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LANGUAGES OF A DIVIDED KINGDOM: LOGIC AND LITERACY IN THE WRITING CURRICULUM

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INTRODUCTION

One problem with slaying kings is that they never actually die in the minds of their survivors. Indeed, as Freud postulated in his theory of totemic authority, and as the Puritan regicides discovered in their righteous interregnum, martyred patriarchs rise up again to wield in death the advantage that they could not muster in life. I confess that Professor Brewer's monarchical metaphor stirs my own royalist sentiments. The metaphor is compelling because, ironically, the restoration of deduction to the law's gravitational center is a kind of romantic project. As a remote heir of the Legal Realist revolution, the question for me is whether the *Punctuated Deductive Equilibrium* model provides the protection sufficient to a constitutional monarchy. Fortunately (for my audience, at any rate), that is not precisely the question I have been asked to address. Nevertheless, I ask indulgence to work my way through the metaphor to elucidate my proper task.

Paying homage to deduction is the duty of a rational mind, for deduction more than any mode of reasoning symbolizes the protective order of logic against chaos. On the other hand, symbols undermine their function if they work too well and draw attention so emphatically to themselves that they obscure what they purport to represent. The Legal Realists dethroned deduction because they perceived it had turned tyrant. Given the dialectic according to which revolutions invariably re-embody (with cosmetic variations) the tyranny that was overthrown, it is good to question whether the anti-deductivist interregnum has not overreached its limits. The question is answerable only in fragments, because here the metaphors of king and country break down unless they are modified: law is a kingdom divided. Any victory of Legal Realism was only in the intellectual provinces, an area small and remote from the major population areas where most of the industry is carried out. In Law's judicial heartland, the post-deductivist regime has never been officially recognized,

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and the deposed king—or his heir, or perhaps a pretender—reigns in exile. The situation is paradoxical because in the heartland no one thinks of the king as being in exile. From their perspective, it is only the rebellious academic guerrillas who will not acknowledge the reality of who is in charge. My present concern is not to decide which model represents the true government or which faction is most out of touch with reality, but to respect the integrity of each model in understanding how we speak law (for one "practices" law only by speaking it) and how we should teach people to speak law. Whether or not deduction can be determinative in legal thought, few people seem to be very good at deduction. Whether experience or logic is more appropriately characterized as bestowing "life" to law, none would argue that both are necessary to sustain life, and few seem adept at integrating human experience into legal discourse.

Legal education generally, and Legal Writing courses in particular, have not done a good job of teaching either the language of logic or the language of experience. Part of the problem is that legal education begins and ends in the morass of law as it is already written, in practice and in commentary upon practice. Thus the study begins in a language already foreign in the sense that it is a creole of ordinary speech, logical inference, and specialized dialects of a social and professional class. It is an artificial language, having the complexity of propositional calculus without the precision. Professor Brewer's examples illustrate the consequences of imprecision and the need to re-establish logical integrity (not simply in the deductive mode) in the language we teach. On the other hand, the voices of Legal Realists still remind us that the failure adequately to incorporate into law's language experiential aspects of human life undermines the goal of logical integrity by covertly asserting premises that are empty, misleading, or downright stupid. Logic is affected by a failure of imagination and empathy as surely as imagination and empathy are affected by invalid inference and deduction.

The present dilemma of legal education resembles in significant aspects the dilemma of the liberal arts curriculum in the mid-nineteenth century. In this sense, the Legal Realists were to the study of law what the New Critics were to the study of literature, both movements arising out of an historical matrix in which the established language of an academic field had been outstripped by evolving social realities. It was easier for the New Critics because the language that needed supplanting was Latin—not the real kind of Latin that people could actually speak, but an artificially preserved version that was foreign even to the few who could write it well. Moreover, its artificial character robbed it of vitality. The study of Latin was also the study of Rhetoric, but a

cheap imitative version—not the logic and ethics of Aristotle.[1] In Legal Writing courses, one way of establishing logical integrity to our peculiar artificial language is to recover the strong aspects of Aristotelian rhetoric so often neglected in a product-oriented approach to writing. But this is not enough. The language of law itself must be made less artificial.

As the strictures of the Latin curriculum fell aside, and the study of literature was no longer yoked to outmoded oracular models of rhetoric, vernacular literature emerged and blossomed in the academy, and with it the new activity of literary criticism. A similar remedy befits the present ill. Legal Writing courses should not abandon rhetorical models, but expand the context against which they are studied, measuring their integrity not only in terms of effective technique, but also of moral value. In other words, Legal Writing must contribute to a new interdisciplinary study of law by cultivating literary imagination and incorporating interpretive methods of literary criticism. The skill of legal argumentation is not accomplished merely by producing written artifacts in a predictive or persuasive genre, but by standing outside the genre in a critical posture that judges something akin to aesthetic integrity as well as logical validity. My present purpose is to delineate the possibility and encourage creative pedagogy.

In Part I of this paper, I elaborate on the analogy between the artificial academic version of "Learned Latin" (a term borrowed from Walter Ong) and the artificial legal discourse of *Stare Dictus* (a term borrowed from Herman Oliphant). In Part II, I trace means of curtailing the artificial character of the discourse, first, through identifying distinctive devices in the language as given by courts (a traditional approach, which I term "weak" rhetoric); second, through translating the given language into informal propositions and identifying the psychological framework which gives the propositions compelling force (a variation of an

1. Aristotle approached rhetoric as a combination of logic and ethics; the point of the discipline is to persuade people to act in accordance with what is good. ARISTOTLE, ON RHETORIC 1.2 §§ 1356a-56b; 1.4 § 1359b; 1.6 (George A. Kennedy trans., Oxford Univ. Press 1991). *See also* ALBERT R. JONSEN & STEPHEN TOULMIN, THE ABUSE OF CASUISTRY 63-74 (1988) (discussing Aristotle's notion of moral judgment as *phronesis* ("prudence" or "practical wisdom") as opposed to *episteme* ("science" or "knowledge"), placing moral deliberation properly within the scope of rhetoric). For a detailed analysis of the sense in which Aristotelian rhetoric both is and is *not* morally neutral, *see* Troels Engberg-Pedersen, *Is There an Ethical Dimension of Aristotelian Rhetoric, in* ESSAYS ON ARISTOTLE'S RHETORIC 116-41 (Amelie Oksenberg Rorty ed. 1996) (explaining how the ethical dimension of Aristotelian rhetoric is not dependent on the moral character of the rhetorician, but on "certain facts about human seeing—the way human beings are related to truth," such that what is good and true will be inherently more convincing than what is not).

Aristotelian identification of enthymemes, which I term "strong" rhetoric); and third, through approaching judicial opinions as a literary genre subject to formal aesthetic categories critically applied to vernacular genres (a kind of "literary criticism" resembling the approach of the New Critics). This third approach, presently in seminal manifestations, provides ample promise for a philosophical approach to the study of law.

I. EXPERIENCING LAW AS A FOREIGN LANGUAGE

A. The Curriculum of "Learned Latin"

In the America of the mid-nineteenth century, there were no college English majors, no substantial courses in American literature, and no literary criticism. The burgeoning public schools were of course teaching English and American literature to the children of merchants and laborers, but the finer secondary schools, like the colleges and universities, eschewed the vernacular in favor of Latin and Greek, just as the humanists had done in the sixteenth and seventeenth centuries.[2] Certainly, this was a strange situation since even in the fifteenth-century Latin was hardly spoken in any public forum except for the Mass, and this hardly counted for schoolboys even in Catholic countries. (Greek, of course, was even more obscure, and so Latin, by its comparative relevance, dominated the curriculum.)[3]

As one might predict, boys who were coerced into learning a language that they would never use outside of school did not learn it very well.[4] But this only caused educators to devote more resources to its instruction, pushing the subject higher into the curriculum, so that Latin classes could not be avoided from elementary school through college.[5] Yet, despite the fact that Latin was *the* language of learning, the number of books published in Latin steadily declined from the seventeenth century through the nineteenth. The language that had once been the prerequisite for all learning now needed justification, and there was little to be conjured up. The addition of new and discrete areas of study, particularly in the sciences, put increased pressure on a loaded down curriculum.[6]

As Walter Ong points out, there are many reasons why Latin

2. Walter J. Ong, *The Vernacular Matrix of the New Criticism*, *in* THE BARBARIAN WITHIN 177 (1962) [hereinafter *The Vernacular Matrix*].

3. *Id.* at 180.

4. The medieval rhetorician Peter Ramus, writing in 1562, complained that of the roughly one thousand students who attended lectures at the University of Paris, barely two hundred were fluent enough in Latin to understand them. *Id.* at 191.

5. *Id.* at 189-91.

6. *Id.* at 192-93.

waned, but principal among them was the contrived character of the language Latin had become.[7] The "Learned Latin" of the humanist tradition was rigid and incapable of growth. Totally dependent upon the academic community for its very existence, it could not, like other languages, adapt to fit the psychological needs of its speakers—more precisely, of its writers, since in function there were no speakers. Indeed, that is the point. Latin was not a "dead" language in the sense that it could not add to its vocabulary—scholars coined new terms with regularity—but it was, in Ong's phrase, "an artificially preserved language, chirographically (and in part typographically) controlled."[8] The literary study that young men encountered in school was also artificial in the sense that it was dominated by rhetorical models largely incapable of expressing the familiar sensibilities of life as it was actually experienced.

As Ong continues:

> This Latin orientation of formal literary training gave to all literature a curiously public and formal, although not necessarily an unemotional cast. This was because Latin was no longer a vernacular language. The vernacular enters into areas of life where other languages cannot enter—the family, intimate personal relationships, and, most of all, the depths of the individual consciousness initially opened and permanently occupied by the terms and the concomitant concepts through which the individual first becomes conscious of his own existence as he learns to think and talk. Latin could be somewhat intimate in the letters of Erasmus or More, but it was never a family language. Humanists actually advocated—and practiced—the expulsion of young boys from their families at around the age of seven so that they would be free of corrupting vernacular influences, particularly from womenfolk, including the child's own mother. For even the humanists' wives did not coo to their children in Ciceronian Latin—or in any Latin at all. No one ever entered into his first awareness of himself and the world around him through its ministrations. Latin was foreign to absolutely all of those who after classical times for well over a thousand years read and spoke and wrote it so well, but as a learned tongue.[9]

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7. *The Vernacular Matrix*, *supra* note 2, at 193-98. Father Ong estimates that in the British Isles during the sixteenth century, no more than ten percent of those who studied Latin in school did any extended writing in Latin as adults. *Id.* at 189. By the nineteenth century, the figure drops to one half of one percent. *Id.* at 190. Anthony Trollope, writing of his education at Harrow, which he left in 1834 at the age of nineteen, complained that "no attempt had been made to teach us anything but Latin and Greek . . . . Those were twelve years of tuition in which I do not remember that I ever knew a lesson." Walter J. Ong, *Latin and the Social Fabric*, *in* THE BARBARIAN WITHIN, *supra* note 2, at 206-08 (quoting Trollope's autobiography).

8. *The Vernacular Matrix*, *supra* note 2, at 195.

9. *Id.* at 181. *See also Latin and the Social Fabric*, *supra* note 7, at 211-16

If the foreign quality of their literary language[10] was felt by those who read and wrote Latin well, the effect was all the more acute for others—the vast majority—who read and wrote it poorly.[11] There could be no literary criticism as we think of it because there was practically no literature as we think of it. Literary study consisted of formulaic rhetoric. Unlike the critical study of literature, which self-consciously draws upon a broad range of intellectual, emotional, and psychological categories to evaluate a work in a given context, the ordinary approach of rhetoric is inherently unreflective. The mastery of rhetoric is largely a matter of imitation. Texts and teachers focus reflexively on *how* to exert influence, neglecting or even disdaining questions pertaining to that *for the sake of which* influence is exerted. To a person who is not adept in the language, and to whom the words and phrases in the most benign context are experienced as external rather than as the essence of self and thought, the temptation to copy language without thinking has all the force of animal instinct. Copying is all people can do when they do not know what they are doing. Unfortunately, rote imitation, when it works, encourages people not to care that they do not know what they are doing.

There were of course some talented pupils who benefited from the rhetoric-centered curriculum, and who enhanced vernacular literature as a result. But students of the caliber of Shakespeare or Jonson are exceptional in any educational milieu. To the degree that the literature of Learned Latin worked to enhance the vernacular through the skillful incorporation of classical forms, it more surely hastened its own demise. Still, however widely

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(connecting the culture of the "particularly male world of Latin-and-formal-schooling" with puberty rites in tribal societies).

10. The fact that Learned Latin preserved the vestiges of oral culture through classical rhetoric is paradoxical when one considers that Learned Latin (as opposed to earlier vernacular Latin) could exist only because human consciousness had been transformed by writing:

> Learned Latin was a striking exemplification of the power of writing for isolating discourse and of the unparalleled productivity of such isolation. Writing . . . serves to separate and distance the knower and the known and thus to establish objectivity . . . . Learned Latin effects even greater objectivity by establishing knowledge in a medium insulated from the emotion-charged depths of one's mother tongue, thus reducing interference from the human lifeworld and making possible the exquisitely abstract world of medieval scholasticism and of the new mathematical modern science which followed on the scholastic experience. Without Learned Latin, it appears that modern science would have got under way with greater difficulty, if it had got under way at all. Modern science grew in Latin soil, for philosophers and scientists through the time of Sir Isaac Newton commonly both wrote and did their abstract thinking in Latin.

WALTER J. ONG, ORALITY AND LITERACY 113-14 (1982).

11. *See generally supra* notes 4 and 7.

Shakespeare was read in the seventeenth and eighteenth centuries, his plays would not routinely be studied in colleges until the nineteenth century was well under way. It was not until 1876 that Harvard, in the vanguard of American education, appointed James Child as its first professor of English. But evolutionary trajectories have their peculiar dynamism. By the time T. S. Eliot entered Harvard in 1906, an entire generation was receiving thorough instruction in English literature.[12]

In the end, what stands out is not the inordinate time that the Latin curriculum was preserved beyond its usefulness so much as the inevitability of its demise and the radical shift of attention that the study of vernacular literature necessarily evoked. Modern literary criticism could not *not* exist so long as the academic model of literary study employed words that could not touch the deeper emotive sensibilities of human consciousness. Latin was a dead language not because it was not used, but because it was not used in the times, places, and circumstances that mattered to people; its forms could not fit the contexts which sustain the psychological complexes which we designate with the short-hand term "meaning." In a word, Latin had become too abstract. Untold years of cultivation had rendered it unsuitable to the naturally wild appetites of the human heart. A language that can be spoken only by rote is a language that cannot speak back, even if the speaker is Cicero, Quintilian, or Thomas More.

Once the Latin curriculum was replaced by literature in an indigenous language, modern literary criticism could *not* exist. Now the text could speak back, for its language, whatever the source, bore meaning, to some degree or another, according to some terms or others. Now the text contained words that the reader necessarily employed in spinning her own narrative identity, her own sense of self. The act of reading was more than an encounter with words as things, but a participation of feeling, just as surely as if the reader participated, however unwittingly, by the author's physical touch. Like it or not, the text was alive because it was written in a living language, and so the text was the center of attention. It could be no other way. The study of literature could no longer exist essentially as imitation for the sake of sounding good to people in a language that neither speakers nor hearers could feel meant very much. Within little more than a generation, the study of literature had evolved in a

12. *The Vernacular Matrix*, *supra* note 2, at 204. English literature became a common subject of graduate study in America, and undergraduate study at Oxford and Cambridge, only after the First World War. ORALITY AND LITERACY, *supra* note 10, at 163. The Harvard curriculum experienced by Eliot stood in sharp contrast to the Latin based curriculum studied by Ezra Pound at the University of Pennsylvania. *The Vernacular Matrix*, *supra* note 2, at 204.

radical way.

Now imagine the same thing happening in Legal Writing courses.

B. The Curriculum of Stare Dictus

While our own legal documents are not written in Latin, we all share the sentiment that, given their poor craftsmanship, many of them might as well be. There is more to this jocular observance than one might suspect, and the resemblance of law to a foreign language is not solely the product of bad writing. Anyone who has taught Legal Writing, or anyone whose student memories remain vivid, will by this point have perceived some uncanny similarities between the antiquated curriculum of Learned Latin and the contemporary law school curriculum, especially Legal Writing pedagogy. Both originated in oral cultures in which public speaking was emphasized over writing. Accordingly, both maintained instructional models based on rhetoric in the classical sense, emphasizing speech over writing long after the cultural consciousness has it the other way around. The residual effects of this commitment to oratory are often subtle, but plain enough to have shaped the agenda of law professors from Langdell to the present day. The extent to which the educational agenda has also been shaped by the expectations of attorneys and judges is debatable, since attorneys and judges are also products of the agenda. But whatever the measure of reciprocal influence, Legal Writing courses arise in a legal community that has maintained strong vestigial roots to an oral culture.

Like the old Latin literary study, Legal Writing courses minimize aesthetic considerations, focusing almost exclusively on clear diction and persuasive structure. Insofar as one thinks about the "content" of legal literature, it is as amorphous mental stuff to be transliterated into simple declarative sentences that support assertions ordered according to logical force and weight of authority. Legal Writing pedagogy also tends to be imitative rather than creative, and aggregative rather than analytic. The way to write well, students are taught, is to follow established models for briefs, memoranda, and examinations. Often these models develop into formulaic anagrams (IRAC, CRAC, CREAC), another vestige of oral cultures. Students are taught that the strength of a legal assertion lies in its familiarity; original ideas are by nature idiosyncratic and untrustworthy. All legal arguments are arguments from authority. The number of cases saying the same thing counts more than the quality of any given idea, and ideas without substantial expression in headnotes are relegated to the inferior species of argument called "policy." The craft of legal research is thus taught as a kind of puzzle in which the researcher finds and fits the rule pieces into an aggregate

picture which is law, and which, like a picture puzzle or a mathematics problem, has a definitive solution waiting in potentiality.

Like the old Latin rhetoric, this classic mode of Legal Writing is practical and unambiguous in its taxonomies and devices. Rhetorical principles are comparatively easy to memorize, and, for a number of purposes, they work. If, however, one wishes to empower a student with any skill greater than can fit into a prefabricated bag of tricks, the approach is not very useful. Because rhetorical tropes are mastered primarily through imitation, traditional Legal Writing courses, like their Latin predecessors, are prone to be pedantic, repetitious, and unreflective. Legal rhetoric, like Latin rhetoric, can be boring. Moreover, if the rhetorician thinks too much, he undermines his mastery of the devices. A cultivated capacity for self-criticism is a definite hindrance to the public performer, who is the archetypal rhetorician. As Plato so adeptly demonstrated, this unreflective character of all rhetoric makes it dangerous when its devices empower the wrong persons.[13] People who do not have to think about what they are saying are all the more likely to believe what they say.

Writers are not public orators, and reflection ordinarily works to the writer's advantage. But the rhetorical mode of instruction was conceived in a culture primarily oral, and vestiges of orality are necessarily grafted onto any adaptation of rhetoric to a literate mode. The disjunction is reinforced by the strong oral component that legal discourse cannot discard, notwithstanding the fact that law has long been a language far more heavily weighted toward the written word. However much the written rule is exalted by formal study and the genres of the appellate process (written briefs and published judicial opinions), the greater part of legal discourse—e.g., trials, motion hearings, negotiations—remains spoken, not written. In a sense, the respective transactions of trial and appellate advocacy represent a duality between the primary oral culture of law's origin and the secondary literate culture into which all disciplines have been irresistibly drawn by technological advances. Surely this is a matter for further study. But one effect is clear: in the shift to the increased linear consciousness that necessarily attended the evolution from orality to literacy, the character of legal language changed. It increasingly took the character of an artificial language, like Learned Latin, well adapted to categorical thinking, and ill adapted to life as it is lived by most people in most circumstances.

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13. *See, e.g.*, Plato, *Gorgias*, *in* THE COLLECTED DIALOGUES 455-65e (Edith Hamilton & Huntington Cairns eds., Lane Cooper et al. trans., Princeton University Press 1961).

The systematic publication of the written judicial opinion, a practice not commonplace until the end of the eighteenth century,[14] symbolized the final dominance of the literate over the oral, and the emerging dominance of artificial language over natural language in legal discourse. The invention of printing in the fifteenth century had begun the process that would change in a fundamental way not only the customs and procedures of legal transactions, but the level of abstraction of the language in which lawyers think. In oral cultures, ritualized language that must be remembered across generations is marked by a kind of "lyric flow," which allows for flexibility in narration[15] and, in the larger temporal context, the kind of creative memory that suits itself to the exigencies of the present, confident in its authority.[16] In fact, the radical inaccuracy of human memory, collective and individual, was revealed only with the advent of written documentation. The word once written is as stone; it alone endures beyond its creator, unlike the oral word, which is vanished even as it is finished. The written word always bespeaks inflexibility, the printed word even more.

Printing generally, and the printed judicial opinion in particular, made law less flexible and more abstract—another twin phenomenon, since, ironically, it is only at a higher level of

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14. PETER M. TIERSMA, LEGAL LANGUAGE 37 (1999).

15. Relying on the work of Milman Parry, Ong notes that a bard reciting the Homeric epics would have had at his disposal thousands of metrical formulas that could be fitted to the needs of the bard's and his audience in any one telling of the story. ORALITY AND LITERACY, *supra* note 10, at 58-59.

16. *See Id.* at 46-49. This is the "homeostatic" quality of oral cultures. Studies of oral cultures in Nigeria and Ghana reported in the 1960's indicated significant discrepancies between the genealogies as they were carefully recorded by the British and as they were recounted by oral genealogists and used by the people in their judicial actions. *Id.* This is not because oral memorization is inherently faulty, but because, in an oral culture, it is natural to account for the shifting social and political structures over forty or fifty years by conforming language to its more immediate contexts. The notion that there is a past state of affairs logically preceding words which represent them operates only when writing structures the human consciousness to view words as things. Only a word grasped as a thing apart from consciousness can have a fixed meaning, a definition. In an oral culture, on the other hand,

> Words acquire their meanings only from their always insistent actual habitat, which is not, as in a dictionary, simply other words, but includes also gestures, vocal inflections, facial expression, and the entire human, existential setting in which the real, spoken word always occurs. Word meanings come continuously out of the present, though past meanings of course have shaped the present meaning in many and varied ways, no longer recognized . . . .
>
> When generations pass and the object or institution referred to by the archaic word is no longer part of present, lived experience, though the word has been retained, its meaning is commonly altered or simply vanishes.

Id. at 47.

abstraction that written language regains some flexibility. In effect, this is the phenomenon Herman Oliphant criticized as the movement from *stare decisis* to *stare dictus*.[17] Noting the great number of writs and forms of action at common law, Oliphant pointed out the significant effect that, for any one form of action, there was comparatively little precedent. This meant that the judge had comparatively greater freedom to formulate an operative principle by which the cases could be analogized, i.e., the necessary level of abstraction was low and the significance of the facts of the case at hand was high.[18] The facts tended to frame the principle necessary for a consistent decision. This was *stare decisis*. Of course all of this changed in the late eighteenth and early nineteenth centuries:

> Reduction in the number of actions and pleas and the broadening of those that remained, with no substituting machinery of classification, resulted in wider and wider groupings of multiform states of fact . . . .
>
> A wave of continental learning swept over England, leaving a thick deposit of its obscurant abstractions, and much of it still remains. When the history of this period is fully written, we may find that the breakdown of procedure was partly an effect as well as a cause of this orgy of overgeneralization [sic].[19]

Whether increased abstraction was the proximate result of printing, German idealism, or some other historical peculiarity, it would seem that the mode of legal analysis dominant when the West Company began publishing its regional reporters in the 1880's was fundamentally different than that which prevailed in the sixteenth century. Oliphant is correct that, facing the plethora of published case law, the contemporary lawyer imposes order by giving a primacy to principle, hunting from the outset for the abstraction that will tie together a mass of cases that have practically nothing in common other than a few judicial phrases. This is *stare dictus*, the misplaced emphasis on the words and phrases of judicial opinions at the expense of the actions taken by courts in light of the specific fact patterns which a court might or might not acknowledge as a factor in its decision.

However concretely lawyers and judges might speak in conversation with one another, when they speak in briefs or judicial opinions, that is, when they are writing the language that is law, they speak more abstractly. The grammar favors conceptualization. It disfavors the individual voice. Like the venerable Learned Latin, it is a language in which vocabulary increases, but in ways that bring the discourse no closer to lived

17. Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 72 (1928).
18. *Id.* at 73-74.
19. *Id.* at 74.

human experience. Like pedantic Latin, *stare dictus* language is not natural to any speaker. People who learn it, even the comparatively few who learn it quite well, *feel* as if it is foreign. Those who do not learn the language well resort to the functional equivalent of phrase books, a practice reinforced by rhetorical modes of teaching. Study of the language is an occasion for attenuated initiation ritual, as was the study of Latin, and, as with Latin, functional mastery bestows the reward of fraternity. Like Latin, *stare dictus* language has been preserved, and its vocabulary shaped, by an elite social and economic class. Like Latin, it has been a language from which women traditionally have been excluded, and so it has lacked a feminine voice. And for all of these reasons, the language in which we write law is not working very well. One might say that it is working about as well as Latin was working in the nineteenth century when it was still the language of literature.

Now imagine replacing *stare dictus* language with a vernacular filled with words, voices, moods, and nuances encompassing a richer dimension of the human experience.[20]

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20. When I speak of experiencing law as a vernacular language, I am not speaking of *familiarity* as such, for artificial languages can become familiar. The essence of a vernacular language is its breadth—in Father Ong's words, its capacity to enter "the depths of the individual consciousness initially opened and permanently occupied by the terms [of the language]." *The Vernacular Matrix*, *supra* note 2, at 181. A vernacular legal discourse, then, presupposes an interdisciplinary network, but remains distinctly "literary" in the sense that no single discipline can establish privileged technical or ideological concepts. In other words, the artificial language of *stare dictus* ought not be replaced by an artificial language of Anthropology, Feminism, Critical Race Theory, Philosophy, or any other field. "Literature" is de facto the academic discipline most amenable to a vernacular experience because literature embraces the most inclusive forms of expression. For this reason, it has been difficult for advocates of a "Law and Literature" movement to state an operative premise. The following attempt seems effective, and it also captures the sense of a "vernacular" legal discourse as I employ the term:

> This premise is that "law is best regarded not as a kind of social science but as one of the humanities." Like literature, law is a form of "constitutive rhetoric," a communal activity through which speakers and writers establish "comprehensible relations and shared meanings." So understood, law is not merely a compendium of rules or an authoritative institution but "a set of speakers, roles, topics, and occasions for speech." Lawyers are more like artists than policy analysts or partisan advocates, in that their work weaves together the materials of culture in new and beautiful designs.

Jeffrey Malkan, *Law on a Darkling Plain*, 101 HARV. L. REV. 702, 707 (1988) (reviewing JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985)) (quotations from the reviewed text).

II. TEACHING LAW AS A VERNACULAR LANGUAGE

A. The Curriculum of Weak Rhetoric

The analogy between the present mode of teaching Legal Writing and the rhetorical mode of teaching Latin literature illustrates a problem that is two-fold. First, we are confronted with teaching in an artificial language, experienced as "foreign" by first-year students, and rightly so, since the medium circumscribes human relations, emotions, and the "individual depth of consciousness" thus engendered. Second, we have developed bad habits of teaching this language in a way that, despite our pretensions, emphasizes imitation over analytic creativity, and so contributes to the obscure character of the language. In teaching rhetorical tropes, asking only perfunctory questions about why these tricks work, and not asking any questions about the moral fiber of a legal system so highly dependent on form over substance, we create the monster we would slay, and condemn ourselves in hypocrisy. At the same time, the monster also creates us, as we are seduced further into formulaic abstraction so that we might solve problems that are in large measure the consequence of our prior solutions.

Here is an example drawn fresh from the rough and tumble world of the classroom. At John Marshall, as at many other schools, our first semester students are initiated into Legal Writing by a closed memorandum problem. One of the issues in the problem this fall was whether a law degree, gained partly by the financial support of the lawyer's spouse, could be marital property. In one of the cases, *O'Brien v. O'Brien*,[21] the New York Court of Appeals concluded that a degree was marital property.[22] Why? Because the dissolution statute said that marital property was "*all* property acquired by either or both spouses during the marriage . . . *regardless of the form in which title is held.*"[23] A second case in the memorandum corpus, *Hoak v. Hoak*,[24] decided by the Supreme Court of West Virginia, held otherwise.[25] The *Hoak* court did not focus on the words of the state's dissolution statute[26] (which did not differ markedly from New York's), but

21. 489 N.E.2d 712, (N.Y. 1985).

22. *Id.* at 713.

23. *Id.* at 715 (citing Domestic Relations Law § 236[B][1][c](emphasis by the court)). The court also emphasized a different section of the statute, requiring the court to consider in distribution contributions or equitable claims "*to the career or career potential* of the other party." *Id.* at 715-16 (citing Domestic Relations Law § 236[B][5][D][6], [9] (emphasis by the court)).

24. 370 S.E.2d 473 (W. Va. 1988).

25. *Id.* at 477.

26. The pertinent section of the West Virginia Code cited by the court defined "marital property," in part, as "[a]ll property and earnings acquired by

instead concentrated on the item in dispute, and announced that all but one jurisdiction that had considered the matter had concluded that an academic degree or professional license could not be marital property.[27] Here is why:

> An educational degree . . . is simply not encompassed even by the broad views of the concept of "property." It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on the death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term.[28]

But the problem goes deeper than empirical verification. In addition, the academic degree or professional license would be difficult to value, and, more importantly, "characterizing spousal contributions as an investment in each other as human assets demeans the concept of marriage."[29] To this argument, we will return later. For the moment, let us stay with what appears to be the more straightforward question of whether the degree *is* property. What teaching strategy makes sense of these conflicting authorities? First, one must attempt to understand the respective courts' reasoning on their own terms, and to identify a strategy based on a close reading of each case.

The rule-based reasoning employed in the first case implicitly appeals to the superiority of legislative acts over judicial opinions. *Strategy:* Emphasize adjectives of inclusion (e.g., *all*) within the statutory text, as well as adverbial clauses (e.g., *regardless of the form*) that designate or connote inclusion, implying that a question of definition is illusory. The law degree is property because, as the *O'Brien* court proclaimed, "The words [of the statute] mean exactly what they say."[30]

The rule-based reasoning employed in the second case implicitly appeals to the shared empirical sensibilities underlying both statutes and case law. *Counter-strategy*: Focus attention on uncontested examples authoritatively fitting the statutory

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either spouse during a marriage, including every valuable right and interest, tangible or intangible, real or personal, regardless of the form of ownership, whether legal or beneficial[.]" *Id.* at 475 (quoting W. VA. CODE § 48-2-1(e) (1986)).

27. *Id.* at 475.

28. *Id.* at 475-76 (quoting *In re Marriage of Graham*, 574 P.2d 75, 77 (Colo. 1978)).

29. *Id.* at 476.

30. 489 N.E.2d at 716.

definition, extrapolate characteristics common to many of the examples, and assert the absence of these characteristics in the critical item. The law degree cannot be marital property because, as the *Hoak* court concluded, "it has none of the attributes of property in the usual sense of that term."[31] (The "usual sense" of the term is of course whatever sense one creates by the choice of examples.)

To this point, the teaching strategy seems sound. Two different rhetorical approaches have been identified. Two different tricks can now be stashed in the proverbial bag. The problem is that it seems so sound that there is a natural temptation to stop here. Having enabled the student to understand the judicial rationales and employ them in a second order (i.e., predictive) analysis, the professor wants to believe that she has done her job. She has not. The student has learned to imitate empty rhetoric. Nothing more. Neither student nor professor has been empowered in the sense befitting legal education without some more thorough analysis of *how* these tricks work. Without some further knowledge of the mechanisms that make the tricks compelling, they can only be applied haphazardly, as orators employ various catchy phrases in the hope that some of them will stick with their audiences.

B. The Curriculum of Strong Rhetoric

Logical fallacies create illusion. While logical integrity does not invariably dispel illusion, it is always a good start. In our marital property example, each court comes to its conclusion by begging the question,[32] each court presupposing identities that it purports to verify empirically. The *O'Brien* court's assertion that the statute includes an academic degree as property because the statute mandates a court to distribute "*all* property" is circular on its face; the statute's admonition that the court consider contributions by one spouse to the "*career or career potential*" when dividing the property does not specify any particular valuation strategy, or dictate that any one strategy is appropriate

31. 370 S.E.2d at 476.

32. Rhetoric texts traditionally employ classifications of "informal" logic, modeled after Aristotle's examples of fallacious enthymemes. ARISTOTLE, *supra* note 1, at 2.24. "Informal" fallacies occur in ordinary language, as opposed to "formal" fallacies, which are expressed in more precise symbolic form. "Begging the Question" (*Petitio Principii*) is a classic fallacy of presumption. IRVING M. COPI & CARL COHEN, INTRODUCTION TO LOGIC 186-87 (10th ed. 1998). *See generally id.* at 160-213 (Chapter 6, "Fallacies"). In writing courses, I prefer an "informal" approach to logic because of its tradition within Aristotelian rhetoric, and because—as anyone who teaches future interests can attest—many students fall into a kind of "math anxiety" when they confront even quasi-symbolic formulas.

for all contributions.[33] If anything is clear from the words, it would seem clear that there is no mandate to value an academic degree as a tangible asset. If there is such a mandate in the statute's words, the meaning is only apparent if one accepts an array of meanings in words and phrases outside the statutory text, i.e., a *con*text of aspirations and purposes against which the statutory terms stand,[34] a value-laden background and lighting which emphasize the measurable income-enhancing angle over the ethereal mental achievement angle. If the court is aware of this larger context, we are told nothing about it. To assert that an academic degree is marital property because the statute means what it says is to say simply that a medical degree is property because it is property.

The *Hoak* court's assertion that an entity cannot be property unless it has certain attributes assumes that the attributes are logically precedent to the concept they define—that an exchange value, for example, is not a consequence of courts bestowing a "property" right, but a substantial characteristic that compels recognition that an entity already is "property," as opposed to something of an inferior ontological status. Moreover, the failure of an academic degree to fit the designations is fatal only by reference to an unarticulated series of relationships by which entities are identified on the basis of comparative strengths and weaknesses across the elemental field. In other words, not every characteristic the *Hoak* court lists can be predicated on everything that courts have spoken of as property.[35] Social Security benefits

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33. For pedagogical purposes, we might thus recast the argument in a syllogistic form: (P1) Marital property includes property in all forms; (P2) In distributing marital property, courts must consider the career or career potential of the parties; *Therefore*, courts must consider a medical degree as a form of marital property. The error might be characterized as a presumptive fallacy of accident, improperly applying a general category (property) to an unrelated item (career potential) by inferring that a function (distribution) is a specific form of its antecedent subject (property). COPI & COHEN, *supra* note 32, at 187-89.

34. That is, a network of silent intervening propositions, which are in the nature of incomplete arguments. Aristotle called these *enthymemes*. Although Aristotle refers to an enthymeme as a sort of syllogism, ARISTOTLE, *supra* note 1, at 1.2 § 1356b, and logicians subsequently employed the term generically to refer to any kind of abbreviated syllogism, an enthymeme is more precisely viewed as a kind of demonstrative likelihood, subject to refutation and confirmation by a preponderance of evidence rather than by validity in a strictly deductive mode. M. F. Burnyeat, *Enthymeme: Aristotle on the Rationality of Rhetoric, in* ESSAYS ON ARISTOTLE'S RHETORIC, *supra* note 1, at 88, 90-91, 105-10. In other words, an enthymeme does not live or die by logic alone, but by its correspondence to lived experience.

35. For pedagogical purposes, we might thus recast the argument in a syllogistic form: (P1) A law degree does not possess attributes shared by many [but not all] items designated as property; (P2) A law degree possess attributes not shared by many [but not all] items designated as property; *Therefore,* a

and vested pension rights are personal to the holder and not transferable. Reversionary interests such as possibilities of reverter and rights of entry could not be alienated or devised at common law, and they cannot in some states today. And while an academic degree cannot be attained solely by the expenditure of money, the matriculation that is the degree's precondition is routinely purchased. If schools do not sell diplomas, they at least sell matriculation. What, then, are the unifying principles by which some entities but not others, for some purposes but not others, are designated as property? If the court knows, it is not saying. To assert that an academic degree is not property because it does not possess sufficient attributes of property is to say simply that a law degree is what it is because it is not what it is not.[36]

The student is thus empowered by grasping the mechanics of the rhetorical illusions that she will fit in the bag. The first level analysis is empowering because it reveals that the legal issue, rather than being a fixed entity objectively verifiable, is a kind of metaphor. Metaphors open possibilities. One can employ the metaphor of "text," presenting a picture of *plain words* standing out as *things* in a chaotic jumble of blurred stuff that (as in a dream) will not quite form readable letters, or one can employ a metaphor of "property," presenting a picture of *houses, land, automobiles, animals* and multiple *things* standing alongside of a vaporous coalescence (the law degree) that will not quite materialize into the "real" world. The second level analysis is empowering because it demonstrates the formal means by which the metaphorical devices appear compelling, providing the student with a sense of mastery over the trope. Again, a professor could end the analysis at this level and reasonably believe that she has imparted the "skills" of these devices by demonstrating their broad

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law degree is not property. The court might here stand accused of an ambiguous fallacy of composition, reasoning that since many specific members of a collection possess *certain* attributes, each and every member of the collection must either possess those attributes or not possess *certain* other attributes shared by many specific members of a contrary class. *See* COPI & COHEN, *supra* note 32, at 197-99. The ambiguity lies in the fact that the *certain* attributes (the presence and absence of which define property in the "ordinary" sense), in this context, are not certain at all. *Id.*

36. *Cf.* Plato, *Meno* 70-72d, *in* THE GREAT DIALOGUES OF PLATO 28-31 (Eric H. Warmington & Philip G. Rouse eds., & W.D.H. Rouse trans., New American Library, Inc. 1956). Believing that he has set forth a definition of virtue, Meno is made aware that he has only espoused specific examples. *Id.* That which is common to all instances—the essential nature of virtue—has eluded him. *Id.* (In retrospect, I wish I had used the opening sections of the Meno when working through the cases in class. Selected passages from philosophical texts can help students realize that the problems in the cases before them are not peculiar to law or expressible only in a legal vocabulary. A modest dose of Plato also reveals how unfair to Socrates is our characterization of the traditional law professor's classroom method).

structure and effective employment. But if the compelling force of the metaphors is to be judged in a particular application—and predicting an outcome is, after all, the point of the objective memorandum of law—there are further questions to be addressed. The potential strength of a metaphor can only be understood against the context in which it is employed, the aforementioned array of meanings already in place, the interpersonal aspirations and purposes against which the metaphors are staged.

Because the judicial reasoning in *O'Brien* and *Hoak* makes sense only if one fills in a number of blanks, the first step in a realistic analysis of these cases is to consider that which the courts have not spoken, but assumed. The next order of business is to examine why these assumptions operate so well, i.e., why the reader has the initial tendency to assume them also, and thus has to stand away from the text and think awhile in order to realize the extent of what is missing. These tacit premises constitute what Aristotle called *enthymemes*, syllogisms that depend on silent ideas that repel conscious reflection like a stealth aircraft repels radar waves. For Aristotle, the art of persuasion was essentially a skill of identifying the assumptions that evade critical analysis because they are so embedded in our ordinary attitudes. The kind of practical psychology that seeks to identify enthymematic force in arguments is in the best tradition of rhetoric, a tradition that appears largely to have been lost in classrooms when Aristotle was lost to the barbarian invasions. Enthymematic analysis necessarily extends beyond a cataloging of tropes. Aristotle saw rhetoric not only as an exercise in logic, but as a manifestation of ethics.[37] So these critical, unspoken modes of perception that win arguments take logic out of the dispassionate realm.

The Legal Realists were just as serious about the ethical content of purportedly dispassionate judicial reasoning. There is no single formula for a realistic critique of case law, but if one strives to think enthymematically, one begins with the obvious. Regarding the issue of whether a professional degree is "property," one might observe that this line of cases almost invariably involves women seeking compensation from men, and that men are almost invariably deciding the cases. One might then wonder whether the majority of judges (and readers) identify more readily with the husbands who would be forced to pay significant sums, sometimes unjustly. Attempting to get behind this attitude, one might sense that this fear of injustice is fueled by a perception that previous judicial expansions of the metaphor of marital property, e.g., to include pension benefits, have been subsequently applied to situations unintended by the architects of expansion. (For example, the cases initially establishing the rights of divorced

37. *See supra* note 1 and accompanying text.

spouses to pension benefits involved older women, unskilled in the labor market, abandoned by their husbands, while such claims now are routinely made by younger professional spouses of both genders.) In addition, one might endeavor to understand the attitudes of the judicial minority by positing a more proximate identification with the women seeking compensation. The identification could be seen against a complex of potential factors: sensitivity to politically correct postures; personal experience (perhaps quantifiable) generating identification with persons having borne disproportionate sacrifice in relationships; personal experience (decidedly non-quantifiable) engendering greater trust in authority (manifested by the courts) and in women (manifested by the wives seeking compensation). These emotive identifications, in turn, lead back to attitudes about the nature of matrimony, the more overt "policy" question put forth in *Hoak*. And these prompt reflections on the varying expectations of men and women, and the dialectic of power manifest in marriage relationships.[38]

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38. Ironically, the argument that "characterizing spousal contributions as an investment in each other as human assets demeans the concept of marriage," *Hoak*, 370 S.E.2d at 476, mirrors a line of argument employed for not enforcing implied or express contractual claims to property in the context of unmarried cohabitation.

> "The argument here is essentially that even if such agreements use language of promise, or commitment, or reciprocal obligation, that language must be understood, *in the intimate context in which it is employed*, as not involving any understanding that one party might use a court to enforce a duty forsaken, or a promise broken."

Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE. L. REV. 997, 1100-01 (1985) (emphasis in original). As this attitude is further broken down in the context of the cohabitation cases, other images emerge:

> One powerful pair of contradictory images of woman paints the female cohabitant as either an angel or a whore. As angel, she ministers to her male partner out of noble emotions of love and self-sacrifice, with no thought of personal gain. It would demean both her services and the spirit in which they were offered to imagine that she expected a return—it would make her a servant. As whore, she lures the man into extravagant promises with the bait of her sexuality—and is appropriately punished for *her* immorality when the court declines to hold her partner to her agreement.

Id. at 1110-11.

Given Freud's account of the male need to debase the object of his sexual desire in order to contain Oedipal frustration, the unconsciously appropriated ambivalence of male judges toward women in unmarried relationships might be felt more acutely when judges assess claims by married women: because wife is identified with mother, the mother representative becomes a whore if her sacrifices to her husband's medical or law degree are compensated with money. The breakdown of the protective measure by which the mother/prostitute distinction is maintained (i.e., the man's debasement of objects of sexual desire) results in impotence. *See* Sigmund Freud, *A Special Type of Choice of Object Made by Men, in* THE FREUD READER 387-94 (Peter Gay ed. 1989); Sigmund Freud, *On the Universal Tendency to Debasement in*

Because the questions go to the truer motives of the judicial authors and of the wider authorial community on whose behalf the judges write, there are no definitive answers. Speculation is constrained only by what the practical intellect sees as plausible. What began as a simple study of effective metaphors has become an exercise in philosophical psychology, appealing to different modes (e.g., psychoanalytic, economic, sociological) of understanding motivation. However open-ended this manner of analysis, the speculation is directed to the attitudes of real humans, rather than to an imaginary point where legal principles meet at a level of abstraction high enough to explain fundamentally different results as those principles are applied in particular instances. This is discourse in *real* languages, not in *stare dictus*. Real language speaks in many voices—narrative, poetic, philosophical—and seeks a vital balance of emotion and reason, as opposed to a vacuous dispassion of successive headnote phrases. Any decision-maker who takes seriously the consequences of his decision will listen to the voices of those whose lives are most burdened under its weight.

There is another very real benefit to this approach. For purposes of the predictive analysis, it matters not whether the process uncovers the truer motives of the judges, so long as it uncovers attitudes that are likely those of the community of whom a particular judge is a member, and to whom that judge will speak. The verity of the attitudes is measured against the analyst's own convictions about the issues and about public perceptions, as the analyst's convictions are uncovered in the interplay of questions set in motion by the judicial texts. Predictive legal analysis is in this sense a means of self-knowledge. At this stage, the skills imparted by the study of the rhetorical devices have extended beyond the scope of rhetoric. Once the metaphors begin to be unpacked, the character of the heuristic enterprise changes from rhetoric to something else. Whether this "something else" is properly designated as philosophy depends, of course, on how one views philosophy. Taking a clue from William James, we might at least acknowledge that it *feels* very much like philosophy. Philosophy, even when it is done badly, is not content dispassionately to predict outcomes. Philosophy lives in continuing conversation, and it aspires to justice. That is an essential part of the feeling.

The philosophical enterprise that engages us in legal analysis is more than an attempt to keep our modes of inference in proper alignment, though it is not less. Enthymemes live in the human mind, and the logic of enthymematic interpretation entails a kind of philosophical psychology. Truth is always dependent upon

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the Sphere of Love, in THE FREUD READER, at 394-400.

context, and context is the stuff of psychology. What we discover is that often contexts will shift to compensate for improper inference, with salutary effect. Consider, for example, Professor Brewer's hypothetical of the two bakers stuck with the precedent of *Joyner v. Adams*, in which the North Carolina Court of Appeals inaccurately deduces the rule of the Restatement (Second) of Contracts.[39] The logic of the faulty rule precludes B, the young and inexperienced baker, from prevailing if he had *reason to know* that a "baker's dozen" consists of thirteen (regardless of the fact that A, the old and experienced baker) *actually knew* that B thought he was contracting for twelve. In applying the faulty rule, however, a judge or jury could easily find that B did *not* have reason to know. Although such a finding seems strained from our dispassionate perspective, judges and jurors do not find their facts in an emotive vacuum, and, given the perception of A's unfair advantage, B's culpable lack of professional savvy could appear less consequential in comparison. Logically, comparison has nothing to do with it (i.e., B's "reason to know" does not increase or diminish as a consequence of A's actual knowledge). Nevertheless, the logic of the misstated rule does not preclude additional propositions (especially silent ones) or ensure their logical integrity. If the misstated rule of law does not allow for degrees of innocence, human perceptions reflexively account for degrees within the constraints of the rule.[40] This is not a justification for bad deduction. It is simply an acknowledgment that the Legal Realists had a point. What courts say is never as important as what courts do.

C. The Curriculum of Literary Criticism

Legal Realism forced the recognition that every legal decision is simultaneously an *ethical decision*. Although the observation might appear unremarkable on its face, it is a truth continually obscured by the language in which law is written, a language that emphasizes the general principle over and against individual

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39 Scott Brewer, *On the Possibility of Necessity in Legal Argument: A Dilemma for Holmes and Dewey* 34 J. MARSHALL L. REV. 9 (2000).

40. This phenomenon is manifest in adverse possession cases. The prevailing black letter rule is clear that for purposes of the "hostile" element, an adverse possessor's state of mind is irrelevant. Nevertheless, as Professor Helmholz has argued, it is most often the good faith possessors (or those who are distinctly more deserving of sympathy than the true owners) who win. R. H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 357 (1983). *See also* Roger A. Cunningham, *Adverse Possession and Subjective Intent: A Reply to Professor Helmholz*, 64 WASH. U.L.Q. 1, 58-64 (1986) (challenging Helmholz's theory); R. H. Helmholz, *More on Subjective Intent: A Response to Professor Cunningham*, 64 WASH. U. L.Q. 65, 99-106 (1986); Roger A. Cunningham, *More on Adverse Possession: A Rejoinder to Professor Helmholz*, 64 WASH. U. L.Q. 1167, 1183-85 (1986).

distinctions and nuances in the circumstances of each case. Legal language thus maintains a comparatively high level of abstraction, and connotes a scientific method. Indeed, the "skills" traditionally taught in Legal Writing courses reinforce the abstract character of the language by emphasizing formulaic modes of "problem solving" and rhetorical modes of "advocacy," disregarding ethical criticism as irrelevant to the analytic enterprise. The dialect of *stare dictus* is insidiously obscure, and this is true even if it is written in plain English, without nominalizations, in sentences that avoid multiple subordinate clauses and the passive voice. Insofar as we who teach Legal Writing have defined our task of promoting clarity only at the level of word choice and sentence structure, we have unwittingly made a bad situation worse: we have taught writers to obfuscate ethics with style.[41]

The mechanistic jurisprudence of Legal Formalism obfuscates because it removes attention from the particular persons and relationships as they live in an actual context, minimizing their ethical relevance by focusing the meaning of a legal decision either at a higher level of abstraction or at a deeper level of signification (depending on which metaphor one prefers). To the formalist, the objective quality of the rule of law depends upon the proper translation of a human conflict into legal concepts which then determine judgments as a matter of formal relations within a larger system of concepts, all represented, however imperfectly, in human language.[42] The concepts logically precede particular persons, relations, events, and emotions, all of which exist to fit

41. *See generally* Douglas Litowitz, *Legal Writing: Its Nature, Limits, and Dangers*, 49 MERCER L. REV. 709 (1998). Rejecting the assertion that legal language is "artificial" in the sense of being meaningless, Professor Litowitz explains how legal concepts properly function to express specialized relationships that would be expressed less efficiently in "plain" speech. *Id.* at 716-23. He proceeds to elucidate how legal concepts improperly function to (1) obscure and mystify power relations, (2) narrow permissible ranges of thought and emotion, (3) elevate formal rationality to irrational extremes, and (4) create a privileged class of experts. *Id.* at 723-38. These improper functions are not the result of a technical language *per se*, but of an unreflective adherence to terms and categories without regard to a human context. *Id.* Plain language too can obfuscate by concealing complexities. Ironically, a Legal Writing curriculum focused on promoting "plain" language will miss the point, and even undermine the ethical concerns that first compelled the movement to reform "legalese."

42. *See generally,* Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1426-32 (1995) (contrasting the "pure" style of judicial writing characteristic of a "formalist" judicial posture with the "impure" style characteristic of the judicial "pragmatist.") The pure style is exemplified by Cardozo, Brandeis, Frankfurter, Brennan, and Harlan. The impure style is exemplified by Holmes, Douglas, Black, Jackson, and Hand. "The pure style is an anodyne for thought. The impure style forces—well, invites—the writer to dig below the verbal surface of the doctrines that he is interpreting and applying." *Id.* at 1447.

the conceptual categories. The dialect of *stare dictus*, as I have used the term, results from the inability of language adequately to signify the pure forms of law. Think of it as a kind of creole mixing symbolic logic with the ordinary speech of "Lawyerland."[43]

There is another way of looking at the formal structure of law. If the Legal Formalist's laws derive from something like Platonic forms, the Legal Realist's laws derive from Wittgenstein's "forms of life."[44] Concepts do not logically precede the people and particulars that comprise them, but rather, concepts are themselves inseparable from the particulars, just as words are inseparable from their meanings rooted in other words. For Wittgenstein, a word did not *mean* something because it represented a higher or deeper something else. A word could *mean* something only because it stood in a context of relationships to other words standing around it. Human actions—the stuff that law regulates—mean in the same way, by existing in a social context, by participating in "forms of life" that give definition to what we do and to who we are. A form of life, as opposed to the neo-Platonic kind of form, cannot be accounted for in an artificial language, just as the most humanly significant aspects of human existence could not be gathered into the pedantic measures of Learned Latin.

So there can be another kind of formalism. If by "formalism" we mean a critical approach to law that assesses value against a life-giving structural principle—a form—as it is manifested well or poorly in specific acts of law-giving, Realists are also formalists; they just appeal to a different kind of form. Here it is useful to distinguish between the kind of "scientific formalism" traditionally employed in jurisprudence and an "aesthetic formalism" employed in literary criticism.[45] Scientific formalism rests on a

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43. *See generally* LAWRENCE JOSEPH, LAWYERLAND: WHAT LAWYERS TALK ABOUT WHEN THEY TALK ABOUT LAW (1997) (gritty, slice of life vignettes portrayed in conversations between practicing attorneys).

44. "[T]o imagine a language means to imagine a form of life." LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 8e para. 19 (G.E.M. Anscombe trans. 1953). See NEWTON GARVER, THIS COMPLICATED FORM OF LIFE 237-67 (1994) for a critique of philosophical interpretations of Wittgenstein's use of the phrase in various passages.

45. For a fuller delineation of this distinction, including a comparison between the New Critical formalism and that of the neo-Aristotelian "Chicago School" of literary criticism, represented by Ronald Crane, see Jeffrey Malkan, *Literary Formalism, Legal Formalism*, 10 CARDOZO L. REV. 1393, 1423-36 (1998). Professor Malkan further distinguishes a classical version of aesthetic formalism exemplified in law by the "plain meaning" school of statutory interpretation from a pragmatic version of aesthetic formalism. *Id.* The classical version insists on a single meaning of a text, while the pragmatic version "in principle, tolerates indeterminacy, but tries to control the proliferation of meanings . . . by establishing interpretive standards and protocol, and by recognizing the authority of institutions and interpretive

correspondence theory of meaning, seeing truth manifest to the degree that a word or text conforms to a meaning at another level of thought. Aesthetic formalism, by contrast, seeks meaning solely within a text, seeing truth manifest to the degree that a literary work itself reveals a unifying principle or scheme. This approach to literature was characteristic of the New Critics. A similar approach to jurisprudence was characteristic of the best of the Legal Realists.

When Felix Cohen spoke of the proper understanding of *stare decisis* as a consistency of ethical sensibility (the metaphorical "quality of dough" giving shape to law over generations),[46] he was speaking of something like "forms of life" in Wittgenstein's sense. Cohen did not contend that ethical decisions were made in a logical vacuum or that bad logic was without ethical consequence, but rather that logical inference was not the primary locus of ethical content. In a similar vein, when Justice Holmes asserted that "[g]eneral propositions do not decide concrete cases,"[47] he recognized that the game of life is not like the game of chess. In acting on one cherished moral principle, one will most often be acting against another cherished principle. Without a meta-principle, one acts on faith. And since meta-principles tend to be extremely general, they cannot dictate action in specific cases unless one supplies so many minor premises that one cannot really escape acting on faith (instinct, intuition, emotion, or some designation of a non-logical process) even with a meta-principle in place. The ethical value of a judicial decision is apparent not because the legal principles a court invokes are, at a higher level of abstraction, systematically reconciled to other principles of other cases, but because the fit of principle to circumstance is psychologically compelling in the specific case.

Certainly, there are logical constraints set by prior cases inasmuch as fairness in the wider context demands an even-handed treatment of people with similar grievances, and inasmuch as any decision must be justified in terms of fairness that are commonly understood. But even this quasi-logic of fairness is at times obscure if we attempt to articulate a meta-principle to which the applied principles correspond to produce the fair result. Most often, we have conviction that a decision is fair because it feels fair. In all manner of life's decisions, when principles seem to work, no meta-principle seems to make it happen. One explanation is that people are not reflective enough to recognize the logical integrity of their own thought. Another explanation is that our perception prioritizes the particular over the universal

communities to limit the free-play of signification." *Id.* at 1439.

46. Felix S. Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201, 216 (1931).

47. Lochner v. New York, 198 U.S. 45, 76 (1905).

because universals are inseparable from the particular forms that give them life, and viewing the particular as existing for the sake of the universal would miscast us to ourselves in our own drama. The forms we seek to define us are necessarily drawn from the stuff of the moment in which we find ourselves. Our sense of self, other, and world, our "center of narrative gravity"[48] which makes our identity, is more an aesthetic phenomenon than a logical one. That is just the kind of creature we are.

Hence, unpacking the ethical content of a legal decision is essentially examining why the enthymemes employed by the decision-maker seem compelling (or not), and this examination is essentially a study in the psychological power of the words that provoke the reader to identify compelling relationships between terms, or—in a more psychoanalytic mode—compelling associations of images. It is the psychological complex revealed by this study in word power, rather than the inferential relationships of principle, that forms the essence of *stare decisis*. Formal logic can be a valuable tool insofar as it provides a baseline against which word power can be measured for validity, but in many instances something more than logical validity is required to make a legal principle fit a situation. This is the aesthetic aspect of the form that defines the legal decision *as* a legal decision. To the extent that a judicial opinion is considered from this aesthetic angle, it is an artistic work as much as is a poem or a story. In the paradigm of New Critical study, the legal text is an object whose purpose is implicit in its form.[49] The purpose of the text, the form of life that it aspires to manifest, is justice.[50]

The new literacy to which the Legal Writing curriculum must aspire is no more radical in design than the model of freshman composition many of us experienced as college students: an introduction to rhetorical forms as a preparation for a thematic study of literature. I do not advocate that we stop teaching

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48. I have taken this phrase from DANIEL DENNETT, CONSCIOUSNESS EXPLAINED 418 (1991).

49. Judge Posner identifies the New Critics' reaction against nineteenth-century Romantic poetry with certain contemporary judges' reaction against the "pure" formalistic style of judicial opinions. Posner, *supra* note 42, at 1428-29. While noting such New Critical concepts of irony, paradox, complexity, polysemy, and ambiguity as illustrative principles of poetic form, Posner does not suggest explicit formal criteria for judicial opinions corresponding to the New Critics' criteria for poetry. *Id.* Nevertheless, by connecting the New Critics with contemporary legal pragmatists, Posner, and Malkan, implicitly raise the possibility and inspire the imagination.

50. The term is a loaded one, but no other will do. "Justice" as a formal literary-interpretive principle is a kind of short-hand designation for the convergence of various elements (rhetorical, psychological, emotional, ethical) measurable in isolation, but ineffable in sum, generating a kind of intuitive harmony that resists definition in empirically verifiable terms—hence "beyond paraphrase."

students how to write objective memoranda and appellate briefs. Quite to the contrary, the "strong" rhetorical approach I have outlined should function to make students highly conscious of the persuasive character of all legal prose, and the significant manipulative potential of ostensibly minor devices. And there should be more, not less, devotion to the elementary principles of logic. But this is not enough. "Style itself makes its claims," writes Martha Nussbaum, "expresses its own sense of what matters. Literary form is not separable from philosophical content, but is, itself, a part of content—an integral part, then, of the search for and the statement of truth."[51]

In a word, it has been the false isolation of form and content, style and truth, that has made law seem like a foreign language to those of us who teach it no less than to those we teach. It is time to speak in a vernacular tongue, even at the expense of admitting that our words are not always capable of defining our terms, but only of pointing to phenomena which definitions cannot contain. For all that can be measured by the practical intellect and put into words, there remains something that cannot be said about *why* justice has been manifest in a particular case, notwithstanding the competing principles, ambiguous facts, and moral ambivalence that pervades the best and worst of all human acts. Goodness is always fragmentary to the human touch. Pure justice is never realized. Yet justice is done despite this, and we can never *exactly* say why any more than we can say exactly what a poem does. Justice manifest is very like a poem.

> Great is Justice;
> Justice is not settled by legislators and laws . . . . it is in the soul,
> It cannot be varied by statutes any more than love or pride or the attraction of gravity can,
> It is immutable .. it does not depend on majorities . . . . majorities or what not come at last before the same passionless and exact tribunal.
> For justice are the grand natural lawyers and perfect judges . . . . it is in their souls,
> It is well assorted . . . . they have not studied for nothing . . . . the great include the less,
> They rule on the highest grounds . . . . they oversee all eras and states and administrations,
> The perfect judge fears nothing . . . . he could go front to front before God,
> Before the perfect judge all shall stand back . . . . life and death shall

51. Martha C. Nussbaum, *Introduction: Form and Content, Philosophy and Literature, in* LOVE'S KNOWLEDGE 3, 3 (1990). *See also* MARTHA C. NUSSBAUM, POETIC JUSTICE 99-118 (1995) (applying the principle in literary critiques of three judicial opinions: Hudson v. Palmer, 468 U.S. 517 (1984); Carr v. Allison Gas Turbine Division, General Motors Corp., 32 F.3d 1007 (7th Cir. 1994); Bowers v. Hardwick, 478 U.S. 186 (1986)).

stand back . . . . heaven and hell shall stand back.[52]

If the literary meaning of a work is that which cannot be exhausted in paraphrase, justice is the judicial opinion's literary meaning. But how does one teach students to apprehend a meaning beyond the words of a legal text? One simply remembers that one is teaching literature. Certainly the task is complicated by the component of deductive reasoning, which comprises a subtext to be studied for its own formal integrity. Moreover, legal texts, unlike poems or fictional narratives, invariably contain empirically verifiable references that must be scrutinized as part of any formal analysis. Logical validity means nothing if it is based on wrong premises. Legal literature in general, and the judicial opinion in particular, always contain propositions. Yet the judicial opinion, like other works of art, cannot be reduced to propositions, and this is why Legal Writing courses, if they are to be taught well, must contain a strong element of literary criticism. A felicitous consequence is that it actually makes the subject interesting.

Literature is interesting not because it expresses human truths in propositions, but because inherent in a literary mode of expression is a dimension that propositions cannot account for. Literary criticism is interesting not because it provides a monolithic mode of understanding this extra-propositional dimension, but because it challenges us to test our purported understandings against other possibilities. If, as T. S. Eliot claimed, the task of the literary critic is to correct taste, a doggedly ineffable and idiosyncratic aspect to aesthetic sensibility guarantees that the enterprise will remain open-ended, just as it dictates the necessity of criticism. It is precisely because we must make judgments about good and bad literature that we must learn to be critics. It is precisely because we must make judgments about good and bad law that we must learn to be logicians and rhetoricians. It is precisely because we presuppose goodness and badness in all manner of judgments that we must learn to be philosophers. As teachers, the most accomplished skill we can impart is not a technical knowledge, but a mode of perception. The distinguishing characteristic of the philosopher, it must be remembered, is not undifferentiated wisdom, but the love that is wisdom's catalyst.

"Great is goodness;
I do not know what it is any more than I know what health is . . . .
but I know it is great."[53]

52. Walt Whitman, *Great Are the Myths* [4] lines 50-58, *in* LEAVES OF GRASS 144-45 (Penguin Books 1986) (1855).

53. *Id.* at 145 [5] lines 58-60.

Sometimes definitions are rather beside the point.

CONCLUSION

The traditional Legal Writing curriculum has been largely ineffective in teaching essential skills of the practical intellect—the deductive skills that measure the validity of arguments, and the psychological skills that identify premises as emotionally compelling and morally good. Much of this failure is a proximate result of classic legal formalism, which promotes an artificial language connoting a scientific method in legal discourse. Traditional Legal Writing courses have accepted the formalist structure uncritically, addressing only its infelicitous symptoms through admonitions to "plain language." In fact, first-year students continue to experience law as a foreign language even when they successfully translate documents into simple declarative sentences. A new approach is required if law is to be *experienced* as a vernacular language, and only in a vernacular context can students feel empowered to criticize the logical integrity and moral suppositions of legal decisions. A vernacular experience entails an interdisciplinary approach to legal analysis, with "writing" acknowledged both as the pivotal assertive act that *makes* law and as the creative mechanism by which law is critiqued and contained. A vernacular model of teaching Legal Writing can take different approaches, but modern literary criticism, particularly in the mode of the New Criticism, provides promising possibilities. Possibility is ours to cultivate. If we fail in imagination, the fault is ours. If we succeed, we are progenitors of a vital new literature and criticism, facilitating a more functional unity of logic and emotion in our language, our selves, and our laws. Perhaps the effect will be revolutionary; it will certainly be salutary. If a new vernacular cannot unite a divided kingdom, it can at least make it easier to speak across the divide.