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ENGLISH AS A SECOND LANGUAGE— OR WHY LAWYERS CAN'T WRITE

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For more than thirty years I've spent a lot of time reading bad writing. By bad writing, I mean writing that fails of its essential purpose—so flawed in concept or execution that it can hardly inform, much less persuade. The writing is the sort that lawyers are routinely expected to produce: briefs, judicial opinions, essays dealing with law-related subjects, and the like. What I see, for the most part, is the writing of second- and third-year law students, the vast majority of whom graduate and enter upon a lifetime career as lawyers.[1] They take with them for tomorrow the writing skills they possess today, and those skills, to put it mildly, are poor. If this experiential diagnosis is accurate, why the ineptness? And can anything be done about it?

The writing I am talking about is commonly referred to as "legal writing." I have never cared for the term because it tends to blur what I regard as the only relevant distinction—that between good writing and bad. It suggests that the writing lawyers do falls into a discrete category, mysterious, arcane, and somehow different from all other forms of written expression. It evokes images of the tortuous first-year obstacle course familiar to all—an obstacle course run for little credit and overseen by non-tenure-track, second-class citizens called "legal writing instructors," whose impossible and largely thankless task it is to cram a bewildering array of research techniques, citation protocols, and analytical and compositional skills into the heads of students already overwhelmed by a heavy and equally bewildering load of substantive courses.[2] These courses are intended to teach students to "think like a lawyer," whatever that odious expression means, and presumably to write like one as well. Yet the

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1. There are many generalizations scattered throughout this article. There are exceptions to all of them. In referring to law students, I use terms like "majority," "many," and "some" to try to give an anecdotal sense of my own experience. I make no claim to universal validity for my observations. Readers will have to judge for themselves what rings true and what does not.

2. This is certainly a generalization. I realize that legal writing is taught differently at different schools, and I have no wish here to enter the debate about the professional status of legal writing instructors. Nothing I say, however, is intended to denigrate the efforts of those who toil in the trenches of legal writing. I think it is hard to deny that these teachers put in longer and harder hours than many of us who are tenured and relatively free to do as much or little as we please.

exemplars in the casebooks of substantive courses are seldom the stuff of good writing. Too often they suggest the need for an arcane vocabulary, preferably studded with Latinisms, and for long, convoluted sentences which seem designed to mask, obfuscate, perhaps even to lie—to do anything, in short, but communicate logically, precisely, succinctly, and persuasively. The second and third years of law school comprise almost exclusively substantive courses, and the writing most students are actually required to do consists largely of note-taking. What was learned in legal writing is soon forgotten. It should come as no surprise that when the occasion to write does arise—in a clerking job, for law journals, moot court, or the occasional paper course—the results are often disappointing.

The academy naturally has its explanations for this ineptitude. Most law students appear to have slept through the eleventh grade; they never learned to diagram a sentence. They gave up reading for television, video games, and other computer-driven diversions. They were inadequately taught by harassed, overworked, and underpaid secondary school teachers. They seldom had occasion to practice their writing, either in secondary school or in college, such ancient rituals as the daily theme or the weekly essay having fallen by the wayside because most teachers, especially those in secondary schools, don't have the time to read, correct, and comment on dozens of essays, requiring rewrites where necessary. There is undoubtedly some truth in all of this, but that fact should not obscure the root notion, which is that law students should have learned to write *before* coming to law school; if they did not, it is somebody else's fault, and it is too late to do anything about it.

These conveniently exculpatory jeremiads are unfortunately subsets of a far more serious and fundamental problem—that of the erosion of the English language itself. English is an old language and an incredibly rich one. The British have had over a thousand years of experience with it, and in the hands of their skilled practitioners it has proven capable of great range and subtlety.[3] It has been said that Shakespeare had a working vocabulary of 20,000 words;[4] today most of us in America get by with a few hundred.[5] Nor is American English the English of Shakespeare,

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3. As Joseph Conrad once said, "My task which I am trying to achieve is, by the power of the written word to make you hear, to make you feel—it is, before all, to make you *see*. That—and no more, and it is everything." JOSEPH CONRAD, THE NIGGER OF THE NARCISSUS, *Preface*, at xiv (Collier ed., 1928) (1897). For Conrad, ironically, English was truly a second language. That he was surpassingly successful in his aim has always seemed self-evident to me.

4. GEORGE STEINER, *Shakespeare—Four Hundredth, in* LANGUAGE AND SILENCE 198, 204 (1967).

5. George Steiner, the distinguished literary critic, put it this way:

Winston Churchill, George Orwell, or even Tony Blair. Much of the debasement of the language—for debasement it is—can be traced to the rank commercialism and self-interest that permeate our lives. Nowhere is this more obvious than in the jargon of the advertising industry. We know from ads that language can distort and lie, and we have learned to discount it accordingly. "Cool" and "awesome" in their myriad of contexts have become more powerful communicators than "superb," "stupendous," or "astonishing." Words like these will not do any more; they have lost their power because they are used a thousand times a day to make claims that we know are ridiculously exaggerated or simply untrue.[6] Faced with this deluge, we do what any sensible person would do: we tune it out. We have learned to ignore language as a medium of communication.

The malaise, unfortunately, has spread far beyond Madison Avenue and its progeny of television and internet hucksters. It permeates virtually all political and public discourse. We have become masters of the turgid euphemism or circumlocution—all with a view of appearing to say something while saying nothing and offending no one. We have learned only too well to use English not just ineptly, but as a way to hide, obscure, distort, and to lie. What are we to make of a President's transmogrification of the phrase "weapons of mass destruction" into "weapons of mass destruction-related program activities"?[7] Or of calling the prisoners being

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> [U]ntil the seventeenth century, the sphere of language encompassed nearly the whole of experience and reality; today, it comprises a narrower domain. It no longer articulates, or is relevant to, all major modes of action, thought, and sensibility. Large areas of meaning and praxis now belong to such non-verbal languages as mathematics, symbolic logic, and formulas of chemical or electronic relation. . . .
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> . . . [F]ifty percent of modern colloquial speech in England and America comprises only thirty-four basic words; and to make themselves widely understood, contemporary media of mass communication have had to reduce English to a semi-literate condition. The language of Shakespeare and Milton belongs to a stage of history in which words were in natural control of experienced life. The writer of today tends to use far fewer and simpler words, both because mass culture has watered down the concept of literacy and because the sum of realities of which words can give a necessary and sufficient account has sharply diminished.

Id., The Retreat from the Word, at 24-25.

6. The industry has not been content with simply debasing the accuracy of language as a medium of communication: it has also taken perverse delight in using sentence fragments and deliberately misspelling words in its effort to achieve impact and interest. Does anyone count the cost to the linguistic skills of the young and impressionable bombarded at every turn by this tripe? I have described this problem before in substantially similar language. *See* Harold P. Southerland, *Theory and Reality in Statutory Interpretation,* 15 ST. THOMAS L. REV. 1, 4-6 (2002).

7. Hendrick Hertzberg, *Unsteady State*, THE NEW YORKER, Feb. 2, 2004, at 25, 26. *See also* IRVING J. LEE, LANGUAGE HABITS IN HUMAN AFFAIRS (1941). At one point, Lee says, "To respond to words as if they were more than symbols of something other is to revert to the primitive and the infantile. The basic question: not, What was it called, but *What* was being so called?" *Id.* at 172. Vilfredo Pareto said much the same thing:

held at Guantánamo Bay "unlawful combatants" rather than "prisoners of war"?[8] Or of "rendition"—an innocuous-sounding term for the sending of suspected terrorists to foreign countries where they can be tortured,[9] eerily reminiscent of the Nazis' "resettlement" of Europe's Jews in the death camps of Poland? Or of "collateral damage," a gloss for the slaughter of innocent human beings, the inevitable though "unintended" by-product of war? What legerdemain is at play when fast-food restaurants are reclassified as "manufacturing" rather than "service" industries and the definition of "small business" is restructured to include some of the nation's largest corporations?[10] American English might well be called virtual English—a language of illusion, not reality.

George Steiner wrote that "[l]anguages have great reserves of life. They can absorb masses of hysteria, illiteracy, and cheapness . . . ."[11]

> But there comes a breaking point. Use a language to conceive, organize, and justify Belsen; use it to make out specifications for gas ovens; use it to dehumanize man during twelve years of calculated bestiality. Something will happen to it. . . . Something of the lies and sadism will settle in the marrow of the language. . . . It will no longer perform, quite as well as it used to, its two principal functions: the conveyance of humane order which we call law, and the communication of the quick of the human spirit which we call grace.[12]

Steiner is right in asserting that language *ought* to convey "the humane order which we call law." But I question whether that is, or ever has been, the case with American English. This nation has produced its

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> First one considers the substance formed by combining oxygen and hydrogen, and then a term is sought to designate it. Since the substance in question is present in great quantities in the vaguely defined thing that the ordinary vernacular designates as water, we call it water. But it might have been called otherwise—"lavoisier," for instance—and all of chemistry would stand exactly as it is.

1 VILFREDO PARETO, THE MIND AND SOCIETY: A TREATISE ON GENERAL SOCIOLOGY 63 (Andrew Bongiorno & Arthur Livingston trans., 1935) (1923). For a masterly treatment of language, meaning, and values in the law, see Samuel Mermin, *The Study of Jurisprudence—A Letter to a Hostile Student*, 49 MICH. L. REV. 39 (1950).

8. *See* Jeffrey Toobin, *Inside the Wire*, THE NEW YORKER, Feb. 9, 2004, at 36, 37 (a handy turn of phrase rendering inapplicable the provisions of the Geneva Conventions).

9. *See* Jane Mayer, *Outsourcing Torture,* THE NEW YORKER, Feb. 14, 2005, at 106; Scott Shane et al., *C.I.A. Expanding Terror Battle under Guise of Charter Flights,* N.Y. TIMES, May 31, 2005, at A1.

10. *See* Molly Ivins, *The Bush administration's White House of Mirth*, TALLAHASSEE DEMOCRAT, Feb. 26, 2004, at E5. With the fast-food industry, Ivins says, "it's so when the administration has to report the statistics on how many manufacturing jobs we've lost, they won't look so bad." *Id.* Redefining "small business" responds to the criticism that the present administration has "lopsidedly benefited huge corporations as compared to small business." *Id.*

11. STEINER, *The Hollow Miracle*, *supra* note 4, at 99, 101. Steiner, of course, was writing about Nazi Germany and the Holocaust.

12. *Id.*

share of brilliant writers and orators; but the normative use of language in this country, like the character of the polyglot society from which it has sprung, has been instrumental in nature: a language in which precision, beauty, and eloquence have always ceded place to utility. American English is useful or it is nothing—a vehicle for approximating meaning and communicating with one another in a rough sort of way, certainly, but with the primary aim of enabling us to get what we want out of life. We have used law itself instrumentally, as the indispensable lubricant for the wheels of politics and the economy,[13] and so also have we used the language of the law. The pertinent inquiry is really whether law in this country has produced "order," much less one that can comfortably be called "humane." Given our history, I find it difficult to answer this question affirmatively.

What this heretical statement means is that in our debased version of English we have created precisely the language we want and need: a language that allows us to do pretty much whatever it is we want to do. We proclaimed that "all men are created equal . . . [with unalienable rights to] Life, Liberty, and the pursuit of Happiness,"[14] but if we turn from this hallowed language of high purpose to the reality of deeds, we find in our short history the ruthless extermination of Native American culture and civilization;[15] the subjugation of black people, first as slaves, then as second-class citizens;[16] the exclusion of women from much of the political and economic life of the nation;[17] and the confinement of Americans of Japanese ancestry in internment camps during World War II.[18] Jefferson evidently meant "men" literally, and only white men at that. We said in the Constitution that Congress could not prohibit the free exercise of religion, but as the Mormons learned to their sorrow, it all depended on whose religion you were talking about.[19] We likewise disabled Congress from

13. *See generally* JAMES WILLARD HURST, LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY (Da Capo Press ed. 1972) (1960); LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY (2002).

14. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

15. *See* 1 MORISON ET AL., THE GROWTH OF THE AMERICAN REPUBLIC 438-41 (6th ed. 1969); 2 MORISON ET AL., THE GROWTH OF THE AMERICAN REPUBLIC 5-9 (6th ed. 1969).

16. This statement hardly needs citation. From a legal point of view, the essence is captured in two well-known decisions of the Supreme Court—Dred Scott v. Sandford, 60 U.S. 393 (1856), and Plessy v. Ferguson, 163 U.S. 537 (1896).

17. *See generally* ALICE KESSLER-HARRIS, OUT TO WORK (1982).

18. *See* Korematsu v. United States, 323 U.S. 214 (1944).

19. *See* Reynolds v. United States, 98 U.S. 145 (1878) (upholding conviction for polygamy against defendant's free exercise claim that his conduct was religiously motivated); Davis v. Beason, 133 U.S. 333 (1890) (upholding statute making membership in the Mormon Church, without more, a crime); Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890) (upholding act which dissolved the church and confiscated its assets).

abridging freedom of speech and association, but those concepts, too, turned out to be quite malleable, depending on what you were saying and with whom you were associating.[20] We carved on the pedestal of the Statue of Liberty the inspiring words of Emma Lazarus—"'Give me your tired, your poor, / Your huddled masses yearning to breathe free, / The wretched refuse of your teeming shore. / Send these, the homeless, tempest-tost to me, / I lift my lamp beside the golden door!'"[21]—while in the same breath slamming shut the golden door on just these sorts of people.[22] And when it comes to capitalism, the bedrock of the Republic, where would one start in recounting the myriad ways in which law and its language have been used to enable a few to prosper at the expense of the many?[23] All of this and

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For a history of the Mormons' persecution, see THOMAS F. O'DEA, THE MORMONS 41-69, 110-11 (1957).

20. The history of the first amendment's speech, press, and assembly clauses—a tortuous and complex one for the last 100 years—is traced in WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW 1202-38 (9th ed. 1993). The basic idea seems to be that one is free to express opinions unless such activity might provoke *actions* deemed contrary to the majority beliefs of the day. *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919) (upholding conspiracy convictions under Espionage Act of 1917 of persons who distributed circulars in opposition to conscription); Abrams v. United States, 250 U.S. 616 (1919) (upholding conspiracy convictions under 1918 amendment to Espionage Act of persons who distributed circulars opposing participation in World War I); Dennis v. United States, 341 U.S. 494 (1951) (upholding convictions under the Smith Act of persons conspiring to organize the Communist Party of the United States). *See generally* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME (2004).

21. These are the best-known lines from Emma Lazarus's sonnet "The New Colossus," written in 1883 to help raise money for the pedestal of the Statue of Liberty. The complete poem is inscribed on a plaque at the entrance to the pedestal. The statue was constructed in France in the period 1875–1885 and then shipped to the United States as a gift from the French to the American people. It was erected on what was then Bedloe's Island in New York harbor and was formally dedicated in 1886. *See* ENCYCLOPEDIA BRITANNICA ONLINE, *Liberty, Statue of* (2005), http://www.britannica.com/eb/article-9048130?query=statueofliberty. Emma Lazarus, an American poet of Portuguese-Jewish ancestry, was born in 1849 and died in 1887. *See* THE READER'S ENCYCLOPEDIA, AN ENCYCLOPEDIA OF WORLD LITERATURE AND THE ARTS 618 (William Rose Benét ed., 1948).

22. The nation's first general immigration statute, enacted in 1882, excluded, *inter alia,* any person "likely to become a public charge"—the poor, in other words. *See* Act of Aug. 3, 1882, § 2, 22 Stat. 214. The language of the 1891 comprehensive amendment made this ground of exclusion even more explicit: "paupers or persons likely to become a public charge." *See* Act of Mar. 3, 1891, § 1, 26 Stat. 1084. The contract labor act of 1885 made it unlawful to contract with or assist aliens in coming to the United States "to perform labor or service of any kind." *See* Act of Feb. 26, 1885, § 1, 23 Stat. 332. This act was aimed at unskilled foreign workers who "'are generally from the lowest social stratum, and live upon the coarsest food and in hovels of a character before unknown to American workmen . . . [and who] are certainly not a desirable acquisition to the body politic.'" *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 465 (quoting H.R. REP. No. 444, at 2 (1884)).

23. Calvin Coolidge, President of the United States from 1923 to 1929, said that "the chief business of the American people is business." David Farber, *Calvin Coolidge, in* THE READER'S COMPANION TO THE AMERICAN PRESIDENCY 346 (Alan Brinkley & Davis Dyer eds., 2000). He

much more was done under color of law, usually accompanied by elaborate rationalizations couched in the language of the law. How is it possible to trust a language in whose name such things are done?

From a practical standpoint, what all of this means is that those who enter upon a career in law do so under a severe linguistic handicap. Far from dealing with the problem, the culture of legal education makes it worse. Many students come to law school in search of order, consistency, and certainty. They come from a world steeped in chaos and confusion, one that seems to value material things and the wherewithal to command them above all else. They see the law as somehow representing humankind's best hope of coping with the Brownian movement of self-interest that surrounds them. Some hope to use the law to survive and prosper in this world, others to change it. Either way, it is necessary to know the rules, and knowledge of the rules is what they expect to find. But as Franz Kafka demonstrated in his allegorical fiction and Lon Fuller in his jurisprudential writings, there frequently are no rules—or if there are, they are not easy to discover, much less play by.[24] Perhaps first-year students are exposed to the chilly but realistic views of Oliver Wendell Holmes, who warned that words have no fixed and invariant content[25] and are more likely to reflect the "felt necessities of the time" than rigorous, rule-driven logic.[26] Perhaps they are exposed, as I was, to Karl Llewellyn's classic

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also said that "[t]he man who builds a factory builds a temple, the man who works there worships there." *Id.* at 347. These words capture a distinctly American ethos. Realizing it has made this nation the richest on earth, but only at the cost of exalting business interests—essentially the interests of property—over all others. In this process the legal system has played a preëminent role, providing the rationalization for exploiting workers and the public and for systematically destroying the environment.

24. With Kafka, one thinks immediately of *The Trial.* In this novel, K., the protagonist, is charged with the commission of a "crime," the exact nature of which is never revealed to him. The great weight of legal machinery is thereby set in motion and grinds mindlessly on to its unhappy end, despite K.'s protestations of innocence and vain efforts to defend himself. "See," one of his jailers says, "he admits that he doesn't know the Law and yet he claims he's innocent." FRANZ KAFKA, THE TRIAL 10 (Alfred A. Knopf ed., 1957). The quotation here is from the 1957 translation by Willa and Edwin Muir, the so-called definitive edition. For Fuller's classic exposition of the problem, *see generally* LON L. FULLER, THE MORALITY OF LAW 33-94 (1964).

25. "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918).

26. In *The Common Law*, Holmes wrote:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

OLIVER WENDELL HOLMES, THE COMMON LAW 1 (Little, Brown & Co. 1938) (1881). Elsewhere he made the point more explicit:

study of statutory interpretation—his "thrusts and parries," the so-called rules for construing statutes, for each of which there is an equal and opposite rule.[27] Or perhaps they intuit the same truth from the juxtaposition of a persuasive majority opinion with an equally persuasive dissent.

At some point there is apt to be a shock of recognition: there are always two or more rules of law that have application to a case of any importance and that point in opposite directions.[28] What they are left with, it seems, are only opinions and value judgments, dependent not on the logic of the syllogism or the analogy, but on the internal workings of judges' minds—judges who are simply human beings and who frequently decide, whatever they say, on the basis of deep-seated intuitions of morality and public policy that are seldom voiced in the opinions and of which the judges themselves may not be consciously aware. Of course, the same value-laden politics also permeate the legislative, executive, and regulatory processes. It would be comforting if well-known and accepted rules were rigorously applied to the facts and some one-and-only conclusion reached as a result, but that seldom seems to be the case. Students are faced with a grim conundrum: why are cases decided as they are when they could just as easily have been decided differently? Law turns out not to be an exact science, but a complex political process in which there are no right answers, only value judgments.

Thus settles into the minds of these students a kind of permafrost of schizophrenia. They soon learn that it is a lawyer's job to take whatever side of a case chance happens to deal him and to make the best arguments that can be made on that side. Any personal, individualized concern for what ought to be done, for perceptions of right and wrong, even for truth, must be subordinated to the task at hand. The facts—or what can be made to pass for them—have to be molded into a plausible version of reality, and that version, in turn, made to seem more plausible than some other. For the

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> The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You can always imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions.

Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465-66 (1897).

27. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 402-06 (1950).

28. *See id.* at 396.

rule-oriented student in search of certainty, all of this can seem surreal. Suddenly, the law stands revealed as just another human institution, as fraught with chaos, confusion, uncertainty, and politics as the world of which it is a part. Some students take to this inherent duplicity like ducks to water. They are smart enough to see the opportunity for personal profit in law's two-faced visage. But for others there is no place to hide, and for these, three years of law study is apt to be frustrating and disillusioning, more like a mandatory minimum prison sentence than an educational experience. When called upon to write, they hardly know what to say. They resent the inherent amorality of the law and its inability to bring order and certainty to an uncertain world, its insistence on answering every question with a question. Inevitably, their writing reflects their frustration, disillusion, and disappointment: it simply is not anything they want to be doing.

Perhaps even sadder is the plight of those who come to law school in hopes of "making a difference." I've read that phrase or its equivalent in thousands of personal statements over the years. Some of it is doubtless hype, masking self-interest; but there are a significant number of students who are genuinely concerned, often from bitter personal experience, with those whom society victimizes, marginalizes, or neglects. They come from a society awash in the quest for the things of the world. By their lights, at least, they know that the existing system is neither fair nor just; and they know that whatever fairness and justice does exist is not equally available to all. They know about discrimination in its myriad forms; they know about raped and battered women and abused children; about people in mental hospitals, prisons, and nursing homes; about poor people and vast disparities of wealth; about migrant workers and aliens seeking help with immigration problems. Some fear for the environment and what they see happening to it—its systematic destruction both here and around the world[29] so that a few nations, preëminently this one, can enjoy comfort and

29. *See, e.g.*, Allen Hammond & Emily Matthews, *Faulty Scholarship: Lomborg and Earth's Living Systems*, 53 CASE W. RES. L. REV. 353 (2002); John Dernbach, *Sustainable Versus Unsustainable Propositions*, 53 CASE W. RES. L. REV. 449 (2002). These articles are part of a symposium of generally critical reaction to the work of Danish statistician Bjørn Lomborg, who startled the environmental community with his view that earth and its resources were not doing that badly at all. *See* BJØRN LOMBORG, THE SKEPTICAL ENVIRONMENTALIST (2001). *See also* Elizabeth Kolbert, *The Climate of Man,* THE NEW YORKER, April 25, 2005, at 56 (pt. I), May 2, 2005, at 64 (pt. II), May 9, 2005, at 52 (pt. III). In this survey of current scientific thinking on the phenomenon of global warming and its implications, the author does not hesitate to castigate the Bush Administration's hostility to environmental measures and its head-in-the-sand posture in relation to the problem. She as much as accuses this nation of retreating "into ever narrower and more destructive forms of self-interest" and concludes with a chilling observation: "It may seem impossible to imagine that a technologically advanced society could choose, in essence, to

convenience inconceivable to most of the world's population.[30] Some are troubled by the casual assumption that human beings stand atop life's biological and ecological ladder and are entitled to do whatever they please to the face of the earth and the so-called lower forms of life—the animals and other creatures—that share it with us.[31] Some worry about what science and genetic engineering may soon make possible.[32]

But what do such students find in the standard law school curriculum that responds to their concerns? Not much. For the most part they find the law that is—a legal system created in the main by white males and that uncannily mirrors who we are as a society and all that we value in this life. In our world, it is an article of faith that survival of the fittest heads the list. And the fittest, in turn, are those with power: those who through wit, strength, or sheer good luck are able to control the environment that surrounds them and all others, human and non-human alike, who inhabit it. This seemingly ineluctable first principle has dominated the human race throughout the whole of its long evolutionary history, notwithstanding that the cost of seeing the world in this way has been fear, violence, pain, and death.[33] In my view, and I suspect in the view of these students, law is at its best when used to restrain the exertion of power by one individual or group over another, at its worst when used to legitimate the exertion of such power. But even at its best, law has had little to contribute in the way of a solution to the problems of a society ridden with fear, hatred, and violence. Its mentality is still that of trial by combat, of fighting fire with

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destroy itself, but that is what we are now in the process or doing." *Id.*, May 9, 2005, at 63 (pt. III).

30. According to the Population Institute's web site, the United States, with less than 5% of the world's population, consumes nearly 30% of its resources. Twenty percent of the world's population—centered in the United States, Canada, Saudi Arabia, Australia, and Japan—consumes 70% of the world's resources and possesses 80% of its wealth. *See* The Population Institute, *Population and Consumption*, http://www.populationinstitute.org/teampublish/71_234_5215.cfm (last visited Sept. 8, 2005).

31. *See, e.g.*, HENRY S. SALT, ANIMALS' RIGHTS (Soc'y for Animal Rights 1980) (1892); IN DEFENCE OF ANIMALS (Peter Singer ed., 1985); STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS (2000); GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG? (2000).

32. *See generally* Paul A. Lombardo, *Taking Eugenics Seriously: Three Generations of??? Are Enough?*, 30 FLA. ST. U. L. REV. 191 (2003) (a collection of insights from various disciplines bearing on the formulation of public policy on genetic issues); JOEL GARREAU, RADICAL EVOLUTION (2005); THOMAS L. FRIEDMAN, THE WORLD IS FLAT (2005). I have described these kinds of student concerns in similar language elsewhere. *See* Harold P. Southerland, *Law, Literature, and History*, 28 VERMONT L. REV. 1, 84-85 (2003).

33. *See* GARY ZUKAV, THE SEAT OF THE SOUL 19-32 (Fireside ed., Simon & Schuster 1990) (1989). If proof of Zukav's insights were wanted, the bloody history of the 20th century alone, in which 200,000,000 humans died unnecessary deaths as a result of "state action" in one form or another, should suffice.

fire, and this has only tended to compound the problem and make it more obscure. Law is itself part of the problem. Legal education reflects the existing legal system, which in turn reflects the larger society. The idealistic students—at least those who do not expediently sacrifice principle to practicality along the way—understand very clearly that in writing something, anything, about the law, they more often than not are forced to fudge, hedge, dissimulate, or lie. As George Orwell so memorably put it:

> The great enemy of clear language is insincerity. When there is a gap between one's real and one's declared aims, one turns as it were instinctively to long words and exhausted idioms, like a cuttlefish squirting out ink. In our age there is no such thing as "keeping out of politics." All issues are political issues, and politics itself is a mass of lies, evasions, folly, hatred, and schizophrenia. When the general atmosphere is bad, language must suffer.[34]

There is another, more mundane way in which the culture of legal education exacerbates the difficulties so many students have with writing. Law schools train their students, quite literally, not to write. Apart from the first-year course in legal writing, crammed into the curriculum at the worst possible time, the typical law school experience requires almost nothing of its students in the way of writing.[35] For more than a hundred years, law schools have trained their students in pretty much the same way. So-called substantive courses dominate the curriculum; and while no one would quarrel with their importance, most of them are taught in large sections with enrollments that can range from fifty to a hundred students or more. Plainly, no one teaching courses of this size could realistically be expected to assign frequent writing exercises and provide helpful and meaningful critiques.

This method of instruction has persisted for so long, I suspect, because those who teach in law schools and who control curriculum and methodology find it congenial. It is certainly economical. Imagine the cost

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34. GEORGE ORWELL, *Politics and the English Language, in* THE ORWELL READER 355, 363-64 (Harcourt, Brace & Co. 1956) (1946).

35. Of course this is not so true of the handful of students who spend two years working on law journals. At least most of them write. But from my dealings with law review editors, I suspect that the experience must often resemble a case of the blind leading the blind. As Richard Posner says in a blunt and insightful critique of the law review industry,

> Apart from acute problems of quality control, neither author nor reader is likely to benefit from the editing process. Because the students are not trained or experienced editors, the average quality of their suggested revisions is low. Many of the revisions they suggest (or impose) exacerbate the leaden, plethoric style that comes naturally to lawyers (including law professors).

Richard A. Posner, *Against the Law Reviews,* LEGAL AFFAIRS, *available at* http://legalaffairs.org/printerfriendly.msp?id=660 (last visited Sept. 9, 2005).

of funding a faculty-student ratio of ten to one in most courses. And it is relatively easy and undemanding, leaving a great deal of time for the research and scholarly writing by which law schools and law faculties are chiefly judged and evaluated. Not to put too fine a point on it, you can be the most exciting, inspirational, and charismatic classroom performer imaginable and yet languish in terms of salary, promotion, and tenure far behind those of your peers who regularly publish articles in second- or third-tier law reviews—articles that few people will ever read and that could hardly be described as earth-shattering.[36] I do not mean to disparage these efforts, by the way; content aside, they have their own intrinsic value. My point is that the old saw, "publish or perish," has very sharp and shiny teeth. In contrast, except for the occasional flare-up over political incorrectness of some sort, no one in legal education worries very much about what actually goes on in the classroom. No one really knows, in fact, what *does* go on in the classroom. In most schools, there is no systematic peer review of teaching; instead, we have rumors, student-borne anecdotal accounts, and student evaluations—the last treated as a joke by many students because they do not believe that anyone reads them, much less takes them seriously. In any case, there is no widespread agreement within faculties on what it is, exactly, that makes for effective teaching. In short, we do not know what good teaching is, we cannot agree on how to measure it, and we are not very interested in finding out. Books and law review articles, on the other hand, regardless of quality, offer a convenient and readily quantifiable way of evaluating and rewarding performance.

It is probably not fair to say that the faculties of law schools do not care about the writing abilities of their students, but it is fair to say that they do not care enough to do much about it. Most of us have sat through endless meetings batting the problem fecklessly about, but in the end nothing really changes. Scarce resources stand in the way; most of us are preoccupied with our own research and writing and cannot spare the time and effort required to grapple with the writing problems of students; and some are hardly competent to help even were they so inclined. It all comes down to a matter of priorities, and the ability of law students to write is far from the top of the list. Yet the fact remains that law is a house of words, utterly dependent on language. Other than integrity, it is hard to think of

36. The history of law reviews, their nature and growth—from one, the *Harvard Law Review*, in the late 1800s to over 400 today—is recounted in FRIEDMAN, *supra* note 13, at 497-501. For a concise description of the recommended strategies for placing articles for publication in these "extremely peculiar journals," *id.* at 497, see EUGENE VOLOKH, ACADEMIC LEGAL WRITING: LAW REVIEW ARTICLES, STUDENT NOTES, AND SEMINAR PAPERS 150-70 (Foundation Press 2d ed. 2005) (2003).

any quality more vital to a lawyer than literacy. In most schools, legal writing in the first year is the only concession to a problem of epidemic proportions. In my experience, it is not enough. The deeply rooted notion still persists that law students should have learned to write before coming to law school. If they did not, it is somebody else's fault, and it is too late to do anything about it.

Perhaps it is too late. The society which law and legal education reflect is unlikely to change that much. If history is any guide, our society will continue to do what it wants to do, using caparisons of bloated jargon either to divert attention from what is really going on or make it hopelessly obscure. No amount of concern is likely to stop the disappearance at all levels of education of systematic and rigorous training in language and its use. And it does not seem likely that the young people of today will abandon television or their computers and return to the once-common practice of reading widely.[37] That leaves the law schools, with their deeply engrained, complacent, "it's too late" mentality, as the last, best hope, at least for lawyers.

In his classic 1946 polemic, "Politics and the English Language," George Orwell asserted, somewhat surprisingly, that the debasement of the English language was curable.[38] He rejected the notion that "[o]ur language . . . must share in the general collapse."[39] He thought it "clear that the decline of a language must ultimately have political and economic causes" but noted that "an effect can become a cause, reproducing the original cause and producing the same effect in an intensified form, and so on indefinitely."[40] The English language, in other words, "becomes ugly and inaccurate because our thoughts are foolish, but the slovenliness of our language makes it easier for us to have foolish thoughts."[41] In his view, "the process [was] reversible."[42]

> Modern English, especially written English, is full of bad habits which spread by imitation and which can be avoided if one is willing to take

37. It is easy to sneer at these activities, but for the interesting insight that contemporary television programs and computer games may contribute significantly to a certain kind of thinking ability, see Malcolm Gladwell, *Brain Candy,* THE NEW YORKER, May 16, 2005, at 88 (reviewing Steven Johnson's *Everything Bad Is Good for You*). Gladwell distinguishes two kinds of thinking: the "kind of fluid problem solving that matters in things like video games and I.Q. tests" and "the kind of crystallized knowledge that comes from explicit learning," the latter derived chiefly from reading. *Id.* at 89. But while games may teach thought, they can not teach the ability to translate thoughts into a form that others can comprehend—the act of writing, the process by which cognition is made concrete.

38. ORWELL, *supra* note 34, at 355.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

> the necessary trouble. If one gets rid of these habits, one can think more clearly, and to think clearly is a necessary first step toward political regeneration: so that the fight against bad English is not frivolous and is not the exclusive concern of professional writers.[43]

Orwell's own prescriptions are simple and straightforward; in essence they reduce to the principle that good writing should be accurate, clear, and brief.[44] And he made it clear that he was talking not about the literary use of language, "but merely language as an instrument for expressing and not for concealing or preventing thought."[45] In writing this, he might have had in mind the kind of writing that lawyers should be able to produce.

So what is it that law schools ought to do—at least those concerned enough to do anything at all? They should start by recognizing that in presiding over an educational system that treats its constituents as students rather than lawyers, they are producing graduates who resemble lemmings more than professionals. A law school is a professional school. It is in the business of training its graduates for lifetime careers as practicing lawyers, charged with the awesome responsibility of representing people who will have entrusted their lives, liberty, and property to their lawyers' care. Law is among the most active of professions. Lawyers are always *doing* something; they are forever talking, negotiating, arguing, and writing, all in the service of their clients.

Yet how are they trained? Almost all instruction in the first year—and much of it thereafter—goes on in very large classes. Students prepare for each class by studying about twenty pages in a casebook, very large texts which contain a collection of materials dealing with the subject matter of the course. In class, teachers may discuss and enlarge on these materials through lecture, or they may engage the students in a Socratic dialogue—a famous form of discourse in which the prevailing view on some aspect of the subject is made to emerge through a series of questions and answers. For the most part, students sit passively, listening and taking notes. Not until the end of the semester are they tested on their grasp of the subject matter, and then by a single three- or four-hour examination. The practice

43. *Id.*

44. *See id.* at 365-66. Orwell thought the following rules would help:

> (i) Never use a metaphor, simile, or other figure of speech which you are used to seeing in print.
> (ii) Never use a long word where a short one will do.
> (iii) If it is possible to cut a word out, always cut it out.
> (iv) Never use the passive where you can use the active.
> (v) Never use a foreign phrase, a scientific word, or a jargon word if you can think of an everyday English equivalent.
> (vi) Break any of these rules sooner than say anything outright barbarous.

Id.

45. *Id.* at 366.

in many schools is then to "curve" the scores on these exams—that is, to place them under a bell curve and arbitrarily raise or lower them as need be to produce the statistically expected distribution—a certain percentage of *A*s, a certain percentage of *B*s, and so on.[46] The final grades that result cannot therefore pretend to be an absolute measure of anything—certainly not of professional competence in a subject.[47] They reflect only performance in relation to all others in the class. Their most important function is that in the aggregate they allow an entire law school class to be ranked.

Perhaps that is why there is not a lot of camaraderie among law students. They quickly come to understand that they have been pitted against one another in a deadly serious competition. Class standing becomes the measure of everything—not depth of learning, curiosity, integrity, diligence and hard work, or anything else. Class standing will largely determine employment opportunities upon graduation. A law degree, in itself, is no guarantee of a decent job—a seeming necessity for many because they are financing their educations with student loans and will be heavily in debt when they graduate. The atmosphere at exam time reeks of paranoia—intense, sometimes ugly, and full of hostility, suspicion, and fear. In this way, how hard you have worked or how much you may have learned is made to seem unimportant; all that seems important is where your grades place you in relation to your peers. Law school will not, cannot, be an open sharing of ideas, a collegial learning experience. It is a foot race.

Class rank is pretty well set in stone at the end of the first year. For those in roughly the top twenty percent, prospects are rosy. But what of the vast majority of the class, those who just do not have it—whatever "it" is? They are left to deal with bitter disappointment, bruised egos, and often a sharply diminished sense of self-worth. It is not easy to have given your all only to discover that your all was not good enough: that at your best you are only mediocre or worse. Some students, of course, ignore this labeling process and continue to work hard at learning as much as they can. But far too many resign themselves to two more years of the same mind-numbing

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46. This practice, it is believed, controls statistically for the subjective or idiosyncratic grading standards of individual faculty members. It prevents any particular professor from "skewing" class rankings by giving a disproportionate number of high or low grades. And, where required first-year courses are subdivided into sections, each taught by a different professor, the curve ensures uniformity of grading across sections.

47. It is entirely possible for a student to answer, say, half the questions on an exam correctly and still receive an *A*, provided most of the rest of the class did worse. Conversely, the curve can turn a competent performance into a *C*.

thing[48] until they can escape into the "real world"—a never-never land out there somewhere where it is at least possible to believe that things will be different, and better. They allow the system to blunt whatever incentive to learn they may have come with; to stifle their curiosity and imaginations; to take the fun and excitement out of law study because the point of it all—getting good grades—has been missed. All these students really want to know at this stage is how little they can do and still get by. Class preparation and class attendance suffer; attitudes become sullen, participation in class discussions grudging. Only the successful few still relish playing the game. Such is the pernicious power of grades.

The effect of this hallowed methodology is to reinforce the mentality of a student, not that of a professional. Actually, not much reinforcement is required because the majority of today's law students are in their early twenties,[49] and most of them can scarcely remember a time when they were not students. Their major life experience thus far has been climbing the fakir's rope of the formal educational system, and it does not seem to occur to them that they are fast approaching the vanishing point. Mesmerized by grades, they cannot grasp the critical difference between being taught and learning. They sit passively, waiting to be taught—the familiar process in which an omniscient teacher ladles out wisdom and measures consumption by exams and grades. Learning, on the other hand—the active process in which students take responsibility for acquiring knowledge because it is vital in every sense to their growth as professionals and as human beings—remains an alien concept. Few seem to understand that soon they will have to do something with what they are supposed to have learned. They cannot seem to realize that for all practical purposes they are lawyers already because they are too accustomed to thinking of themselves as students. And the current style of legal education does little to disabuse them of this notion.

I am not naïve enough to believe that this grand design will change any time soon. Grades will continue to be both carrot and stick: they

48. The second and third years turn out to be much like the first even though course selection is largely elective. Any good school offers a variety of seminars and other intriguing small-enrollment courses, but students have difficulty in practice in fitting too many of these in: they may be over-subscribed, or they may offer only pass-fail credit where graded hours are needed. And there are only so many hours in a semester: most students feel pressured to take the so-called core courses that everyone deems essential either for the practice of law or for the bar examination. These courses typically have large enrollments and run in the lecture-discussion format.

49. In the Fall 2003 entering class at Florida State University, for example, 180, or 74% of the students who enrolled were under 25 years old. The average age of the whole class was 24.6; the median age, 23. These statistics were furnished by the Director of Admissions, Florida State University College of Law (on file with the author).

reward talent and hard work in the best American tradition;[50] they provide a useful club to hold over the heads of the disaffected and disillusioned who might otherwise be tempted to do little or nothing; and they are hugely popular with employers, who rely heavily on class standing in making hiring decisions. Teaching methods will not change because they are at once cost-effective for schools and, for faculties, a comfortable and relatively painless way of discharging an obligation that everyone agrees is necessary and important but that in practice is apt to be seen as far less important than the obligation to publish law review articles.[51] No one seems concerned that what might suffer in this paradigm of meritocracy and self-serving efficiency is the thirst for learning, critical analytical skills, curiosity, imagination, writing ability, and ultimately professional competence. For these ills, curricular overhaul is the obvious answer—requiring each student, for example, to take one substantive course each semester in which enrollment is limited to about ten and in which there are substantial supervised writing expectations. That a change like this would radically improve the learning environment in any number of ways will be immediately obvious to any experienced teacher. But it will not happen, simply because most faculties lack the will and, to be fair, the resources to implement such a scheme.

I am left with this modest proposal. If implemented, I believe it would improve the writing ability of law students and perhaps indirectly other aspects of the law school experience as well. The most obvious, hence most often overlooked thing you can say about writing is that it takes practice. Yet passing the token effort in the first year, nowhere in the current design of legal education do most law students have to write anything. Of course, they are advised with a knowing wink by upper-class students at orientation to brief cases in preparation for class, and models ridiculous in their cumbersome detail—some as long as the cases themselves—are dutifully passed out. Most first-year students quickly abandon the practice because it is too time consuming and because cans are readily available for moral support in case they are called on in class. Does

50. For an interesting account of the dog-eat-dog competition for grades that exists even at the high-school level today, see Margaret Talbot, *Best in Class,* THE NEW YORKER, June 6, 2005, at 38.

51. Law schools would not exist without students. That fact should tell us something about where our priorities ought to be. I know there are many faculty members who take their teaching obligation seriously, and I also know there are those who are not only inspiring teachers but productive scholars as well. My point is that the intense administrative pressure to publish, so common in law schools these days, tends to encourage a race to the bottom so far as innovative and stimulating teaching is concerned. For many of us, if something has to give, it's teaching, not research and writing.

no one point out to them that briefing cases is the process of *actively* engaging legal materials? That there is no better way to learn than forcing oneself to distill *in one's own words* what a court did in a particular situation? With this technique students absorb more than legal concepts. They also absorb the language in which those concepts are expressed. Writing about these things steadily improves facility in using and manipulating that language.

When I talk about briefing cases, I decidedly do not mean the sort of thing passed out during orientation or the samples that can be found in standard handbooks on how to study law.[52] I mean the sort of concise statement a lawyer might give a judge at a motion hearing when asked about some case she is relying on: its name, the year of decision, the facts, and the result—two paragraphs at the most. One of the most valuable skills a lawyer can possess is the ability to distill a case to its essence so that the nature of the dispute and how it was resolved are clear, even to someone who knows nothing about the law. Students who practice this skill usually find that something remarkable happens. They find that their interest in legal materials is heightened; that they are more confident in their ability to deal with them; and that their ability to express themselves quickly and accurately has magically gotten better.

Here is an example of what I mean, drawn from a 1914 decision of the New York Court of Appeals, *People v. Tomlins*:[53]

> A father shot and killed his 22-year-old son. The father's defense at his murder trial was that his son attacked him with a knife and that he killed in self-defense. All of the events occurred in the father's home, where the son had been born and raised and was apparently still living. The trial judge charged the jury that the father had a duty to retreat if he could safely do so before using deadly force to resist the son's attack. The father admitted on cross examination that he could have run from the house and escaped the danger. The jury found the father guilty of first-degree murder.
>
> On appeal, the New York Court of Appeals reversed the conviction and remanded the case for a new trial. In an opinion by Judge Cardozo, the court held that the jury instruction was erroneous. A person murderously attacked in his own home need not retreat but could stand his ground and kill if necessary in self-defense, even though the attacker was also an occupant of the home.

An opinion of some five or six pages has been distilled to its essence. Notice that I did not bother with the citation—only the case name, the

52. For an example, see HELENE S. SHAPO, ET AL., WRITING AND ANALYSIS IN THE LAW 28-31 (Foundation Press 4th ed. 1999).

53. 107 N.E. 496 (N.Y. 1914).

jurisdiction, and the date. Where a case was decided and when often explain why it was decided as it was, at least if one is on speaking terms with American history. The brief gives just the essential facts and the result.[54] There is no better way of actively engaging legal materials and of practicing the fine art of writing on a daily basis.

Now all of this used to be pretty much standard wisdom, but my sense today is that it is wisdom largely ignored, both by teachers and by students. Too often the art of distilling cases is touted solely as an aid to class preparation, not to the learning process itself or to the improvement of writing ability. Most first-year students feel overwhelmed by the volume of material they are asked to digest and either cannot or will not take the time to brief cases. They are far more concerned with looking silly in class than learning an indispensable skill or improving their writing and quickly fall back on book-briefing as a way of coping. This is an understandable reaction, and it is probably unrealistic to expect students to brief all their cases, even in the scaled-down format set out above. But there is a simple remedy. Instructors could pick just one case from each day's assignment for written briefs. From these, they could select, say, ten, critique them both for substantive accuracy and writing technique, and return them at the next class. Then another ten, and so on. If this were done in all courses, students would not only be getting a lot of writing practice on an almost daily basis, but over the course of a semester would have the benefit of individualized criticism on twenty-odd writing samples.

I would envision this practice continuing throughout law school—a built-in, routine part of law study. Obviously, these daily writing assignments would not have to consist just of case briefs. As students gain experience, and especially in the second and third years, they might be asked to write précis of textual material in their casebooks, or to synthesize

54. At the time *Tomlins* was decided, it was well-established that a person attacked in her own home by a stranger had no duty to retreat but could stand her ground and defend herself with deadly force if necessary. This was the so-called castle doctrine, an exception to the general rule requiring a person attacked by another to retreat if she could safely do so before resorting to force to resist force. What was important about *Tomlins* and what made it a case of first impression in New York was the fact that the father was attacked in his own home not by a stranger but by a person who was also entitled to be there—a lawful co-occupant of the home. The case has considerable contemporary resonance because we live in a society in which domestic violence is rife. An abusive husband attacks his wife and begins to beat her brutally. Must she flee their home if she safely can and seek refuge with a neighbor? Or can she stand her ground and kill in self-defense? The states have split on this question, and the history in Florida is particularly instructive. In Weiand v. State, 732 So. 2d 1044 (Fla. 1999), the Florida Supreme Court receded from its earlier ruling in State v. Bobbitt, 415 So. 2d 724 (Fla. 1982), and held that a woman beaten and choked by her husband throughout their three-year marriage need not flee the marital home when threatened but could stand her ground and kill if necessary in self-defense.

a line of cases, or to support or attack some approach that appears to represent the majority view. The subject matter could be left to the discretion and imagination of individual teachers. Law students can think, and they do have decided, sometimes very strong opinions about the material they are studying. Many are loath to express their opinions, and the instructional methods of law school do not always encourage them to do so. They fear confrontation, and they fear ridicule or disapproval, either from their instructors or their fellow students. But surely we should be in the business of spurring students to think for themselves and to say forthrightly whatever it is that is on their minds. And there is no better way for them to discover what exactly is on their minds than having to put their thoughts into writing. I know how often I have discovered that some of my cherished views and opinions were silly or misguided through the discipline of trying to put them into words.

For this strategy to work, a significant number of faculty members would have to subscribe to it and be willing to put in the time required to read and critique ten short papers after each class meeting—not, in my opinion, an unreasonable demand.[55] In the process, I think faculty and students would learn a lot about each other, an interaction often missing in today's style of legal education. I think students would respond enthusiastically to the chance to express their views and have them challenged in a constructive way. I think the learning environment would become far more active. And it would be easy to spot students with technical writing problems and to refer them for remedial work to any of the excellent legal writing texts now on the market—texts which students will probably have from the course in legal writing anyhow, all of which contain summaries of the rules governing grammar, syntax, and punctuation.[56]

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55. There are obviously many possible variations on this theme, and I leave the details of implementation to the judgment and imagination of individual teachers. To avoid unduly burdening both teachers and students, I would argue for keeping these papers short, preferably a few single-spaced paragraphs, a page at most. Gen. George C. Marshall was famous for requiring his subordinates to submit recommendations and assessments on no more than one page, no matter how complex the problem. I do think it would be hard to resist inviting students, even in the first year, to take a position on some aspect of the subject matter and attack or defend it.

56. *See, e.g.*, ANNE ENQUIST & LAUREL CURRIE OATES, JUST WRITING: GRAMMAR, PUNCTUATION, AND STYLE FOR THE LEGAL WRITER (Aspen Publishers 2d ed. 2005); MARY BARNARD RAY & JILL J. RAMSFIELD, LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN (West Group Publishing 4th ed. 2005); TERRI LECLERCQ, GUIDE TO LEGAL WRITING STYLE (Aspen Publishers 3d ed. 2004); and RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS (Carolina Academic Press 4th ed. 1998). To these, of course, should be added the *Bluebook,* the closest thing there is to an agreed-upon standard for the citation of sources and authorities in legal writing. For more comprehensive coverage of the conventions of syntax, grammar, and punctuation in American English, two excellent college handbooks are BONNIE CARTER & CRAIG

Good legal writing should strive for *accuracy*, *clarity*, and *brevity*. The importance of these qualities follows from the nature of the audience for whom such writing will typically be done. Readers will be overworked, harried, and busy people—judges, senior partners, department heads, and the like. They are not reading for pleasure or entertainment, but because they have to. They want to get the point as quickly and painlessly as possible, and they do not want to read one word more than necessary to do it. And they will in all likelihood be reasonably intelligent people versed in the English language. They have long since grasped that "I mean what I say" and "I say what I mean" are not the same thing.[57] They are apt to recognize that "he spent hours taking care of the children who were sick with malaria" means something quite different from "he spent hours taking care of the children, who were sick with malaria";[58] that "he was charged with stealing diamond jewelry, ancient jade statutes and furniture" is ambiguous.[59] Eyebrows are sure to be raised when a writer says that "the

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SKATES, THE RINEHART HANDBOOK FOR WRITERS (Harcourt College Publishers 2d ed. 1990) and CHERYL GLENN ET AL., HODGES' HARBRACE HANDBOOK (Thomson Learning 15th ed. 2004). And for exhaustive discussion of the finer points of usage, there is no better source than MERRIAM-WEBSTER, WEBSTER'S DICTIONARY OF ENGLISH USAGE (Merriam-Webster 1989).

57. *See* LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 59-60 (Folio Society ed. 1962) (1865). In construing statutes, courts routinely start their search for the "intent of the legislature"—its meaning—with the presumption that the legislature has said what it means: that is, that the words it has used express its intent. Of course it is often a lawyer's task to try to show that a reasonable legislature could not possibly have meant what it appears to have said. For perhaps the most famous example—or infamous, depending on one's philosophy of statutory interpretation—see Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

58. A comma—its absence or presence—makes all the difference. Its absence in the first sentence indicates that some but not all of the children were sick with malaria; in the second, its presence indicates that all of the children were sick with malaria. Only the comma allows a writer to make his meaning clear.

59. What, exactly, did this thief steal? Four things (diamond jewelry, ancient jade, statues, and furniture)? Three things (diamond jewelry, ancient jade statues, and furniture)? Or two things (diamond jewelry and ancient jade objects (in this case statues and furniture))? Ambiguity in legal prose is not desirable and can sometimes be fatal. But "ambiguous" is not a pejorative word. It simply means fairly susceptible of two or more different meanings. "Dumb," for example, can mean "stupid" or "unable to speak." But what does it mean to say, "What's the good of the dumb question you're asking?" *See* FRANZ KAFKA, *A Fratricide, in* SELECTED SHORT STORIES OF FRANZ KAFKA 165, 167 (Willa Muir & Edwin Muir trans., Modern Library ed., 1952). Here, commas make the difference. Everyone knows that commas are used to separate items in a series. But there is widespread confusion about the permissibility of omitting the comma after the next-to-last item in the series. Some sources say the comma may be omitted if no misreading will result. But for lawyers there can be only one right answer to the question. Never omit the comma after the next-to-last item. There are several reasons for this imperious dictum. First, even today in standard American English, omission of the comma is acceptable only in newspapers and commercial magazines. *See* Louis Menand, *Bad Comma*, THE NEW YORKER, June 28, 2004, at 102, 102 (reviewing British writer Lynne Truss's best-selling book *Eats, Shoots & Leaves: The Zero Tolerance Approach to Punctuation*). In fact, it was newspaper journalists who first began dropping the comma, thus lending the practice a certain aura of

plaintiff relies on a long and unbroken line of precedence."[60] Or "the statute proscribes three conditions for obtaining a license."[61] Or "the new crime-prevention initiative has affected much-needed change in the inner city."[62] Or "the defendant's principle argument won't hold water."[63] Or "the verbiage of the contract provides for liquidated damages."[64] Or "government's efforts in this area have only exasperated the problem."[65]

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respectability. The second and better reason, however, is that I have read too many sentences where the omission of the comma creates confusion or ambiguity. Consider this perplexing excerpt from a recent newspaper article: "Biocovers optimize methane-eating bacteria at landfills to eliminate the gas, which contributes to the greenhouse effect. The low-tech covers consist of layers of soil, broken glass and gravel and compost." TALLAHASSEE DEMOCRAT, May 30, 2004, at B1. What are the errors? First, the comma after *gas* makes the clause that follows non-restrictive; this means that it modifies the entire preceding clause, thus making it seem that the optimizing of methane-eating bacteria contributes to the greenhouse effect. Of course, just the opposite is true; it is not optimizing methane-eating bacteria that contributes to the greenhouse effect but the methane gas itself. Deleting the comma makes this clear. Secondly, is the writer talking about layers of soil, broken glass, and gravel and compost? Or layers of soil, broken glass and gravel, and compost? If the former, only a comma after *glass* makes clear that the third layer consists of gravel and compost. If the latter, only a comma after *gravel* makes clear that the second layer consists of broken glass and gravel (which is in fact what the writer meant). A reader should never be forced to puzzle over meaning.

60. "Precedence" means "priority in time, importance, or rank," as in "my wishes take precedence over yours." A "precedent" is something done in the past that serves to authorize a subsequent act. In law, of course, the word is used to refer to a previously decided case. The plural of "precedent" is "precedents," so this plaintiff should be relying on a "long and unbroken line of precedents."

61. "Proscribe" means "to forbid." "Prescribe" means "to lay down guides, directions, or rules."

62. "Affect" usually functions as a verb and means "to influence." "Effect," as a verb, means "to cause or to bring about"; as a noun it means "a result." The two words are most often confused when used as verbs. Simply remember that "effect" and "effectuate" are synonyms. One would never be tempted to say, "Her behavior effectuated me deeply."

63. "Principle" and "rule" are virtually synonymous. Remembering that both end in *-le* will help in avoiding this common error. "Principal" as an adjective means "main." Both have the *a*.

64. "Verbiage" does not mean "language." It means "unnecessary or excess language." "Verbosity" (or wordiness) is a synonym. "Verbiage" is the opposite of "conciseness."

65. Government exasperates almost everybody, but what is meant here is "exacerbate," meaning "to make worse." Pretty obvious, maybe, but I have encountered this misusage on many occasions. If there is any doubt about the meaning of a word, it should be looked up in a good dictionary. I recommend the G. & C. Merriam Co.'s *Webster's New Collegiate Dictionary*, preferably a printing based on the Second Edition of the same company's unabridged *Webster's New International Dictionary*. Though superseded by the Third Edition, careful writers (among them Antonin Scalia) still prefer the Second Edition, probably because they regard it, rightly in my opinion, as more precise than its successor. Copies can usually be found for a dollar or two in used-book stores, often in hard-cover editions. Do not trust a computer's thesaurus and turn off its grammar checker; it is worse than useless. The spell checker is good, but there are a lot of words that it will pass over— "tenant" and "tenet," for instance. I have seen these confused on a number of occasions. A "tenet" is a principle or belief held as true. A "tenant" is someone who rents property from another. Some other pairs that give trouble are "disinterested" and "uninterested"; "infer" and "imply"; and "conscious" and "conscience." I rely on the spell checker chiefly to flag typing errors. There will never be a substitute for careful proofreading.

Or "this court should not sanction deliberate defiance of federal mandates by corporations that willingly flaunt the law of the nation."[66]

When one writes that "carefully considering all of the mitigating circumstances, a very light sentence was imposed by the court," readers will wonder how a prison sentence can consider anything.[67] They are likely to flinch when they read that "the defendant's damages are miniscule in comparison with the plaintiff's."[68] They will marvel at the multiplier at work in "a brutal killer should be executed to vindicate their victims," or "the Court announces their decisions on Mondays."[69] When a writer says that "I graduated law school in 2003," some will wonder into how many parts she subdivided her alma mater. Quite a few readers know that no

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"Judgment," by the way, can also be spelled "judgement." But no lawyer ever spells it that way except out of ignorance.

66. This sentence comes from a paper I recently read. It is flawed in several respects. First, the word this author wanted was "flout," not "flaunt." "Flout" means "to mock, insult, or treat with contempt." "Flaunt"" means "to make an open, brazen, or vulgar display of," as in "he flaunted his wealth by wearing massive gold chains and smoking Havana cigars." A student can flaunt her contempt for a particular professor by never coming to class; in doing so, she is probably flouting the rules of the school. Second, note the redundancy. If corporations are deliberately defying federal mandates, what does it add to say that they "willingly flout the law of the nation"? A good example of verbiage.

67. This is a dangling participle, of course.

68. "Miniscule" is not a word. The correct word, meaning "very small," is "minuscule." "Miniscule" is so commonly misused that it will probably soon supplant "minuscule." Ironically, it may even be dangerous to use "minuscule" correctly because some readers will assume in their ignorance that a mistake has been made. Most knowledgeable writers—among them Richard Posner and Antonin Scalia—still use the word correctly. But this is a good example of how language changes to reflect the way in which it is commonly used. "Flammable" has almost entirely supplanted "inflammable," though both mean the same thing, because the New York Fire Department discovered that too many people were starting fires in the mistaken belief that the label "inflammable" meant "not capable of burning."

69. The misuse of plural pronouns to refer to singular nouns (or pronouns) has reached epidemic proportions. No matter how common, this anomaly will not be sanctioned by formal English in the foreseeable future simply because it is illogical. How could *one* killer murder *their* victims? How can *each* student turn in *their* homework? The easy way to avoid this error is to make the referent plural: "brutal killers should be executed to vindicate *their* victims." If context requires a singular noun, then refer to it with a singular pronoun. Problems with sexist language arise when the noun (or pronoun) could be a person of either sex. I agree that the old convention of arbitrarily using masculine pronouns when the referent could be either male or female is indefensible. To use "his or her" over and over is tedious; to use "his/her" is unsightly. My personal preference is to alternate masculine and feminine pronouns, as Justice Ginsberg does in her opinions. English abounds with collective nouns: court, majority, minority, Congress, legislature, board of directors, company, corporation, firm, agency, and so on. Though these nouns are understood as describing entities which comprise a number of people, American English treats them in most cases as singular. As subjects they take the singular form of verbs, and they should be referred to with singular pronouns. "The Court announces *its* decisions on Monday." "The company pays *its* employees well." "Number" is somewhat tricky: *a* number of people or things is treated as plural; *the* number of people or things as singular, as in "a number of people *are* going" or "the number of deaths *is* rising."

Justice O'Conner ever sat on the Supreme Court. From long and painful experience, I know that few students are able to integrate quoted matter smoothly into their own context or use an ellipsis correctly; that many do not know how to use authority to advance an argument, much less cite it properly; that some do not know the fifth amendment has no equal protection clause; and that some still do not understand the difference between what a case holds and what it does not.[70]

These are just a few examples of the kinds of mistakes that I see again and again. Good writing strives to put no *unnecessary* obstacles in the way of agreement. By unnecessary obstacles I mean anything that irritates or distracts readers, that makes their task of reading, comprehending, and deciding more difficult, or that gives them cause to question a writer's credibility. Certainly under this heading would fall tortured syntax; bloated, stilted, convoluted sentences; careless, inaccurate, or misleading handling of details, especially quoted matter; typographical errors; and errors in grammar, punctuation, word usage, and citation form. These are not trifles. Mistakes like these not only irritate readers and distract them from the substance of what is being said; cumulatively, they eat away at credibility—an advocate's most precious asset.

Writing is hard work, and good writing takes practice. It is well to come to grips with this reality sooner rather than later. There is no excuse for the non-writing style in which legal education now goes on. We all have thoughts and ideas swirling around in our heads, some of them quite cogent. A major goal of legal education is to implant such thoughts and ideas. But if we want to communicate this unruly jumble to others, to make it readily and easily understandable, we have to impose on it the discipline of words. That is the purpose of writing—the ordered translation of thoughts into words. Fortunately, good writing in legal matters does not require much in the way of literary flair. Its hallmark, as I have said, is accuracy, clarity, and brevity, its aim to inform and to persuade. Read any of the opinions of Richard Posner or Antonin Scalia—not for substance but simply for style—and you will see these qualities exemplified.

As matters now stand, law students do not have to work all that hard, although I am sure they do not think so. But a major component is missing for most, and that is the discipline of words. We do not always want to say what we mean, but it is nice to be able to when the need arises.

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70. "Holding" is a term of art. It is the result reached by a court on the facts of a particular case. No matter what a court says in the course of an opinion, it is what it does that counts. Any statement not consistent with the result is necessarily dictum—useful, perhaps persuasive, but not binding. Watch what they do, not what they say.