland South Rotary Club, I'm in a church choir...

JEB: I was going to ask you about that next! So church choir. How long have you been singing in, which church?

MA: The church is in Rutland City. It's the Grace Congregational Church. And I've been in the choir since about 1983. I'm also in Rutland Area Chorus and we sing, pandemic excluded, Handel's Messiah every Christmas season...

JEB: Was last Christmas season the first one you missed?

MA: Yes, sadly, the first one in something like 37 years.

JEB: So I'm guessing you just walked around the house singing?

MA: Yes--VPR had a Messiah program, so I turned it on and I sang along.

JEB: I have heard you sing of the office so I think that's when I first wondered where you do sing, like in a band or some-



thing. I can totally picture that.

MA: Nope. The church choir and area chorus only. I don't play the guitar or anything although I have played the tambourine and the washboard. So if anyone's interested...

JEB: There you go. Tambourine for hire! And how often do the choirs practice or at least pre-pandemic how often?

MA: Fortunately, we've started practicing again. In fact, I sang yesterday morning in service and we rehearse every Wednesday evening. And we've been rehearsing outdoors in nice weather which is lovely although there was one blue jay that was really annoyed with us. Apparently, we were off pitch or something.

JEB: Oh, I think he was joining in, don't you think? So church choir is Wednesdays and Sundays and the chorus?

MA: No, that blue jay was not a joiner! For the Rutland Area Chorus, we'll have five rehearsals, Sunday afternoons, before our two performances--, usually on the first Sunday in December to rehearse for the Messiah. And then we usually do a spring concert as well, and that's like seven or eight weeks of rehearsals leading up to two performances.

JEB: How many people are in the choir and the chorus.

MA: The chorus is somewhere just under a hundred.

JEB: That's huge! Are there tryouts?

MA: Everybody is welcome—no tryoutsbut there are, you know, kind of holes where groups of people who don't know it very well sit together. So we try and put someone who knows it better close by to kind of sing them back on track.

JEB: That makes sense. And there's not trials for the church choir either?

MA: No. All are welcome. We have had as many as 40 members. But right now, we are down around 15 or 20. I think they're going to start coming back since the pandemic is easing. We're an older congregation and an older choir, so we've all had our vaccinations. And we sing behind these plexiglass barriers, which we did yesterday in church, which was kind of interesting.

JEB: I guess it's better than nothing. I was going to ask if church choir members are a dying breed. I mean, are you getting any new young people? We worry about that as lawyers in Vermont, but also generally worry about our whole state demographics. And I'm assuming that the church choir population probably suffers that greatly. Do you have any new young members in your church choir? **MA:** We have a couple of younger people in choir and I'm more concerned with having young people aspire to the leadership positions in the church. But we are getting some new folks in there. The congregational church tradition is that you have a church council, like a board of directors, with an annual meeting and I'm moderator.

JEB: Ah, there's another thing you do. I'm sure that's a lot of extra work when sometimes you want to just sing!

MA: For sure, but I want it to be successful. Like with so many different organizations, whether it's the bar or whether it's town government, we want more young people involved. The average age of our select board I think is right around 70.

JEB: Wow. It's definitely a problem and one we discuss often at the VBA board. Which reminds me that we haven't even talked about your main occupation-- you're full-time at the bar association as the legal access coordinator, which used to be part time when you were also full-time in a family law practice. Do you still take on some cases?

MA: Not really. I just finished up an estate last week, thank goodness. And I also volunteer as a *guardian ad litem* in probate court here and there. There's a real need for this service. Tomorrow, I have a two-hour hearing on a minor guardianship and I think everybody there with one exception are represented by volunteer attorneys. So the Rutland county bar has been terrific about stepping forward and helping out in cases like this. It's a nice thing to see.

JEB: That's fantastic. Consider this your pitch for more volunteer lawyers and guardians ad litem! So, you're doing all this volunteer work, selectboards, choir moderator, member, guardian ad litem, singing *and* you're working at the VBA, but you also run a farm?!

MA: Yes, well I've inherited my late husband's dairy farm although we had sold the cows quite some time before he died. He was a volunteer too, by the way, he was a *guardian ad litem* in a lot of juvenile cases in family court. So he was doing his part volunteering at the same time.

JEB: What an amazingly generous couple! So you both tended to juveniles outside of your home, but you had farm animals to care for on top of everything, just not cows?

MA: Yes. I have a very small goat herd and their job is to eat the brush. And that's when they're not getting into my garden. One got out today and we had to put her back in. My daughter works with the goats. We also have chickens. I don't do any of these really for profit, but I do pay my snowplow guy in eggs.

Much of the land and structures I rent. I've got a conventional farmer who with his son does hav and corn on my absolutely wonderful Otter Creek soil, like two and a half feet deep. There's a cell tower on my silo that's going to be undergoing an upgrade. So I had to kind of stay on top of that. I lease some land to a woman who has horses and she pastures them here. And she also has riding lessons up on the hill. And one of my renters who use the land is a market gardener. He does hanging baskets, vegetable plants and perennials and annuals for the farmer's market. So every once in a while, when it gets really busy in the in the spring, I go down the greenhouse and help out.

JEB: Well it's good, then, that most of your farming is now landlording since I don't see how you could fit much else in. Although I know it keeps you extra busy as sometimes you present our incubator lawyers with some new issues that you have on the farm. I'm sure it's never a dull moment either with live animals or with tenants.

MA: Right. Always legal issues to go over so it's good that I'm trained. Never a dull moment. I was just chasing a goat this morning so the issues run the gamut.

JEB: Ha! Many areas of expertise. And your daughter's helping?

MA: Yes, she's primarily responsible for the goats and chickens.

JEB: And I should note that you were a foster mom and now an adoptive parent. Are your kids children that came through the system under either Harold's or your volunteer work?

MA: Well partially because of Harold's work I think. He spotted a youngster early on that he was GAL for and then obviously withdrew as GAL when our interest progressed. And so that was our first foster child and, and then we adopted him and then there were three others after that, each with their own challenges.

JEB: So much hard work but incredibly rewarding as well.

MA: For sure. Three of our kids--now grown--live on the farm. My daughter and one of my sons lives here in the house. Al-though I don't really see my son as he's up early working and gets back late at night. My daughter is going to Project Search, which assisted her in getting a hospital internship. And my other son is living with a caregiver on one of the other houses here on the farm. So we were able to provide care and housing long-term for these guys. That's a good thing.

JEB: Not good, great! That's amazing.

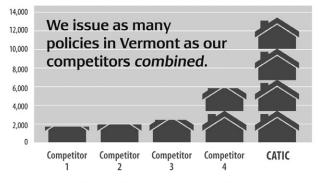
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That obviously was another full-time job on top of your other-- what are we up to-five full-time jobs now? So, in your "spare" time, when you like to relax, I understand you also like to quilt.

Pursuits of Happiness

MA: Oh yeah. I'd forgotten about that. I did some this weekend. There's something kind of silly or frivolous about cutting up pieces of fabric and sewing them all back together again. But it's also soothing and creative. I'm working out a quilt right now that is called a charm quilt. There's absolutely nothing charming about it. Probably one or two other people who read this article will know that a charm quilt is where every piece is cut from a different fabric. So it's crazy making sure you haven't used the fabric before in one of the pieces

JEB: Like collage work or they are standard patches?

MA: Well, it's a four-patch quilt. So you make a four patch square at a time, but every single piece has to be different.

JEB: That sounds like a ton of work. Do you, do you ever sell your quilts?

MA: No, I usually I do them all by hand and after I spend so much time, it's really hard to give them away. I did give one to my son and one to my daughter and I've got a couple more in progress that I'll give to a friend and to my other son.

JEB: Do you ever show them at the fair or anywhere?

MA: I haven't at the fair. I did-at a couple of quilt shows in the past, back when we were having quilt shows.

JEB: I bet they are beautiful. So we talk a lot in this column about having a passion that is artistic or at least creative in some way to take focus away from your intellectually challenging work. While you are quilting, do you get fully immersed or are you thinking about all your other full-time jobs?

MA: I often listened to the radio but yes I do think about the other stuff that I'm in-

volved with, but I find that it is pretty relaxing. And I will say that when we were doing conference calls before we zoomed everything, I was doing a lot of quilting at the same time.

JEB: I was going to say that people knit or sew during meetings, which is still okay. But do you feel like once you're on zoom, you probably can't.

MA: Right, I'm sure people would be wondering why I'm looking down the whole time. Sometimes, with my low bandwidth, I just turn off the video anyway and then, of course I can quilt....

JEB: I think a lot of people turn off their video sometimes. It's hard to be on all the time and so difficult not to either look at yourself or be creepily focused on what everybody else is doing and what their setting is like. Sometimes it is distracting to the conversation. So we're all figuring out ways to zoom and be present and do all our other things at the same time.

So we hit legislature, rotary, select board, quilting, choir, community work, GAL, fostering, landlording, goats, VBA work-- Am I missing anything else? Do you ever watch television or have time for light reading?

MA: I discontinued the cable about five and a half years ago. It was just before a certain presidential election. But I'm thinking of reconnecting to help with my internet, not that I would watch television...

JEB: But you'd watch Downton Abbey or something?

MA: Of course! But the public library has been terrific during the pandemic. You couldn't go into the building, but you could order up all kinds of DVDs and, and downloadable programs and everything during COVID. I read quite a lot of mostly murder mysteries. I get great ideas from murder mysteries...

JEB: I'm going to ignore that last statement! But don't we all have to have SOME junk television or junk books to totally let our minds go? Some kind of junk entertainment?

MA: For sure. I enjoy my murder mysteries and read mostly at night. I can't go to sleep unless I'm reading from a book at night.

JEB: Me too! I alternate between junk and educational so it's not all junk. But sometimes (often?) it's only a page I get through before falling asleep. They say turn off all screens for at least an hour. And a book is a good way to fall asleep.

MA: But I try and stay away from hardcover books. Because when they tip over and hit you in the face, it wakes you back up again.

JEB: [laughs]. Exactly! Well, I really appreciate you taking the time and telling me about all your pursuits which are all pursuits of happiness, right? I mean, you wouldn't be doing all these things if you didn't find that they balance your life out.

MA: I think that's a better way of saying it --balance and enjoyment. Not giddy happy, but it's a lot of interaction with people and I think that's what it comes down to. It's the interactions. And also it's some way of being creative, whether it's solving a problem with the town or making music with a choir. It's a way of connecting with people to make something good.

JEB: Yes and separated from the bottom line. So it's not something that you're required to do. Volunteer work actually, chemically, makes you happier by releasing dopamine in the brain, literally making you feel better. And you do so much of it—no wonder why you are always smiling. Now that we've talked about all these things you d≠o, you must realize why I have wanted to interview you for all these years. Right?

MA: Anytime I can make a pitch for volunteerism! The thing is in, in Vermont with our small population in so many towns, people need to pitch in and do. There are countless opportunities, and people in Vermont take them from coaching kids in sports to working with them in school, helping their communities in all sorts of ways, I mean, there's so much to do. Vermont does pretty well, but there's always a need for more.

JEB: Well, thank goodness there are people like you who devote so much time to others. Thank you so much for the opportunity to finally interview you!

MA: Thanks for having me, and how about taking an adult involuntary guardianship case?

JEB: For you, Mary? Of course!

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RUMINATIONS Commentaries on Vermont Law: Private Ways

When I took the bar review course in 1978, the lecturer opened his talk with the statement that to understand the law of property you'd only need to purchase the first ten volumes of *Vermont Reports*. In the forty-some years since, I have often wondered whether that statement was justified. Now is a good time to test it.

Property law includes a diverse number of subjects, but for this purpose let's focus on easements relating to access of a private nature. This requires a review of the caselaw of the Vermont Supreme Court to 1839, when 10 Vt. was published. Of the 585 cases in the Vermont canon that mention "easement," there are but 15 in those first ten volumes. If we could expand the field just a little further to include the eight volumes of privately-printed cases in books published before Vermont Reports started in 1827, a few more can be added.¹ A review of those decisions should answer the question of what was known and accepted wisdom on the law of private ways in Vermont at an early time.

The challenge goes deeper than that. I want to know whether and how the principles of the common law have changed since 1839 or, for that matter, from "time immemorial," or "time whereof the memory of man runneth not to the contrary."² That phrase, so frequently repeated, is just one of the memorable lines that are associated with easement law. It was used by William Blackstone in his *Commentaries on the Laws of England* (1765-1770).³ You're expected to pull back from further inquiry upon hearing that explanation for the origin of the well-defined principles of private easement law. The common law is legal gospel.

Matthew Hale called the common law *Lex* non Scripta, and defined it as "those Statutes of Acts of Parliament that were made before the Beginning of the Reign of King Richard I and have not since been repealed or altered, either by contrary Usage, or by subsequent Acts of Parliament, (because what is before Time of Memory is supposed without a Beginning, or at least such a Beginning as the Law takes Notice of) but they obtain their Strength by meer immemorial Usage of Custom."⁴

But where would you look to find the common law in early days? You wouldn't learn much about it from the statutes or constitution. The 1840 compilation of Vermont laws does not mention "easement." The Vermont Constitution includes the words of Article 1st, "That all persons are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety....^{*5} Possessing property is among the natural, inherent, and unalienable rights of Vermonters. Article 2ND provides the constitutional basis for the taking of private property for public purposes and Article 5th is the foundation for the Vermont judicial exercise of the police power.

Most critically, Chapter XXVII of the *Revised Laws* (1840) reiterated the statute enacted first in 1778 that adopted the common law of England, "as is applicable to the local situation, and is not repugnant to the constitution or laws of this state," and required "all courts to take notice thereof, and govern themselves accordingly."⁶ To find the common law, courts up to 1839, and beyond, used other books.

The early Vermont cases were slow to provide annotations or precedents as authorities, but eventually decisions that relied on the common law treated English cases as established authority. This practice of using English caselaw to settle disputes in Vermont soon declined as the first official reports were published and disseminated. After 1826, the high court could quote itself for authority. The common law didn't disappear. It still forms the spine of the laws that govern Vermonters, perpetuated and restated generation after generation in the reports. This is particularly true in property law.

When Judge Lott Hall wrote, "By common law a *feme covert* can convey neither real nor personal property," in *Harmon v. Taft* (1800), he gave no authority to support his statement.⁷ Perhaps he didn't need to. Perhaps some tenets of the common law were so well known as not to require a source. But without sources, the law is unmoored. It must have books and cases, statutes and bylaws. Without books or libraries, or printed decisions, some judges were required to rely on their memories of earlier decisions. In *Kinne v. Plumb* (1801), Judge Noah Smith "recited *memoriter* the decision of a case in this Court last term, *Bennington County....*"⁸

The first book most lawyers owned was Blackstone's Commentaries.

Blackstone on Easements

In Volume the Second of the Commentaries, Blackstone gave private access easements a brief treatment. He described them as a species of incorporeal hereditaments, that are "not the object of sensation." "can neither be seen nor handled." that are "creatures of the mind, [that] exist only in contemplation." They "are a sort of accident, which inhere in and are supported by that substance; and may belong, or not belong to it, without any visible alteration therein. Their existence is merely an idea and abstracted contemplation: though their effects and profits may be frequently objects of our bodily senses."9 He traced the ownership of property back to original sources. "In the beginning, we are informed by holy writ, the all-bountiful Creator gave to man 'dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth, whatever any metaphysical notions may have been stated by fanciful writers upon this subject.""10

Blackstone also looked back to the Twelve Tables of Rome, which guaranteed, "Warranty of prescriptive right in land shall be two years to acquire ownership. ... Of all other things, prescriptive right shall be for one year to acquire ownership." The Tables also provided, "Against an alien a warranty of ownership or prescriptive right shall be valid forever."¹¹

Blackstone described private ways as a subspecies of the right of common, which included the right to profit in the land of another, pasture beasts, catch fish, dig turf, cut wood, and run over private land.¹² Private ways are those "in which a particular man may have an interest and a right, though another be owner of the soil," granted by special permission. He distinguished easements in gross, which last only as long as the ownership of the grantee, from appurtenant easements, which run with the land. He described the rights of dominant and servient estates. He also noted that when a way is out of repair that the right may be extended to other lands of the grantor to ensure access.

Blackstone also covered prescriptive ways, which arise by act and operation of law, allowing an otherwise landlocked owner the right to continue to cross the land of another after using it for a period of time.¹³

Blackstone's reputation suffered from a comment reported by Lord Mansfield, when deciding *Devon v. Watts* (KP 1779): "We must not always rely on the words of reports, though under great names: Mr. Justice Blackstone's reports are not very accurate."¹⁴ Blackstone was quoted as recently as

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last year, in Justice Beth Robinson's dissent in *In re A.P.* (2020), finding "the delicate sensibilities of William Blackstone" insufficient to justify the use of imprecision in penal legislation, quoting an Alaska Supreme Court's decision.¹⁵ Yet that same year, among the citations supporting the court's decision in *VTRE Investments, LLC v. MontChilly, Inc.*, the court listed Williston on Contracts as a source, and added that comment was based on "2 Blackstone Comm. 295."¹⁶

Blackstone still carries great weight. Part of the reason is his style. He wrote, "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in the total exclusion of the right of any other individual in the universe."¹⁷ People fight over their "rights" in many ways, but nothing brings out the hoes and pitchforks like a good disagreement over roads that threaten that "sole and despotic dominion."

Viner's Abridgment

At trial, John Cook, arguing for the defendants in Hazen v. Smith (1801) read sections from Viner's Abridgment into the record. Daniel Chipman, for the plaintiffs, also quoted Viner.¹⁸ Charles Viner compiled his 23-volume opus A General Abridgment of Law and Equity in 1763. A new edition in 1791 included a 24th volume as an index.¹⁹ The set would have graced lawyer's libraries and avoided the need to purchase a complete set of decisions. Viner also is remembered for his generosity in endowing a professorship of law at Oxford. William Blackstone was the first to hold the Vinerian chair. Viner is listed as an authority by the Vermont Supreme Court in decisions throughout the years, as recently as 1934.20

That same John Cook, as attorney for the defendant in *Page v. Walker* (1801), quoted *Bacon's Abridgment.*²¹ Matthew Bacon's *A New Abridgment of the Law* was first published in 1736, and by 1793 was in its sixth edition. The set included eight volumes. Bacon was last cited by the Vermont high court



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in Trustees of Caledonia County Grammar School v. Kent (1912).²²

In his *Abridgment* Bacon discussed the obstruction of private ways: "If a man has a private way over the land of another, and is obstructed in the enjoyment of it, this action lies, whether he claim it by express reservation in any modern deed, by grant, by prescription, or by operation of law."²³

Some attorneys purchased other compilations of cases, including *Burrow's Reports* and *Salkeld's Reports*, among others.²⁴ A full set of English decisions (limited to decisions made prior to the creation of Vermont) could fill a wall in a lawyer's office, and consume a sizable amount of income.²⁵

Baylies

The three-volume Digested Index to the Modern Reports of the Courts of Common Law in England and the United States was published by a Montpelier attorney, Nicholas Baylies, in 1814.²⁶ Incorporating the work of two earlier digesters, Baylies read and copied excerpts from seventy-six volumes of cases and then organized them alphabetically by subject. It is a work of a dedicated compiler. It includes no commentary, however. That was not Baylies's object. In 1923, when Frank Fish published his book of biographies of the Vermont bench and bar, he described Baylies's Digest as "a work that is now practically useless."²⁷ But it had its day.

Baylies's *Digest* is the first law book, other than statutes and reported cases, published in Vermont. Judge Baylies's decision in *Brackett v. Waite* (1832) applied a Vermont statute on fraud, but he also found support in understanding the nature of the offense from the "whole doctrine of the law, as to fraudulent conveyances under the statute of 13th Eliz." ²⁸

Nicolas Baylies was also a key player in the establishment of the Vermont State library. As a Councillor, Baylies convinced the Governor and Council to ask former Supreme Court Judge Royall Tyler to move the collection of state statutes and federal laws that Tyler held for the state to the Council Chambers in the State House, "for the use and benefit of the State."²⁹ This was in 1814.

That same year, he promoted the first official publication of the decisions of the Vermont Supreme Court.³⁰ Baylies was elected to the high court in 1831 and 1832, and then retired from the bench at the end of the second year.

Under the title "Way," Baylies reviewed the common law of general and private ways. He wrote, "There may be a way of necessity.... Where one (even as trustee) conveys land to another, to which there is no access but over the grantor's land, a right of way passes of necessity as incidental to the grant." But, he added, "Where no evidence appeared to shew that a way over another's land had been used by leave or favor, or under a mistake of an award which would not support the right of way claimed, such a use for above twenty years exercised adversely and under a claim of right is sufficient to leave to the jury to presume a grant which must have been made within twentysix years"31

Unlike Viner and even Bacon, Baylies's work was portable. Baylies solicited the approval of his work from several authorities, including James Kent and Nathaniel Chipman. Kent wrote, "I have examined, with such attention, the three Vols. Of *Mr. Baylies' Digested Index*, and I am of the opinion it will be found extremely useful to the Profession, and that it is entitled to encouragement and patronage." Chipman also found it "correct, and well digested, and as to its usefulness concur in the opinion of Chancellor Kent."³²

Kent on Easements

Chancellor Kent spent only a few more pages discussing private ways than his English predecessor, but added little to the tenets that rule such easements. After pointing out the "deep traces of feudal law" that still governed the law of property, Kent stated, "It was part of the original destiny and duty of the human race to *subdue the earth*, *and till the ground when they were taken*."³³ The productive use of land depended on roads to drive cattle to pasture, carry harvests to market, and bring out timber.

Kent never discussed private ways granted by deed, confining himself to implied and prescriptive easements. Addressing prescription, Kent explained the need to prove a "continued, uninterrupted, or pacific, and adverse, that is, under a claim of right, with the implied acquiescence of the owner." He stressed that the time of enjoyment may not be interrupted to avoid destruction of the claim of right, but that the "personal disabilities of particular proprietors" do not interfere with the presumption.³⁴ He explained that ways of necessity are not lost by unity of possession of both parcels, but are revived when the lots are again severed.³⁵

Prescriptive easements, according to

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Kent's view of the common law, can be lost by abandonment if unused for more than the statutory period, which creates a presumption of release, particularly if there is "some act done by the owner of the land charged with the easement, inconsistent with or adverse to the existence of the right...."³⁶

With their treatments of the subject, Blackstone nor Kent rarely cited English caselaw, and it took a few years before even case citations from English or American courts began to appear in the reported decisions of the Vermont Supreme Court.

Kent is frequently relied on by the Vermont Supreme Court during the nineteenth century, both from his Commentaries but from his decisions as a New York judge as well. James Kent was quoted over 150 times in the Vermont Reports from as early as 1824. The last time Chancellor Kent was quoted by the Vermont Supreme Court was in Standard Register Co. v. Greenberg (1957). Justice John Holden wrote that "the point of the decision is quoted by Chancellor Kent in his commentaries without question. The other cases referred to in the Vermont Reports adopt the same view."³⁷ He did not direct the reader to the book and page. Perhaps he didn't need to.

The Vermont Law of Private Ways to 1839

Take a look back on how the high court applied the common law to private roads at the start. ³⁸ The first reported Vermont decision on rights-of-way, Judd v. Leonard (1814), was written by Chief Judge Nathaniel Chipman. Appleton Foot had conveyed a fifty-foot square tract to Joseph Cook and Anthony Rhodes in 1798, with a right of way from the highway to the easterly end of the property, across Foot's land, "between the house of the grantor and the coal house bank, sufficient to pass and repass with carriages, &c." Leonard, the successor to Foot, erected buildings that encroached on the passage, not leaving sufficient room for passing. Judd, successor to Cook and Rhodes, sued for ejectment. Chief Judge Chipman denied the relief, explaining that ejectment was the wrong procedure to follow. Leonard, if successful under such a writ, would be claiming the fee of the land, not just an easement. The Chief Judge listed no authority for his conclusion. 39

In Shumway v. Simons (1827), the court held that the statute of limitations of 15 years for adverse possession of real property applies equally to prescriptive easements. The court agreed that Simons had satisfied the requirements of adverse possession. His mill had caused water to overflow onto plaintiff's land, at a level at its present height for at least fifteen years, in spite of occasional suspensions or interruptions of his right not caused by the defendant. That qualified as a presumptive grant of an easement by adverse possession.⁴⁰ This is the high court's first case on presumptive grants.

Judge Bates Turner, in *Putnam v. Smith* (1829), described how deeds should be used in determining boundaries. "The rules of law," he wrote, "with regard to the interpretation of deeds, have been long since settled, and, as the Court believe, settled on the soundest principles of public policy and general utility. Where the ambiguity arises on the face of the instrument, it must be solved by the deed itself. But if the meaning of a deed is clear and plain on the face of it, but doubts arise on the application of it, those doubts may be removed by extrinsic or parol evidence."⁴¹ Witnesses may testify as to the meaning of the deed.⁴²

The court returned to the issue of prescriptive easements in 1827. Chief Judge Richard Skinner noted, in *Mitchell v. Walker* (1827), that while "It is insisted by the plaintiff's counsel, that to acquire a prescriptive right, the exercise and enjoyment thereof for no period of time short of that recognized by the ancient common law, *i.e.* time whereof the memory of man runneth not to the contrary, is sufficient.... By repeated decisions of this Court, the law at this time must be considered as well settled here as in England, that in analogy to the limitation of twenty years, affixed by the statute of James, in England, for entry upon lands by the owner, and here by our statute of limitations of fifteen years, applying to all real and possessory actions, a presumptive right, or more properly, the presumption of a grant to incorporeal hereditaments, arises in the same period of time. A prescriptive right or "more properly, the presumption of a grant to incorporeal hereditaments," is governed by the statute of limitations of 15 years.⁴³

Skinner added, "This enjoyment and use must be with the acquiescence of such proprietor, and accompanied with a claim of right on the part of the occupant. An interruption of the occupant, and a claim of right on the part of the proprietor, or an admission of such right by the occupant, either express or implied, will repel the presumption. So use and occupation by mistake, will defeat a claim set up on the ground of fifteen years' enjoyment."44 He listed "Jackson v. Wilkinson, 3 Barnwell & Creswell, 413.-2 Saund. 173, d" for authority. Neither Barnwell & Creswell or Saunders are texts covered by Baylies. Skinner, a well-established attorney from Manchester, had likely purchased a set of English cases for his library, and relied on decisions rather than synopses.

The issue of abandonment was at stake in *Rogers v. Stewart* (1833). Chief Judge Titus Hutchinson held that failing to remove a house wrongfully erected on land obstructing a right-of-way for seven or eight years does not constitute abandonment of the way.⁴⁵ Abandonment requires at least 15 years of obstruction to become final. Hutchinson cited no authority for his opinion.

The cases to 1839 provide a solid foundation for understanding the law of private ways. The decisions that followed, over the centuries, made a few important changes, but the heart of the common law of ways remains in place.

The Present Law of Private Ways

Private ways may be created expressly, through a deed or agreement; by implication, because a subdivision of land has left one lot land-locked and there is no other way to reach a parcel; by prescription, used without permission for fifteen years; or by the discontinuance of a public highway, which could be called a succeeding easement.

Express Easements

Where the intent is clearly to create a right of ingress and egress, but the language of the deed is general, "the owner of the easement is 'entitled to a convenient, reasonable, and accessible way, having regard to the interest and convenience of the owner

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of the land as well as their own.'"⁴⁶ Where a party grants a right-of-way, he is not bound to construct or maintain it.⁴⁷ That duty falls on the grantee of an easement. The failure to mention a right-of-way in a deed conveying property to another is no indication of an intention not to convey the easement created earlier in the chain.⁴⁸

Deeded easements may be explicit as to location, incorporating a survey line or described in metes and bounds, or simply provide for a right-of-way without elaboration. They usually run with the land they serve, although rights-of-way may also be granted to third parties, for temporary removal of trees, for example from lands of others. In some cases, parties have claimed the right-of-way was personal to the grantee, and invalid for use by successors, rarely successfully. Easements in gross are not favored by the courts. A deed that does not include words of inheritance ("heirs and assigns") which includes the word "appurtenances" in the habendum is not an easement in gross, but creates an appurtenant easement, and does not limit the authority of the grantee to convey property subject to the easement.49 If there isn't evidence of a clear intent to limit the use of the right to the grantee, the court will favor appurtenance.50

Parking

A deed that conveyed a general rightof-way which had historically been used for parking was consistent with the use of the right-of-way as a driveway.⁵¹ In another case, where historic use didn't include parking, only access and a turnaround were authorized.⁵²

Location

The owner of the servient estate may designate the location of an undefined right-ofway; when that owner fails to act the dominant estate owner may select a suitable route.⁵³ A way cannot be changed without the mutual consent of the owners of both the dominant and servient estates.⁵⁴ The parties may agree to grant or reserve to either or both parties the power to unilaterally relocate the easement.⁵⁵

Overburdening

A right-of-way appurtenant to land attaches to every part of it, though the land be subdivided.⁵⁶ Uses evolve over time. A right-of-way historically used for horses and cows may be used a century later by motor vehicles as they did not "burden the estate to a greater degree that was contemplated at the time of the grant." The "manner, frequency, and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development" if it "reflects the expectations of the parties who create servitudes of indefinite durations." ⁵⁷ Appropriate use depends on the easement's original purpose and the scope of its authorized use.⁵⁸

An easement by implication is limited to the use which gave rise to it and can "neither be enlarged because of subsequent necessity nor cut down by a claim that some part of it was not indispensable."⁵⁹

An express easement authorizing "all normal and usual purpose [sic] of vehicular and pedestrian ingress and egress from the parcel" does not include use of the lane for access to a restaurant parking lot, as the subdivision in which the lot was created was intended to be residential.⁶⁰ Where a twentyeight foot wide driveway, "much wider than the traditional driveway," was originally to be used for a church, and was now part of a plan for a residential subdivision, with no restrictions in the deed, the land may be used for that purpose without overburdening the easement.⁶¹

Exclusivity

Unless exclusive use of a lane is specifically expressed in the deed, rights-of-way may be used by both the servient and dominant owners.⁶²

Abandonment and Extinguishment

Easements can be lost to abandonment or extinguishment. A right- of-way is extinguished by unity of possession.⁶³ It may be extinguished by ouster. The road might be blocked off, or made impassible, but those acts must be continuous for 15 years, obvious to the dominant landowner, and with that party's acquiescence. The possession must be unequivocal and equivalent to an ouster of the dominant owner.

Recall that Chancellor Kent believed an easement acquired by use may be lost by non-user.⁶⁴ Vermont has diverged from that position. A deeded easement-holder need not make use of the right to maintain the title. "[R]eliance by the owner of the subservient state is not required to establish an abandonment." "The absence of reliance is not fatal to a finding of abandonment." The burden on one claiming abandonment, however, is "a heavy one," requiring evidence of the "acts by the owner of the dominant tenement conclusively and unequivocally manifesting either a present intent to relinquish the easement for a purpose inconsistent with its future existence." Nonuser alone is insufficient.65

Implied Ways

A right-of-way may be reserved, as well as granted, by implication.⁶⁶ A landowner might say, "I intended to leave myself a right-of-way to the road on the land I just sold." That's an implied reservation. Or the owner of an otherwise land-locked parcel might say, "the owner intended to leave me a right-of-way." That's an implied grant.

Chief Justice George Powers described

the difference between implied grants and implied reservations in *Hawley v. Chaffee* (1915).⁶⁷ Ways of necessity are implied grants. Implied reservations are called by various names--quasi-easements, visible servitudes or "easements arising from severance with apparent benefit existing."⁶⁸ In *Hawley*, Powers admitted that the two concepts had been confused for years, "a confusion, it must be admitted, from which our own cases have not wholly escaped."

Powers settled the confusion. "The foundation of this rule regarding ways of necessity is said to be a fiction of law, by which a grant or reservation implied, to meet a special emergency, on grounds of public policy, in order that no land be left inaccessible for purposes of cultivation. But the access must be "strictly one of absolute necessity." Powers supported his conclusion with authorities. "The learned authors show, from a most thorough examination and analysis of the cases, that this view has been recognized and acted upon by the courts from a very early period in the record of judicial decisions in England, and also show that the law of the Civil Code of France accords therewith."69

Recognizing there is no question of public policy with implied reservations, as with ways of necessity, Powers essentially removed implied reservations from the legal canon. Only cases of strict necessity are justified, whatever their names. Powers ruled that "despite some divergence of judicial opinion and consequent uncertainty in the law, strict necessity has come to be the settled rule of implied reservations in England," giving a series of citations to leading English cases.

Judge Royall Tyler defined ways of necessity this way:

If A. conveys land to B., to which B. can have access only by passing over other land of A., a way of necessity passes by the grant. If A. conveys land to B., leaving other land of A., to which he can have access only by passing over the land granted, a way of necessity is reserved in the grant.⁷⁰

State policy disfavors land-locked property, reflected in the recognition of an implied easement, "implied" as if to say that the parties intended an easement but neglected to put it in the deed.⁷¹ Mere inconvenience, however great, is not sufficient to justify a way of necessity, even though the existing access required the landowner to cross a hill, requiring many turns, and only with very light loads.

An easement by implication requires proof of the use of the land prior to severance, but use is irrelevant to a finding of a way of necessity. A way of necessity has no hostility, and so cannot ripen into a prescrip-

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tive easement.72

In 1970, Vermont adopted the Marketable Record Title Act, which provides,

Any person who holds an unbroken chain of title of record to any interest in real estate for 40 years, shall at the end of that period be deemed to have a marketable record title to the interest, subject only to such claims to the interest and such defects of title as are not extinguished or barred under this chapter, and such interests, limitations or encumbrances as are inherent in the provisions and limitations contained in the muniments of which the chain of record title is formed which have been recorded during the 40-year period.⁷³

The law grants an exception to this rule when an easement is clearly observable by physical evidence of its use.⁷⁴ Otherwise this statute cuts off claims of ways of necessity from before the 40-year period that have not been renewed with a notice of claim.⁷⁵

A way of necessity exists only so long as the necessity which creates it: "if, at some point in the future access to plaintiff's land over a public way becomes available, the way of necessity will thereupon cease."⁷⁶

Prescription

A prescriptive easement is earned by 15-years of continuous, hostile, open, and notorious use of a road, without the permission of the servient landowner.⁷⁷ Strict necessity has nothing to do with it, unlike ways of necessity. The general rule is that open and notorious use will be presumed to be adverse.⁷⁸

"The tenant must unfurl his flag on the land, and keep it flying so that the owner may see, if he will, that an enemy has invaded his dominions and planted his standard of conquest."⁷⁹ Judge H.H. Powers invented that phrase in *Wells v. Austin* (1887), and it has gone around the world as a fit description of the openness and notoriety that is required of adverse possession and its traveling companion prescriptive easement.

The 15-years need not be limited to the years the plaintiff used the land. Tacking the years of prior, continuous use is proper.⁸⁰ Once a right-of-way is established by adverse use, it cannot be divested by obtaining a license to use it, although this would be strong evidence that the former use was permissive.⁸¹ To stop the 15-years, and to show a want of acquiescence, you must either institute legal proceedings against the claimant or place obstructions actually preventing the use.⁸²

The width of a prescriptive right-of-way is determined by the extent of actual use.⁸³

Succeeding Ways

After a public highway is discontinued, the

landowners whose property was formerly served by the road enjoy a private right-ofway along the same route. This was codified in 2006 in 19 V.S.A. § 717(c), which reads, "A person whose sole means of access to a parcel of land or portion thereof owned by that person is by way of a town highway or unidentified corridor that is subsequently discontinued shall retain a private right-of-way over the former town highway or unidentified corridor for any necessary access to the parcel of land or portion thereof and maintenance of his or her right-of-way."

In Sum

After marinating ourselves in the law of private ways, the answer to the abiding question, whether the common law of private ways has changed over time, is ready. Based on the record, no common law principle relating to access easements has been changed by the Supreme Court. The legislature has cut off the life of ways of necessity after 40 years by enacting the Marketable Record Title Act. It has codified the law of succeeding rights-of-way by enacting Section 717(c) of Title 19. The high court has filled in details. It has sorted out that a road isn't abandoned merely by not being used, the only time among the reported cases that Vermont disagreed with Chancellor Kent, but even then,⁸⁴ the outcome squared with the way English and American court read the common law. Beyond that, the ancient rules of express, implied, prescriptive, and succeeding private ways have remained unspoiled by modern reforms or transient policies. A few years ago, a legislator introduced a bill to repeal adverse possession. The bill never became a law. The common law remains in place.

Note: One of the benefits of writing this piece is the discovery of BAILII, a web page that provides free access to British and Irish case law and legislation. https://www/bailii. org. The initials mean "British and Irish Legal Information Institute."

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Skinner, J., Mitchell v. Walker, 2 Aik. 266 (1827). ³ The phrase in context reads: "But though this is the most likely foundation of this collection of maxims and customs, yet the maxims and customs, so collected, are of higher antiquity than memory or history can reach: nothing being more difficult than to ascertain the precise beginning and first spring of an ancient and long established custom. Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is what gives it its weight and authority: and of this nature are the maxims and customs which compose the common law, or lex non scripta, of this kingdom.

"This unwritten, or common, law is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification. 2. Particular customs; which, for the most part, affect only the inhabitants of particular districts. 3. Certain particular laws; which, by custom, are adopted and used by some particular courts, of pretty general and extensive jurisdiction)." William Blackstone, *Commentaries on the Laws of England Book the First* (Oxford: The Clarendon Press), 1765), 67.

⁴ Matthew Hale, *The History of the Common Law of England* (London: E. and R. Nutt and R. Gosling, 1739), 3.

⁵ Chapter I, Article I, Vermont Constitution, The Revised Statutes of the State of Vermont (Burlington, Vt.: Chauncey Goodrich, 1840), 29.

⁶ Revised Statutes (1840), Chapter XXVII, ibid., 277-278.

⁷ Harmon v. Taft. 1 Tyl. 6, 7 (1800).

Kinne v. Plumb, 1 Tyl. 20 (1801).

⁹ William Blackstone, *Commentaries on the Laws of England Volume the First* (Oxford: The Clarendon Press, 1765), 17.

¹⁰ Ibid., 2.

¹¹ The Avalon Project : The Twelve Tables (yale. edu); https://avalon.law.yale.edu/ancient/twelve_tables.asp.

¹² Blackstone divided common into four parts, common of pasture; of piscary (fishing on another's property), turbary (the liberty of digging turf on another's land); and ways. William Blackstone, *Commentaries on the Laws of England Book the Second* (Oxford: The Clarendon Press, 1768), 35. ¹³ Ibid., 36.

 ¹⁴ "The Reporters and Text Writers," Canada Law Journal, IX, December 1873, 339; Devon v. Watts,
 1 Dongl. 86, 93, 99 E.R. 59, 64 (KP 1779).

¹⁵ Robinson, J., dissent, *In re A.P.* 246 A.3d 399, 414, 2020 VT 86 (2020).

¹⁶ VTRE Investments, LLC v. MontChilly, Inc., 2020 WL 5495780.

¹⁷ William Blackstone, Commentaries on the Laws of England (Oxford: The Clarendon Press, 1768), 2.

¹⁸ Hazen v. Smith, 1 Tyl. 105, 110 (1801).

¹⁹ Charles Viner, A General Abridgment of Law and Equity (London: G.G.J. and J. Robinson, T. Payne, E. & R. Brooke, T. Whieldon and J. Butterworth, 1791).

²⁰ In re O'Rourke's Estate, 106 Vt. 327, 175 A. 24 (1934).

²¹ Page v. Walker, 1 Tyl. 145 (1801).

²² Trustees of Caledonia County Grammar School v. Kent, 86 Vt. 151, 94 A. 26 (1912).

²³ Matthew Bacon, *A New Abridgment of the Law* I (London:: A. Strahan, 1832), 102.

²⁴ Olin v. Chipman, 1 Tyl. 167, 174 (1801); James Burrow, Reports of Cases Adjudged in the Court of King's Bench (London: 1772); William Salkeld, Reports of Cases in the Court of King's Bench, with some special cases from the Courts of Chan-

¹ These eight are Nathaniel Chipman, *Reports and Dissertations* (Rutland, Vt.: Anthony Haswell, 1793); 2nd ed. (Rutland, Vt.: Tuttle & Co., 1871); Royall Tyler, *Vermont Reports*. 2 vols. (New York: I. Riley, 1809–1810); William Brayton, *Reports of Cases* (Middlebury, Vt.: Copeland & Allen, 1821); Asa Aikens, *Reports of Cases* (Windsor, Vt.: Simeon Ide, 1827–1828; and Daniel Chipman, *Reports*

cery, Common Pleas and Exchequer. From the 1st year of K. William and Q. Mary to the 10th year of Q. Anne. Vol. II. (London: Eliz. Nutt and R. Colsting, 1718; London: Geo. Wilson, 1773).

²⁵ I've seen what became of two lawyer's libraries, one from Barre, another from Irasburg. The latter was owned by Laforrest H. Thompson, of Irasburg, who served on the Vermont Supreme Court (1890-1900), but the library came to a sad end. I helped shovel the books he once treasured, taken from a barn in Lower Cabot whose roof had fallen in, into a dumpster, the books covered with pigeon droppings and ripe with mold. One cover, which I saved, includes his yellowed book plate, "Law Library of L. H. Thompson." Some of Edward A. Bisbee's law library I inherited from one of his descendants and now reside on the shelf behind my desk. Bisbee had a full set of English precedents and many volumes of treatises, although only a few volumes escaped the taint of mold.

²⁶ Nicholas Baylies, A Digested Index to the Modern Reports of the Courts of Common Law in England and the United States (Montpelier, Vt.: Walton & Goss, 1814), 3 vols.

²⁷ Frank Fish, "Nicolas Baylies," Walter Hill Crocktt, Vermont The Green Mountain State (New York: Century History Co., 1923), IV: 99

²⁸ Brackett v. Waite, 4 Vt. 387 (1832).

²⁹ E.P. Walton, Jr., Records of the Governor and Council of the State of Vermont (Montpelier: E. P. Walton, 1877), VI: 99-100.

³⁰ Ibid., 95.

³¹ Baylies, Digested Index, Vol. 3, 441.

³² Ibid., Book I, i.

³³ O.W. Holmes, ed., James Kent, Commentaries on American Law (Boston: Little Brown, and Company, 1873), III: 377, 388.

Ibid., 444-446.

³⁵ Ibid., 449.

³⁶ Ibid., 448.

 $^{\rm 37}$ Standard Register Co. v. Greenberg, 120 Vt. 112, 118, 132 A.2d 174, 178 (1957).

³⁸ Some confusion enters the field when pent roads are described by statute as "private roads." Judge Jacob Collamer's decision in Warren v. Bunnell (1839) held that pent roads, or "private ways, as they are called in the statute," must be opened in the same manner as public roads. A certificate of opening was then necessary. Pent roads are public roads, penned in to meet the needs of the farmer whose pasture is crossed by the road. They are not private ways, in the language of the common law. Had a town laid out a road purely for a private purpose, it would have run afoul of Article 2nd of the Vermont Constitution. Warren v. Bunnell, 11 Vt. 600 (1839)

Judd v. Leonard, 1 D.Chip. 204 (1814).

⁴⁰ Shumway v. Simons, 1 Vt. 53 (1827).

⁴¹ Putnam v. Smith, 4 Vt. 622, 628 (1829).

⁴² Today, declarations of deceased persons are hearsay, but when they involve the location of a dividing line between lands of individuals they can be admitted into evidence, provided the deceased person had actual knowledge of the location of the line or peculiar means of knowledge, made at a time when the person had no interest to misrepresent, made while in the immediate vicinity of the line, and pointing it out. Rule 802. Mitchell v. Walker, 2 Aik. 266 (1827).

44 Ibid., 270-271.

⁴⁵ Rogers v. Stewart, 5 Vt. 215 (1833).

46 Patch v. Baird, 140 Vt. 60, 66, 435 A.2d 690, 692 (1981) (quoting La Fleur v. Zelenko, 101 Vt. 64, 70, 141 A. 603, 605 (1928)).

⁴⁷ Walker v. Pierce, 38 Vt. 94 (1865).
 ⁴⁸ Barrett v. Kunz, 158 Vt. 604 A.2d 1278 (1992);

Kinney v. Hooker, 65 Vt. 333, 26 A. 690, 691-692 (1893)

⁴⁹ Rowe v. Lavanway, 180 Vt. 505, 904 A.2d 78 (2006)

Sabins v. McAllister, 116 Vt. 302, 305-6, 76 A.2d

106 (1950).

⁵¹ Cashin v. Nichols, unpublished, 2007-355 (2008).

VTRE Investments, LLC v. Monchilly, Inc., No. 2019-387 (2020)

⁵³ Patch v. Baird, 140 Vt. 60, 435 A.2d 690 (1981); LaFleur v. Zelenko, supra.

In re Shantee Point, Inc., 174 Vt. 248, 811 A.2d 1243 (2002); Sargent v. Gagne, 121 Vt. 1, 12, 147 A.2d 892, 900 (1958).

⁵⁵ Holden v. Pilini, 124 Vt. 166, 170, 200 A.2d 272, 275 (1964); Sweeney v. Neel, 179 Vt. 507, 904 A.2d 1050 (2006).

Dee v. King, 77 Vt. 230 (1905).

Rowe v. Lavanway, supra.

⁵⁸ Farrell v. Vt. Elec. Power Co., 193 Vt. 307, 69 A.3d 1111 (2012).

Read v. Webster, 95 Vt. 239, 113 A. 814 (1921). ⁶⁰ Post and Beam Equities Group, LLC v. Sunne Village Development Property Owners Association, 199 Vt. 313, 124 A.3d 454 (2015).

⁶¹ Roy v. Woodstock Community Trust, Inc., 195 Vt. 427, 94 A.3d 530 (2014).

Folley v. Martin, unreported, 2020-219 (2021). 63

Plimpton v. Converse, 42 Vt. 712 (1871). 3 Kent, Comm., 448.

Lague, Inc. v. Royea, 152 Vt. 499, 503, 568 A.2d 357, 359 (1989); Nelson v. Bacon, 113 Vt. 161, 172, 32 A.2d 140, 146 (1943). What about this word nonuser? It isn't the name for a person who doesn't use something. It isn't a misspelling in the reports and there is no reason to bracket out the final letter. The word means non-use, but the preferred form is nonuser. Most often it's mere nonuser. A legal encyclopedia defines it as "the failure to exercise a right, such as a franchise, as a result of which the person have the right might lose it." 37 C.J.S. Franchises § 38.

Dee v. King, 73 Vt. 375, 50 A. 1109 (1905).

Hawley v. Chaffee, 88 Vt. 468, 93 A. 120 (1915). ⁶⁸ Visible servitudes were first recognized in Vermont in Harwood v. Benton (1860). Judge James Barrett wrote, "While the owner of a parcel of land could not have an easement in one part in favor of another part thereof, yet, by force of his ownership, he could use it as he pleased and impress it with conditions as he chose, which upon severance could survive." Harwood v. Benton, 32 Vt. 724 (1860).

Hawley v. Chaffee, 93 A. at 123.

Willey v. Thwing, 68 Vt. 128, 34 A. 428 (1896).

Willey v. Thwing, 68 Vt. 128 (1896).

Traders, Inc. v. Bartholomew, 142 Vt. 486, 459 A.2d 974 (1983).

73 27 V.S.A. § 601(a).

27 V.S.A. § 604(a)(6).

⁷⁵ Gray v. Treder, 209 Vt. 210, 204 A.3d 1117 (2018); 27 V.S.A. § 605.

⁶ Traders, Inc. v. Bartholomew, 142 Vt. at 493, 459 A.2d at 979.

77 N.A.S. Holdings, Inc. v. Pafundi, 169 Vt. 437, 438, 736 A.2d 780, 782 (1999), cert. denied, 528 U.S. 1079, 120 S.Ct. 798, 145 L.Ed.2d 672 (2000); Community Feed Store, Inc. v. Northeastern Culvert Corp., 151 Vt. 152, 559 A.2d 1068 (1989).

⁷⁸ Barber v. Bailey, 86 Vt. at 223, 84 A. at 611 (1912).

⁷⁹ Wells v. Austin, 59 Vt. 157, 10 A. 405, 409 (1887).

Hassam v. Safford, 82 Vt. 444, 74 A. 197 (1909). Tracy v. Atherton, 36 Vt. 503 (1864).

Dodge v. Stacy, 39 Vt. 558 (1867)

Gore v. Blanchard, 96 Vt. 234, 242, 118 A. 888, 894 (1922)

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WRITE ON

Assessing the Legal Writing Style of Amy Coney Barrett

In recent articles for this column, I have assessed the legal writing styles of Neil Gorsuch and Brett Kavanaugh, soon after President Trump appointed them to the Supreme Court. It seems fitting, then, that I devote this article to assessing the legal writing style of Amy Coney Barrett, President Trump's third and final appointment to the Court (we think!). Barrett breaks the mold in that she is the only sitting Justice who did not graduate from Harvard Law School or Yale Law School. Barrett graduated from Notre Dame Law School. So did I. I therefore admit to some alma mater pride in this appointment, though I intend to offer a dispassionate critique of Barrett's writing style.

Prior to her appointment to the Supreme Court, Barrett served on the Seventh Circuit Court of Appeals for three years. In that time, she authored 79 opinions, three concurrences, and seven dissents.¹ As of this writing, Barrett has authored four opinions for the Supreme Court. I will refer to her Supreme Court opinions at the end of this article, but the bulk of my analysis will focus on her more numerous Seventh Circuit opinions. I read thirty of those opinions for this article. Based on this representative sample, I give Barrett high marks for her legal writing style. She adheres to all of the key principles of Plain English: She writes in the active voice using concrete nouns and vivid verbs. Barrett writes sentences that are short and to-the-point with few surplus or unnecessary words. Barrett establishes coherence and flow through the artful application of explicit and substantive transitions. I will elaborate on these points below with examples from her opinions. I will conclude with some thoughts on Barrett's legal writing "voice," comparing it favorably to the legal writing "voice" of my two earlier subjects, Gorsuch and Kavanaugh.

Brevity

Before highlighting particular aspects of Barrett's writing worth emulating, I offer two over-arching appraisals of her opinions. First, they are short. Any lawyer who has labored through dozens of pages of a typical judicial opinion (that is—all of us) will find Barrett's approach to judicial opinion writing refreshing. Of the thirty opinions I read (chosen randomly), the longest was twelve pages.² And this twelve-page opinion, though modest in length compared to many circuit court opinions, is an outlier in Barrett's oeuvre. A couple of the opinions I read are seven-to-nine pages, but most average between four and six pages. I hasten to add that these opinions are not summary dismissals of trivial issues. To the contrary, they address important issues like murder, police misconduct, judicial bias, and sex discrimination. Through it all, Barrett succeeds in addressing the parties' claims forthrightly and respectfully but with an impressive economy of words. (I have sentence counts and word counts of the opinions for any reader interested in finer detail.)

Second, Barrett's opinions deserve praise for their infrequent use of footnotes. Two of the opinions I read have six footnotes.³ Most of the others have between one and five footnotes (averaging closer to two to three). Two of the opinions have no footnotes at all.⁴ Legal writing bliss!

The brevity of Barrett's opinions is an aspect of her legal writing "voice" I will address in full later: Say what you must to resolve the dispute, but say nothing more after that. This approach comports with that of Chief Justice John Roberts, who has notably urged the Court to adopt a philosophy of judicial minimalism when crafting opinions.⁵ In this regard, he has found and acolyte with the Court's newest appointee.

Crisp, Clear Openings

Now to the particulars. First, Barrett is adept at summarizing cases concisely in opening paragraphs that display all the attributes of fine legal writing. This is true for virtually all of the opinions I read. Space allows me to offer just a few examples of this commendable practice. The openings of Barrett's opinions not only capture the case, they capture the reader's attention:

Is it reasonable for officers to assume that a woman who answers the door in a bathrobe has authority to consent to a search of a male suspect's residence? We hold that the answer is no. The officers could reasonably assume that the woman had spent the night at the apartment, but that's about as far as a bathrobe could take them. Without more, it was unreasonable for them to conclude that she and the suspect shared access to or control over the property.⁶

Barrett embeds the Fourth Amendment legal standard into an artfully written paragraph and provides the court's holding, all within 84 words. Try as I might, I can find no surplus words to omit. Notice how Barrett refers back to the bathrobe, the most memorable word in the opening question, in the court's holding. Repeating words and referencing back (and forward) creates a thematic quality that holds the paragraph together and improves the reader's understanding.

Here is another opening paragraph that needs no introduction. Barrett describes the facts, the legal issue, and the court's holding in 113 words:

Judge Colin S. Bruce sentenced James Atwood to 210 months' imprisonment for federal drug crimes. While Atwood's case was pending, Judge Bruce improperly communicated ex parte with the prosecuting U.S. Attorney's Office about other cases. The federal recusal statute requires a judge to recuse himself from any proceeding in which his impartiality may reasonably be questioned. The government concedes that the disclosure of Judge Bruce's ex parte correspondence invited doubt about his impartiality in proceedings involving the Office. Because of the judge's broad discretion in sentencing, we conclude that Judge Bruce's failure to recuse himself was not harmless error. We vacate Atwood's sentence and remand his case for resentencing by a different judge.7

The reader needs no other information to understand the case (though, take my word for it, the details of the judge's communications with the prosecutor would likely only anger you more).

In the following opening, Barrett uses two paragraphs to explain the facts and holding; this opening stands as a paradigm of legal writing efficiency:

Before Edward Acevedo could appear on the 2018 Democratic primary ballot for Cook County Sheriff, he had to obtain a certain number of voter signatures on a nominating petition. He didn't meet the signature requirement, so he was kept off the ballot. He then sued the Chicago, Cook County, and Illinois electoral boards, arguing that the Cook County signature requirement is unconstitutional because it is more onerous than the signature requirement for statewide offices. According to Acevedo, the comparatively higher county requirement can survive only if it is narrowly tailored to advance a compelling state interest.

Acevedo is wrong. Strict scrutiny is not triggered by the existence of a less burdensome restriction—it is triggered only when the challenged regulation itself imposes a severe burden. Because Acevedo has not alleged that the burden imposed by the Cook County signature requirement is severe, the defendants need not show any justification for it beyond Illinois's interest in orderly and fair elections. That interest easily justifies the signature requirement here.⁸

Note how each sentence flows logically into the next, satisfying the reader's expectations. In this, Barrett displays yet another aspect of good legal writing: the effective use of transitions. Effective transitions are the final step good legal writers apply to their drafts. After you have done the hard work of organizing your thoughts in a logical manner, it is then time to show the reader how your thoughts are connected. We call this flow, but learning to use transitions is about lot more than knowing when to use "however" and "therefore."

Focusing on flow in these two introductory paragraphs makes you appreciate how well Barrett ties her narrative together with a sophisticated used of transitions. Barrett creates coherence by using both explicit transitions and "substantive transitions." Substantive transitions use words from one sentence in the next sentence (or the sentence after that) to link them together. Legal writing textbooks use the carpentry metaphor of "dovetailing" to explain substantive transitions. As one book notes, "Carpenters use dovetail joints to fasten wood together without nails or screws. They simply cut the two parts in a way that allows them to fit securely and seamlessly together."9 This metaphor aptly describes the effectiveness and power of substantive transitions. Transition words (however, therefore, etc.) are the nails and screws in this metaphor. They work, but why stop there. Using substantive transitions binds sentences together so tightly you do not need nails or screws: the fit is perfect.

Using the words of one sentence in the next sentence gets the job done, but Barrett takes it to the next level by at times using the gist of words from one sentence in the next. In the example above, "a certain number of voter signatures" in the first sentence becomes "signature requirement" in the following sentence. This transformation of one phrase into the next (different but the same) is advanced substantive transition work. Barrett then applies substantive transitions in a more traditional manner by using the phrase "signature requirement" two more times to hold the first paragraph together (Barrett uses the phrase in the second paragraph for further coherence).

Barrett uses this same, sophisticated method of substantive transitions to link the two paragraphs. Here, though, her use of transformative substantive transitions is challenging because only readers versed in the law will see it. Barrett closes the first paragraph with a classic definition of strict scrutiny ("narrowly tailored to advance a compelling state interest") without using the term itself. In the second paragraph, Barrett uses the term strict scrutiny and says is not the appropriate standard of review. This is taking the technique of transformative substantive transition to its limit. I like it, but I will acknowledge that the linkage loses its value for any reader not trained in the law.

Even when it comes to basic explicit transition words, Barrett's writing is exemplary. Barrett opens the opinion with an explicit transition word ("Before"). This is unusual, but she does it because she knows the word provides a trajectory and progression when, two sentence later, she links it with "then." Logical, chronological, forward movement is a hallmark of good legal writing.

Finally, the signature-requirement example shows Barrett using still another tool of dynamic legal writing: She plants a powerful short sentence at the start of the second paragraph. Short sentences have rhetorical impact; they catch the reader's attention better than any fifty-word sentence ever has. Vary your sentence length, to be sure, but try the occasional two- or three-word sentence: they wake the reader up.

I will offer one more opening (also two paragraphs) which re-enforces the points I have already made about Barrett's legal writing style. Here is another compact yet comprehensive opening:

The police received an anonymous 911 call from a 14-year-old who borrowed a stranger's phone and reported seeing "boys" "playing with guns" by a "gray and greenish Charger" in a nearby parking lot. A police officer then drove to the lot and blocked a car matching the caller's description. The police found that a passenger in the car, David Watson, had a gun. He later conditionally pleaded guilty to possessing a firearm as a felon, 18 U.S.C. § 922(g)(1), but preserved for appeal his argument that the court should have suppressed the gun because the stop lacked reasonable suspicion.

We agree with Watson that the police did not have reasonable suspicion to block the car. The anonymous tip did not justify an immediate stop because

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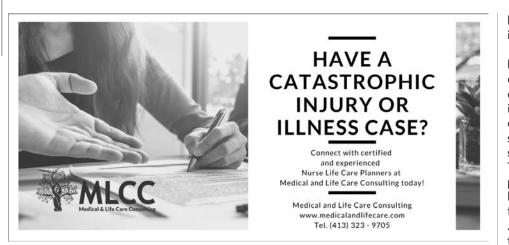
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the caller's report was not sufficiently reliable. The caller used a borrowed phone, which would make it difficult to find him, and his sighting of guns did not describe a likely emergency or crime—he reported gun possession, which is lawful. We therefore vacate the judgment and remand for further proceedings.¹⁰

Pretty much sums up the case, doesn't it? This opening follows still another principle of Plain English I hold dear: Keep the subject and verb close together at or near the start of the sentence. In every sentence of both paragraphs, the subject and verb are either the first two words in the sentence or, at the outside, within the first four words of the sentence. One legal writing textbook summarizes the linguistic theory behind this principle simply and succinctly: "a reader can't comprehend a sentence until she's read both the subject and the verb."¹¹ Telling your reader who is doing what to whom at the start of each sentence will improve their understanding of the point you are trying to make.

Notice also that the subjects of the sentences in these two paragraphs (as well as in many of the sentences of the earlier examples) are concrete nouns—people, places, and things—and not abstract concepts. One challenge of good legal writing is to translate the abstract concepts of legal analysis into concrete nouns all readers can understand, and Barrett does this consistently Clarity in legal writing does not happen by chance. Barrett's writing is clear and crisp because she applies the core principles of Plain English to most every sentence she writes.

Barrett's introductions are effective because she appreciates that the legal reader needs to know, right up front, the issue and the writer's position on it. Legal-writing expert Megan McAlpin contrasts legal writing with mystery novels. Mystery writers, she notes, "purposefully leave their readers in the dark."¹² We read mystery novels because we enjoy being fooled by a red herring. We try to spot clues, but are still pleasantly surprised by a plot twist at the end of the story revealing an unexpected culprit. Once all is explained, the excited reader "must go back and read the whole book from the beginning."¹³ Not so with legal writing. The busy legal writer needs to know right up front what the issue is and your position on it: do not hide anything. Barrett's approach to introducing issues and their resolution at the start of her opinions is an excellent model every legal writer should follow.

Sentence Length

Earlier I complimented Barrett for using the occasional super-short sentence. Here, I will compliment Barrett for her overall average sentence length. Legal writing experts agree that short sentences are a crucial component of good writing. Indeed, Bryan Garner ranks sentence length as a top concern: "As much as any other quality, your average sentence length will determine the readability of your writing."14 Noah Messing, in his book The Art of Advocacy, agrees: "The simple act of shortening sentences hones your prose, clarifies your points, keeps readers interested, and makes it easier for you to spot problems in your legal analysis."¹⁵ Messing recommends an average sentence length of 17-20 words per sentence, and that is what I recommend to my students as well.

Barrett's judicial opinions at the Seventh Circuit come in, on average, right in that range. Indeed, it is uncanny how closely she hues to this average. I scanned 15 of the 30 opinions I read (again, randomly) through Word's "readability statistics" program, and they all came in within the narrow range of 18.2¹⁶ to 22.7.¹⁷ The other opinions I scanned average 19.1, 19.3, 19.7, 20.2 (twice), 20.3, 20.5, 20.7, 21.1, 21.5, 21.6, 21.7, and 22 words per sentence, for an overall average of 20.59. I find this consistency remarkable, especially because it is so hard to write such relatively short sentences in legal writing.

Barrett also excels at another, lesser known indicator of good legal writing: average characters per word. I recognize that counting characters in words might be taking Plain English to the extreme, but shorter words are easier to understand. In the same 15 scanned opinions, Barrett averages slightly less than five characters per word. This, too, I find remarkable given the complexity of legal analysis. Messing, a true believer in the importance of short words, offers an appendix to his book containing over 2000 single-syllable verbs!¹⁸ You need not take it that far to agree with Messing that the goal of legal writing is to present your position in "absorbable, engaging prose."¹⁹ Barrett does this, and you can too. Shorter sentences and shorter words are easier to absorb and are generally more engaging. (In case you are wondering, this article averages 18.1 words per sentence and 5 characters per word; it has 3% passive voice.)

Voice

Vermont Law School Professor Catherine Fregosi discussed finding your "voice" in legal writing in her recent article for this column.²⁰ Professor Fregosi's article has since been recognized nationally by the Publications Committee of the Association of Legal Writing Directors in its quarterly review of legal writing scholarship.²¹ Professor Fregosi uses excerpts from the judicial opinions of Justice Elena Kagan, Justice Robert Jackson, and Chief Justice John Roberts to show "three examples of strong voices in legal writing."22 She describes Kagan's voice as "conversational," Jackson's voice as "oratorical," and Roberts's voice as restrained-Roberts's "voice lies in what is left out, rather than what is included."23

Professor Fregosi's excellent analysis of "voice" in legal writing prompted me to reflect on Justice Barrett's voice. Of the three voices Professor Fregosi describes. Barrett's voice is most aligned with the restrained voice of Roberts in that both of their voices are "conveyed through the art of precision."24 If pressed to give Barrett's legal writing voice a name, I would call it the voice of moderation. Modesty is an underrated aspect of advocacy. Cicero said an advocate should adopt "a mild tone, a countenance expressive of modesty [and] gentle language."²⁵ This describes precisely Barrett's writing style. Barrett's writing style and, indeed, her judicial temperament, appeal to me: Respect the parties, respect the law, resolve the dispute, and say nothing more.

I intend the following as high praise: In Barrett's writing, she's not there. In my view, in the best legal writing the writer disappears. The reader sees the writer's argument, not the writer. Even more so than in judicial opinions, in briefs and other persuasive writing by lawyers, the reader (the judge) should see the client's cause, not the lawyer's writing style. Judges face little consequence for artifice in judicial opinions; the risk to lawyers for any undue rhetorical distraction is real, and it's the client who will feel the pinch.

To explain what I mean by Barrett's moderate voice, I will contrast the opening paragraph of her first opinion for the United States Supreme Court with the opening paragraph of Neil Gorsuch's first opinion for the Court. Here is Barrett's introduction:

The Freedom of Information Act (FOIA) requires that federal agencies make records available to the public upon request, unless those records fall within one of nine exemptions. Exemption 5 incorporates the privileges available to Government agencies in civil litigation, such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege. This case concerns the deliberative process privilege, which protects from disclosure documents generated during an agency's deliberations about a policy, as opposed to documents that embody or explain a policy that the agency adopts. We must decide whether the privilege protects in-house drafts that proved to be the agencies' last word about a proposal's potential threat to endangered species. We hold that it does.26

This is a no-nonsense, straightforward explanation of the issue in the case and the Court's resolution of it (in a pithy, five-word sentence). The reader understands the question presented and its answer at once. All of the attributes of good legal writing I praised in Barrett's Seventh Circuit opinions are here. Barrett establishes flow and holds the paragraph together with effective substantive transitions (nine exemptions/ Exemption 5; the deliberative process privilege (twice) becomes the privilege; We must decide/We hold (cadence)). Every sentence is in the active voice (yeah!). But on a cautionary note, Barrett's readability statistics are not as good here as in her Seventh Circuit decisions (23 words/sentence; 5.8 characters/word on average). Let's hope that's not a trend!

Here is how Gorsuch introduces himself to the august body of Supreme Court jurisprudence:

Disruptive dinnertime calls, downright deceit, and more besides drew Congress's eye to the debt collection industry. From that scrutiny emerged the Fair Debt Collection Practices Act, a statute that authorizes private lawsuits and weighty fines designed to deter wayward collection practices. So perhaps it comes as little surprise that we now face a question about who exactly qualifies as a "debt collector" subject to the Act's rigors. Everyone agrees that the term embraces the repo man someone hired by a creditor to collect an outstanding debt. But what if you purchase a debt and then try to collect it for yourself—does that make you a "debt collector" too? That's the nub of the dispute now before us.²⁷

Gorsuch certainly has pluck for beginning his first Supreme Court opinion with a quadruple alliteration! True, his flow and use of transitions is just as good as Barrett's. But in my opinion the quality of his legal writing (which I praised overall in my earlier article) is undermined a bit by his frequent use of colloquialisms-the repo man-to connect with the reader. Gorsuch's writing style is too showy, too cloying, for my tastes. Worse, the showiness becomes predictable. A quadruple alliteration is cute and clever, but the same opinion contains a second quadruple alliteration ("Constant competition between constable and quarry"28) and one quintuple alliteration ("supposing such a surreptitious subphrasal shift"²⁹). Gorsuch often tries too hard to amuse.

Barrett's writing does not reach the soaring heights of Gorsuch's or Kavanaugh's best rhetoric, like the memorable opening line of Gorsuch's landmark decision on Indian Country: "On the far end of the Trail of Tears was a promise."³⁰ Or this, later in the same opinion: "None of these moves [encroaching on Indian Country] would be permitted in any other area of statutory interpretation, and there is no reason why they should be permitted here. That would be the rule of the strong, not the rule of law."³¹ Or this, from Gorsuch's concurrence in an opinion allowing the Catholic Church to ignore New York's Covid-19 capacity restrictions under a claim of religious liberty: "[W] e may not shelter in place when the Constitution is under attack. Things never go well when we do."32 Kavanaugh is worthy competition for Gorsuch in this regard, with witty aphorisms like this: "It is sometimes said that the bigger the government, the smaller the individual."33

But nor does Barrett's writing succumb to the irksome lecturing voice to which both Gorsuch and Kavanaugh are prone, For them, resolving a dispute is rarely enough; instead, they must intone sagaciously on the appropriate role of the Court in our tripartite system of government. Examples of this are easy to find in Gorsuch's opinions. Like, "[T]he proper role of the judiciary [is to] to apply, not amend, the work of the People's representatives."³⁴ Or, "[1]t is nev-



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er our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced."35 Or, "[U]nder the terms of the compromise [the framers of the 21st Amendment] hammered out, the requlation of alcohol wasn't left to the imagination of a committee of nine sitting in Washington, D.C., but to the judgment of the people themselves."36 Or, "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law."³⁷ Or, "Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations."³⁸ And here is a recent, representative sample from Kavanaugh (in a case that eviscerated class-action lawsuits against corporations): "Federal courts do not possess a roving commission to publicly opine on every legal question. Federal courts do not exercise general legal oversight of the Legislative and Executive Branches, or of private entities."39

Barrett applies the same textualist philosophy to her opinions but without all the preaching. For example, in one of her four Supreme Court opinions, Barrett interpreted the Computer Fraud and Abuse Act to conclude that a police officer who ran a license-plate search in the law enforcement computer database for money did not violate the Act.⁴⁰ To reach this conclusion. Barrett employs accepted textualist methods, but in an understated way. Her analysis begins with this simple-and unassailable statement: "[W]e start where we always do: with the text of the statute."41 But she does not follow this line with some solemn incantation about the role of the Judiciary and the limits of judicial review; instead, she follows this line with-the text of the statute!42 As is common in statutory interpretation, the resolution of this case came down to the meaning of one word. In this case, believe it or not, the defendant's culpability under the Act turned on the meaning of the word "so."⁴³ The details of the Act are not relevant for the purposes of this article. Suffice it to say that Barrett uses accepted textualist methods of defining "so," including dictionaries.⁴⁴ Barrett concludes that the contested provision containing the word so "is best read" to favor the defendant's position.45

Barrett's use of the phrase "is best read" is telling and sets her apart stylistically from Gorsuch and Kavanaugh. "Best read" suggests there is more than one plausible reading-reasonable people can disagree. Barrett reaches her conclusion through careful analysis, while acknowledging vulnerability-this is the best reading but not the only reading. This is a far cry from Gorsuch and Kavanaugh, who issue their pronouncements as inescapable conclusions upon which the very foundations of our three branches of government depend. Barrett's recognition of a legitimate difference of opinion evinces a tone of moderation, even humility, which is a welcome voice on today's Court.

Conclusion

Barrett's writing has it all-crisp and concise introductions that forthrightly explain the issue and the court's resolution; shorter sentences in the active voice held together with a sophisticated use of transitions; a voice of moderation in which she respectfully resolves the dispute while recognizing the legitimacy of competing views. Because of this, my advice in this article is simple: Write like Amy Coney Barrett!

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2019; and Terry v. City of Chicago, 932 F.3d 579 (7th Cir. 2019).

Walton v. EOS CCA, 885 F.3d 1024 (7th Cir. 2018); and United States v. Terry, 915 F.3d 1141 (7th Cir. 2019).

See, e.g., Jonathan Adler, This is the Real John Roberts, N.Y. Times, July 7, 2020 (referring to Chief Justice Roberts as a "judicial minimalist who seeks to avoid sweeping decisions with disruptive effects.").

United States v. Terry, 915 F.3d 1141, 1143 (7th Cir. 2019).

United States v. Atwood, 941 F.3d 883, 883-84 (7th Cir. 2019).

Avecedo v. Cook Cty. Officers Electoral Bd., 925 F.3d 944, 946-47 (7th Cir. 2019).

⁹ Megan McAlpin, Beyond the First Draft: Editing Strategies for Powerful Legal Writing 26 (Carolina Academic Press 2014).

¹⁰ United States v. Watson, 900 F.3d 892, 893 (7th Cir. 2018).

¹¹ McAlpin, *supra* note 9, at 93.

- ¹² McAlpin, *supra* note 9, at 8.
- ¹³ Id.

¹⁴ Bryan Garner, Legal Writing in Plain English 27 (Univ. of Chicago Press 2013).

¹⁵ Noah A. Messing, The Art of Advocacy 247 (Wolters Kluwer 2013).

- ¹⁶ United States v. Atwood, 941 F.3d 883 (7th Cir. 2019).
- ¹⁷ Torry v. Chicago, 932 F.3d 579 (7th Cir. 2019).

¹⁸ Messing, *supra* note 15, at 279-85.

¹⁹ *Id.* at 246.

²⁰ Catherine Fregosi, The Importance of Finding Your Voice as a Writer, 46 Vermont Bar J. 36 (2020).

²¹ Email announcement from the Publications Committee (on file with author).

- ²² Id. at 36.
- ²³ Id. at 36-39.

²⁴ Id. at 39 (Roberts's voice "makes the law seem simple by conveying the law in a level tone.").

²⁵ See Shelley Kierstead, Legal Writing, Therapeutic Jurisprudence, and Professionalism, 3 Suffolk Univ. L. Rev. Online 30-31 (2015) (quoting Cicero).

²⁶ U.S. Fish and Wildlife Serv. v. Sierra Club, Inc., U.S. ___, 141 S.Ct. 777, 783 (2021).

- ²⁷ Henson v. Santander Consumer USA Inc., ____
- U.S. ____, 137 S.Ct. 1718, 1720 (2017).
- ²⁸ Id. at 1726.
- ²⁹ *Id.* at 1723.

³⁰ McGirt v. Oklahoma, ___ U.S. ___, 140 S.Ct. 2452, 2459 (2020).

- ³¹ Id. at 2474.
- ³² Roman Catholic Diocese of Brooklyn v. Cuomo, U.S. ___, 141 S.Ct. 63, 71 (2020).
- ³³ Manhattan Cmty. Access Corp. v. Halleck, ____
- U.S. ___, 139 S.Ct. 1921, 1934 (2019).
- ³⁴ Hansen, 137 S.Ct. at 1726.
- ³⁵ *Id.* at 1725.

³⁶ Tennessee Wine and Spirits Retailers Assoc. v. Thomas, ____ U.S. ___, 139 S.Ct. 2449, 2484 (2019 (Gorsuch, J., dissenting).

- ³⁷ Bostock v. Clayton Čty., ____ U.S. ____, 140 S.Ct.
- 1731, 1737 (2019).
- ³⁸ Id. at 1754.
- ³⁹ Transunion LLC v. Ramirez, ____ U.S. ___, 2021
- WL 2599472, *6 (June 25, 2021). ⁴⁰ Van Buren v. United States, ____ U.S. ___, 141
- S.Ct. 1648, 1652 (2021).
- ⁴¹ *Id.* at 1654.
- 42 Id.
- ⁴³ *Id.* at 1654-58.
- ⁴⁴ *Id.* at 1655.
- ⁴⁵ Id.

See Seventh Circuit Opinions Authored by Supreme Court Nominee Amy Coney Barrett, available at https://supreme.justia.com/7th-circuitjudge-amy-barrett-opinions/

Doe v. Purdue Univ., 928 F.3d 652 (7th Cir. 2019).

Rainsberger v. Benner, 913 F.3d 640 (7th Cir.

BE WELL The Hand Brain Model

I recently learned a portable way to view the most important parts of the brain, in relation to mindfulness and well-being: your own hand! Dr. Dan Siegel has created a "Hand Model of the Brain" (see image below) that allows each of us to begin to understand the parts of our own brain.¹ This is important because when you know about the parts of the brain, you can learn to direct your attention in a way that can get certain areas to not only get activated, but also to start to work together. Thus, you can change both the <u>function</u> and the <u>structure</u> of your brain by knowing about how the brain is structured.

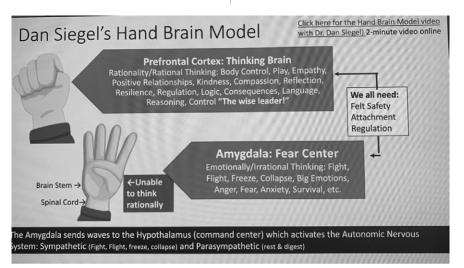
Overview of the areas of the brain and how they link together:

- Start with a closed fist. The entire hand/ brain is connected to the body through the spinal cord, represented by the wrist.
- <u>Brain Stem</u> (represented by the center of the palm) – the deepest and oldest part of the head brain, takes in information from the body and regulates how you breathe, how you digest food and how your heart functions.
 - Important set of regions in the brain stem create the fight/flight/freeze/ faint reaction when you feel threatened. Creates a reactive sympathetic state.
 - Works closely with the limbic region

 a 200-million-year-old region of the brain that works with the 300-millionyear-old reptilian brain. Combined these two oldest parts of your brain create emotion in working with the body.
- Lift up the fingers the thumb represents the <u>Limbic System</u>, which functions closely with the <u>Cortex</u> region of the brain (discussed below when you

close your fingers down). The important functions of the Limbic System include:

- Connections up to the cortex above
- it.Connections down to the area below it, the brain stem of the palm.
- The body, brain stem and limbic area create emotions. "Unable to think rationally."
- The limbic system motivates us and drives our behaviors.
- It appraises the meaning of things, whether they are significant or not, good or bad.
- Creates the attachment experience we have as mammals with caregivers to protect us and we can be soothed by them.
- Certain ways memories are divided up into the <u>Hippocampus</u> and <u>Amyg-</u> <u>dala</u> region.
 - The <u>Amygdala</u> is a part of the Limbic system, AKA the Fear Center:
 - Emotionally/Irrational thinking
 - Collapse
 - Big Emotions: Anger, Fear, Anxiety, Survival
 - Nervous System is triggered:
 - Amygdala sends waves to the Hypothalamus (Command Center), which activates the autonomic Nervous System, both Sympathetic (Fight/Flight/ Freeze/Faint) and Parasympathetic (Rest/Digest/Heal)
- Top of the brain <u>Cortex</u>
 - The <u>Cortex</u> region (all four closed fingers) makes maps of the outside world through our eyes and ears
 - The <u>Frontal Cortex</u> (area between the two knuckles) is known as the association cortex where you make associations in thought.



- <u>Prefrontal Cortex</u> (last knuckles to your fingernails) involved in integration, integrates the Cortex with the Limbic system, brain stem, body and even the external social world. AKA "The Wise Leader", the important functions of the Prefrontal Cortex include:
 - Rationality/Rational Thinking
 - Body Control
 - Play
 - Empathy
 - Positive Relationships
 - Kindness
 - Compassion
 - Reflection
 - Resilience
 - Regulation
 - Logic
 - Consequences
 - Language
 - Reasoning
 - Control

When you do an awareness/mindful practice, you are integrating the entire system. This is essential for feeling safe, attachment and emotional regulation. When you are not integrating the brain systems, it can become chaotic, like flipping your lid (lift up the fingers on the hand brain model). Thus, instead of living with harmony within yourself and harmony in connection with others, you are literally becoming chaotic with an outburst or rigid and withdrawn. When the Prefrontal region (lift up fingers) is no longer linking with the rest of the system, it has become dis-integrative. There are some interesting Connectome brain studies that show that the best predictor of your overall well-being is how interconnected your brain is.²

Thus, anything you can do to bring a connection of these areas promotes integration and will increase your overall well-being. Integration of your entire brain is the source of well-being with others and even with nature. Integration stimulates both creativity and collaboration, two of the most effective ways to increase your overall productivity in your legal profession as well. It is my hope that other lawyers may use the Hand Model of the Brain to know the different parts of the brain, to understand how they may be be differentiated when you are emotional, and then be open to ways of integrating them together in a mindful practice. It is my hope that you may utilize this brain integration to increase your overall well-being as lawyers.

² See http://www.humanconnectomeproject. org/

¹ See https://drdansiegel.com/hand-model-ofthe-brain/

Five Things You Can Do to Help Keep Your Malpractice Insurance Premium in Line

I have been a risk manager here at ALPS for well over two decades now, which helps explain why I personally view the purchase of legal malpractice insurance as a necessary expense. Having to face the fallout of a malpractice misstep while uninsured is something I would never wish upon any lawyer because, for some, the final outcome can so easily be a tipping point toward financial ruin. That said, the interesting issue for me is the affordability question; and while reasonable minds are free to disagree as to the definition of affordability in this context, I thought sharing five tips as to how one can favorably influence a quoted rate¹ might be useful. After all, everyone wants to save a little green whenever and wherever they can.

When I was much younger and in the early years of adulthood, the initial deductibles I chose for my homeowners and auto policies were low for a hopefully obvious reason. Cashflow in the early years meant that I couldn't easily afford to cover a high deductible in the event of a claim. Of course, over time, my financial situation improved to the point where I could afford to take on a bit more of the risk, which is when I started to responsibly raise my deductible as a way to save a little money. So, my first tip is if you can afford to take on additional risk, consider raising your deductible.

Tip number two is a bigger deal than many lawyers seem to think. Let me start by saying I do realize, and in fact agree, that all lawyers deserve to be paid for all of the legal work they do. I also sympathize with the view that malpractice insurers should mind their own business and not dictate how any lawyer should run his or her practice. Unfortunately, for some lawyers there is an elephant in the room, which is failing to accept the reality that there really is a strong correlation between aggressive collections actions and malpractice claims. If you regularly sue for fees, meaning 2-3 times or more every year, that decision is costing you money. Thus, tip number two is if you regularly sue for fees, consider stopping this practice and focus on finding ways to prevent serious delinquencies from ever developing in the first place.

Now, I have a question for you. If you wanted the best price for a home you are about to sell, what would you do to try and get the best price? I think most sellers would do all they could to spruce up the place. It's all about trying to show their home in the best light. In short, presentation matters in all kinds of financial transactions, be it a loan application, selling property, or an applica-

tion for malpractice insurance, which brings me to tip number three. Your application is the one chance you have to set the right impression so make the most of it. For example, never submit a poorly written or partially completed application. Make sure every question is answered honestly and thoroughly. If the application happens to be a renewal application, never sit on it until the last minute. Do all you can to see that it's submitted well in advance of the deadline. Again, the information you are presenting and how you present it matters.

I think it's safe to say every lawyer understands that a firm's claims history impacts the premium number. All things being equal, a firm that has never reported a claim in the last five years will pay less than a firm that has reported four claims in the past five years, two of which resulted in a six-digit loss payout. Accordingly, tip number four is to encourage you to proactively manage your firm's claims history by way of a robust risk management program. I would hope that it goes without saying that insurers prefer to insure firms that consistently use engagement and closure letters, rely on effective rulesbased calendaring and docket control systems, have deployed a state of the art conflict checking system, and regularly conduct file review just for starters. Time spent on developing and maintaining risk management processes and procedures will be well worth it in the long run.

Finally, I'd like to briefly talk about car insurance rates. The cost to insure an expensive performance car such as a Porsche 911 or an Audi A8 is going to be far higher than insuring something more budget friendly such as a Hyundai Tucson or a Subaru Outback. The reason is the associated risks with the class of cars these vehicles represent are not the same. In a similar vein, the associated risks with any given practice area can vary greatly. This is why premiums for criminal defense lawyers are lower than those of plaintiff personal injury lawyers. With this in mind, tip number five is to have you do what you can to minimize the associated risk of your practice areas.

Here are a few ideas as to how to do this. Make sure your application and every renewal application accurately reflect the areas of practice you currently practice in. For example, if you transitioned away from divorce law the past year or so, make sure to remove that practice area from your current application. The risk profile of a broad-based general practitioner is different than that of a specialist, so consider limiting your practice areas if you are more of a generalist. And last, but not least, don't ever dabble in any practice areas you have limited experience with. Straying from the practice areas you normally focus on is a bad idea. I liken that to taking a Porsche 911 out on a racetrack before ever taking the time to learn how to drive a performance vehicle like that. So not a good idea.

ALPS Risk Manager Mark Bassingthwaighte, Esq. has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology. Check out Mark's recent seminars to assist you with your solo practice by visiting our on-demand CLE library at alps. inreachce.com. Mark can be contacted at: mbass@alpsnet.com.

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¹ For additional information on how the cost of malpractice insurance is determined see: https://www.alpsinsurance.com/about/true-cost-of-legal-malpractice-insurance

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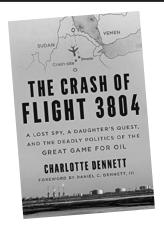
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BOOK REVIEW



"The Crash of Flight 3804 - A Lost Spy, A Daughter's Quest, and The Deadly Politics of the Great Game for Oil" by Charlotte Dennett Reviewed by Mark Oettinger, Esq.

The author of *The Crash*, Charlotte Dennett, is a Vermont lawyer. This is her third book. Charlotte is an investigative journalist. She was born to US parents in Beirut in 1947. At the time, her father was nominally a cultural attaché at the US embassy in Lebanon. In fact, that was his cover. He was ac-

tually a spy whose mission, immediately following the end of World War II, was to advance US interests in the upcoming laying out of the route of the Trans-Arabian Pipeline. He and 5 other US citizens died when their plane crashed mysteriously in Ethiopia. Charlotte had just been born at the time of the crash.

Immediately following graduation from college, Charlotte served as a journalist in the Middle East, from 1972-1975. She is a painstaking researcher. Her familiarity with the places and the people recounted in the book allow her to convey the events vividly and with insight. The book has numerous maps which afford the reader a helpful reference to the geography of the region. I say "reference" quite intentionally, since *The Crash* is not a casual read. It is a gripping and true story wrapped in a deep and complex series of lessons in geography, history, economics and politics.

I had the unusual opportunity of being able to invite Charlotte over to my house for a discussion of the book over coffee on a Saturday morning. One of my first questions was, "Why oil?" Why not gold, or timber, or something else? Her answer was immediate and simple. "Because the military runs on oil!" Having access to more oil means being able to successfully wage war, and being able to defend our national security. Likewise, to the extent that oil is a finite resource, more for us means less for our enemies to wage war against us, and less for them to defend themselves against us. In some ways, I am a rather pollyannish person, and this answer surprised me, although I suppose it shouldn't have. After all, the time was 1947, shortly after the devastation of World War II. And that war was a "conventional" war, not one with nuclear-powered ships and submarines, or drones and ICBMs.

The economics and politics of oil are way beyond my knowledge base, but Charlotte points the reader to the *Red Line Agreement* of 1928, wherein the industrialized world's oil companies essentially "divvied up" the oil interests of the Middle East. History teaches us that industrial know-how has often led to the plundering of natural resources. A related historical event was the 1945 shipboard meeting between Franklin Delano Roosevelt and Ibn Saud on Great Bitter Lake in the Suez Canal. The contemporary environment of public international law



(a subject near and dear to my heart), particularly the United Nations Convention on the Law of the Sea (UNCLOS), deals with the complex subject of nation-state rights to oil, gas and other off-shore natural resources. The Crash of Flight 3804 certainly showcases a constellation of complex and thoughtprovoking topics!

Because I was a government employee for a number of years, there was another part of the book that I found fascinating. Much of Charlotte's underlying research came from CIA archives. For those of you who are familiar with "public record requests" and/or their federal counterparts, Freedom of Information Act (FOIA) requests, you know how difficult it can be to obtain release of government documents. Vermont law on public records is found at 1 V.S.A. Chapter 5, Subchapters 2 and 3, Sections 310-320. 42 exemptions to public disclosure can be found in Section 317(c) alone. Those exemptions, in turn, incorporate all of the other exemptions that can be found throughout the Vermont Statutes Annotated. The Reporter's Notes list 264 exemptions in all, and make it clear that even this list may not be comprehensive.

You can therefore just imagine the CIA's reaction when, in 1999, Charlotte filed an extensive FOIA request to obtain documents related to her father. After a lengthy delay, she was largely denied on national security grounds, and she appealed. Through a convoluted and largely political process, she eventually prevailed, and got most of what she was looking for (although her quest continues). The long-awaited disclosures involved the declassification of an extensive volume of documents, and eventually led to the lionization of her father as the CIA's first "Fallen Star." She even got a personal

audience with the director of the CIA! You can read more about the early stages of this process in Charlotte's article in the Summer 2005 issue of the Vermont Bar Journal.

The fact that Charlotte writes about her very own father is a particularly compelling part of the book. In that sense, the narrative is part personal exploration, and part catharsis. The work is scholarly, informative, insightful and compelling.

Mark Oettinger is an attorney with the Burlington, Vermont law firm of Montroll, Backus & Oettinger. He is chair of the VBA's International Law & Practice Section, has volunteered extensively in the international promotional of rule of law, and teaches and writes on public and private international law.

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IN MEMORIAM

Erick E. Titrud

Erick E. Titrud passed away at his home in Moretown on June 8, 2021, with his family by his side. Born on June 23, 1958, in Minnesota, Eric came to the Vermont Law School in 1981 and never left. Eric loved everything about Vermont -all seasons and all people. He began his legal career at the Chittenden County State's Attorney's Office, spent years practicing public environmental law at the Office of the Vermont Attorney General where he played a major role in Vermont's battle against acid rain, and later served his own clients at his solo practice. Eric served on the Moretown Development Review Board for nearly two decades and was Moretown's representative to the Valley Mad River Park Committee. He enjoyed skiing, ultimate frisbee, playing the violin with the Montpelier Chamber Orchestra, being a ski instructor and spending time with his family, friends and his dog. He is survived by his two daughters, ex-wife, three sisters and extended family.

James P. Carroll

James P. Carroll, 81, died July 2, 2021, in Rutland. He was born on October 13, 1939, in Rutland and was a graduate of Rutland High School, Yale University and the University of Virginia Law School in 1964. Jim served active duty as a US Army Infantry Captain from 1965-7. He was a founding partner of Carroll, George & Pratt and a long-time member and officer of the Rutland County Bar Association. Jim was known for his wit and legal and athletic acumen. He is survived by a niece and was predeceased by a brother. VP.

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Following training, officers will find themselves assisting soldiers and retirees, advising military commanders, and representing the Vermont Army National Guard in administrative matters. Position assignments include the Office of the State Judge Advocate at Camp Johnson in Colchester, Vermont; the 86th Infantry Brigade Combat Team (Mountain) at the Joint Readiness Center in Jericho, Vermont; and the Trial Defense Detachment based in Williston, Vermont.

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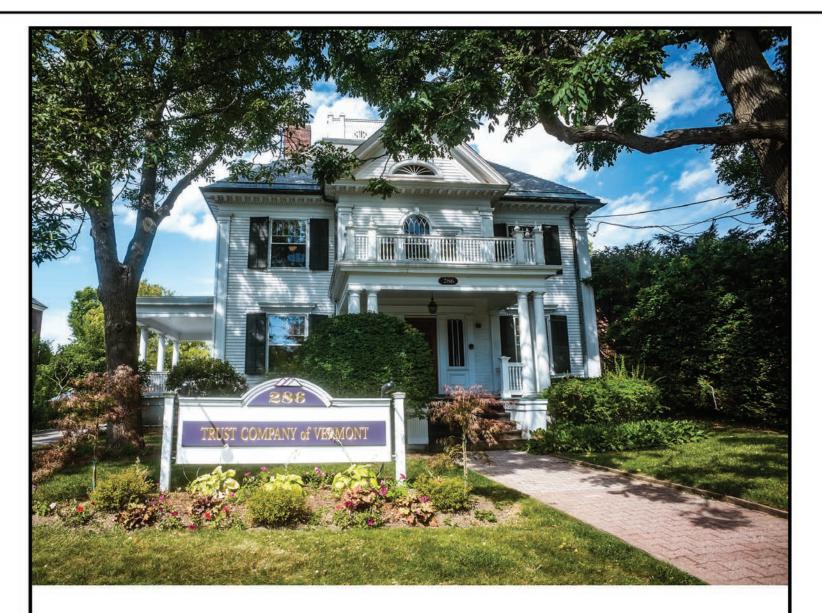
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