Avoiding the Curse of *Whetherornot*

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The Basic Problem: The Curse of *Whetherornot*

In the box-office sensation *Independence Day*, Earth is invaded by hordes of aliens with villainous motives and glass jaws. As the world watches in horror, the President of the United States calls a hasty press conference. In a futile effort to project an image of one who ought to be in charge at such a time, he strides up to the microphone and announces, in convincingly presidential language: "The question of whether or not we are alone in the universe has been answered."[1] This line was judged by the film's producers to be such a wonderful slice of prose that it later became the centerpiece of an extensive ad campaign.

This dramatic scene is probably, if nothing else, the only realistic moment in the movie. In fact, if superintelligent visitors from another planet tried to learn the English language by listening to Presidents and lawyers, they would quickly surmise that our favorite word is *whetherornot*. But they would never guess that we have a word like *whether* that carries some unique meaning apart from the suffix *-ornot*.

Actually, for the benefit of aliens who are new to our language — and for the many experienced lawyers who have forgotten its basics — English does contain the word *whether*, as well as the phrase *whether or not*, and the two serve different purposes. The distinction is straightforward and can be found in any worthwhile basic text on grammar or writing. *Whether or not*, properly used, is a standard idiom signifying "regardless of whether" at the beginning of an adverbial clause, as in "we will visit her *whether or not* she wants to be alone." For example, declaratory relief is

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[1] INDEPENDENCE DAY (20th Century Fox 1996).

available in federal court at the request of "any interested party seeking such declaration, *whether or not* further relief is or could be sought."[2] That statute is grammatically correct because declaratory relief is available in either case — if you could get damages, and even if you couldn't.

Far more often, however, *whether* is used by itself to introduce a choice, as in "we asked *whether* she wants to be alone." (In slightly more technical jargon, *whether* is being used to introduce a noun clause, as opposed to an adverbial clause.) In that context, the words *or not* are always superfluous because *whether* already implies that we asked her to choose between the two alternatives: being alone or not being alone.[3] The next time the skies are filled with alien spacecraft, the President should remember to say: "The *question whether* we are alone in the universe has been answered." It is shorter, more dramatic, and grammatical to boot. (The careful reader might note that I actually improved the original line in two ways: omitting the redundant *or not*, and also shortening *question of whether* to *question whether*.[4])

This distinction is second nature to most high-school graduates, but it's lost on most lawyers. As a law student, judicial clerk, and litigator, and now as a law professor, I have spent the past 17 years in the daily company of lawyers, law students, judges, and professors, listening to them in person and on television, and reading transcripts of things they've said in court. For many years, I've observed that well over 90% of them use *whetherornot* indiscriminately, if not incessantly, even when they really mean

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[2] 28 U.S.C. § 2201(a) (emphasis added).

[3] *See* BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 930 (2d ed. 1995) ("Despite the superstition to the contrary, the words *or not* are usually superfluous, since *whether* implies *or not*."); KENNETH G. WILSON, THE COLUMBIA GUIDE TO STANDARD AMERICAN ENGLISH 465 (1993) (stating that *or not* should be omitted in this context); HARRY SHAW, DICTIONARY OF PROBLEM WORDS AND EXPRESSIONS 358 (1975) (calling *or not* "unnecessary" and "mere filler").

[4] *See* GARNER, *supra* note 3, at 727 (condemning *question as to whether* and *question of whether* as "common prolixities").

whether. This figure does not include first-semester law students, who have not yet begun the tragic process of learning — and unwittingly teaching one another — "how to talk like a lawyer."

In my experience, the lawyers in the grip of this madness are never aware of it, and they'll deny it vigorously if you challenge them. But it is a fact. The persistence of this linguistic occupational hazard reflects the inherent legal preference for spelling out the obvious, and it arose out of the same impulse that gave rise to such old favorites as "rest, residue, and remainder." The sorry truth is that "a lawyer never uses one word when two or three will do just as well."[5]

Although the indiscriminate abuse of *whetherornot* is common in oral expression, it is less frequent in highly polished legal writing, where some editor or law clerk usually manages to catch it along the way. But not always. Justice Stephen G. Breyer, for example, makes this mistake with great regularity in his Supreme Court opinions. He recently wrote for a unanimous Court: "The case here focuses upon the legal standard for determining whether *or not* their behavior was improper."[6] In Justice Breyer's first four terms on the bench, he has already made this mistake over two dozen times in a total of 17 opinions, 8 of which were unanimous opinions for the Court.[7]

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[5] Coca Cola Bottling Co. v. Reeves, 486 So. 2d 374, 383-84 (Miss. 1986) (adding that "[t]he legal mind finds magnetic attraction in redundancy and overkill"); *see also* RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS 1 (3d ed. 1994) ("We lawyers do not write plain English. We use eight words to say what could be said in two.").

[6] Atherton v. FDIC, 117 S. Ct. 666, 669 (1997) (emphasis added for the words *or not*, as throughout this article).

[7] *See, e.g.*, Federal Election Comm'n v. Akins, 118 S. Ct. 1777, 1788 (1998); Trest v. Cain, 118 S. Ct. 478, 481 (1997); Young v. Fordice, 117 S. Ct. 1228, 1237, 1239 (1997); Barnett Bank v. Nelson, 517 U.S. 25, 31 (1996); NLRB v. Town & Country Elec., 516 U.S. 85, 97 (1995); Johnson v. Jones, 515 U.S. 304, 307, 320 (1995) (using the phrase six times, including instances in the first and last paragraphs of the opinion); Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 161 (1995); Milwaukee Brewery Workers' Pension Plan v. Joseph Schlitz Brewing Co., 513 U.S. 414, 427 (1995).

Some readers might wonder why I would object to such a trifling linguistic imperfection. For starters, *whetherornot* is not always a victimless crime. The inclusion of the superfluous *or not* phrase may not cause much difficulty in a sentence that is otherwise short and sweet. But when the logic or the structure of a sentence is already a little complex, especially when other negatives are involved, *whetherornot* can be fatal to the sentence's intelligibility. At the criminal trial of O.J. Simpson, for example, Deputy District Attorney Rockne Harmon posed this question to a witness:

> Professor Speed, you do *not* know whether *or not* there are many other biological samples that did *not* go through the Evidence Processing Room on June 13th and June 14th, do you?[8]

Try digesting that in the middle of a long day. Earlier in the same trial, Judge Lance Ito disposed of a hearsay objection by offering the jury the supposed benefit of this limiting instruction:

> Overruled. Ladies and gentlemen, I'm allowing these questions and answers for the limited purpose — assuming that the answer — that the implication of the answer — excuse me — the question — let me start again. I'm allowing this evidence for a limited purpose, that is, whether *or not* this statement was made to Mr. Fung, *not* whether *or not* that statement is in fact true.[9]

These statements must have been utterly opaque to the jurors. Try reading them out loud. Then try again, this time without the additional complexity injected by the gratuitous *or not* clauses after *whether*. You can almost taste the difference. If defense attorney Barry Scheck had tried that improvement, he might have received a different reply to this question:

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[8] People v. O.J. Simpson, Trial Transcript, 1995 WL 489486, at *16 (Cal. Super. Ct. Aug. 8, 1995) (referred to only by Westlaw citation throughout this article).

[9] 1995 WL 221962, at *24 (Apr. 13, 1995).

> Q. All right. Was there any discussion with you as to whether *or not* you should discuss *the question of* whether you saw four red stains on the exterior of the Bronco door on the morning of June 13th?
> A. I don't understand that question.[10]

For years in my trial-advocacy classes, I've strictly enforced a zero-tolerance policy against the indiscriminate use of *whetherornot.* None of my students understand why I take the matter so seriously, because none believe my dire warnings about where that kind of talk will inevitably lead them. I've warned that they too will someday say things like "Do you recall whether *or not* you had bottled water *or not*?" Some laugh at the absurdity of the very suggestion and swear that no lawyer would ever say such a thing; others insist they would never go that far. All of them look at me as they must have gazed at their mother when she warned, "If you keep making that nasty face, it will freeze that way someday."

But now, at long last, I get the last word. Thanks to the miracle of computerized access to real-world trial transcripts, it's now possible to illustrate for everyone what I've been telling my students for years. The points I'll make here could be documented just as well from the transcript of any trial or oral argument, but I've relied largely on the criminal trial of O.J. Simpson.

I chose this trial for several reasons. First, it's readily available on Westlaw, so any doubters can see for themselves that I'm not making these quotes up. Second, this trial involved an unusually large number of lawyers from all over the country, many of them supposedly among the world's finest, so readers can't dismiss these findings as the errors of one or two half-wits. And third, because the case was tried before the largest television audience in history, the attorneys had the greatest imaginable incentive to flaunt their supposed fluency. Yet despite all this, even the leading participants in the so-called "Trial of the Century" continually played out all the same mistakes I've been warning my students about for years.

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[10] 1995 WL 215715, at *17 (Apr. 12, 1995).

The Three Corollary Curses

I would not bother to complain publicly if most trial lawyers did no more than use *whetherornot* as a careless substitute for *whether*. By itself, the error merely results in two redundant words, which most lawyers are quite able to slur into a single syllable.

But the curse of *whetherornot*, like most dread diseases, carries hideous side effects as its rot spreads through the host organism. I have witnessed them countless times in the courtroom and the classroom. And I can hold my tongue no longer. For the benefit of my future students and young lawyers everywhere, I now undertake the unenviable task of exposing the madness awaiting those who slide into the *whetherornot* abyss.

1. "Whetherornot . . . or not"

In one of the most closely watched Supreme Court decisions in this decade, Chief Justice William H. Rehnquist complained, in a separate opinion joined by Justice Stevens, that some of the "general observations" offered by the majority were "not applied to deciding whether *or not* particular testimony was *or was not* admissible."[11] This line is doubly redundant: it twice explicitly spells out possibilities that are already clearly implied. One almost wonders why the Chief Justice didn't add "or inadmissible" at the end — just to "make assurance double sure."[12]

Unfortunately, this language is something worse than merely redundant and inelegant: it makes the sentence positively absurd.

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[11] Daubert v. Merrell Dow Pharms., Inc., 113 S. Ct. 2786, 2799, 61 U.S.L.W. 4805, 4810 (1993) (Rehnquist, C.J., concurring in part and dissenting in part). After this linguistic error appeared in print, it was caught and partially corrected when the opinion was released in the official United States Reports (509 U.S. 579, 598), but not before it was reprinted in a dozen leading textbooks on evidence law.

[12] WILLIAM SHAKESPEARE, MACBETH, act 4, sc. 1, *l.* 83 (G. Blakemore Evans ed., Houghton Mifflin Co. 1997).

Rearranging only slightly the order of the words, we see that the Chief Justice is here listing the possibilities that a piece of evidence might be (1) "admissible," (2) "or not admissible," or (3) "or not" — that is, presumably, neither of the above. This third possibility is senseless and reduces the sentence to mild incoherence. Yet this gaffe managed to get past the desks of two of the most senior members of the Court and their law clerks.

The Chief Justice is far from alone in this error. Witness these lines written in recent years by some of the highest state and federal courts in the land:

> Whether *or not* the statements themselves were true *or not* raises a wholly separate inquiry.[13]
>
> Those regulations make clear that whether *or not* the use of such a word is, *or is not*, deceptive varies, depending upon product and context.[14]
>
> We need not decide whether *or not* a procedural rule change taking effect after oral argument in a court of appeals normally should *or should not* apply retroactively . . . .[15]
>
> Thus, the test as to whether evidence is relevant *or irrelevant* is whether *or not* it tends to prove *or disprove* a fact in issue.[16]
>
> [Plaintiffs may recover if they] prove that the defamatory statements were made . . . with reckless disregard for whether *or not* they were true *or false*.[17]

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[13] United States v. Hatchett, 918 F.2d 631, 645 (6th Cir. 1990) (Jones, J., dissenting).

[14] Abruzzi Foods, Inc. v. Pasta & Cheese, Inc., 986 F.2d 605, 606 (1st Cir. 1993) (Breyer, C.J.).

[15] Freund v. Fleetwood Enters., 956 F.2d 354, 363 (1st Cir. 1992) (Breyer, C.J.).

[16] State v. Haugen, 458 N.W.2d 288, 290 (N.D. 1990).

[17] Thompson v. Public Serv. Co., 800 P.2d 1299, 1306 (Colo. 1990) (en banc).

> The trial court found that the testimony . . . was not relevant to proving whether *or not* the defendant was guilty *or innocent* of the charges alleged.[18]

> Whether *or not* the statements made to the [plaintiffs] were true *or false* at the time made are issues of fact to be determined at trial, not by the court on summary judgment.[19]

If this mistake can slip by an appellate court, imagine how much more easily it can slip out when judges and lawyers are talking in court off the tops of their heads!

The tone for the O.J. Simpson trial was set from the very outset by Judge Lance Ito. During jury selection, the jurors got their first taste of the linguistic abuses that would become their daily fare for months. Judge Ito asked the prospective jurors questions like these:

> Has any of that caused you to have an impression about one side or the other, whether *or not* that's fair *or not*?[20]

> Your answers concern me because you've already formed opinions about whether *or not* witnesses are truthful *or not*. What do you think about that?[21]

> For example, oftentimes if I have to decide whether *or not* a piece of evidence comes in *or doesn't come in*, obviously we have to do that out of your presence.[22]

> One of the tests as to whether *or not* I make you live in hotels *or not*, as you know, is how bad the situation is out there and whether *or not* you can resist the temptation.[23]

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[18] State v. Gibson, 384 S.E.2d 358, 366 (W. Va. 1989).

[19] Appel v. Presley Cos., 806 P.2d 1054, 1057 (N.M. 1991).

[20] 1994 WL 557335, at *27 (Oct. 12, 1994).

[21] 1994 WL 630840, at *27 (Nov. 8, 1994).

[22] 1994 WL 682739, at *10 (Dec. 7, 1994).

[23] 1994 WL 687678, at *6 (Dec. 8, 1994).

But Judge Ito wasn't the only one to blame for starting this mess. Here are some of the questions asked of the prospective jurors by the lead prosecutor, Deputy District Attorney Marcia Clark:

> Okay. And did you develop an ability to tell whether *or not* they were telling the truth *or fibbing*?[24]
>
> Did you take any part in evaluating whether *or not* the claims made were credible *or not*?[25]
>
> In your life, have you had the experience of having to determine whether *or not* someone is telling you the truth *or not*?[26]
>
> Probably the most important part of this, I understand you are nervous, is all we really need to know is based on what you have seen and heard about Detective Fuhrman, or any witness at this point, do you have an opinion formed as to whether *or not* you will believe *or not believe* them?[27]

Her cocounsel, Deputy District Attorney William Hodgman, did the same:

> But when you're dealing with something with your kids as to whether something occurred and whether *or not* your child is telling you the truth *or not*, that would be a simpler type decision making process for you it sounds like.[28]
>
> So as it stands now you don't know whether *or not* there was a trial or he pleaded guilty *or there was some other disposition*?[29]

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[24] 1994 WL 557335, at *22 (Oct. 12, 1994).

[25] 1994 WL 588553, at *57 (Oct. 25, 1994).

[26] 1994 WL 651231, at *25 (Nov. 16, 1994).

[27] 1994 WL 680264, at *23 (Dec. 5, 1994).

[28] 1994 WL 665869, at *24 (Nov. 29, 1994).

[29] 1994 WL 595269, at *21 (Oct. 31, 1994).

The attorneys for the defense were no better. Here is lead counsel Johnnie Cochran:

> And you would expect, as a juror, to hear some evidence from Mr. Simpson regarding whether *or not* he did it *or not*; isn't that correct?[30]
>
> And you understand that as a judge of the facts, then you make that determination of whether *or not* you believe this person is credible *or incredible*. You understand that?[31]
>
> Look at all those things and make your determination as the judge of the facts whether *or not* you find this particular person credible in whole or in part *or not at all*. Do you understand that?[32]

Defense attorney Robert Shapiro spoke the same language:

> So you understand the problems that we have in deciding whether *or not* Mr. Simpson should *or should not* testify?[33]
>
> After seeing that incident, did you have any opinion as to whether *or not* he was guilty *or innocent* of the charges that have been filed against him, two counts of first degree murder?[34]
>
> Well, how would you be able to form an opinion as to whether *or not* the sentence was fair *or not*?[35]

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[30] 1994 WL 673406, at *5 (Dec. 1, 1994).

[31] 1994 WL 557335, at *31 (Oct. 12, 1994).

[32] 1994 WL 557335, at *48 (Oct. 12, 1994).

[33] 1994 WL 644142, at *24 (Nov. 15, 1994).

[34] 1994 WL 651230, at *31 (Nov. 16, 1994).

[35] 1994 WL 673406, at *12 (Dec. 1, 1994).

> Do you have any impression at all as to whether *or not* the police who testified at the preliminary hearing were telling the truth *or not*?[36]

It's tempting to blame all this linguistic nonsense on the fact that it was only jury selection, where some lawyers are unusually relaxed about their diction. Most English teachers in the television audience probably hoped that their students were watching MTV instead, or that these absurdities would end once the judge and lawyers settled down to the serious business of trying a murder case. But it was not to be. Here are just some of the comments made by Judge Ito on the record during the trial:

> You can ask him if that thought has been communicated to him by anybody else and if he read any newspaper coverage that might include that thought and whether *or not* that has impacted his testimony *or not*, but other than that, no.[37]

> I'm just saying that that is going to be their goal. Whether *or not* that is true *or not* is for them to decide.[38]

> After I hear that explanation and make a ruling whether *or not* the television camera will stay *or go*, I will then conduct a hearing with juror number 1492, the affected juror, to see whether *or not* knowing that her image has been broadcast, that her anonymity has been compromised, whether *or not* it will cause any impact upon her ability to sit as a fair and impartial trial juror and whether *or not* her frame of mind will be affected.[39]

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[36] 1994 WL 680263, at *4 (Dec. 5, 1994).

[37] 1995 WL 89833, at *15 (Mar. 6, 1995).

[38] 1995 WL 139886, at *40 (Mar. 30, 1995).

[39] 1995 WL 27396, at *1 (Jan. 25, 1995).

> It's come to my attention from a credible source that one of our jurors has made contact with a literary agent or a book publisher and has agreed to write a book about this case, and the title of the book indicates that this juror has already made up his or her mind about whether *or not* Mr. Simpson is guilty *or innocent.* Are you with me so far?[40]

As usual, Judge Ito had several ready accomplices in his assault on grammar. Prosecutor Marcia Clark made legal arguments like these:

> Well, I have not heard from the defense whether *or not* they have accepted our proposal *or not.*[41]

> That may *or may not* ever occur and the outcome of this case certainly has no bearing on whether *or not* defamation suits will be found meritorious *or not.*[42]

> A search warrant is not relevant to a trial. . . . We don't go back before the jury and talk about whether *or not* the search was reasonable *or unreasonable* or in *or without* the 4th Amendment.[43]

> It should be examined carefully, every single alleged incident, to determine whether *or not* it did happen *or did not happen*; and Mr. Hahn, the City Attorney's Office, is present to accomplish that very goal.[44]

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[40] 1995 WL 450874, at *29 (May 25, 1995).

[41] 1994 WL 510862, at *12 (July 25, 1994).

[42] 1995 WL 106323, at *10 (Mar. 14, 1995).

[43] 1995 WL 116381, at *5 (Mar. 20, 1995).

[44] 1995 WL 523691, at *37 (Aug. 29, 1995).

Nor was Marcia Clark the only offender. Here are a few remarks by her cocounsel Hank Goldberg:

> So it's not entirely clear to us exactly whether *or not* legally he's unavailable *or not* depending on the exact testimony of the doctors . . . .[45]

> The most important issue as far as we are concerned next to the issue of whether *or not* the test tubes were standing up *or lying down* is the question of the swatches, the number of swatches in the test tubes.[46]

> The next aspect of the test is this question of the evenhandedness of the prosecution, and the issue there is whether *or not* the prosecution is motivated by a proper purpose *or an improper purpose*, and that has to be understood in the context of what the District Attorney's function is.[47]

Now try to unravel this submission to the court by Deputy District Attorney George Clarke:

> Today we hear for the first time that 405 is actually applicable either as an alternative or in addition, and that, therefore, because 403 and/or 405 apply, you are vested with the discretion under 402 to decide whether *or not* this hearing should be held outside the presence of the jury *or inside the presence of the jury.*[48]

And here is one of the strangest things ever said at any trial, this time by Deputy District Attorney William Hodgman:

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[45] 1995 WL 462224, at *64 (July 20, 1995).

[46] 1995 WL 521225, at *7 (Aug. 25, 1995).

[47] 1994 WL 693432, at *10 (Dec. 9, 1994).

[48] 1994 WL 705400, at *15 (Dec. 16, 1994).

> Now, the defense has lodged with regard to the November 28 package of materials a claim of privilege, and we are in the midst of taking testimony with regard to that claim of privilege, whether it is available to the defendant *or not or whether or not it has been waived.*[49]

Hodgman could have omitted the last ten words of this remarkable statement without changing its meaning at all. Because a privilege is either available or waived, Hodgman's statement is the equivalent of asking, "Toss this coin and then tell me whether it is heads or not, or whether it is tails or not."

By this point, you might wonder if "whetherornot . . . or not" is something they teach young recruits at the Los Angeles District Attorney's office. But it can't be that simple. Take a look at some of the legal arguments made by Simpson's defense attorneys:

> *Johnnie Cochran:*
> The lawyers are not — the lawyers basically are irrelevant with regard to whether *or not* this man receives a fair trial *or not*, and I think the Court addresses and grasps that issue.[50]

> *Robert Shapiro:*
> We think the Court should make a decision at this point in time and decide and let the People make a decision whether *or not* there is evidence that's going to be offered *or not.*[51]

> *Barry Scheck:*
> That argument is irrelevant to this experiment and this discussion because the point at issue here is whether *or not* the swatches on the morning of June 14th when taken out of the test tubes were wet *or dry.*[52]

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[49] 1994 WL 698431, at *2 (Dec. 14, 1994).

[50] 1995 WL 19617, at *19 (Jan. 20, 1995).

[51] 1994 WL 550587, at *3 (Oct. 6, 1994).

[52] 1995 WL 521225, at *9 (Aug. 25, 1995).

> *Carl Douglas:*
> The opening statements are going to be given whether *or not* the exhibits are here *or not here*, . . . but whether *or not* a particular picture, for example, is objectionable *or not* doesn't mean that Mr. Cochran or whomever is speaking is going to alter —[53]

Immediately following this last slice of gibberish, by the way, Douglas was justifiably interrupted by Judge Ito with the request "Let's take this from the top."[54] This was too much to follow — even for a judge who talks that way himself.

Attorneys for the parties were not the only ones to talk this way; every lawyer who approached the microphone seemed to catch the bug. At one point during the trial, Melvyn Douglas Sacks moved to quash a subpoena of a nonparty witness. At oral argument, he told Judge Ito that all the world was judging each witness to decide "whether *or not* she is credible *or maybe lying, mistaken or whatever.*"[55] (This quotation, by the way, was entombed in the middle of a sentence of 117 words!)

At this point, the charitable reader might suggest, "Sure, trial lawyers talk that way when addressing the judge because that's just legal argument, but any good lawyer would avoid that mistake when questioning a witness." Wrong again. Listen to some of the questions Marcia Clark put to the witnesses on the stand:

> And he is the one who is your check or balance as to whether *or not* you have made a correct interpretation *or not*; is that right?[56]

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[53] 1995 WL 23580, at *3 (Jan. 23, 1995).

[54] *Id.*

[55] 1995 WL 94146, at *9 (Mar. 8, 1995).

[56] 1995 WL 468714, at *24 (Aug. 1, 1995).

> But then it is your opinion, Doctor, that you set your own standard and you determine whether *or not* a certain standard is correct *or not*?[57]
>
> And was there any indication that you could see on those boards as to whether *or not* the items compared were of the same magnification *or not*?[58]
>
> Did he ask you to find out whether *or not* the defendant was in *or out of* town, to your knowledge?[59]
>
> Did you ask *whether they had any information as to* whether *or not* the defendant was in *or out of* town?[60]

This last question was perhaps the worst of the bunch. Without the italicized surplusage, it would have been less than half as long.

But don't just blame Marcia Clark. Here are some questions asked by Christopher Darden, who is now a professor in California teaching hundreds of young students how to talk like a lawyer:

> So you don't know whether *or not* there was a white Ford Bronco parked behind that structure at 10:20 *or not*; is that correct?[61]
>
> And even though someone told you that the camera was off by an hour, have you ever attempted to determine whether *or not* the minutes depicted in the view finder were incorrect *or correct*?[62]

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[57] 1995 WL 499012, at *36 (Aug. 14, 1995).

[58] 1995 WL 566997, at *19 (Sept. 14, 1995).

[59] 1995 WL 61433, at *14 (Feb. 14, 1995).

[60] *Id.* at *15.

[61] 1995 WL 431034, at *30 (July 11, 1995).

[62] 1995 WL 462222, at *30 (July 20, 1995).

> Did you determine whether *or not* he was left-handed *or he was right-handed*?[63]
>
> Okay. And you never did [in] fact check to determine whether *or not* the things he told you were true *or not*; is that correct?[64]

As you can already surmise, I hope that someone who has read this article is on the stand the next time an attorney poses a question like that and then asks the witness "is that correct?"

Once again, lead defense attorney Johnnie Cochran was no better. Here are some of the actual questions he put to the witnesses during the trial:

> Were you able to tell whether *or not* he appeared intoxicated *or not intoxicated* or how did he appear?[65] [This question used 19 words to ask: "Did he appear intoxicated?"]
>
> Now, do you recall whether *or not* that door that's depicted there on the attorney visiting area was open *or closed* on this particular date?[66]
>
> All right. So there was something about his schedule, whether *or not* he would be in town *or not*?[67]
>
> You don't know whether *or not* they checked that *or not*, do you?[68]

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[63] 1995 WL 508728, at *16-17 (Aug. 22, 1995).

[64] 1995 WL 523691, at *6 (Aug. 29, 1995).

[65] 1995 WL 429481, at *37 (July 10, 1995).

[66] 1994 WL 698431, at *22 (Dec. 14, 1994).

[67] 1995 WL 429482, at *50 (July 10, 1995).

[68] 1995 WL 36096, at *18 (Jan. 31, 1995).

This last question was equally notable for the answer it justifiably elicited from the witness: "As far as I know, I don't know."[69] As my mother always warned me, "Ask a stupid question . . . ."

But here's my favorite question by Cochran:

> Do you recall whether *or not* you had bottled water *or not*?[70]

Sound familiar? It's the same question I used earlier to illustrate the way real lawyers invariably end up talking once they grow accustomed to *whetherornot*. I wonder how many of you dismissed that example as utterly preposterous, or the exaggerated claim of some academic lunatic.

Almost without exception, every other lawyer at the trial did no better at avoiding this madness. A complete list of the examples would be truly excessive, but take a look at the following representative samples, all taken verbatim from questions asked by nearly every attorney for both sides.

> *Deputy District Attorney Brian R. Kelberg:*
> And did you as part of that interview say that part of your job as part of the forensic team is to assist in identifying evidence, collect evidence, document it and interpret it . . . to make a judgment as to whether *or not* he, meaning Mr. Simpson, is guilty *or not* of the crime and whether there's mental reasons that comes along after the initial investigation as to whether he's being falsely accused?[71]

> And, Doctor, you have no independent basis on which to evaluate whether *or not* Mr. Simpson was truthful with you, fully candid *or whether in fact he was pulling his punches with you*, can you?[72]

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[69] *Id.*

[70] 1995 WL 431034, at *20 (July 11, 1995).

[71] 1995 WL 493508, at *18 (Aug. 10, 1995).

[72] 1995 WL 437455, at *26 (July 14, 1995).

> *Defense Attorney F. Lee Bailey:*
> And you say on one occasion, a woman whose description you cannot dredge up in any detail may have been in the office and you're unable to say whether *or not* that was *or was not* Kathleen Bell; is that correct?[73]
>
> *Defense Attorney Robert D. Blasier:*
> And if there's blood residue left on the inside of the plastic bags, can that be useful in testing whether *or not* a later sample actually came from that bag *or not*?[74]
>
> Do you know whether *or not* the fibrous material that you took was on the inside *or the outside* [of the sock]?[75]
>
> *Defense Attorney Peter J. Neufeld:*
> Now, Dr. Cotton, I'm going to ask you a hypothetical, and I'm going to ask you whether *or not* that hypothetical is consistent *or inconsistent* with the observed evidence in your laboratory.[76]
>
> And would you agree, Miss Kestler, that someone who is assisting in the overseeing of this case in that laboratory, that decisions as to whether *or not* the evidence should be sent out for DNA testing *as opposed to be handled in-house* for certain logical testing is another important question?[77]

In case you lost count — an easy thing to do — the quotations listed above and the ones preceding came from the mouths of 15 different lawyers (a judge, 6 prosecutors, 7 defense attorneys, and an attorney for a nonparty witness). Many of them were reputed to be among the best and most experienced in the business, and all were working in front of a worldwide audience, with the greatest

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[73] 1995 WL 106323, at *21 (Mar. 14, 1995).

[74] 1995 WL 507633, at *6 (Aug. 21, 1995).

[75] 1995 WL 406151, at *39 (June 28, 1995).

[76] 1995 WL 289345, at *37 (May 12, 1995).

[77] 1995 WL 499013, at *56 (Aug. 14, 1995).

incentive they would ever have to speak like well-educated orators. They came from many different parts of the country, and many had never been together in the same courtroom. Yet there were literally dozens of times when one of them said "whetherornot . . . or not," sometimes twice in the same sentence.

Think it couldn't happen to you? Don't kid yourself. If you start using *whetherornot* as a regular substitute for *whether*, it's only a matter of time before you start doing the same thing. Your colleagues won't ever tell you because they're doing it too. But jurors aren't used to spending much time in the company of lawyers, and your words will sound jarring to their ears. Nonlawyers simply don't talk this way. (Although I had little trouble finding scores of examples where attorneys or the judge said "whetherornot . . . or not" at the Simpson trial, the hundreds of nonlawyers who took the witness stand never did so. Out of the many thousands of pages of trial testimony, I couldn't find a single witness who made the same mistake.)

If the problem persists long enough, you'll eventually get so caught up in the legal way of talking that you'll sound like the Mississippi prosecutor who recently asked a prospective juror:

> Now if you're selected on a capital case, and you're in that guilt phase, in the portion of the trial where you're deciding whether *or not* he's guilty *or innocent*, and you know that if you vote guilty then you are fixing to have to decide whether *or not* he should live *or die*, is that going to affect your decision on whether *or not* he's guilty *or not*?[78]

In truly extreme cases, you might even find yourself before a jury caught in an embarrassing exchange like this:

> JUDGE ITO: Well, try it the old-fashioned way.
> MS. CLARK: What is that? I forgot.[79]

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[78] Foster v. State, 639 So. 2d 1263, 1278 (Miss. 1994).

[79] 1995 WL 465136, at *39 (July 26, 1995).

2. "Do you know whetherornot . . . ?"

The curse discussed above afflicts both speakers and writers who spend too much time around other lawyers. But a related curse plagues only trial lawyers. Again, it's one that could be illustrated by the transcript from any trial, but I'll use the Simpson case. Try to spot the problem with the following question, posed by Johnnie Cochran to O.J. Simpson's daughter on the witness stand:

> Do you know whether *or not* [your father] plays tennis?[80]

The wording of this question is quite familiar to anyone who has been in any American courtroom for more than five minutes. If you've read closely up to this point, chances are good that you immediately noticed that the superfluous words *or not* are a distracting and meaningless waste of time. The question would be better without those two words.

But that's only a small part of it. In fact, if all you did to improve that question was to delete those words, you would have only scratched the surface. The bigger problem is that the entire six-word phrase — *Do you know whether or not* — is *always* redundant in a question to a witness on the stand.

Unfortunately, this problem is quite pervasive. During the Simpson trial, just like any major trial, there were literally hundreds of times when an attorney began a question with *Do you know whether or not*, or some even worse variation. Probably the most tedious was offered up by Marcia Clark: *"Do you have a particular recollection of whether or not* Kato played Nintendo with Justin *or not?"*[81] That question used 17 words to ask, "Did Kato play Nintendo with Justin?"

Although Clark weighed in with the longest variation on this theme, she didn't come up with the strangest. That came from

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[80] 1995 WL 429481, at *41 (July 10, 1995).

[81] 1995 WL 429482, at *27 (July 10, 1995).

defense attorney Carl Douglas: "*Do you have occasion to recall whether or not there was* another garment bag like a Louis Vuitton bag?"[82] Those 11 words are just a long-winded and opaque way of asking *Was there.* But for the fact that Douglas suffers from the disability of being "experienced" in the modern courtroom, it would have been impossible for someone raised on this planet to say something like that in public.

A question, by definition, is always a request for a person to tell us what he or she presently knows and remembers. It can be nothing else. Thus, you never need to begin a question by asking a witness *Do you know whether* or *Do you recall whether* or *Do you remember whether.* Just ask what happened — the rest of that gibberish is understood.

When you strip away those words, the question is not only shorter and simpler, but also less ambiguous. Consider the answer that Cochran received — and richly deserved — when he asked that question of O.J. Simpson's daughter:

> Q. *Do you know whether or not* he plays tennis?
> A. Yes.[83]

This answer was perfectly natural, and fairly responsive to the question. But the critical problem is obvious: what does the answer mean? Of course, it might mean "Yes, I know." Then again, it might mean "Yes, he does." Before we return to the trial transcript, ask yourself what question you would pose next to that witness. I suspect most readers would follow up the same way Cochran did:

> Q. *Do you know whether or not* he plays tennis?
> A. Yes.
> Q. And does he?
> A. No.[84]

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[82] 1995 WL 434060, at *19 (July 13, 1995).

[83] 1995 WL 429481, at *41 (July 10, 1995).

[84] *Id.*

If you had interpreted the first answer to mean "Yes, he plays tennis," you would have been wrong.

Just a few minutes earlier, Cochran had asked the same witness the same sort of clumsy question:

> Q. *Do you know whether or not* your father was home at that time when [Mr. Shipp] was using the jacuzzi with this lady?
> A. Yes.
> Q. Was your father at home?
> A. Yes.[85]

In both these exchanges, Cochran ended up wasting the jury's time and patience by asking two questions instead of one. And each time he had to clarify the witness's answer by following his first worthless question with the question he *should* have asked in the first place. If he hadn't asked the follow-up question, he would have been stuck with an answer that was unclear or (worse yet) that didn't mean what it seemed to say. All this unexpected trouble came from an extremely friendly witness, his client's daughter; imagine how much more likely such ambiguous answers would be from a neutral or hostile witness.

Cochran repeatedly wasted time with such clumsy circumlocutions. Watch what happened when he posed a similar question to another witness:

> Q. And *do you recall whether or not* the alarm was on at that house at that time, sir?
> A. No.
> Q. You don't recall?
> A. That's correct.[86]

Evidently not content to waste two questions on what should have taken only one, Cochran's very next question was: "You have no

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[85] 1995 WL 429481, at *37 (July 10, 1995).

[86] 1995 WL 94147, at *26 (Mar. 8, 1995).

recollection of whether *or not* she had to turn the alarm off at some point?"[87]

But Cochran wasn't the only attorney who got engulfed in this maladroit manner of eliciting testimony. Christopher Darden made the same gaffe:

> Q. *Did you notice whether or not* the Louis Vuitton bag Kardashian had, *did you notice whether or not* it was full?
> A. Yes.
> Q. Did it appear full?
> A. Yes, it did.[88]

And here is the same silly *pas de deux*, this time choreographed by defense attorney Robert Blasier:

> Q. *Do you recall whether* you did that with any of the bags from the Coroner's Office in this case?
> A. No, I didn't.
> Q. You don't recall or you didn't do that?
> A. I didn't shake them.[89]

We see here one reason why this problem is so insidious. On paper, Blasier's second question seems obviously unnecessary. But Blasier wasn't reading the answer — he was hearing it. And he evidently had some doubt whether the witness said "No, I don't" or "No, I didn't." Or perhaps he felt the answer was not pronounced clearly enough to permit him to safely presume that each juror would have heard it correctly. And so, even though the witness answered with more than a simple "yes" or "no," Blasier still had to clarify the answer by following up with another question. The entire problem would have been avoided if he had simply begun with the most natural variation, the one he ended up

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[87] *Id.*

[88] 1995 WL 449844, at *33 (July 18, 1995).

[89] 1995 WL 406153, at *22 (June 27, 1995).

needing to ask anyway: "Did you shake any of the bags from the Coroner's Office in this case?"

Blasier's mistake is a common one for trial lawyers — and sometimes the results are altogether comical. When defense attorney F. Lee Bailey tried his hand at this hoary incantation, but inadvertently said "Did" instead of "Do," he had to ask *three* questions instead of the one he should have asked in the first place:

> Q. *Did you know whether or not* she was known to the marines that you met when you went to the recruiting station on several occasions?
> A. Then or now?
> Q. *Do you now know*?
> A. Yes.
> Q. And the fact is, she was known to them, correct?
> A. Yes.[90]

There are many more examples of this madness, but you get the picture. It is *always* a mistake to begin a question with *Do you know whether or not.* Sometimes, if you're lucky, a witness will give you an answer that is better than you deserve. For example, when you ask "Do you know whether or not your father plays tennis?," your witness might respond "No, I don't know" or "No, he never did," thus curing the ambiguity in your compound question.

But if you're not so lucky, as the above examples show, you might receive a simple "Yes" or "No" — even from a friendly witness. Then, one of two things will happen, and either will ultimately make you wish you had done it right in the first place.

The first possibility: you'll have wits enough to realize that the "Yes" or "No" answer was fatally ambiguous. At that point, you'll need to conduct some vital damage control by following up with some form of the question you should have asked in the first place. Without any conceivable benefit to your client, you will have

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[90] 1995 WL 106323, at *21 (Mar. 14, 1995).

gratuitously wasted a little bit of the time and patience of the witness, the judge, and the jury. That may not sound so bad in isolation, but the cumulative toll can be overwhelming. I once sat through six days of depositions that should have been completed in half the time, all because the questioning attorney couldn't break himself out of the rut of beginning every other question with *Do you know whether*. The intervening questions, of course, were always some variation of "Does that last answer mean no you don't know, or no it didn't happen?"

The second — and far worse — possibility: you'll fail to notice the ambiguity of the answer. This happened incessantly throughout the Simpson trial; here are just a few of the examples I found:

> Q. *Do you know whether or not* he called for the coroner?
> A. No, sir.
> Q. *Do you know whether or not* he called for a criminalist?
> A. No, sir.[91]
>
> Q. All right. *Do you recall whether or not* you saw him at all on the Saturday which I think would be the 11th of June?
> A. No.[92]
>
> Q. *Do you know whether* Nicole Brown had a babysitter? . . .
> A. No.
> Q. *Do you know whether or not* she had a maid?
> A. No.
> Q. *Do you know whether or not* she had an Avon lady? . . .
> A. No.[93]
>
> Q. Yes. And *do you recall whether or not* you saw any initials or anything on that at all?
> A. No.[94]

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[91] 1995 WL 66985, at *36 (Feb. 16, 1995) (Cochran).

[92] 1995 WL 429481, at *18 (July 10, 1995) (Cochran).

[93] 1995 WL 507641, at *8 (Aug. 17, 1995) (Darden).

[94] 1995 WL 137527, at *8 (Mar. 29, 1995) (Cochran).

Q. *Do you know whether* a red top tube has any kind of preservative in it at all?
A. No.[95]

Q. *Do you know if* he had been drinking when he arrived there that day?
A. No.[96]

Q. *Were you able to ascertain whether or not* he appeared to be intoxicated at that point? . . .
A. No.[97]

Q. *Do you know whether* your lab complies with that aspect of the guidelines with respect to documenting outbreaks of contamination?
A. No, I do not.[98]

I saved the most subtle example for last because it shows that a question like this might leave you saddled with an ambiguous answer even if it is more than one word, and even if you have no trouble hearing what was said. In this last example, the answer could plausibly mean either "No, I do not know" or "No, I do not comply with them."

What do all the above answers mean? The world will never know for sure. Yet all this confusion is preventable and unnecessary. *Never* ask a witness, "Do you know whether or not your father plays tennis?" Instead, ask it right the first time: "Does your father play tennis?" The witness will then say one of four things: (1) "Yes." (2) "No." (3) "I don't know." (4) "I don't remember." Any of those answers will be clear and unambiguous, and will make you glad you asked your question the way you did.

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[95] 1995 WL 465690, at *3 (July 25, 1995) (Blasier).

[96] 1995 WL 429481, at *37 (July 10, 1995) (Cochran).

[97] 1995 WL 429481, at *37 (July 10, 1995) (Cochran).

[98] 1995 WL 257177, at *37 (May 3, 1995) (Blasier).

3. "Do you remember being asked whetherornot . . . ?"

By my best estimate, and as the preceding sections of this article have illustrated, lawyers who say *whetherornot* really mean *whether* at least 95% of the time. And when you hear *whether* at trial, 95% of the time even *that* word is unnecessary — especially when it's used as part of the preface to a question explicitly asking if the witness knows "whether" something is true.

Before leaving this topic behind, I must briefly mention a related occasion for frequent abuses. In the Simpson trial, a remarkable number of the *whetherornots* occurred in the first few questions put to a witness on cross-examination, or on redirect or recross. The witness was asked "whetherornot" he or she remembered being asked by opposing counsel "whetherornot" something was true and giving a certain answer. This happened dozens of times during the trial. In one perfectly representative example, Johnnie Cochran began his redirect of a witness with this question:

> Now, a few questions if I might, sir. *You were asked by Mr. Darden whether or not* you were informed *whether or not* Mr. Simpson had cut his hand or his hand was bleeding. You remember you said yes to that, that you were informed?[99]

This technique is incredibly popular with lawyers. But it is never ideal, much less necessary, to begin cross-examination or redirect examination with a long and compound question about what the witness was just asked, and what was then said, about what happened at some earlier time out of court. Assuming you have a good reason to go back over a topic that the witness has already covered, it's far better and simpler to just ask the witness again what happened. In the above example, Cochran took 45 words to ask what should have been said in only 12:

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[99] 1995 WL 508728, at *17 (Aug. 22, 1995).

> You were informed that Mr. Simpson's hand was cut or bleeding, correct?

I'm not saying that this would be a great question — it isn't. It should have been even more clear and direct. But my translation says everything Cochran's question asked, is four times shorter, and is ten times easier to follow.

The failure to observe this simple rule can lead to hilarious results. As he prepared to recross-examine one witness, Cochran again started by trying to rehash some earlier questions, and then some previous answers, about events that had taken place out of court:

> Q. Thank you, your Honor. Detective Lange, *do you recall when you were testifying before I asked you whether or not* you were aware of a controversy between Los Angeles Police Department and the L.A. County Coroner's Office regarding LAPD's failure to promptly report the death of individuals at crime scenes? *Do you remember those questions?*
> A. A controversy?
> Q. Yes.
> A. I don't recall a controversy.[100]

Ironically, the witness has done Cochran a favor: he has answered the question Cochran should have asked. Detective Lange, who has presumably spent much of his adult life being questioned by attorneys, knows even better than Cochran does where this is all eventually heading. But Cochran isn't satisfied with this gift; he has evidently trained his mind to follow a roundabout path for approaching these matters at the beginning of every recross. So he admonishes the witness:

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[100] 1995 WL 89833, at *18 (Mar. 6, 1995).

Q. All right. I asked you — I'm asking you do you remember me asking you those series of *questions*?
A. I recall something like that, yes.
Q. All right. And you indicated to us that you didn't recall any particular *controversy*; is that correct?
A. Yes.[101]

Four questions into his recross, Cochran finally extracts an "admission" that the witness had tried to volunteer in response to the first question and was alert enough to recognize as the real issue. But Cochran couldn't accept or appreciate that gift because — like most of the lawyers at the trial — he was so trapped in the rut of beginning every recross or redirect with the same silly progression: (1) ask if the witness remembers recently being asked on direct or cross some *question* "whetherornot" some event happened out of court; (2) ask "whetherornot" the witness gave a certain *answer* about whether that event happened; and, only then, (3) ask about the event itself.

My advice to every young attorney who isn't yet permanently stuck in this mindset: skip steps one and two. Get right down to business and ask about the event. We can only imagine what a wonderful breath of fresh air would have blown through the courtroom if even one attorney — just once — had begun a recross-examination without using *whetherornot.*

The other moral of this little example, by the way, is the timeworn maxim of witness examination: listen to the answers. Often the witness isn't really answering your question but instead doing you the favor of answering the question you should have asked, or the question you are inefficiently leading up to. Don't be so wedded to your silly mental script that you can't accept the gift graciously.

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[101] *Id.*

Conclusions, Warnings, and Recommendations

I must apologize for the fact that this article, by design, has been rough going at times. This essay is much like a driver-education film that achieves its salutary point only by graphically laying out the awful consequences awaiting those who scoff at the rules of the road. It's never pleasant to dwell on the sight of human tragedies trapped on film, but sometimes that's the only way to avoid those mishaps ourselves.

I conclude with some bits of advice for several different audiences.

For seasoned trial attorneys, judges, and law professors, my message will be brief — because I don't imagine that many of them have read this far. In my experience, most lawyers in the grip of the *whetherornot* virus will vehemently deny having the ailment. Many of them put down this article halfway through after concluding that it was all about somebody else. But if you have managed to get this far (or, more likely, skipped ahead to the conclusion), I urge you to ask some close and trusted colleague if you exhibit the symptoms outlined here. Or take a good hard look at a transcript or video of yourself talking. If you discover that you're already suffering from an advanced case of this linguistic occupational hazard, seek professional help quickly.

I write especially for law-school faculty. If you teach legal writing to first-year students, inoculate them with a heavy dose of advance exposure to the *whetherornot* bug. Students who aren't treated until their third-year trial-advocacy course are almost beyond recovery, and can be cured only after a long and painful period of drying out.

Here's another suggestion for legal-writing instructors. Pick out several pages of trial transcript of attorneys making arguments, giving openings, or questioning witnesses. Have your students edit the transcripts for brevity and clarity. As this article has shown, linguistic excesses and abuses are rampant even — if not especially — in the locutions of the most experienced trial lawyers. Unlike many contrived writing exercises from textbooks, this assignment

might actually be interesting to your students, who will know they are getting a preview of the way real lawyers talk.

If you teach trial advocacy to second- and third-year law students, your challenge is even more difficult. Make it clear from the first day of class that you will rigorously enforce the following ground rules:

1. Never use *whetherornot* as a thoughtless substitute for *whether*.
2. Never use *whether* at all while questioning a witness, except in the extremely rare case when it is necessary.
3. Never begin cross-examination, or redirect or recross, by asking if the witness remembers being asked certain questions and giving certain answers about some event, when you're really only interested in the event itself.

It usually takes repeated reminders, but I've discovered that one semester is sufficient to nip these bad habits in the bud.

Few students will take you seriously, and none will fully appreciate what you are doing for them. But if you don't make the effort and instead let them loose into a courtroom without being inoculated against these infections, it's inevitable that they will succumb just a few months after they leave your schoolhouse doors. Don't blame me when you hear them talking someday on Court TV as if they were recent visitors to Earth.

Finally, for my most important audience of all — law students and new lawyers — I beg you to remember the lesson of Ebenezer Scrooge, who was saved from a terrible fate by an unpleasant visit from "the Ghost of Christmas Yet to Come."[102] After the specter confronted Scrooge with a ghastly vision of the future toward which he was racing, Scrooge cried out in horror:

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[102] CHARLES DICKENS, A CHRISTMAS CAROL 103 (Penguin ed. 1946).

> Answer me one question. Are these the shadows of the things that Will be, or are they shadows of the things that May be, only? Men's courses will foreshadow certain ends, to which, if persevered in, they must lead. But if the courses be departed from, the ends will change. Say it is thus with what you show me! . . . Why show me this, if I am past all hope? . . . Assure me that I yet may change these shadows you have shown me, by an altered life! . . . Oh, tell me that I may sponge away the writing on this stone![103]

Like the Ghost of Christmas Yet to Come, I have brought an admittedly unpleasant vision of the future awaiting every law student or new lawyer who will otherwise learn how to speak like a lawyer. Yet I also bring reason for hope: even Scrooge was able to avoid the horrors laid before him when he "lived upon the Total Abstinence Principle, ever afterwards."[104]

Go now and do likewise. Resolve to banish *whetherornot* from your vocabulary. Then resolve that you will abstain even from *whether* unless you absolutely must use it. These two simple resolutions can stave off a whole parade of excesses to which you will otherwise inexorably descend.

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[103] *Id.* at 125-26.

[104] *Id.* at 137-38.