

BEFORE & AFTER THE COLON

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HERE ARE FEW PATTERNS MORE NOTICEABLE in law review articles than the abundant use of colons in titles. For what has been referred to as "the least used punctuation mark" or the sideways umlaut, legal scholars may be among the mark's few remaining fans. Scholars have commented on the pattern, positing various causes for the colon's prevalence. The explanations include: (1) the author's insecurity with the article's subject matter, (2) as scholarship becomes more advanced, colons become more necessary in titles (advocated in an article titled with two colons), and (3) journal editors make authors add colons. These do not provide a plausible account of how a field of intelligent and freethinking individuals developed such a mundane habit. Given the enormous amount of time and energy legal academics pour into writing articles, a better explanation is long overdue.

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¹ North Carolina State Writing and Speaking Tutorial (2003), at www.ncsu.edu/tutorial_center/writespeak/download/colons.pdf.

² Sidney W. Delong, On the Lighter Side: An Appraisal, 41 J. LEGAL ED. 483 (1991).

J.T. Dillon, In Pursuit of the Colon: A Century of Scholarly Progress: 1880-1980, 53 J. HIGHER EDUC. 93 (1982); see also J.T. Dillon, The Emergence of the Colon: An Empirical Correlate of Scholarship, 36 AMERICAN PSYCHOLOGIST 879 (Aug. 1981).

⁴ Justin Hughes, *The Line Between Work and Framework, Text and Context*, 19 CARDOZO ARTS & ENT. L.J. 19, 19 (2001).

This paper offers empirical data to examine several questions regarding the colon's use in article titles. The most direct question it answers is just how often authors use colons. It also analyzes three variables: what time period the article was written in, what journal it was published in, and whether it was student-written. We did not have a specific hypothesis before data collection — simply that the titular colon is rather frequent and has likely been on the rise — but the data reveal some surprising trends. For instance, colon usage has remained relatively constant among articles published in elite law reviews during the past fifty years; there is a significantly higher percentage of colonized titles in second-tier journals than in the elites; and there is a noticeably higher percentage of colonized titles in student notes than in articles. After rejecting some alternative explanations, we argue that posturing, imitation, and institutional habit are the most plausible causes of excessive colon use.

For those unfamiliar with current law review articles, the primary section headings can be viewed as typical article titles, as each is inspired by one or more actual titles. We realize this aspect of the paper is more obnoxious than helpful or clever, but the demonstrative point is that article titles are often, if nothing else, obnoxious.

TAKING CARE OF BUSINESS: TITULAR COLONIZATION AND HOW WE COUNTED THE NUMBERS – A METHODOLOGY⁵

We collected data from ten different law reviews: five "elite" and five "second-tier" journals, based on Washington and Lee's rankings.⁶ For the elites, we chose the five most-cited law re-

Titles sometimes have a colon, em-dash and footnote. See, e.g., Kelley J. Johnson, "New Thinking About an Old Issue:" The Abortion Controversy Continues in Russia and Ireland — Could Roe v. Wade Have Been the Better Solution?, 15 IND. INT'L & COMP. L. REV. 183 (2004); cf. Sherri L. Toussaint, Defense of Marriage Act: Isn't it Ironic ... Don't You Think? A Little Too Ironic?¹, 76 NEB. L. REV. 924 (1997). At least eight titles reference the song, "Taking Care of Business."

⁶ Washington & Lee University, Most Cited American Legal Periodicals (2002), at http://lawlibrary.wlu.edu/library/research/lawrevs/mostcited.htm.

views: the Yale Law Journal, Harvard Law Review, Michigan Law Review, Stanford Law Review, and Columbia Law Review. For the "second-tier" journals, we used the Nebraska Law Review, Dickinson Law Review, University of Missouri at Kansas City Law Review, Montana Law Review, and Arkansas Law Review. Ideally we would have used journals ranked 101-105, but since our study required data dating back to 1948, we chose the first five journals ranked 101 or below published continuously since that year.⁸

For each of the ten selected journals, we extracted colonized title tallies from an entire volume every five years. For instance, we tallied the volume beginning in 1948 of the *Michigan Law Review*, along with the 1953 volume, the 1958 volume, etc. We stopped with the 2003 volume. This was repeated for each of the ten journals. For each volume, four numbers were tallied: number of articles, number of notes, number of colonized article titles, and number of colonized note titles. With these numbers, we calculated the percentage of articles and notes with colonized titles published in a given year.

A few admittedly arbitrary decisions were made while harvesting data. In some instances, early student work contained canned titles. For instance, the *Michigan Law Review* applied a formula to title its student notes and comments until around 1963; they all read something like, "Insurance – Rate Regulation – Competitor's Standing to Seek Administrative Review of Rate Filings." We decided not to count these canned titles toward our tallies. Similarly, we chose not to tally book review titles as they often suffered from the same "canned title" problem, where the title of the book being reviewed always preceded a colon in the title. We are concerned with the frequency of colonized titles where the *author* decides to use a colon; the inclusion of canned titles would only dilute the data.

⁷ These are typically ranked as the top five. See Fred R. Shapiro, The Most-Cited Law Reviews, 29 J. LEG. STUD. 389, 394 tb.2 (2000).

The five journals we selected are ranked 107 (Nebraska), 112 (Dickinson), 122 (UMKC), 123 (Montana), and 124 (Arkansas).

⁹ 58 MICH. L. REV. 730 (1960).

Further, we did not count a title as colonized when it contained a punctuation mark that functioned as a colon. Authors often, perhaps subconsciously, avoid using colons in their titles by substituting an em-dash or question mark. Even when it was clear that the author could have used a colon, and as much as it pained us, we considered these articles non-colonized. 10 Authors often use these as a way of sneaking a second colon into the title as well.11 In total, we surveyed over 5,000 articles and notes spanning 55 years.

ONCE, TWICE, THREE VARIABLES EXAMINED: REVIEWING THE USE OF COLONS IN TERMS OF TIME, JOURNAL, AND STUDENT-AUTHORSHIP¹²

A. The Emergence of Colonized Titles

Today, thousands of law review articles and notes are published every year. Fifty years ago, the number was much lower, as there were fewer law schools and consequently fewer law reviews. Also contributing to today's influx of published articles is the prevalence of specialty law journals. The graph on the next page demonstrates how the colon has emerged over time in article titles (including notes) in law reviews.

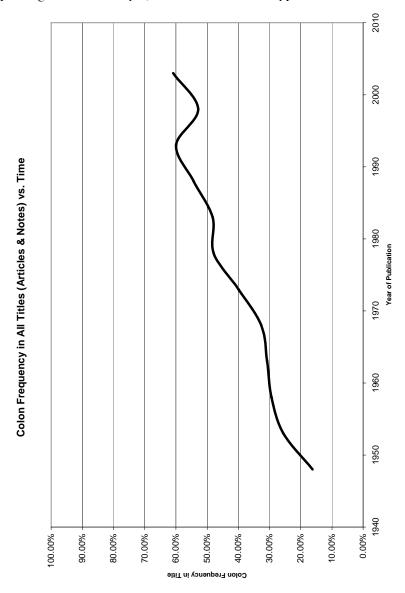
Decades ago titular colons were rare in articles, but around 1950 they began a steady climb that appears to have tapered off in 1990. It is difficult to attribute much significance to the line's intricacies, but we can confirm the basic hypothesis from the outset. The percentage of articles with titular colons is currently high (roughly sixty

 $^{^{10}}$ See, e.g., Alan Howard & Bruce Howard, The Dilemma of the Voting Rights Act -Recognizing the Emerging Political Equality Norm, 83 COLUM. L. REV. 1615 (1983).

¹¹ See, e.g., David B. Prokop, Antitrust Liability for Municipal Action and Concerted Attempts by Businessmen to Influence Such Action: Separate but Unequal - An Anomaly Persists, 88 DICK. L. REV. 697 (1984); Scott A. Henderson, United States v. Emerson: The Second Amendment as an Individual Right – Time to Settle the Issue, 102 W. Va. L. Rev. 177 (1999).

¹² See Benjamin J. Cluff, Federal Term Limits in Idaho: Once, Twice, Three Times Unconstitutional?, 36 IDAHO L. REV. 119 (1999).

percent) and it has drastically increased over recent decades. Looking through the pre-1960 journals, it was common to go through entire volumes without finding a single titular colon, but accomplishing that with today's journals would be a Sisyphean task.



Admittedly, we were somewhat surprised that the data suggest the percentage of colonized titles has remained relatively constant during the past fifteen years. We also thought that, based on our informal observations as article editors, the final percentage would have been even higher — one of us predicted as high as ninety percent. But some interesting explanations arise as we explore the other variables.

B. Elite vs. Second-Tier Journals

We explored this second variable because authors have expressed the sentiment that colonized titles are prerequisites for getting published in decent journals. One author quipped, "I did not receive a generous grant for writing that article ... because the title did not have a colon," and another suggested the colon was a "requirement for a good title Multiple colons are even better." While both authors were poking fun at the trend, their statements capture what some authors must be thinking: "Using a colon is what good scholars do, and it will help me get published in a good journal." The graph on the next page suggests there is little truth to that conception.

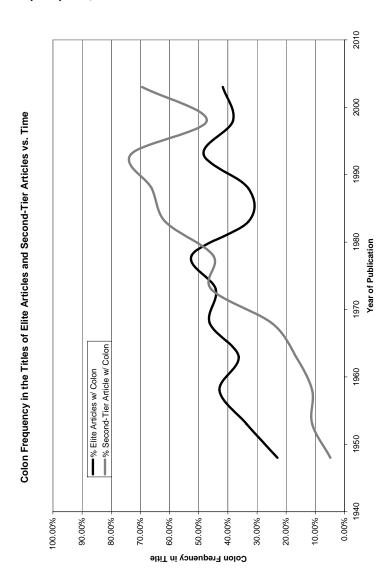
There was a time when elite journals published a higher percentage of articles with colonized titles than their second-tier counterparts, but that time has passed. Elite journals have remained relatively constant since 1960, publishing roughly forty percent of articles with colonized titles. The second-tier journals have been oscillating around sixty percent during the last twenty years, but notice where they began. In 1960, when the elite journals were around forty percent, the second-tier journals were barely cracking the ten-

12

¹³ David G. Epstein & Jonathan A. Nockles, *Recoupment: Apples, Oranges and a Fruit Basket Turnover*, 58 SMU L. REV. 51, 73 n.149 (2005). This comment was only half-joking, as the author did not make the same "mistake" twice.

¹⁴ C. Steven Bradford, As I Lay Writing: How to Write Law Review Articles for Fun and Profit: A Law-and-Economics, Critical, Hermeneutical, Policy Approach and Lots of Other Stuff That Thousands of Readers Will Find Really Interesting and Therefore You Ought to Publish in Your Prestigious, Top-Ten, Totally Excellent¹ Law Review: [this space reserved]:, 44 J. LEGAL EDUC. 13 (1994).

percent barrier. In other words, the jokes about adding a titular colon to increase chances of getting published in a good journal may have been well founded in 1960 – perhaps as recently as 1980 – but today they are just uninformed.



This graph also suggests some inaccuracies in the first graph and dispels some of our initial surprise. Since there is an enormous number of second-tier journals and only a handful of elite journals as we used those terms, the second-tier trend is much more indicative of overall journal trends in recent years. When viewing all journals collectively, we used an equal number of volumes from elite and second-tier journals, but for every elite journal there are tens or hundreds of second-tier journals. From viewing the two graphs, we would estimate the actual number of articles being published with colonized titles is currently between sixty and seventy percent. This is further demonstrated by the second-tier journal percentages in the following chart. Because of the dip in colonization seen in the second-tier journal data during 1998, we decided to gather article data for the ten journals *each* year from 1993-2003.

The table below displays the percentage of colonized titles in each journal from 1993-2003, and also ranks the journals inversely according to the percentage of colonized titles:

Inversed Colon Ranking	Review Name	Colonized Article Title %
1	Harvard	41.74%
2	Stanford	43.23%
3	Yale	43.82%
4	Montana	45.31%
5	Columbia	46.18%
6	Michigan	47.61%
7	UMKC	60.84%
8	Arkansas	61.40%
9	Dickinson	62.72%
10	Nebraska	65.58%

The elite journals during the eleven-year span each had between 41 to 48 percent of colonized titles. The second-tier journals — excepting the *Montana Law Review* — each had somewhere between 60 to 66 percent, nearly twenty-percentage points higher on average. We cannot offer a plausible explanation for *Montana*'s deviation, so we will settle for labeling it, "The Montana Anomaly."

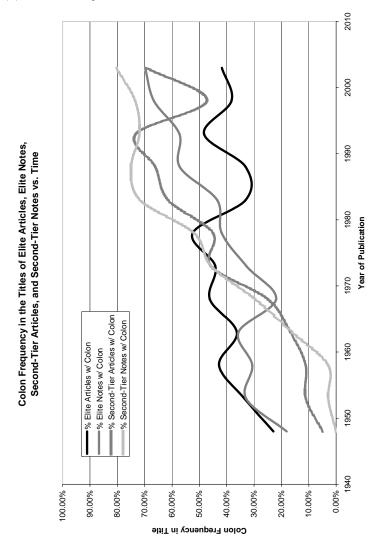
Some authors may not be concerned with getting published in an elite journal; they just want to be published somewhere. The data do not address this concern because we are only looking at the universe of published articles. It is difficult to get an untainted sample of articles that were never published, but we did take a peek into the Michigan Law Review's "cabinet" for some answers. The cabinet contains a random assortment of articles, submitted in 2005, that the Michigan Law Review declined to publish. While most of these articles were surely published elsewhere, the sample should also include some number of articles that were never published. Of the first hundred articles in the top drawer, seventy-two (or seventytwo percent) of them had colonized titles - somewhat higher than the sixty to seventy percent we estimate the number to be for published articles. While this sample is inadequate to draw any concrete conclusions, if it is at least partially representative of the universe of legal articles submitted, then we can say that colonized titles show up with higher frequency in (1) unpublished articles and (2) secondtier journals, and are less likely in (3) elite journals. Another way of looking at it is – assuming that elite journals get the best articles and unpublished articles are the worst¹⁵ – the worse the article is, the more likely it is to have a colon in its title.

C. Student-Written Work

Student-written work deserves separate treatment. Students have had less exposure to legal academia, and they are probably more likely to rely on imitation when they feel uncomfortable explaining material. In their favor, students may be among the small group of writers that have yet to acquire all the poor institutional habits of academics, although those habits are learned rather quickly. This graph shows the incidence of titular colons in (1) elite journal arti-

¹⁵ This is a big assumption. For a flogging of the current system of student-edited law reviews, see Richard A. Posner, *Against the Law Reviews: Welcome to a World Where Inexperienced Editors Make the Wrong Topics Worse*, LEGAL AFFAIRS 57 (Nov./Dec. 2004).

cles, (2) elite journal notes, (3) second-tier journal articles, and (4) second-tier journal notes:



Since we are most interested in the current state of legal scholarship, the trends over the past decade are especially informative. According to our statistics, the four plotted categories rank in the fol-

lowing order, from lowest to highest percentage of colonized titles: (1) articles in elite journals, (2) articles in second-tier journals, (3) notes in elite journals, and (4) notes in second-tier journals. We suspect most people would rank the expected quality of legal scholarship by category in this same order. This lends further support to the idea that the worse the piece of scholarship, the more likely it is to have a titular colon. Only the "elite articles" clearly stand apart in 2003, with approximately thirty to forty percent fewer articles with colonized titles than each of the other categories.

We have not suggested any cause for this phenomenon. It is highly unlikely that the article selection process favors or disfavors articles with titular colons, but there is certainly something to the patterns observed that is beyond mere coincidence. Before offering our explanation, we should address some alternatives.

A COLON BY ANY OTHER NAME REMAINS THE SAME: IN SEARCH OF AN EXPLANATION FOR THE INCREASED FREQUENCY OF COLONIZED TITLES IN LEGAL SCHOLARSHIP¹⁶

A. The Advanced-Scholarship Thesis

In defense of the increase in titular colon usage, one author theorized that as scholarship becomes more advanced, titular colons become more necessary. The argument is that complex concepts require more than just a single-phrase title to convey the thrust of an article completely. There is no doubt that over the years legal scholarship has become — if not more advanced — more nuanced and specialized. But there are two decisive reasons why this explanation fails.

AUTUMN 2006 17

6

¹⁶ The cliché, "____ by any other name," appears in 89 titles according to a Westlaw search. See, e.g., Dennis S. Ellis, A Product Liability Claim By Any Other Name Remains A Product Liability Claim: California Courts Should Not Permit Plaintiffs To Recast Product Liability Claims In The Terms Of Fraud, 25 WHITTIER L. REV. 441 (2003).

¹⁷ See Dillon, supra note 3.

First, while the theory may account for some small fraction of colonized titles, the vast majority of scholarship does not employ the colon for its explanatory power. Articles are far more likely to use colons to include clichés and rock-and-roll lyrics, rather than to help clarify complex, multifaceted ideas. The colon typically separates a "snazzy phrase" from "a nuts and bolts description of what the work is really about." Hardly the best approach to help shed light on a complex concept. Perhaps that is why the proponent of this theory used two colons in his article title. His first phrase is snazzy, the second explanatory, and the third has the excess information that could not possibly fit in the first two phrases. Consider the title: "In Pursuit of the Colon: A Century of Scholarly Progress: 1880-1980."19 We prefer "The Colon and Scholarly Progress Over the Past Century." His subject matter was not as complex as he made it out to be. At least he did not use three colons, as others have done.²⁰

A few examples may help demonstrate the point. Some of the following articles were written by preeminent legal scholars, and there is no doubt that the substance of each is terribly sophisticated. Yet none employ the titular colon with the purpose of clarifying a concept:

"I want my MTV": Mandatory Access to Premises Legislation and Pennsylvania Senate Bill 524²¹

Much Respect: Toward A Hip-Hop Theory Of Punishment²²

¹⁸ See Hughes, supra note 4, at 19 (explaining his "struggle[] to avoid titles with colons" but blaming law review editors for not allowing authors to use snazzy, uninformative titles).

¹⁹ Dillon, *supra* note 3.

²⁰ See, e.g., Carol J. Gill, Empirical Research Relevant to the Law: Existing Findings and Future Directions: Health Professionals, Disability, and Assisted Suicide: An Examination of Relevant Evidence and Reply to Batavia, 6 PSYCHOL. Pub. POL'Y & L. 526 (2000). Is there an important difference between "empirical research," "existing findings" and "relevant evidence"?

²¹ 93 DICK. L. REV. 83 (1988).

²² 56 Stan. L. Rev. 983 (2004).

It's a Bird, It's a Plane, No, It's Super Precedent: A Response to Farber and Gerhardt²³

One might respond that three articles prove nothing. A search of Westlaw found that the following phrases (or slight variations thereof) turned up in multiple titles, overwhelming majorities of which were colonized:

"Scylla and/or Charybdis" hits)
by any other name: 89 hits
The forest from the trees: 47 hits
Business as usual: 38 hits
Would the real please stand up?: 28 hits
Before and after: 114 hits (115 if we count this article).
These were just a few examples, but there are certainly many more.
For instance, while the phrases "Taking seriously," "Re-
thinking," or "The case against" undoubtedly
occur in hundreds of titles, we did not think they qualify as clichés,

Of course there are some examples where the colon is used in an interesting, informative way, but we can confidently say that those are rare exceptions. The only example of effective colon usage we can think of comes from the movie, "Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb."

although they may show a similar lack of originality.

The second problem with this theory poses an even larger obstacle: The data do not support it. If this explanation were correct, student-written notes would have to be considered more advanced than articles published in elite journals. Setting notes aside, secondtier articles also have a higher occurrence of colonized titles than elite articles. If we assume that articles published in elite journals are more sophisticated than articles published in second-tier jour-

²³ 90 MINN. L. REV. 1232 (2006).

²⁴ Columbia Tri-Star (1964).

nals, then the advanced-scholarship theory is dead in the water. It also ignores the fact that elite journals have remained fairly constant in titular colon usage in the last four decades. From our data, it seems this explanation has it completely backward: the worse the article, the more advanced it is.

There is a final way to conceptualize this view that may resonate with the data. Namely, as articles are more specialized, the colon becomes more necessary. Students, with their limited fields of expertise, tend to write on statutory sections or facets of a particular case, while elite authors may be commenting more broadly on entire fields of law. Beside contesting the empirical point that students write on narrower topics, there are three responses: (1) it does not explain the variance between elite and second-tier articles, especially since we did not survey "specialty" journals, (2) it is unclear why a narrower topic is more likely to require a colon, when the converse seems equally plausible, and (3) it fails to capture the reality of colonized titles as pithy displays of humor. Ultimately, the issue may come down to who can list more examples, but we believe any serious look will reveal a lack of informative colonized titles

B. "Law Review Editors Made Me, the Important Legal Scholar, Do It"

Another explanation for the increase in titular colons is that student editors force colonized titles upon authors: "[Student] editors resist allowing authors to use snazzy but uninformative titles and ... authors, for good reason, resist titles that inform but bore." So it would seem that student editors require boring informative titles and authors would prefer fun, fresh, catchy titles. Because neither is willing to back down, a stalemate ensues, and the colon acts as the peacemaker — a veritable Berlin Wall separating everything that is hopeful in the West from everything that is gloomy in the East.

²⁵ See Hughes, supra note 4.

This is not how things work. We cannot speak for all article editors, but of the fifteen we informally questioned, both from the University of Michigan and several other law schools, we did not encounter a single one who had ever made a substantive or structural change to an article title. This is not to say it does not happen, just not with much frequency. In contemplation of this paper, however, one of us experimented with an author-editee - who happened to be a professor at an elite institution – by suggesting that he remove the colon from his title and delete one of its titular phrases. The title fit the snazzy-COLON-informative mold described above. The suggestion of removing the colon was rejected and the issue was never discussed again. We think it is nearly universally true that (1) student editors could not care less about an article's title, and (2) insofar as they do care, they have virtually no power to command a title change. It is the authors, not the editors, that need to learn to "just say 'no"!

Also, this explanation cannot account for the discrepancies in the data. Notice the difference between titular colon frequency in articles published in elite journals and articles published in second-tier journals. Assuming student editors at elite journals exert more control over pieces, we would expect to see the inverse of what the data show, with elite articles having higher instances of colons. One could argue that student editors at second-tier journals prefer the titular colon more, but there is no indication that the second-tier editors have a preference for titular colons over editors at elite journals. The data suggest that students at both elite and second-tier journals roughly prefer colonized titles at an equally high rate when writing their own work. While the second-tier notes have a somewhat higher occurrence of the titular colon, the discrepancy does not approach the margin between elite and second-tier articles.

Recall, our rough sample from the *Michigan Law Review*'s cabinet showed that seventy-two percent of the articles received by the *Michigan Law Review* this year contained colonized titles. Given that the average of all published articles is in the neighborhood of sixty to seventy percent, it looks like it cannot be that student editors are forcing authors to employ titular colons. After all, authors submit

articles with an equal or higher frequency of titular colon use than those actually published (the deviation is even larger with respect to elite journals). Blaming student editors for the influx of colonized titles, while convenient, is misplaced.

C. The Colon's Prevalence as a Product of Imitation

Tarious factors are undoubtedly at play when an author chooses to colonize a title. We questioned several student-authors about their titles in recent scholarship, and the most common response went something like this: "I'm not sure why I have the two phrases, but it's just some petty attempt at humor and it's pretty stupid now that I think about it." The point is not that authors are unintelligent for using the colon; it is that they suffer from a series of influences that make the colon a seeming inevitability. We think three largely interrelated forces are at play: posturing, imitation and institutional habit. The first is likely the least prevalent, as it insinuates that an author is making a conscious choice to include a colonized title for some perceived benefit. The perceived benefit is presumably signaling to readers that the author is an intellectual force, having graduated to the ranks of authors using colons. This factor is probably only marginally at play, as our experiences suggest that once one points out how unnecessary the colon is, most authors are eager to remove it. This suggests the choice to use the colon is typically subconscious, learned behavior.

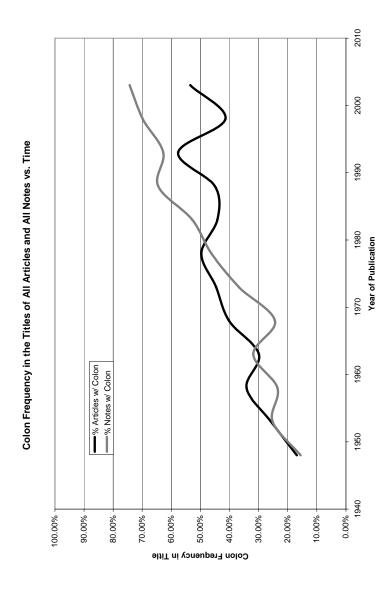
This brings us to the second and third factors of imitation and institutional habit. The former explains why new authors might begin using the colon and the latter why they persist. The imitation point is that, after being inundated with articles with colonized titles, a student interested in absorbing the culture around him will likely internalize the pattern of colonizing titles. Query whether institutional habit should be considered as a separate phenomenon, but it is meant to capture authors who use colons not because of any current external influence, but because of their own continual practice of using the colon. A theory predicated on imitation of course begs the question, "how did the *imitated* start using the colon in the first place?"

Without delving too deep into psychological and social sciences - perhaps it is too late for that assurance - here is one rudimentary story about how this occurs. If there is a proper and interesting way to use the titular colon, we can assume the better writers would be the first to employ it. Once some observable mass of those writers use the colon, bad writers are sure to imitate it. In fact, because the colon is noticeably absent from the bad writers' articles, they will likely over-imitate it, using the colon in a higher percentage of titles than the good writers ever did. At some point, the good writers (having stayed relatively constant in their colon usage) will be identifiable as those who do not use colons nearly so often. The bad writers will over-imitate that behavior and come crashing back down to under-use the colon, and the cycle can begin anew. While the data cannot say much about this skeletal story, it at least does not contradict it when we substitute student writers as the bad writers in the graph on the next page.

Before 1980, notes and articles either kept pace with each other or articles outpaced notes. In fact, during that period the notes line is almost identical to the articles line, except that it is roughly five years behind the pace. Students seem to have imitated the upward trend of colonization in articles by the feverish inclusion of colons in note titles. In the late seventies, when article-writers began to pull back on using colons, students either did not notice or did not care. It appears, however, that the frequency of colonized titles in student-written work might be nearing a plateau, albeit at an appreciably higher level than articles. Our haphazard prediction is that there will be a significant decline in colonized titles in student-authored scholarship during the upcoming decades.

We should not overstate the point of this paper. It is not that adding or removing a colon in one's title will alter the chances of being published in a good journal, merely that a title may be indicative of an article's content. Authors that employ the colon excessively are prone to imitation more than those that use it in moderation. Given the choice between a writer who falls easily into conventions and one who takes a more independent approach to style and scholarship, the safe bet is that the latter will produce better,

more interesting work, thereby increasing the chances of getting published in better journals.





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