

**IN A CREATIVE VOICE:
TALKING BACK TO LAWYERS' TEXTS IN
NOTES FROM A DIFFICULT CASE**

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In her legal and literary writing, Ruthann Robson—law professor, novelist, essayist, poet—continually crosses borders between professional and personal voice in ways that reveal the power of each. Recently, a conference paper I presented, “Further Reflections on Voice in Legal Writing Pedagogy: Negotiating the Space Between Lawyerly Discourse and Creativity,” addressed questions of voice and border crossing explicitly. The paper considered law students’ struggles to gain fluency in a professional voice and their efforts to hold on to the capacity for creativity in their writing as they begin to work within the formal, often alienating structures of law. It proposed classroom exercises to help students enter the space between formal writing and personal voice, including discussion of Ruthann’s prize-winning essay, *Notes from a Difficult Case*.² Examining how *Notes* draws attention to disjunctions between professional and non-formal discourse, the paper suggested how *Notes* can help lawyers-in-training begin to assess when language is appropriately “legal,” and how legal language can more appropriately document human experience. Building on these observations, in this essay I reflect further on voice and creativity, and on *Notes from a Difficult Case*.

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I think of *Notes* as an exploratory text because it defies easy categorization as a genre. Perhaps it is best described, as it has been anthologized, as “creative nonfiction”—fact-based writing

¹ The title is a reference to Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163 (1993).

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² Ruthann Robson, *Notes from a Difficult Case*, in *IN FACT: THE BEST OF CREATIVE NONFICTION* 226 (Lee Gutkind ed., 2005).

having qualities of fictional narrative³ that stakes out a distinctly personal point of view,⁴ while pointing to a reality beyond the writer's own experience.⁵ Among other things, *Notes* is a poignant and painfully candid meditation on Ruthann's personal health crisis and on her responses as a lawyer, and possible litigant, to a misdiagnosis and other potentially life-threatening medical errors. Its discussion of what her medical malpractice complaint might look like, both as a legal pleading and as a narrative of personal anguish, illuminates the working of formal language, both legal and medical, and the knowledge it structures, in an intensely personal context.⁶ And it offers a framework for thinking about how legal writers negotiate the space (*not* a seamless border) between professional genres and non-legal language.

A "mixed genre" such as *Notes* engages questions of voice, language, audience, and creativity that legal writers always confront when we write in the more specialized modes and structured forms of professional discourse. The excerpt from *Notes* that follows raises these questions about writing and a lawyer's perspective explicitly, and I would offer it as a way to begin a reflection on the lawyer's role as professional communicator. I propose a close reading of this text, with attention to its shifts in language and tone, and to how it sets up a disjunction between professional and personal voice, while modeling ways in which a legal writer can engage both.

³ Lee Gutkind, *The Creative Nonfiction Police?*, in *IN FACT: THE BEST OF CREATIVE NONFICTION XIX, XIX-XX* (Lee Gutkind ed., 2005).

⁴ *Id.* at xxiii.

⁵ *Id.* at xxvi-xxvii.

⁶ In a note at the conclusion of the anthologized version of *Notes*, Ruthann writes that she turns to creative nonfiction when she is "most resistant" to "conventional" ways of understanding facts, and that in *Notes* she wanted to view the same facts filtered through both legal and medical knowledge as well as the "lens of embodied and emotional experiences seeking an epistemology." Robson, *supra* note 2, at 244. In this focus on rendering *knowable* the *facts* of personal physical and emotional experience, Ruthann raises problems of epistemology and writing/representation that also confront historians of trauma. Much in the way that her intimate, self-exposing narrative of illness engages with the formal languages of medicine and law, historian Dominick LaCapra has identified an "affective dimension of historical understanding" about trauma in both its historical and "transhistorical" or "structural" aspects that similarly draws sustenance from different disciplinary languages and structures of thought—in LaCapra's inquiry, from historiography, literature, literary and psychoanalytic theory. Despite real differences in context and audience, both the personal narrative of illness and historiography on trauma can illuminate a range of affective responses to crisis and risk, and their aftermath, including survivorship, in the way they call upon a variety of languages. DOMINICK LACAPRA, *WRITING HISTORY, WRITING TRAUMA* 44-46, 76-77, 183-86, 204-05, 218 (2001).

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The excerpt opens with a sense of paradox:

*The circumstances of my ordeal are both simple and complicated.*⁷

It continues with a speculation, inviting us to consider a hypothetical circumstance:

They could be allegations on a complaint, numbered and neat, and augmented by specific dates and quotes from the defendants' own records:

1. *On such and such a date, the patient plaintiff was seen by the chief sarcoma surgeon, who observed that the plaintiff had a "very large abdominal mass and lesions in the liver consistent with liver metastases."*

2. *On a date approximately a week later, the patient underwent a liver biopsy, for which the cytology report read "suspicious cells present" on "scanty evidence."⁸*

Building to some kind of crescendo, it strings together a series of increasingly arcane medical terms, one bloated clause spilling over into the next:

3. *On a date approximately another week later, the patient plaintiff was seen by the oncologist, who told her that she had an "extensive intra-abdominal, presumed soft-tissue sarcoma, probable liposarcoma, with hepatic metastases" with no "curative potential," and "no role for surgical intervention at this time, given the presence of metastatic disease."*

4. *On yet another date yet another week later, the patient was ordered to have a biopsy of the abdominal mass, the surgical pathology report for which was liver biopsy with the diagnosis of "well-differentiated lipoma-like sarcoma."⁹*

As Ruthann begins to reframe this clinically precise language into less formal terms, she announces an act of translation:

Meaning that within these four weeks, the patient was first diagnosed with liver metastases by the famous sarcoma surgeon, given a liver biopsy to confirm this judgment on "scanty evidence" that showed "suspicious cells," then told she was incurable by the oncologist because of liver metastases, and then given another biopsy of the abdominal tumor, which was mislabeled a biopsy of the liver.¹⁰

Adding another layer of translation, she continues:

In other words [and this alerts us that she is shifting to the vibrancy and directness of an even more informal idiom] the doctors screwed up their biopsies.¹¹

⁷ Robson, *supra* note 2, at 227.

⁸ *Id.*

⁹ *Id.* at 228.

¹⁰ *Id.*

¹¹ *Id.*

Then she prepares us for a return to the language of legal pleadings:

Later, the complaint would introduce the expert opinions from oncologists and oncology textbooks.

32. *There has never been a case in which liposarcoma has metastasized to the liver.*

33. *Well-differentiated liposarcoma is a non-metastasizing lesion.*

34. *Chemotherapy is ineffective on well-differentiated liposarcoma.*¹²

And she offers us a further translation:

*In other words, the doctors screwed up more than the biopsies.*¹³

By recasting the hypothetical complaint's catalogue of medical errors into language that resonates with her personal perspective and experience, Ruthann's words leave no doubt where agency and responsibility reside, and underscore the consequences, and the personal impact, of those errors:

*The doctors at the famous cancer center were wrong when they pronounced me hopeless, incurable, and inoperable because of liver metastases, not knowing that liposarcoma, in its well-differentiated state, does not metastasize. Even if it becomes poorly differentiated, liposarcoma does not metastasize to the liver. I was misdiagnosed and mistreated.*¹⁴

At this point in the text, she explicitly names the juxtaposition, the shifting back and forth between formal and informal idioms, as the work of translation:

*"Screwing up," translated into legal language, is a breach of the duty of care. "Deviation from the applicable standard of care" is one of the elements necessary to establish a cause of action for medical malpractice.*¹⁵

Calling attention to what is, and what is not, considered salient and cognizable in the law, her language takes on the clipped, truncated quality of negation, of that which cannot be:

*My complaint would omit facts that are not legally relevant: details that do not establish breach of the duty of care and may not be objective or provable. I do not recall the dates of these occurrences, and if they appear at all in the medical records, those narratives would differ from mine. These are the legally irrelevant facts that subsume my complaint.*¹⁶

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 229.

¹⁵ *Id.*

¹⁶ *Id.*

And here, the language of legal irrelevance makes up in rhetorical force what it lacks in legal efficacy:

The surgeon's secretary called me and told me the liver biopsy confirmed metastasis. His secretary. Who could not answer my questions. Who did not have a soothing voice. Who was not a surgeon.

The oncologist, when questioned, repeatedly told me that of course she/they were correct that surgery was useless because she/they were at the world-famous cancer center. Though, perhaps, she admitted, I could find "someone off the street to do surgery."

The oncologist smirked—I swear—when I lost my previously waist-length hair.

Despite my protests, I was repeatedly advised to take tranquilizers, given prescriptions for Ativan, and referred to a psychiatrist to help me deal with "it."¹⁷

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In the flat, atonal language of social science, she offers for seemingly detached consideration what is at bottom a stunning revelation:

According to several studies, the decision whether to sue for medical malpractice is not necessarily related to the degree of the doctor's negligence or fault, or to the degree of the patient's injuries, including death.

Instead, the most consistent variable is something that is named as compassion, caring, or communication.¹⁸

Something that is named as compassion—a quality so absent from the formally precise language of medicine and law as to be incommensurable with it—is only approximated by the resort to naming.

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Notes goes on to explore the ways in which the law was unable to offer recompense when, happily, "legal" damages are mitigated by Ruthann's recovery. And it underscores how formal legal discourse was completely inadequate to convey her experience of pain and anguish, and a sense of erasure by the medical establishment to which she had entrusted her care.¹⁹ Drawing attention to

¹⁷ *Id.* at 229-30.

¹⁸ *Id.* at 230.

¹⁹ In a similar spirit, physician Danielle Ofri, a participant in the Symposium's Law and Literature panel, has recounted the lack of resonance of medical language as she edged toward an emotionally wrenching disclosure to a young mother, and the woman's aunt, that the woman was HIV-positive. Finding Dr. Roget's supply of synonyms—and euphemisms—of no help, Ofri is left only with "convoluted clauses" until ultimately she eschews language entirely:

[T]here was a relief in the absence of words. A relief to escape tongue-

the need to accommodate legal doctrine and rhetoric to human experience, *Notes from a Difficult Case* illuminates why lawyers, no less than doctors, must see a client's or a patient's situation as more than a potential "cause of action" or a diagnosis. Rather, we must have a capacity to bridge the distance between, on the one hand, the professional language and structures of thought in which we have been trained, and, on the other, a voice that recognizes and responds to the personal subject behind a professional's problem. In a similar vein, my Symposium co-panelist Dr. Danielle Ofri has described how she draws on work in the humanities in her clinical practice, asking the interns she supervises to read and reflect on poems to help them develop the capacity to listen—to "hear the metaphor" behind a patient's speech.²⁰

The sociologist Arthur Frank refers to the act of telling stories about illness as an effort to "give a voice to an experience that medicine cannot describe."²¹ Frank, who is himself a cancer survivor, identifies the "post-colonial voice" of the person who has experienced illness—a voice that resists medical colonization and resists being reduced to "clinical material" in a medical text.²² If the project of medicine as a scientific and administrative discourse is to acknowledge the patient as a disease-bearing body,²³ and if its

twisting jargon, those lumbering, multisyllabic words intoned from textbooks, thesauruses, and professors; polyphonous clinical terms that were supposed to capture the essence of the disease. Words that I'd rehearsed and memorized, words that I'd thought would clarify and explain, but in fact served only to stymie. It was a relief to escape their tyranny and to lapse, for a moment, into the sanctuary of the nonverbal world—a world that required only the physical lexicon of the body. We cried together, sharing a language that paid no heed to linguistic proprieties, socioeconomic differences, or ethnic barriers.

DANIELLE OFRI, *SINGULAR INTIMACIES: BECOMING A DOCTOR AT BELLEVUE* 180-82 (2003).

²⁰ For examples of Danielle Ofri's integration of humanities and medical practice at Bellevue Hospital, see <http://www.danielleofri.com>. See also Ofri, *supra* note 19.

²¹ ARTHUR W. FRANK, *THE WOUNDED STORYTELLER: BODY, ILLNESS, AND ETHICS* 18 (1995).

²² *Id.* at 10, 12. The burgeoning literature on narrative medicine reflects similar perspectives. As noted, an increasing number of medical clinicians assign reading and writing in the humanities to guide their mentees toward a reflective, empathetic approach to professional communication that is attentive to patient's voices. See, e.g., discussion of Dr. Rita Charon's work for the Program in Narrative Medicine at the College of Physicians and Surgeons at Columbia University, at <http://www.narrative-medicine.org>. Among other projects, Dr. Charon requires her third-year students in internal medicine to write narratives ("parallel charts") about their interactions with patients. Preliminary findings from an outcomes study on this project suggest that the students who have written in this way have improved their interviewing skills and strengthened therapeutic relationships.

²³ FRANK, *supra* note 21, at 144-45.

“ideological work” is to facilitate the patient’s acceptance of a “diagnostic identity,” the antidote is the ill person’s testimony, or self-story—“[s]peaking in a voice recognizable as one’s own”²⁴—in which the ill person achieves parity with the authoritative professional voice.²⁵

Offering us writing about law that is infused with a literary sensibility, and that models how language can affectingly convey an experience that is intensely human, *Notes* similarly offers a post-colonial voice. *Notes* makes us confront and analyze closely our own sense of “lawyerly” language, and encourages us to question why and when that language seems to fall short. It keeps us focused on how achieving a voice that is appropriate to its context, audience, and purpose requires a willingness to think outside of the lawyerly-formal/non-lawyerly-informal categories. And it helps us to see that good “legal” writing in a professional voice does not necessitate losing one’s personal writing voice, or one’s creativity. As Ruthann so fearlessly shows us in *Notes*, voice need not be imposed upon us as legal writers. To borrow Arthur Frank’s words, voice is a modality that must be claimed or reclaimed.²⁶ And when we do that, when we step back from, and talk back to, the professional texts that can seem so oppressive, so removed from personal experience, our own and that of our clients, we reconnect our writing to human need, aspiration, and desire. And it is then that we create the conditions for producing work that, like *Notes from a Difficult Case*, is evocative, creative, and powerfully post-colonial.

²⁴ *Id.* at 71.

²⁵ *Id.* at 145.

²⁶ *Id.* at 11-13.