

# WHAT KIND OF STORY IS LEGAL WRITING?

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## I.

This essay and the symposium in which it appears originated in an invitation by legal educators interested in legal writing to talk about narrative. Narrative has become fashionable in legal education circles, so much so it has become a full-fledged “school” of contemporary jurisprudence.<sup>1</sup> When narrative rises to the level of jurisprudence, it becomes a perspective that demands attention.<sup>2</sup> The invitation of legal writing teachers to talk about narrative was more, I think, than a request for a briefing on a fashionable “new” school of jurisprudence, it was also an indication of a growing intellectual and scholarly sophistication in the field of legal writing.<sup>3</sup> There has been

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<sup>1</sup> See generally, Gary Minda, *POST MODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* (New York: New York University Press, 1995). In talking about narrative jurisprudence, I am mindful of James Boyd White's unwillingness to call his efforts to revision law as a literary and rhetorical activity as a project of jurisprudence. He candidly admitted that his project was located “far from the center of usual philosophical discourse.” James Boyd White, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* xxi (Boston: Little, Brown and Company, 1973).

<sup>2</sup> Today, it has become fashionable (and with annoying frequency) to use story as a word substitution for concept and theory. Instead of claiming to have a theory or concept about what the law is, or how it's changed, or failed to change, or how it is to be taught, we talk about concepts and theories as if they were stories. Sometimes it is a story or narrative we deliver; more often, there is no story within sight. In the legal academic's adaptation of the “turn to narrative,” we often find in lieu of story sensibility (and the change of heart and cast of mind it brings with it), a set of fashionable new words used to update stagnant professional vocabularies. As fashionable as the new language of story and narrative has become, it continues to represent a shift of focus and mood — concept to story, theory to narrative — that reflects a seismic shift in the foundational structures underlying legal academic thinking.

<sup>3</sup> See Leigh Hunt Greenshaw, “*To Say What the Law Is*”: *Learning the Practice of Legal Rhetoric*, 29 Valpariso U. L. J. 861 (1995); J. Christopher Rideout and Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 Wash. L. Rev. 35 (1994); Philip N. Meyer, “*Fingers Pointing at the Moon*”: *New Perspectives on Teaching Legal Writing and Analysis*, 25 Conn. L. Rev. 777 (1993); Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 Cornell L. Rev. 163 (1993); Andrea A. Lunsford and Lisa Ede, *Collaborative Authoring and the Teaching of Writing*, 10 Cardozo Arts & Ent. J. 681 (1992); Mary Kate Kearney and Mary Beth Beazley, *Teaching Students How to “Think Like Lawyers”: Integrating Socratic Method With the Writing Process*, 64 Temple L. Rev. 885 (1991); Frank Pommersheim, *Voice, Values, and Community: Some Reflections on Legal Writing*, 12 Leg. Studies Forum 477 (1988); Teresa Godwin Phelps, *Writing Strategies for Practicing Attorneys*, 23 Gonzaga L. Rev. 155 (1987/1988); Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 Southwestern L. J. 1089 (1986).

a quiet evolution in this “field” of teaching and the invitation to talk about narrative is yet another signal of the “greening” of legal writing that is underway.<sup>4</sup> Legal writing instruction plays an increasingly important role in legal education and the work of our colleagues who specialize in this area of teaching deserve attention, scrutiny, praise, and criticism.

## II.

Legal story-telling, narrative jurisprudence, law and literature, literary criticism and interpretation, cultural studies — legal education and legal scholarship are besieged by newly emerging disciplines. As the phantasy of law as an autonomous discipline gives way, we have increasingly cast our gaze beyond the moat that surrounds the borders of legalistic thinking. Beyond the moat, according to the traditionalist, there is little but chaos that awaits us. We are, they tell us, opening up the gates of the heavenly city to the unholy. Yet, in many areas of law, we have invited outsiders in. Constitutional law, never quite safe from history and political theory, has turned to literary critics for new ways of thinking and talking about what we do when we read the constitution. Economics has become a prominent methodology in torts, contracts, and property law and indeed, no field of law seems entirely safe from economic analysis. One finds that law is no longer an autonomous discipline with an exclusive focus on judicial opinions and statutes. In the last two decades, law has opened up, and out, to other disciplines (methodologies, languages, interpretive strategies). The study of law and legal scholarship — as least for many scholars, students, and teachers — is no longer located at the end of a quiet, intellectual cul-de-sac but at a busy interdisciplinary cross-roads.<sup>5</sup>

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<sup>4</sup> By “greening” I do not mean the growing specialization and professionalization of this field of teaching, a movement found in the appearance of conferences, workshops, and journals specifically devoted to legal writing. By “greening” I mean the movement from talking about legal writing programs to talking about writing and the linkage of legal writing to composition studies and other disciplines and theoretical enclaves such as literary criticism and the cognitive learning theory. For the legal writer teachers who have been major participants in this “greening” see, note 3, *supra*.

<sup>5</sup> The movement from autonomous discipline to an interdisciplinary one will be no surprise to readers of the Legal Studies Forum. This journal, founded by colleagues in the legal studies program at the University of Massachusetts, Amherst, has long focused on the humanistic, critical, interdisciplinary features of law, legal education, and legal theory. The founding of the Legal Studies Forum, some twenty years ago, was occasioned by the need for a journal responsive to those who taught law outside law schools, for teachers of law unwilling to have law, legal education, and legal thinking confined to the

Even the most traditional enclaves in legal education are now subject to revisionist interpretation. If legal thinking and legal method can be subjected to critical analysis and deconstruction, there is little likelihood that legal writing and legal writing pedagogy will be spared. As in all traditional activities made dense and narrow by prevailing conventions, the ranks of legal writing teachers will be divided by the revisionist views of their work. One camp will defend legal writing as an autonomous, specialized, technical writing with little need of help from the outside world. This camp will oppose those who find the outside world of scholarly disciplines a rich source for new ways to comprehend the “analytics” and “pathologies” induced by legal reasoning, legal thinking, and legal writing.<sup>6</sup> A similar oppositional

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prosaic needs and predominant world-view represented in law as a form of professional training with its positivist focus on rules. With the emerging interdisciplinary focus represented in critical, feminist, narrative, literary, and cultural studies the mission and focus of the Legal Studies Forum has now become mainstream.

<sup>6</sup> Donald McCloskey, an economist, warns us to beware the expert who doesn't understand his literary situation. “Experts who recognized their literary devices would stop selling snake oil and would come back into the conversation of humankind. That is where they belong, back where we can watch them.” Donald N. McCloskey, *IF YOU'RE SO SMART: THE NARRATIVE OF ECONOMIC EXPERTISE* vii (Chicago: University of Chicago Press, 1995). Wendell Berry, a Kentucky farmer, essayist, poet, novelist, and an extraordinarily sensible person observes that “the specialist withdraws from responsibility for everything not comprehended by his speciality.” Wendell Berry, *STANDING BY WORDS* 4 (San Francisco: North Point Press, 1983). In pursuit of specialization, the specialist is forced “to resist the charms of aesthetic experience before its own perfection could arise.” (Quoting John Crowe Ransom on the specialization of poets). *Id.* at 4. Berry concludes that the “practical disciplines” like engineering and agriculture, and we might add, law, have “shrugged off the claims of esthetics — among other things.” *Id.* at 5. The shrugged off claim, for the law teacher, whether esthetics, ethics, politics, economics, or something intimately close to the task at hand, such as writing, reading, speaking, is today reinvented as a new field of specialization.

Berry, for example, reflects on the way poets have made themselves specialists “by their tendency to make a religion of poetry or to make a world out of words” and in doing so creating “extreme occupational risks.” *Id.* at 14. Berry expresses concern about a teaching of writers who “are not distinguished by their knowledge or character or vision or inspiration or the stories they have to tell; they are distinguished by their specialties.” *Id.* at 9.

The danger may not be so much in the overcultivation of sensibility as in its *exclusive* cultivation. Sensibility becomes the inescapable stock in trade of the isolated poet, who is increasingly cut off from both song and story because the nature of these is communal.... The union of over cultivated sensibility and undercultivated verse cannot produce song. It produces—not prose—but the prosaic, unessential prose. The art does not press hard enough against experience.

tension is found throughout legal education. (The surface tensions overlay seismic shifts that result in surface eruptions as our disciplines are reconfigured to fit the new times.)

The seismic shifts are played-out in the conflict between those who never leave home (in the sense that disciplines provide an academic home) and those who come to believe that only by leaving a discipline and bringing back what they find on their journey into the out lying regions can they keep a discipline true to its ideals.<sup>7</sup> We

*Id.* at 16. Berry argues that the essential problem of the specialist poet is his or her “estrangement from storytelling.” *Id.* at 17. Narrative, like poetry, has been subjected to the specialization impulse as the specialist create a new “field” called narratology.

In the education of lawyers we create and cultivate occupational risks, of isolation, of immersion in a practical discipline that seems to make the world beyond law irrelevant, or optional. Everything beyond law has a bearing on law but is not necessary to law. We claim to be borrowers of other disciplines, other ways of thinking, but the everyday work of law (as a practical discipline), law taught in the classroom, law demanded in end-of-term examinations, and pushed in the pragmatics of legal writing courses would lead a novice to believe that law remains an autonomous discipline. Nowhere is the ideology of law as an autonomous discipline more prominent than in old-style, traditional approaches to legal writing.

The autonomous discipline school of legal writing is being eroded by a strong antinomian undercurrent that has reached out to composition studies, literary criticism (and its interest in “reading”), rhetoric, cognitive psychology, learning theory, and philosophy. The antinomian stream in legal writing has both a conserving quality (with its attempts to re-integrate legal writing with a focus on “legal thinking” and “legal reasoning” and traditional forms of Socratic teaching) and a subversive quality (focusing on the “voices” and “stories” left aside by traditional forms of legal analysis).

The legal writing teacher, like all teachers of law, is pushed toward isolation and instrumentalism by the nature of legal writing. We build instrumentalism into legal education by way of curriculum and by way of the heavy-duty industrial work found in legal writing. But there are competing forces: new forces that would make legal writing less mechanical and more rhetorical, less instrumental and more social, less conventional and more critical, less reductive and more connective.

<sup>7</sup> Consider the history and context within which this conflict is waged:

- \* Christopher Columbus left us with the notion that law was as a science divorced from morals and politics.
- \* Drawing on Langdell we attempted for a half century to make law an autonomous discipline, having failed rather dramatically in convincing anyone but ourselves that law was a science. (There is still a hardy band of legal scholars who place great stock in socio-legal studies as the most productive way to understand and appreciate law.)
- \* Legal education takes place in stand-alone “schools” or “colleges” — often physically removed from other parts of the university.
- \* Law schools have their own faculty, professional journals, accrediting agencies, and professional associations.
- \* Legal educators focus on “thinking like a lawyer” in contrast to other modes of functioning — feeling, sensation, intuition/ imagination.

can expect then, in legal writing (as in other areas of legal studies) a continuing struggle between those who by impulse and sentiment keep themselves close to home and colleagues who see this stance as an act of denial that delays intellectual overhaul.

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We have grown accustomed to propositions that stand ready to enhance our pedagogies; they appear with regularity. Today, I talk about narrative but we could substitute race theory or feminist jurisprudence, any one of the social sciences (law and ... psychology, anthropology, sociology), some version of philosophy (political theory, legal ethics), or a new focus in pedagogy (critical thinking, writing across the curriculum), and what you have is a proposition in the form of diagnosis, critique, and a suggested enhancement of legal education with jurisprudential implications. When gender becomes the focus of legal education (feminist jurisprudence), law is confronted with its sexism. When race is made the subject of inquiry (critical race theory), law is implicated in racism. Feminist jurisprudence and critical race theory attempt to be both instructive (providing a new pedagogical agenda) and subversive of old ways of thinking and pedagogical practices.

Another example. For two decades now we have been struggling with the practical and philosophical proposition that lawyers are deeply involved in morals and ethics. Legal educators have shown little propensity to make moral philosophy (in contrast to legal ethics presented as a set of legal rules) a part of the legal education curriculum, yet, it is increasingly obvious that we cannot ignore or deny the moral/ethical dimension of lawyering (try as we will). Legal ethics, like legal writing, is divided into opposed camps. One camp would circle the wagons and teach legal ethics as the law of lawyering. In the opposed camp, a small group of teachers of legal ethics have found that only by getting beyond teaching "rules" of ethics can they make the study of legal ethics as matter of ethics. Consequently, ethics teaching for lawyers, properly conceived, is a subversive activity.<sup>8</sup>

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\* Legal educators focus basically on the role of the lawyer rather than the lawyer as person.

\* We have taken up an ethic that sets our "professional morality" against "ordinary morality."

<sup>8</sup> On teaching as subversive and conserving activities, see Neil Postman and Charles Weingartner, *TEACHING AS A SUBVERSIVE ACTIVITY* (New York: Delcorte Press,

In legal education we are fond of the old maps that have always guided us. But some of our maps are showing their age. E.F. Schumacher made an observation about the use of inadequate maps that is applicable to our situation:

On a visit to Leningrad some years ago I consulted a map to find out where I was, but I could not make it out. From where I stood, I could see several enormous churches, yet there was no trace of them on my map. When finally an interpreter came to help me, he said: "We don't show churches on our maps." Contradicting him, I pointed to one that was very clearly marked. "That is a museum," he said, "not what we call a 'living church.' It is only the 'living churches' we don't show."

It then occurred to me that this was not the first time I had been given a map which failed to show many things I could see right in front of my eyes. All through school and university I had been given maps of life and knowledge on which there was hardly a trace of many of the things that I most cared about and that seemed to me to be of the greatest possible importance to the conduct of my life. I remembered that for many years my perplexity had been complete; and no interpreter had come along to help me. It remained complete until I ceased to suspect the sanity of my perceptions and began instead, to suspect the soundness of the maps.<sup>9</sup>

Legal story-telling and narrative jurisprudence are, if taken seriously, an invitation to a new way of thinking and teaching. Jurispropositions, like those associated with narrative and critical legal studies (and other contemporary schools of jurisprudence) are designed to encourage examination of the cognitive maps used in teaching. Legal story-telling and narrative, as other jurisprudential propositions, ask you to see around corners, rethink what you are doing, and determine whether the existing map you are using is adequate. Jurispropositions like narrative provide an opportunity to slow down and think anew, a time to make the obvious uncertain, to see how the writing self (person) and institution (legal writing program) has become incongruent.

The implicit premise (and promise) in linking story to legal writing is that an interest in stories and narratives might have a salutary bearing on legal writing and its instruction. The fantasy is

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1969); Neil Postman, *TEACHING AS A CONSERVING ACTIVITY* (New York: Delta Book, 1980)(1979).

<sup>9</sup> E.F. Schumacher, *GUIDE FOR THE PERPLEXED 1* (New York: Harper & Row, 1977).

that legal writing and its teaching might, somehow, be transformed by an infusion of the sensibilities associated with story and narrative.

For narrative, as a juris-proposition, the point is clear: *If lawyers are involved in stories, as we are beginning to recognize they are, then the education of a lawyer as writer should reflect and deepen this understanding.* When we open ourselves to understanding we are subject to change. Any juris-proposition in legal education turns perplexing if you take it seriously, act on it, and attempt to make it a part of your teaching.<sup>10</sup> The narrative perspective, taken seriously, might steer us away from programmed learning and writing. Narrativists, like other transformational carriers, would set us on a course that would make much of legal education unrecognizable.

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There is one problem: wonderful propositions don't upend the world. We have, in legal education, with relentless (serial) persistence, been about the business of summoning up antidotes and cures for what ail our pedagogical practices. Each antidote arrives with a flourish, a hail of promises, a glimmer of hope for fundamental structural change. Read: clinic, critical legal studies, feminist jurisprudence, the turn to interpretation, literary criticism, rhetoric, any one or all of the social sciences, interdisciplinarity. Now comes story.

There was some, and I do not exclude myself from this band of hopeful seekers, who have turned to new "schools" of thinking with the idea that something might save legal education from itself. In each instance, more times than I take pleasure in recalling, the Langdellian, positivist hold on legal education or some reinvented version of it, has strengthened its grip, adapted the transformational change agent, and avoided significant change. Each new round of critique seemed destined to put the old Langdellian paradigm to rest. Yet, the center holds and every available space at the margin of legal education becomes more crowded with those waiting to participate in the re-invention of legal education. Stories and narrative have joined the subversive throngs in still another wave of pedagogical evangelism.<sup>11</sup>

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<sup>10</sup> Legal educators, reformist by nature or inclination, give an appearance of openness to change, to new pedagogical strategies. Some law teachers are open to change in order to be more effective, others seek acceptance, some are fashion conscious, others are fearful that their colleagues or the world will pass them by.

<sup>11</sup> For the use of evangelism in this context I have borrowed from Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 *Southwestern L.J.* 1089, at 1089 (1986).

## III.

Who will tell the emerging story of legal writing? (Who will be its cultural historian, its archaeologist, its anthropologist? Who will make legal writing a subject of cultural analysis?) And what is the author of this essay, who does not teach legal writing, and is unprepared to act as historian, archaeologist, or anthropologist doing taking part in this story telling? We know, and are constantly relearning, that stories depend upon audiences as they do tellers of the tale. We lawyers and students of law are selective about the stories we hear. (No one can be attentive to every possible story. We don't have the cognitive hard-wiring to pull-off total receptivity.) We are limited in stories as we are in the ways we find it possible to teach (and live). We belong to places (and to people)(and to time) and our stories, those we tell and those we are willing to hear, are based on where and how we have found a place to belong.

Stories are a function of power as much as they are a matter of truth. Legal education is a world of power and distinctive power centers. By most forms of power accounting, legal writing and those who teach it have little. In this, they are like legal narrativists. But even the most marginal of perspectives, narrative and legal writing among them, sometimes find its way into the inner corridors of power (academic versions of it, at least).<sup>12</sup>

The nuances of power and its effect on the kind of stories we tell and teach is a central question in legal education, an occasion for reflection by legal narrativists, and a major concern to legal writing teachers. I suspect power will increasingly become a focal point for the telling of the legal writing story. The "inside" power story of legal writing *will be told*. With the proliferation and main-streaming of legal writing in the curriculum, the "professionalization" of legal writing instruction (the formation of institutes, journals, and academic scholarship) and growth of textbook production, there will be more legal writing teachers to speak out about legal writing as a form of education.<sup>13</sup>

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<sup>12</sup> See e.g., the contributors and claims in Peter Brooks and Paul Gewirtz (eds.), *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* (New Haven: Yale University Press, 1996). Only five years earlier, David Ray Papke with his excellent collection of essays on narrative and legal education found it necessary to turn to an English publisher to have the essays published. See David Ray Papke (ed.), *NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW* (Liverpool, Eng.: Deborah Charles, 1991).

<sup>13</sup> Philip Meyer, the editor of this symposium issue, has already stepped forth with an evocative personal narrative that speaks to the troubled world of legal writing



Granted a central place in the curriculum, mind-numbing tasks, and questionable faculty status, the story of legal writing instructors may turn out to be painful. (Stories of suffering are not easy listening.<sup>14</sup>) We visit upon teachers of legal writing the fate and punishment of Sisyphus, assign them to move boulders up a hill, and have them repeat the task of up-the-mountain boulder moving until numbed by weariness. Each new semester reenacts the punishment, a fate to be eternally endured. Is this the fate of some vengeful academic god or the worldly profaneness of terminal contracts (off the tenure-track), overcrowded classrooms, and slights of every sort by those who have assigned themselves the guardians of legal education? With teachers of legal writing subjected to the degradation of appointed, paid servitude, how can we expect young legal writers to develop (from their teachers) a sense of fluency, literacy, curiosity, fascination, and passionate involvement in the craft of legal craft?

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Even in these brief remarks, I have overextended myself. How can I speak for those who teach legal writing? They have not elected me as their spokesman. Even storytellers should know their limits.<sup>15</sup>

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instruction. See, Philip Meyer, *Confessions of a Legal Writing Instructor*, 46 *J. Legal Educ.* 27 (1996).

<sup>14</sup> We might not want to listen to suffering, but the stories are being told. There is a growing number of "illness" narratives by sufferers and healers.

<sup>15</sup> My first impulse, in taking up this investigative story, was to gain some first hand knowledge by observing my legal writing colleagues and their teaching. Fearful of what I might find, I did not pursue this possibility. While my colleagues might have had sufficient confidence to allow me into their classes, I feared that I might find their teaching problematic and in writing about what I found would betray their confidence and kindness in extending me an invitation to observe their teaching. Journalists and writers seem to have developed an ethic that allows for this kind of betrayal, I did not have the stomach for it.

There was, of course, another possibility. My observations might have led to the conclusion that the present teaching of legal writing was acceptable, adequate, or, I might have found it less than inspiring but no less imaginative than other forms of teaching I have witnessed. I can't rule out the possibility that I would have found my colleagues teaching more than adequate, indeed admirable, perhaps inspired, even heroic. Based on my relationship with the colleagues involved, and my regard for their prodigious work and active involvement in the intellectual life of the law school (what little it might be said to have), I might well have been far more impressed by their teaching than they or I would have thought possible. Even so, I was reluctant to learn what I would be precluded from disclosing. It was not that I suspected my colleagues to be doing badly what they had set out to do, but that in taking up legal writing (with all its conventions) they had fallen prey to some monster which set loose would taint the production of every text it touched.

## IV.

I turn now to another version of the legal writing story, one found in the academic literature on legal writing and in legal writing instructional texts. The historical literature on legal writing — one is unlikely to call it scholarly — is an odd kind of local history consisting largely of geographical accounts of institutional programs: this is what we do when we teach legal writing at Utah, Kentucky does it this way, we have tried this approach at Vanderbilt.<sup>16</sup> In this telling of the story of legal writing, curriculum and delivery of services are the focus. The person writing, in this account, is displaced by a focus on institutional organization and economies of scale (doing more with less). The story is not really about writing and writers and the struggle to write as a lawyer, but an academic accounting remote from individuals and from writing. Legal writing, in the old story it has told for itself in the legal literature, obliterates persons and writing.<sup>17</sup> The only narrative impulse in early legal writing scholarship has been the naming of the place (the school/university) in which legal writing takes place. There is, as a confirmed narrativist knows, a story to be found in this dry-bones, institutional history of legal writing programs, but it would take the patience of Job and a fertile imagination to make of it a story anyone would be willing to hear told.

For those who find the secondary (or historical) literature on legal writing barren of a tellable tale, legal writing “texts” appear, initially,

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<sup>16</sup> A perusal of the writing about legal writing suggest that legal scholars have been obsessed with programs (programs attached to particular schools) in which legal writing is taught in contrast to what it is they actually teach.

<sup>17</sup> Robert Scholes has made a similar observation about the “institutionalization” of English teaching.

For those of us who teach English, this volatile entity, our relationship to the language, must be institutionalized, departmentalized, and curricularized. Our hopes for our students must also be translated into this same institutional medium—which is itself another code, another language. In such translation much may be lost. In particular, what is most precious, our feeling for the language, our linguistic touch, may be sacrificed to the institution’s needs for safety and regularity.

Robert Scholes, “Toward a Curriculum in Textual Studies,” in Bruce Henricksen and Tavis E. Morgan (eds.), *REORIENTATIONS: CRITICAL THEORIES AND PEDAGOGIES* 95-122, at 98 (Urbana: University of Illinois Press, 1990).

to be a more fruitful source.<sup>18</sup> The story told by this emerging genre of texts has not been told (and may never be told). I will not attempt to tell it here, but offer some preliminary observations. Consider what follows as observations of a small country as seen by a traveler:<sup>19</sup>

- Legal writing texts are plentiful in number, if not variety; their production part of a new growth industry.

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<sup>18</sup> Over a number of months I perused the following: William P. Statsky and R. John Wernet, *CASE ANALYSIS AND FUNDAMENTALS OF LEGAL WRITING* (St. Paul: West Publishing Company, 4th ed., 1995); Veda R. Charrow, Myra K. Erhardt, and Robert P. Charrow, *CLEAR AND EFFECTIVE LEGAL WRITING* (Boston: Little, Brown and Company, 2nd ed., 1995); Charles R. Calleros, *LEGAL METHOD AND WRITING* (Boston: Little, Brown and Company, 2nd ed., 1994); Laurel Currie Oates, Anne Enquist, and Kelly Kunsch, *THE LEGAL WRITING HANDBOOK: RESEARCH, ANALYSIS, AND WRITING* (Boston: Little, Brown and Company, 1993); Nancy L. Schultz, et.al., *INTRODUCTION TO LEGAL WRITING AND ORAL ADVOCACY* (New York: Matthew Bender, 1993); Laurel Currie Oats, Anne Enquist and Kelly Kunsch, *THE LEGAL WRITING HANDBOOK: RESEARCH, ANALYSIS, AND WRITING* (Boston: Little, Brown and Company, 1993); Gertrude Block, *EFFECTIVE LEGAL WRITING: FOR LAW STUDENTS AND LAWYERS* (Westbury, New York: Foundation Press, 1992); Diana V. Pratt, *LEGAL WRITING: A SYSTEMATIC APPROACH* (St. Paul, Minnesota: West Publishing Co., 1990); Richard K. Neuman, *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* (Boston: Little, Brown and Company, 1990); Diana V. Pratt, *LEGAL WRITING: A SYSTEMATIC APPROACH* (St. Paul, Minnesota: West Publishing Co., 1990); Helen S. Shapo, Marilyn R. Walter and Elizabeth Fajans, *WRITING AND ANALYSIS IN THE LAW* (Westbury, New York: Foundation Press, 1989); C. Edward Good, *MIGHTIER THAN THE SWORD: POWERFUL WRITING IN THE LEGAL PROFESSION* (Charlottesville: Blue Jeans Press, 1989); Tom Goldstein and Jethro K. Lieberman, *THE LAWYER'S GUIDE TO WRITING WELL* (Berkeley: University of California Press, 1989); Norman Brand and John O. White, *LEGAL WRITING: THE STRATEGY OF PERSUASION* (New York: St. Martin's Press, 2nd ed., 1988).

Grace Wigal, my colleague at West Virginia who directs our legal writing program, was gracious enough to loan me many of these books. I made no effort to insure that the texts perused were the most widely used, or the most highly regarded by venerable legal writing colleagues. The texts, especially those that position themselves to be used in law school legal writing courses, begin to look so much alike that it seemed futile to search for more of the same, or to determine which among those that look so much alike, which may offer an incremental better view of legal writing. I will leave such a task to those who must use these texts in their teaching. It would, I might add, be interesting to determine, by further investigation, how authors in this impacted, competitive field distinguish between texts which reflect such a high degree of conformity, at least as they are read by an outsider to this area of teaching.

<sup>19</sup> I have in mind the travel writings of Paul Theroux. See e.g., *THE OLD PATAGONIAN EXPRESS: BY TRAIN THROUGH THE AMERICAS* (Boston: Houghton Mifflin, 1979).

- While insiders (teachers of legal writing) may find discerning differences among the profusion of legal writing texts, to an outsider they display a marked conformity.<sup>20</sup>
- Many of the major legal writing texts offer a one volume version of legal education. They purport to be not only an instruction manual for legal writing, but a manual on legal thinking and positivist jurisprudence primer.<sup>21</sup>
- A legal writing text confronts the student with an awesome edifice (of exercises, steps, stages, structures, and rules). Those familiar with and who have managed to learn to use a word processing program like WordPerfect or Microsoft Word by reading the instruction manual will be comfortable with this kind of learning.<sup>22</sup>

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<sup>20</sup> Ruled as they may be by conventions of conformity, my current favorite would be Linda Holdeman Edwards, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION* (Boston: Little, Brown and Company, 1996)(which I reviewed after writing this essay). Professor Edwards draws attention to the relationship of writing to identity and makes a strong claim for the need for “narrative reasoning” in lawyering, a claim spelled out further in her article in this issue of the Legal Studies Forum. While Professor Edwards’ textbook does not fully incorporate the insights found in the article, she should be given credit for setting forth the proposition in a strong, straight-forward fashion. I suspect future editions of the book will incorporate her movement into narrative-based thinking.

<sup>21</sup> The Oates, Enquist, Kunsch text is an example of the phenomenon. The authors devote four chapters to the “foundation” for legal writing, including an overview of the United States legal system, an introduction to common and statutory law, an introduction to legal analysis, and an introduction to analysis of statutes and cases. Oates, et.al., *THE LEGAL WRITING HANDBOOK*, *supra* note 18. I had the distinct impression, reading the Oates text, typical it turns out, that legal writing text are holographic representations of the whole of legal education. If the student could fully comprehend, respond to, and appreciate the legal writing text they would have little need for other courses of instruction in law. (Assuming, as so many do, that legal education consists primarily of a master of reading cases and their application to solve particular problems.)

<sup>22</sup> The texts appear to offer all anyone would need to know to write like a lawyer. Indeed, they suggest that if you complete the “exercises” associated with the “steps” and “stages” of legal writing presented in the text, you will be fully trained as a legal writer. Legal writing texts offer commentary and exercises for comprehending every possible writing task. Reading legal writing texts one gets the impression that legal writing is akin to planning and preparation for battle. Every move, every angle, every possibility is mapped out and practiced, every linguistic move contemplated and made into a strategy. Legal writing, from the perspective of legal writing texts, is not writing derived from a “deep” (tacit) understanding of law and the habitual practice of reading and analyzing law cases and legal doctrine, but rather specific formulaic exercise of a rule-based competence.

- Legal writing texts assure the student that what lies ahead is a series of steps and stages, that learning legal writing is a matter of progressing, step at a time, from stage to stage. Legal writing texts are reassuringly methodical and hopeful in the assertion that by doing writing exercises one will become proficient as a legal writer.<sup>23</sup> The underlying phantasy that dominates legal writing texts is that structure and progress through a program of writing exercises will make you a “good enough” legal writer.<sup>24</sup>
- Legal writing texts view writing as an industrial process. The legal writing portrayed in these texts is mechanical: the process/product can be understood by viewing it in its component parts, studied, the parts replicated, then reassembled. (It is something akin to a medical school version of gross anatomy, but with the added task of putting all the pieces back together at the end of the day.) In legal writing texts the idea is disassembly, part-by-part, and then re-assembly. A legal writing, like a machine, is known by classification and labeling of parts. In legal writing we proceed by labeling parts and practicing skills of assembly. In legal writing nothing can be left out because, like a

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Legal writing programs may, paradoxically, send the message that legal writing is a great mystery, not unlike nuclear physics, in contrast to a message that writing is a simple act of thinking and using words to express an understanding of how law might be used to solve a problem. (The surface message is the opposite: See e.g., the claim in Calleros, *LEGAL METHOD AND WRITING*, *supra* note 18, at xxiii: “I hope to eliminate any mystery in the study of law . . .”).

By making complex, what is simple, legal writing tells only half the story.

<sup>23</sup> The step/stage thinking in legal writing extends from the simplistic to the ridiculous. Charrow and colleagues, for example, assume that it will be of some value to students to identify the stages of writing. And what are these stages? Prewriting, Writing, and Postwriting. Charrow, et. al., *supra* note 18, at 81-84. The Charrow text proclaims: “[I]t is valuable to begin any writing task by articulating the steps you plan to take. It is also worthwhile to place the steps in a workable order, even if you end up moving the steps around or omitting some of them as you create the document.” *Id.* at 207.

<sup>24</sup> Underlying the edifice of a legal writing text is the fundamental assumption that it is possible to begin with the foundations of law and legal writing, identify basic components of legal documents produced by lawyers (briefs, memorandum, and advisory letters, among others), the skills necessary to produce one of these component parts, engage in exercises that articulate and replicate the skill, and that building-block skills, exercised, can be built-upon, and made into in a progressive march toward making oneself into a legal writer.

machine, ever part of the machine must be properly assembled to run. Absent any part the machine is dysfunctional.

- Legal writing texts would have the novice legal writer believe that writing a legal brief is like learning to operate a nuclear power plant; one must master, paragraph by paragraph the instruction manual. For authors of legal writing texts and nuclear power plant owners, no contingency can be left unanticipated, every action must be according to plan and structure. There is a procedural way of doing every thing that needs to be done. Nothing beyond the manual is permitted.
- With the exclusive focus on technique, form, and structure in legal writing texts<sup>25</sup> one experiences an eerie absence of the soul of the writing enterprise — a person who writes.

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<sup>25</sup> Authors of legal writing texts seem always in danger of letting technique and the technical triumph over a focus on contextual thinking and persuasive argument (writing as a rhetorical activity). Gertrude Block, for example, gives grammar a prominent place in her legal writing text providing detailed discussion on: when to use a comma, when to use a semi-colon, when to use a colon, when to use a dash, when to use a hyphen, when to use a possessive apostrophe, when and where to use quotation marks—the list goes on. Block, *EFFECTIVE LEGAL WRITING: FOR LAW STUDENTS AND LAWYERS*, *supra* note 18, at 40-72 (the second chapter of the text is devoted to grammar). The triumph of technique is a corollary of the will to micro-manage writing. For example, in Oaks, Enquist, and Kunsch, *THE LEGAL WRITING HANDBOOK: RESEARCH, ANALYSIS, AND WRITING*, *supra* note 18, in addition to a “guide to correct writing” which is presented in three chapters, contains seven chapters consisting of 204 pages that deal with topics such as connections between paragraphs (pp. 527-534), effective paragraphs (pp. 535-566), connections between sentences (pp. 567-590), effective sentences (pp. 591-627), and effective words (pp. 629-689). One of the seven chapters on “effective writing” is, to the credit of the authors, devoted to eloquence. (691-708). Technique and micro-managing are all part of the heavy focus on planning. Planning precedes the writing and dominates as the writing is produced. The focus is on a planned production. See e.g., Charrow, et. al. on prewriting: suggesting that there is much to be done before writing begins, a series of “steps” to be followed. One must define purpose, audience, and constraints. Charrow, et. al., *CLEAR AND EFFECTIVE LEGAL WRITING*, *supra* note 18, at 81-83. “The more you work out these conflicts [that arise in the prewriting “steps”] before you write, the easier the writing task will be.” *Id.* at 81. Planning is the key to success. If you plan the steps and go through the stages in the right order you can “avoid the pitfalls that can destroy clarity and credibility.” *Id.* Consequently, the recommendation: “It is valuable to begin any writing task by articulating the steps you plan to take. Careful thinking through each step will help you construct a complete, well-formed document. It is also worthwhile to place the steps in workable order . . . . As you write, you may end up moving the steps around or even omitting some of them.” *Id.* at 81.

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One wonders how, in the enormity of structure and process, legal writing texts might affect the novice legal writer. How can one learn to write, to experience legal writing first-hand, to know struggle, failure, and the wonder of words and rules of law made into argument, when the task(s) of writing are provoked by and connected to a life-less instruction manual? (The most traditional of law school case books are filled with cases, and in turn, with people who have stories to tell, even if these stories have been severely "edited" by law.) What kind of invitation do legal writing texts extend to a student, or to any one of us, concerned that law be a humanistic and liberal art?

In reading legal writing texts, I feel like one who ventures into a vast city, alone, walking down canyon-like streets, lined with buildings that loomed over me. In these texts, there was no one, absolutely no one at street level with whom one might converse. (The traditional law school case book is designed for critical reading, for conversation/dialogue in a classroom. Law school case books are not legal instruction manuals.) The reading and writing life viewed from ground (human) level seemed dwarfed by the heights symbolized in the authoritativeness of the structure, exercises, stages of development, and the "rules" of writing. I was left small, inconsequential; told to do exercises, follow the text step-by-step, in essence, do as I was told and be what the system would have me be. Legal writing texts are not only joyless but authoritarian. Reading these texts, I experienced a strong desire to flee, to find a place, any place where I could think about writing and learn the writing of legal argument free of these soulless texts. In this momentary feeling of being outsized, alone, and wishing to be elsewhere, I suspect a forewarning of the ways in which we isolate and disempower students who seek (in the most hopeful fashion) to learn the skills of writing associated with lawyering.<sup>26</sup>

Where does the legal writing text leave a solitary law student to stand, to learn, to think, to dream?

## V.

Psychotherapists have a technique they sometimes use with patients in the grips of unarticulated and unexamined. They have the

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<sup>26</sup> Legal writing texts do sometimes warn of such conditions. In the Oates, Enquist, and Kunsch text there is an admission that a student can be "overwhelmed." The authors contend that the antidote is analysis and synthesis. See Oates, Enquist, and Kunsch, *supra* note 18, at 127, 128-129.

patient articulate and explore their worst possible imaginable fear. There is, it seems, something therapeutic in naming and facing the fears that lurk in the margins of consciousness. I wonder whether a similar naming of fears might have therapeutic value for legal writing and whether the story of legal writing might take on a different shape if we attended more fully to these fears (of possible therapeutic concern). Legal writing, befitting its solid, central, traditional bearing, has a way of turning away from its shadow (as we all do, but even more likely to do when we see ourselves as solid, productive citizens).

Legal writing takes its self-assured cue from law, a discipline and set of practices more determined to maintain the fearlessness of boundaries, than to cross boundaries and confront the fear.<sup>27</sup> Legal writing is of such fundamental importance in the life of a lawyer that complaints registered against life-less forms of teaching can be set-aside. On the relationship of legal writing and complaints against the teaching of legal writing, I am reminded of the police and the way we deal with complaints of police brutality. We know how important the police are, so important that we are prone to overlook the "dirty" (abusive/over-the-line) aspects of policing. Policing is important, important enough that we convince ourselves that we can live with the complaints against it. No one worries about the complaints until there is a scandal. The more important and central legal writing is, the less need we experience to confront what students and colleagues fear.<sup>28</sup>

There is, by students, much talk about legal writing. And what do they say of it: It is important but distasteful; mechanical, dry, and boring; narrowly focuses on writing a lawyer might be expected to do in a big law-firm; involves arbitrary preferences of teachers unable or unwilling to justify their demands; encourages students to learn to write by formula; and could be taught better.

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<sup>27</sup> Stanley Fish, in contrast to the perspective presented here, is a proponent of the proposition that in staying within disciplinary boundaries we are doing what we must and that crossing disciplines is not an act to celebrate. See e.g., Stanley Fish, *PROFESSIONAL CORRECTNESS: LITERARY STUDIES AND POLITICAL CHANGE* (Oxford: Clarendon Press, 1995); "Anti-Professionalism," in Stanley Fish, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 215-246 (Durham: Duke University Press, 1989).

<sup>28</sup> My own suspicions about legal writing are derived (and encased in) a set of conventions, of a conflicting nature, no better than partial truths, some unconsciously adopted from the chorus that instructs in all matters of value in the drama of legal education. Once we track down our suspicions, we are giving ourselves over to a story, often not one we know how to tell or how to escape.



While I certainly would not turn to law students for a prescription for what ails legal education,<sup>29</sup> in contrast to some colleagues, I take seriously this talk about education. (It is one thing to know you are sick and ailing, another to know what medicine might bring relief.) The student “complaints” parallel, in some ways, my own concerns about the legal writing enterprise. First, considered a specialized form of writing, taught in stand-alone courses, by teachers who teach little or nothing other than legal writing, we create for legal writing (as we have for legal ethics) an enterprise that cannot imaginatively sustain itself. Secondly, legal writing conceived as a “technical” skill to be analyzed, broken-down into component parts, and taught by way of dissection and re-assembly may teach the mechanics, but in doing so we leave students with an impoverished view of writing which is always as much an imaginative (literary)(rhetorical) activity as it is a mechanical one.

With student “distress” signals floating ashore like messages in a bottle, students may be saying not that legal writing is taught badly, but that too much is at stake, too much of their identity, too much of the self, too much of their phantasies for lawyering, to have this central performative aspect of their professional life turn on an instrumental, mechanistic focused series of writing exercises. If legal writing is one of the “core” skills, and the skill entails a lifeless, soulless endeavor, then students may know something is wrong and confuse the disease in describing its symptoms. Which raises a question: Can legal writing be anything, is it anything, other than a form of technical writing? Is the story of legal writing to be told as one of mechanical, technical, specialist achievement?

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To conclude that legal writing is painstaking work, requires discipline less than enjoyable when imposed, and must be approached in a methodical manner, we have drawn a step closer to the fears that shadow legal writing. Without a better sense of the fears that grip us, we will tell comforting “cover stories” about legal writing. (Would you like to know more about the legal writing program at West Virginia?)

I want to befriend the shadow side of legal writing and see how my fragmentary propositions might represent the present fear and loathing of legal writing. I imagine the exercise as something a novelist might do, putting or having a character undergo the most extreme circumstances, to see who and what the character may turn out to be.

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<sup>29</sup> I realize the need for caution in reading student complaints; concerns about legal writing may be of the type that blames the doctor for the pain of treatment.

- Legal writing is not glamorous; it has a status akin to housework.
- Legal writing is hard work for which it should be honored. Like most hard work, it can be misunderstood. If one isn't cautious, what is hard begins to look like toil, plodding incrementalism, tasks done and repeated, for which one is rewarded by slow, willed acquisition of habit. The Greek god Sisyphus dominates the life of the legal writing teacher and is a threatening menace to the student. Who would, by human choice, move the rock up the hill, knowing it must be moved up the mountain again and again? Surely, this must be a form of eternal punishment! This God Sisyphus, the student says, I can live without.
- Legal writing, the unglamorous, takes place in a realm of toil. For many (most?) it involves the most unpleasant of tasks, like separating lentils from peas. Legal writing, unloved, with tasks that test us, is the Cinderella of legal education, forever waiting to be discovered, its true value recognized and proclaimed.
- Legal writing is the space or terrain in/on which thinking is concretized,<sup>30</sup> idealists confront reality, chaos becomes order. Legal writing is hard because it represents Reality, the force that stands against the subjective, willful, fanciful, dream of the student lawyer/warrior/champion of lost causes. Most of us don't like to be backed into a corner by Reality. The Reality of Legal Writing is no more welcome than the punishment of Sisyphus.
- There are still other gods that demand our allegiance in legal writing.<sup>31</sup> Consider Apollo and his world of order, form and format.<sup>32</sup> In the hands of legal academics, Apollo's order

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<sup>30</sup> Our writing is, in the most real sense, a reality check on thinking. "Writing is thinking on paper." Goldstein & Lieberman, *supra* note 18, at 39, 41. We don't write well because we don't think well. *Id.* at 27-28, 32-34. Goldstein and Lieberman contend that writing and thinking are inseparable. *Id.* at 43. See also, Calleros, *supra* note 18, at 227 ("You cannot write clearly unless you first develop clear ideas. In many cases, muddled legal writing reflects an incomplete understanding of the substantive legal analysis and suggests the need for further research and reflection.").

<sup>31</sup> For some preliminary observations on legal writing and mythology, a subject deserving of far more attention than it has received in this essay, see Appendix.

<sup>32</sup> W.K.C. Guthrie says of Apollo: "Under his most important and influential aspect

becomes the structured, every sentence in its place, every argument a set consisting of issue, rule, authority, and conclusion (IRAC). Legal writing is the triumph of seriousness over play (Apollo over Dionysus), the known over the unknown.

- Legal writing, ruled by a logic of linearity, creates a path straight as a ruler — no diversions, surprises, or reversals. Diverge from the path and you are exiled. In legal writing, objectivity triumphs mightily, totally, and finally over subjectivity. In the exile world of legal writing conformity is

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may be included everything that connects him with law and order.” Quoted in Jean Shinoda Bolen, *GODS IN EVERYMAN: A NEW PSYCHOLOGY OF MEN’S LIVES AND LOVES* 130 (San Francisco: Harper & Row, 1989). Bolen identifies the Apollo archetype with “the aspect of the personality that wants clear definitions, is drawn to master a skill, value order and harmony, and prefers to look at the surface rather than at what underlies appearances.” *Id.* at 135. Those whose energy is directed by the Apollo archetype favor “thinking over feeling, distance over closeness, objective assessment over subjective intuition.” *Id.* Those in the grips of this archetype tend to master a classical art form like law easier than those under the influence of other gods and goddesses. “The Apollo mind is logical and easily relates to objective reality. For him, the laws of cause and effect are not lessons to be learned by dint of experience. . . but principles that an Apollo mind seems programmed in from the start.” *Id.*

Apollo is the God of form, of archery, one who with great skill can hit a target from afar. Law makers, like Apollo, sometimes work to hit a target from afar (even as they assume they are in the middle of the fray). Apollo was known as the “pure, holy, and cleansing god, whose attributes were analogous to the sun, which was his most important symbol.” *Id.* at 131. Apollo was a sky god, whose sun aspect is found in legal writing with the strong focus on clarity, on writing that is clear, bright, transparent. Apollo is the god of clarity and form. “Apollo is the embodiment of a masculine attitude that observes and acts from a distance.” *Id.* at 130. “Apollo is uncomfortable with chaos or turbulence, the discordant note, or passionate intensity. . . .” *Id.* at 137-38. Apollo influence results in a predisposition to emotional distance and a focus on rationality. *Id.* at 138. Apollo is a goal-setter. With Apollo energy we know where we want to go, what we want to accomplish, what it takes to win. *Id.* at 135. “Doing well at work comes easily for him, because he has an inherent ability to focus on a task, to want to practice until he masters something, and to see the end produce of what he is doing. . . . [S]tep by step he advances according to plan.” *Id.* at 144-45. “The Apollo man has a marked tendency to always do what’s expected of him, without questioning whether he really wants to do what he is doing.” *Id.* at 160.

Apollonian designed legal writing has no place for Dionysus, god of wine and ecstasy; mystic, lover, wanderer. W.F. Otto identifies Dionysus as “the god of ecstasy and terror, of wildness and the most blessed of deliverance.” *Id.* at 251. “Regularity and constancy are foreign to him.” *Id.* at 256.

a virtue, creativity suspect, humor forbidden, voice mute.<sup>33</sup> Legal writing says no to all the gods; there is nothing sacred here, you have entered the world of the profane. But there is always some god or other that we worship: Legal writing worships at the altar of instrumentalism; it claims no value for itself, its only purpose to serve, to make an argument adapted to the cause of another.

- Legal writing, for law students, returns the student to an activity claimed to have already been mastered. For many, however, legal writing offers not an opportunity to work again with that which has been mastered, but the unwelcome, forced return to the scene of an accident repressed from memory. When their mastery is questioned or becomes suspect, students become defensive. (“How could I not know the basics of writing, by now?”)(“No one has ever suggested that I couldn’t write.”)(“I write well enough.”) If it takes denial (“I don’t have a problem with my writing”) to get to the sweet promised-land of success, then denial it will be. While writing, legal and otherwise, evokes defensiveness, and then outright fear and loathing, it is a central, core,

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<sup>33</sup> In the world of legal writing there is a surface of consensus, conformity, convention, homogeneity, and rules. But the surface is a facade. Beyond an apparent ruling sameness of programmed legal writing there is a sea of contradiction. The student of legal writing is unlikely to see this inner world of contradiction for several reasons: she is assigned a single text for a course (contradictions are revealed by multiple texts, one text brings out the contradictions of another); assigned multiple texts, the student trains her eye on information and how-to-do-it skills in contrast to divergent ways of proceeding (the law student reads in a way that focuses on convergent rather than divergent bases of knowledge); the student has a single teacher rather than being exposed, as a writer, to many teachers; the teacher has no interest in teaching the contradictions but focuses on teaching of accepted conventions. That the teaching of conventions is an expressed purpose of legal writing, see Calleros, *LEGAL METHOD AND WRITING*, *supra* note 18, at xxiv and Oates, Enquist, and Kunsch, *THE LEGAL WRITING HANDBOOK: RESEARCH, ANALYSIS, AND WRITING*, *supra* note 18, at 141-143, 253. The basic proposition of these authors is that: “To be successful as a law student and a lawyer, you must understand the system. You must know the framework before you can work well within it.” *Id.* at 3. Translated: You must be an insider and possess insider knowledge before you can write like a lawyer. And before you can be an insider and legal writer: “you must possess not only basic writing skills but also an understanding of your audience, your purpose, and the conventional formats.” *Id.* at 1. For a more interesting presentation of the various “traditions” that might account for our situation as legal writers, see Charrow, et. al., *supra* note 18, at 7-18 (presenting a short history of legal writing that serves as a worthwhile diagnose of legal writing traditions).

performative tasks, and cannot, without massive effort and energy be denied, subdued into silence by the success of having gotten oneself in law school.

- Legal writing, seen in its most unfavorable shadow light is flat, technical, and formulaic.<sup>34</sup> Its favorite color is gray. Its neurotic styles: depression and denial. Still other students, openly critical of legal writing, troubled by the implicit lessons it teaches, find it not just gray and depressive, but life-denying and soul-less.
- Legal writing reminds, again, and always, of brute Necessity. Confronted with the necessity of writing, students lace Necessity with thick strands of Alienation. Legal writing becomes alien (unloved) even as it becomes familiar. By figuring out how to write in matters of law well enough to get by, avoid embarrassment, and pass law school courses, the student survives. To make this volatile mix of Necessity and Alienation work, the student needs a phantasy — the real life of lawyering lies elsewhere, beyond the toil of legal writing. Students of law do not vest their dreams and hope of lawyering in the mastery of writing but rather escape from it.

## VI.

Lawyers, by the nature of their work, are required to write. We write for clients and to clients. We write to communicate with other lawyers. We write about law and present this writing to judges who decide cases involving our clients. Judges write when they pronounce the law. We write to explain, persuade, threaten, reform. Absent the crafting of language into writing; the modern lawyer stands as one-legged.

Lawyers put language to immediate, practical, instrumental use, first in establishing what the law would have us do, and then in applying what we have found it possible to say in the name of law that

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<sup>34</sup> Some legal writing texts disavow the proposition that there is a formula to legal writing. See Brand and White, *LEGAL WRITING: THE STRATEGY OF PERSUASION*, *supra* note 18, at 113 ("The truth is that most legal writing isn't that formalistic and stylized at all.") and Neuman, *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE*, *supra* note 18, at 42 ("[T]here is no easy, simply, workbook-like formula for doing legal writing well."). The authors of legal writing texts may disavow formulaic approaches to writing but the rhetoric, structure, and strategy of the texts suggest otherwise.

will persuade others our reading of the law's requirements is correct. Lawyers can no more escape writing than they can be indifferent to the language of arguments they find in cases, or the prescriptive language they find in statutes. Writing lies at the heart of our craft. We are trapped: write or fail.

We write out of necessity. Teachers demand it. There is a course devoted to it. We write to get into school and stay there as long as we can. We write to get into court and stay there until we get what our clients want. We write to clients to inform them of what we are doing on their behalf (so we can justify the fees we charge for our services). We write to get a job done.

We write as best we can, in the way authorities (teachers, colleagues, senior partners) dictate; we write the way we see others write. And basically, there is no one, to demand, really demand, that we do otherwise. (Unless, some story can be found, in which this demand can be impressed upon us, in a way that can be comprehended and acted upon.) Influenced by education, profession, economic constraints, and perceived self-interest, we write badly.<sup>35</sup>

We assume we don't have much choice when it comes to legal writing: we do it because we must. Legal writing, driven by a relentless sense of the inevitable and the necessary, speaks of an authority that stands against and outside desire and will, beyond aesthetics and subjectivity. Legal writing insinuates itself on us, acting as an unwanted, silent partner in our lawyering.

Legal writing is the urban city we inhabit by day and flee at night. Legal writing creates a black hole, an uninhabitable, desolate space. We commute into that space, get on with the day work of writing, doing what must be done, making a living, then we flee for respite to the congenial suburbs of professional life.

There is a danger, of course, in wishing yourself elsewhere, away from the central enterprise of a craft, praying silently for completion of tasks that cannot be left to others. (We have here the makings of another professional pathology: procrastination.) Trouble looms when the work of lawyering, so centrally dependent on writing, must be done well, thoughtfully, and competently, and is the first task we compromise. The failure to honor tasks that require attention, skill, and care comes back to haunt us. Inattentiveness to writing leads to

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<sup>35</sup> For an interesting explanation of the various "influences" that dictate bad writing, see Steven Stark, *Why Lawyers Can't Write*, 97 Harv. L. Rev. 1389 (1984).

confused and incoherent writing. Bad legal writing is the result of misguided, mindless effort. Mindless work puts the soul at risk.

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In teaching and the practice of law we live crowded lives — crowded by things that must be done, and done now. Necessity is ever-demanding, judgmental to a fault, sometimes threatening. Getting from day-to-day, project-to-project, client-to-client can keep the wolf of Necessity at bay, but it takes energy.

Where does the time go? (It seems to be going nowhere when we are faced with tasks we don't want to do, avoid doing, and do only when we must. Necessity alters time.) Who has time? We would have more time if we had less Necessity. Law, rivals Necessity, as a master thief of time. (If law trifles with time, stealing it like the infant God Hermes stole Apollo's cattle, we will need to be more aware of Hermes, the god of thieves and robbers.) By responding to concerns most immediate, tasks defined by Necessity — the final, the paper, the article, the presentation, the client, the trial; the root canal, the birthday party, the evening with the family — we lose the script of the story we have set out to live. Its hard to see, in the business of the moment (busyness is the business we make of time) how day-to-day life can be a storied life. Yet, the busiest law teacher or law student would be quick to say, without much prompting, there is more to life than the immediacy of the moment. (Life has direction, plot, coherence, and meaning.) We assume, rightly or wrongly, that what we do adds up or counts (to use a language of accounting/economics) for something that cannot be fully known in or described by the activities of the moment. The living that gets done day-to-day, moment-to-moment, takes place within and becomes part of some larger narrative or dream, an ideal, or a bundle of hopes. The most immediate demands on our time are the holographic fragments of a larger master narrative, a fully scripted social and political drama that provides a patterned way for inhabiting the world of work, time, place, and discipline.

## VII.

We worry about the loss of soul in writing because we can never let ourselves be ruled by Necessity alone. Necessity may claim a good part of our day but it can never go unquestioned.

We worry about the soul of legal writing shaped by Necessity. The fruits of that false god are in ready view — bad, notoriously bad, writing. Soul-less writing has consequences: “It erodes self-respect.

Hurried careless writing weakens the imagination, saps intelligence, and ultimately diminishes self-esteem and professionalism.<sup>36</sup> One commentary has argued that for those who deem writing unimportant “are doomed to be second-rate lawyers.”<sup>37</sup> Richard Neumann contend notes that “mediocre use of language implies general mediocrity as a lawyer.”<sup>38</sup>

When we mimic a conventional style (whether of legal writing or a any genre of literary and writing) we twist ourselves into knots and play with soul-fire.<sup>39</sup> Bad writing subjects us to ridicule (of outside observers) and creates problems for clients. There are social costs when legal writing makes the law more inaccessible and the parties to a dispute more prone to litigation. Legal writing leads to public disdain for lawyers and the work we do, as well as self-denigration.

If legal writing cannot escape the imagined “technical” fix it is in, it will forever be a desert story — flat, remote, barren. When legal writing is imagined as Technical Writing, writing by rule and formula, there is a story in place, but one no truly wants to live or tell or pass on to a future generation. More striking, it is a story that runs counter to the occupying phantasies of those who take up lawyer and those seek to teach them the craft of legal writing.

To conceive legal writing as a technical skill flattens it. In psychology, we identify those who make human interactions into a

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<sup>36</sup> Goldstein and Lieberman, *THE LAWYER'S GUIDE TO WRITING WELL*, *supra* note 18, at 5.

<sup>37</sup> *Id.* at 6.

<sup>38</sup> Neuman, *LEGAL REASONING AND LEGAL WRITING: A SYSTEMATIC APPROACH*, *supra* note 18, at 40-41.

<sup>39</sup> Genre writing is efficient and safe. How can anyone be critical of your writing if it follows the *form* that other such writing has taken. Genre Writing is requirement writing, hoop-jumping, an eyeing of the bottom-line. In Genre Writing the thinking and worrying is transferred from what we do to what we make, a shift away from process to product. In Genre Writing we absolve our creative impulses by reference to form, to filling an empty container. Fill-in the form, follow the form, stay out of trouble. We let the *pro forma*, prosaic nature of the task—filling the form, satisfying the requirement, doing what we think is expected—shape not only the product but the process of writing. It is hard to argue against such writing. It gets the job done. It is writing that takes out insurance against critique. The problem with Genre Writing is that we grow stale and lazy and it shows in the writing. The writing becomes cluttered with easy thinking, group thinking, and cliches. And then we over compensate. We try to “fix” writing, to spruce it up with jargon and high-flying phrases. There is nothing more noticeable and glaring in a piece of flat writing than a discordant effort to boost the writing with fancy sounding words.



technical project, by their flat affect. Flat affect is prevalent in those who suffer from a restricted emotional register, range, and depth of speech and feeling. The flat affect of the neurotic and the narrow range of human experience/ emotion/ life/soul found in legal writing suggest a danger for legal writing, that its pathologies will be associated with a dampening and pervasive erosion of human spirit — depression, anxiety, and denial.

Legal writing is neurotic in its flatness; neurotic in its denial of the life of language. Legal writing is neurotic when it sets up a professional barrier and provides a psychological defense against life, passion, care, competence, imagination, creativity, and wildness. “[B]ecause it aspires to objectivity, legal language may refuse to recognize troublesome concepts such as hope, candor, or even love.”<sup>40</sup>

### VIII.

We turn to stories (as we do new forms of jurisprudence) when old explanations grow thin and the feel of what we do seems wrong-headed.<sup>41</sup> We turn, when the discipline grows sluggish, to “thick” description, interpretation, critique, and subversive teaching.

Stories are an antidote to a flat, de-energized world. Stories test and tease surface flatness, a flatness always threatened with an emergent from the depth — unexpected, unknown, un-think-able, un-say-able. Fiction writers, even when they tempt with the flatness of minimalism and the surface banalities of everyday life, leave the reading knowing that the surface is a disguise, a momentary respite from the storm of troubles that lurk just off central stage. In the

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<sup>40</sup> Stark, *supra* note 35, at 1391 (“Deprived of such concepts as hope and fear, most novelists would have little to write about.”)(Id. at 1392).

<sup>41</sup> On the use of stories by legal writing teachers in an advanced legal writing seminar, see Fajans and Falk, *supra* note 3. The Fajans and Falks bibliography of readings used in their course (Id. at 192-193, fn. 137) include Peter Goodrich, Robert Ferguson, Carolyn Heilbrun and Judith Resnick, Gary Minda, Richard Weisberg, and David Papke. The assigned readings tend to be highly theoretical or jurisprudence oriented. Other texts, accomplishing the same purpose, but more accessible to the reader could be assigned. For example, Fajans and Falk assign the symposium on legal storytelling in the Michigan Law Review, 97 Mich. L. Rev. (1989) instead of the more accessible symposium that appeared a year later in the Journal of Legal Education. (My preference for the Journal of Legal Education symposium is biased by the fact that I served as its' editor.) If, as Fajans and Falk contend, they are looking for “other voices” than those expressed in judicial opinions, the academic and theoretical focus of their assigned readings are not the best source.

flatness of a minimalist world, trouble awaits. When we flatten ourselves for roles, adopt method and technique as substitute for full-bodied character, we are heading for trouble. Let legal writing know its troubles and find a story worth telling.

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Stories make a claim on us, none more burdensome than those we tell under the influence of Necessity. If legal writing is seen only through the prism of Necessity, we may end up with work (and a life) we don't want as a story. The good news is that Necessity too is a story, no more, no less. Given the world in which legal writing exists, little wonder it becomes neurotic — flat, lacking affect, controlling (autocratic), depressed, anxious, lacking a sense of aesthetics.

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When writing becomes mechanical we must seek to make it more alive.<sup>42</sup> When done to satisfy a requirement we must seek out its intrinsic value. Now, we seek only to write well enough to avoid derision and negligence—enough for a grade, a teacher, an uninformed client, a busy and undemanding judge—but in doing so our writing goes bad, putrid. We may be able to write well enough to get by, get on with other tasks, and yes, even get ahead, but our heart will not be in such an endeavor.

## IX.

I should make it clear — narrative is not magic and does not, by some dramatic shift in perspective cure all that ails legal writing.<sup>43</sup> By knowing more about stories, one doesn't by alchemical transmutation become a writer. Getting from stories to writing is not done by acquiring story-sensibility any more than one becomes grammatical by learning rules of grammar. If narrative is not magic, then what is it? What symptoms does it address?

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<sup>42</sup> See Natalie Goldberg, *WRITING DOWN THE BONES: FREEING THE WRITER WITHIN 103* (Boston: Shambala, 1986) ("Push yourself beyond when you think you are done with what you have to say. Go a little further. Sometimes when you think you are done, it is just the edge of beginning. Probably that's why we decide we're done. It's getting too scary. We are down onto something real. It is beyond the point when you think you are done that often something strong comes out.")

<sup>43</sup> On the possibilities of reflective, introspective writing, see James R. Elkins, *Writing Our Lives: Making Introspective Writing a Part of Legal Education*, 29 *Willamette L. Rev.* 45, 69-72 (1993).

Narrative and story, when put to use (in contrast to when they are written about as academic subjects) are people-oriented. Stories provide a context in which people (persons, selves, individuals) have space, take up room, move about, perform, display character — and do all the things that human beings act, succeed and fail, in doing. Stories have characters; they are alive with human actors. Characters do things and have things done to them; they are actors in a drama. Story is about drama and the characters in it. It is this story aspect of language that keeps writing alive.

In legal education, we sometimes act as if the only story that counts is the story found in a judicial opinion, and even there, in the facts of the case. Cases, like stories, have characters: plaintiffs, defendants, judges who decide the case (or some lower court judge who has issued a ruling/opinion now on appeal), the judge(s) now hearing the case and writing the opinion, judge(s) who are hearing the case and writing a dissenting opinion. Oddly, the lawyers who tried and argued the case are not explicit characters in the case story.<sup>44</sup> Their absence in judicial opinions means that “thinking like a lawyer” (should such a way of thinking actually exist) is acquired not by seeing lawyers at work, but in the “filtered” textual reasoning of judges. Judicial reasoning may not be the best source (and is certainly not the sole source) of what we now think of as legal thinking.

In its most simple, basic, brown-vanilla version, a story/narrative perspective in legal education focuses on the case as a story. The narrative focus has implications for legal education generally and legal writing specifically. First, legal education. By focusing on story, a student is reminded that cases involve people. We don't make up cases or get judicial rulings abstractly, judicial rules are the result of some person, or group of persons, or persons who act collectively as a “legal entity” appearing before a judge with a “real” conflict. (Even in the making of legislative law there is constant reference to persons and groups directly affected by the law even if this reference is not explicitly set forth in the law itself.) Legal education neglects to carry through on this fundamental insight — law is about people. Traditional law teachers justify the neglect: there is too little time, too many cases to read, too many legal rules to learn, too much legal doctrine to master, too many skills to practice. Law students learn to read law cases *as if* cases were about rules not people.

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<sup>44</sup> For an enthralling account of a law case in which the lawyer is a major character in the drama, see Jonathan Harr, *A CIVIL ACTION* (New York: Random House, 1995).

For the novice student, law cases are interesting reading, with insight into many realms of human activity (and its perversity), realms far beyond the students actual and intellectual experience. There is, in those early days of one's law schooling, a time when a student reads cases as stories, as doorways with opening into unexplored terrain. Yet, the pleasure and adventure promised by this new case reading must be suppressed. Students don't want their intellectual adventurism to endanger their efficient reading to extract rules of law. Consequently, the student learns that the legal case is not a story or drama with plot and characters, but a structural edifice (facts, issues, holding, reasoning). The template for instrumental legal reading is enforced by law school examinations and in legal writing. Some teachers may, by verbal exhortation, insist that legal cases be read whole, contextually, less instrumentally, but the more powerful institutional message is clear: the case must be read for its rule. And of course, it must. Getting the rule from the case is something a law student needs to learn to do.

Some find the task relatively easy, others do not. But this need (oh, Necessity, again) to extract rules and be efficient doing it, in case after case, in literally hundreds of cases for each course, means that learning rule extraction is given priority. Law school reading must, on efficiency grounds, be devoted to a limited, instrumental purpose — rule extraction.

And of course, there is some complexity even in the basic skill of rule extraction, especially the judge created obstacles which must be studied up close. The judge delivers the rule and the teacher contends that the judge (the judge who has written the opinion) has gotten it wrong. Detecting how judges misstate and obscure their rulings is an important part of legal education and of the legal reading that goes into legal writing.

If I am right, that there is a brief time in the earliest days of legal education, when the student reads judicial opinions like short stories and instructive texts on the human condition, and they forego this literary way of reading for other purposes — extracting and formulating rules, stringing rules together to form legal doctrine, and taking examinations — legal writing provides confirmation that instrumental reading and putting story reading aside was necessity.

Some teachers express caution about a constant diet of instrumental legal reading, but even these teachers give examinations that signal a different message. And yes, some teachers celebrate the forced focus on narrow instrumental case reading. (That such narrowness is not easily disciplined testifies, in the view of traditionalists, to its need.) Still other teachers, may see instrumental, legal reading as problematic, but consider it so basic and

important, that it must be given priority. Rule-based reading comes first and when and if there is time, other kinds of reading can be introduced. Legal reading is so *basic*, not only can it not be ignored, it seems to fill up the full screen of our imaginative writing space. Finally, there are teachers who find intellectual justification in the enclave theory of legal writing because it is a defining feature of *legal discourse*.<sup>45</sup> The only way to master a discourse is to immerse oneself in it, to do it the hard way, by extractive reading for rules and the writing that will put them into arguments.

None of these pedagogical stances are wrong. They each represent a powerful enough partial truth about learning to make one a true believer and the practitioner of an unrelenting pedagogy. So unrelenting, that the proposition that cases are about people, that cases are stories, that cases are literature is forgotten. Who would have time to explore such a proposition? Who would have the energy to make it fundamental to legal writing?<sup>46</sup>

Without a literary reading of cases, the context of the case is distorted or lost.<sup>47</sup> A reader (and writer) who has no frame-of-reference from outside the case will have trouble keeping their bearings

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<sup>45</sup> The argument, in this case by a colleague not identified with legal writing, goes as follows:

In order to have law, a polity needs lawyers, people who "do" law. Law is not theology or philosophy; it has its own internal coherence. Law constitutes a distinct context for human knowing. I do not believe that legal concepts block our understanding of the world or that they wrongly eviscerate our human sensitivities. Quite to the contrary, rules and doctrines are themselves the order; they are not the shadows of an obscured reality on the walls of the cave.

Mark G. Yudof, *"Tea at the Palaz of Hoon": The Human Voice in Legal Rules*, 66 *Tex. L. Rev.* 589, 590 (1988). Compare Yudof's defense of legal discourse with James Boyd White's argument that a lawyer must "begin to think in more than one language, more than one voice, and thus to locate particular practices of a discourse [in this case, legal discourse] in the larger context of the rest of what we know and are." James Boyd White, *Economics and Law: Two Cultures in Tension*, 54 *Tenn. L. Rev.* 161, 199 (1986).

<sup>46</sup> The one colleague to do so, in a systematic way, is James Boyd White. See THE LEGAL IMAGINATION, *supra* note 1. In the presentation to legal writing teachers that provided the occasion for this essay, I noted that if there were a single text to serve as required reading (and teaching) by every legal writing teacher, it would be White's THE LEGAL IMAGINATION. My second recommendation would be Peter Elbow, *WRITING WITH POWER: TECHNIQUES FOR MASTERING THE WRITING PROCESS* (New York: Oxford University Press, 1981).

<sup>47</sup> For a reading of cases that calls on their narrative context, see, David Ray Papke, *Discharge as Denouement: Appreciating the Storytelling of Appellate Opinions*, 40 *J. Leg. Educ.* 145 (1990).

when deluged with legal doctrine.<sup>48</sup> Legal cases (and the drama created by the law school version of the Socratic method) create a false sense of a fully contextual world. When we talk about law cases we ask students: what is the plaintiff's theory in this case? what element in the defendant's case was decisive in the judge's ruling? what is the holding in this case? (or: what law is established in this case that will govern future cases of this sort?) These questions posit a fully enclosed, bounded, pragmatic, instrumental world. They are questions decisively directed to encourage legal thinking gratuitously identified as legal.

And when, if ever, is the student asked: What is the story here? What kind of story is the plaintiff telling? To what political and cultural story does this case belong? What kind of story would you subscribe to if you accepted the defendant's position (and the political and cultural narrative to which it is indebted)? In some instances, we may not be making a big shift when we ask questions about stories rather than questions about theory, holdings, and law.<sup>49</sup> But stories can, at times, if we let them have their way, provide an opening out from *discourse* defined reading, that is, from instrumental (single-purpose) legal reading, to the world of law beyond rules. Stories open up the closed world of legal thinking and discourse, they expose the boundaries of legal thinking, the absence of voices that demand a hearing.<sup>50</sup> Stories say: this case can be read differently, more contextually; it can be read

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<sup>48</sup> Fajans and Falk found their students "stalled in their writing because they were stalled in their reading." Fajans and Falk, *supra* note 3, at 168 (Describing traditional law school reading as "mechanistic, issue-holding-reasoning reading" and arguing for an alternative focus on close-reading, to which there is resistance.)

<sup>49</sup> One finds in the wide-ranging legal scholarship drawing on the narrative perspective frequent examples of law professors simply substituting the work story or narrative for theory and going about their writing business. Their writing tells no stories, and reflects little in the way of story-sensibility. They have simply used a new more fashionable terminology to write about theory. Stories may lead to theory, and we may theorize about stories, but stories are not rough equivalents to theories.

<sup>50</sup> See Julius G. Getman, *Voices*, 66 Tex. L. Rev. 577 (1988) (exploring the role of "distinct voices" in legal education) (The essence of professional voice is the "addressing [of] questions of justice through the analysis of legal rules." The rhetorical style that accompanies this voice "tends to be formal, erudite, and old fashioned." Psychologically, professional voice is of interest because "the focus on general rules . . . ensures the use of language that removes some of the feeling and empathy that are part of ordinary human discourse." And who speaks in this professional voice? "The quintessential professional voice is that of the judge." *Id.* at 577, 578. Getman argues that professional voice serves "only a part of what lawyers do. A number of the most important functions of lawyers — advocacy, negotiating, counseling — require the ability to utilize a different, less removed mode of discourse." *Id.* at 579. Getman goes on to identify critical, scholarly, and ordinary voices that have a place in legal education.

like literature that remarks on the culture in which it is produced. This case, like every text produced by a culture, speaks to all that is important to the culture. Is this case about justice? Is it about some ideal? Is it about some human failing? What and where in the great drama of human existence does this case (and those which bear a family resemblance) fit?

These story perspective questions don't mean that "what is the story?" and a full contextual reading of a law case is called for in every reading of every law case. (Who would have time?) A student elected to serve on a law review writes about a single case. Perhaps, law schools that want to maintain the "human" voice in a legal world of real people would have *every* student read and report publicly on one case in a way that explored its storied meaning, pointing out its openings to a world beyond law.

Given the current state of legal education, we might need even more prophylactic remedies: no instrumental reading of any case, at least initially, until the student demonstrates that a case may be contextualized, can be articulated and explored in terms of the stories it tells. For every instrumental reading there must be, either simultaneously, or in a different forum, a story reading of the case.<sup>51</sup>

Since teachers cannot be forced to adopt a narrative perspective (or a critical, feminist, or cultural one), some teachers teach *only* instrumental reading. In some instances this instrumental reading may be taught in compelling ways, and some teachers may have found ways to humanize instrumental reading in ways that make it less offensive and less antagonistic to the humanistic perspective I have alluded to here.<sup>52</sup> So long as instrumental legal reading is being taught, it should be countered, case for case, course by course. The only way we can be true to stories is to tell them, teach them, make use of them, ponder them, puzzle over them — and we must do this through out legal education, in every law school class room. Legal education may, if we take story and narrative seriously, be less efficient. The efficiency of teaching instrumental legal reading (with rule extraction as its goal) cannot be had in story reading (with contextualization and opening out

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<sup>51</sup> In an ideal world, both instrumental and narrative perspectives would be taught at the same time by the same teacher. Some teachers will, of course, have mastered both and can teach both, in the same class with the same students.

<sup>52</sup> We need not celebrate our success at humanizing traditional forms of law teacher just yet. See, Emily M. Bernstein, "Law School Women Question the Teaching," *New York Times*, June 5, 1996, p. B10, c.5. There are defenders of the old practices. See, Letter to the Editor, "Law School women Gain From Socratic Wars," *New York Times*, June 12, 1996, p. A16, c. 3.

beyond law as an autonomous discourse as its goal). Instrumental reading will always hold itself out as more efficient than story-focused reading; stories do not hold efficiency as an ultimate value. It may no longer be cost effective, or story-wise, to teach law in classrooms of seventy or several hundred twenty passive students, students prodded into speech by a fake Socratic dialogue.

## X.

When reading law and the student is quickly (all too quickly) corralled into instrumental reading, there is still a freedom and means to escape, an escape that may be foreclosed in legal writing. Faced with the explicit demand for narrow, instrumental case reading, the student is still free to read as she chooses (if she is willing to pay the price, a price that may not be as high as one imagines). Indeed, some lawyers, looking back on their efforts to survive law school have described learning to read law in ways their teachers did not teach. Ruth Knight, one of my former students, says: "When I read the cases the way I wanted to read them, they made me want to write a novel. When I read them the way I was supposed to read them it was like traveling in a foreign country."<sup>53</sup> What makes legal reading like traveling in a foreign country?

It was as though the fact patterns [of the cases] no longer had anything to do with passion and pain and other humanizing elements, and that former humans —inferior ones — litigated for the sole purpose of providing tired law students with case precedent. Case precedent, in turn, allowed some students to bandy strange Latin words about and to talk law-language as if they had been speaking it all their lives.<sup>54</sup>

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<sup>53</sup> Ruth Knight, *Remembering*, 40 *J. Legal Educ.* 97, 99 (1990).

<sup>54</sup> *Id.* at 98-99. Knight's experience provides support for one of the diagnosed ills of legal writing.

[A]nyone who writes about rules and not facts is going to have a difficult time composing an appealing piece. What intrigues most readers are stories about people; a story is usually the development of a character. For example, what would make the story in *Erie v. Tompkins* interesting to the typical reader is what happened to Tompkins, not what happened to the doctrine of *Swift v. Tyson*. But the legal writer must ignore the attractive part of a story and be content instead to discuss the application of rules in a way that tells lawyers what doctrines they should follow. Even Joan Didion would have trouble doing much within those constraints.

Stark, *supra* note 35, at 1391.



For Ruth Knight the language and professional voice of her new discourse was odd and uninviting. But she still had a need to understand law. In the open-ended teaching and single examination system, Knight was able to turn to what she knew best, stories.<sup>55</sup> She describes the panic as she prepared for her first-semester final exams.

All I could understand was the factual situations as embellished by my imagination, and I knew by then that the facts were the first thing professors and smart students carved away. Professors wanted only rules of law, carefully placed.

In panic, I tried to type each factual story, together with its rule of law, so that at least I could attach the rules to something I understood . . . . Amazingly, as I typed, main ideas began to rise to the surface of the soup in a fluid pattern that I could not exactly lift out and organize, but which was definitely a pattern. I felt reverent, as though I had beheld a miracle.<sup>56</sup>

Knight goes on to describe her struggle to make sense of law and her struggle to survive law school. She found a way to done reasonably well, but resolved "to carve the cases and notes down to the bones" so she could be successful on terms prescribed by her teachers.<sup>57</sup>

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<sup>55</sup> From this and other accounts of instrumental legal reading we find bright, thoughtful, caring students who don't catch on to legal reasoning as we now teach it. To find something that can be grasped, these students rediscover the power of stories. Even in a world of instrumental, limited purpose reading, there is still a measure of freedom. No law teacher watches as the student reads. The reading is, of course, translated into examination answers (and less directly, in classroom discussion) but there is no direct observation or testing or feedback on specific reading, of specific cases, requiring the formulation of specific rules. The student is, for all purposes short of legal writing, free. In legal writing, the space for freedom, even if to find your own method or style is foreclosed.

Legal writing is the life of the lawyer lived in micro-performances, in discrete, minatory moves made solely for the purpose of critique and evaluation. These writing performances are demanded on *belief* that the mastery of this micro-world of performance, makes one a lawyer. So, we are doomed to an instrumental world (and its familiar environs: civil procedure; UCC; tax; property law) as fully enclosed legal labyrinths, where air is stale and stagnant, getting lost a constant possibility, where loops and levels and layers of rule/exception abound, where the abstract and the rule have driven people concerns to the periphery of consciousness, where it is possible to think about rules *as if* they were not meant to apply to real people, not mean to be worked out in cases that are always stories and that whether it be law or not we are ever in the process of arguing about and constructing still more stories worth telling.

<sup>56</sup> *Id.* at 99-100.

<sup>57</sup> *Id.* at 100.

The effort was heroic but doomed. In classes such as property I semisuccessfully banished the lords and ladies, the castles and serfs' cottages, and my imaginings of ceremonies of feoffment in Nottingham Forest. I doggedly and dryly filled my brain with "T to A for life, R to B in fee if B attains 21; or O to T and his heirs to the use of O and his heirs."

Knight's efforts at instrumental, rule-extractive reading was even more difficult in other courses (she mentions Constitutional and criminal law, along with Legal Writing). Finally, the legal reading eludes her and she forages on "all the delicious trivia . . . ."

I found stories that cried out for better treatment of social guests who slipped and tripped on their hosts' loose carpeting. The Avon Lady could recover! The babysitter could recover if she was paid fifty cents an hour! But a poor, nice neighbor who comes over to bring flowers to a sick friend can break her neck and not receive a penny for her doctor bills! I even found a case in which a railroad employee, who was standing on top of a parked boxcar in order to string a radio antenna from his two-room company-house to the tree on the other side of the tracks, was hit by a runaway train, and the court denied recovery because he was a trespasser. The rich railroad company would have been required to pay for his injuries if he had been in the boxcar, next to the boxcar, on the track, or in his bed asleep when the train bashed into the station. But no, the man was trespassing on top of the car, so forget it.<sup>58</sup>

There was, for Ruth Knight, no one in this first difficult year of her legal education, to confirm or work with the intelligence she brought to her reading of cases. There was no one to explain why legal reasoning (as it was presented to her) seemed incomprehensible, like "traveling in a foreign country." If there had been someone who could have seen the power of Ruth Knight's story intelligence<sup>59</sup> and helped her work with it, she would have felt at home rather than off on a journey of foreign travels.

## XII.

I was once impressed into the cadre of legal writing instructors by a Dean who thought it a form of punishment for errant colleagues. I

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<sup>58</sup> Id. at 100-101.

<sup>59</sup> Roger Schank has put the matter rather simply: "our interest in telling and hearing stories is strongly related to the nature of intelligence." Roger C. Schank, *TELL ME A STORY: A NEW LOOK AT REAL AND ARTIFICIAL MEMORY* xii (New York: Charles Scribner's Sons, 1990).

dreaded the teaching of that course, a dread I had never previously experienced as a teacher. The course itself turned out to be as valuable as any I have ever taught.

Law students tend to be relevance hounds. They want their learning to be relevant and immediate tasks to be clearly identified with work they will do as lawyers. Consequently, there was some eye-rolling and skepticism when I suggested to these students of appellate advocacy that it might be prudent to talk about ourselves as writers before we set out to take on legal writing.

In teaching appellate advocacy, I wanted students to see the course as a continuation of their legal education, a way to put reading and thinking about cases and legal doctrine and legal problem-solving to work rather than as setting off to master a new, special, technical, mysterious enterprise — writing the legal brief. I had in mind demystifying brief writing and making it an ordinary act of writing rather than a technical skill.<sup>60</sup>

I find the relationship between writing and legal writing an open question and a continuing matter of intellectual curiosity. I remember a discussion of this matter — the relationship of writing and legal writing — during my brief tenure as an instructor of appellate advocacy. I told students that if Norman Mailer or Bobbie Ann Mason (two authors with somewhat different styles and sensibilities who happened to come to mind during the presentation) were provided a brief introduction to the basics of case reading and legal argument and provided the cases on which a memorandum were to be produced, they would write a better memorandum than virtually any student in the class. I realize, now as then, that the statement is a bit outrageous as it is unlikely to be proven true or false. The point was made in service of a premise: if you can write, you can do the writing that lawyers do, and you can learn, without great trauma, to do it well. In my perusal of legal writing texts I have found no direct support for this proposition.<sup>61</sup>

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I had, although the Dean who wanted to punish me by assigning me to teach legal writing, did not know it, written a fair number of appellate briefs during a summer's student internship with the United

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<sup>60</sup> A legal writing text will sometimes make a similar move. See e.g., Oates, Enquist, and Kunsch, *supra* note 18, at 263-264, relating advocacy to what ordinary folks do.

<sup>61</sup> One text does note that "The rules of good writing and good legal writing are identical. Both require clarity, logical organization, precision, and conciseness." Charrow, et.al., *supra* note 18, at 1.

States Attorney's office and later as a trial attorney with the Department of Justice. Unless I have managed to submerge those early years in a massive illusion, I recall no particular difficulty in writing legal briefs, either as a student or as a lawyer. Brief writing work seemed neither particularly hard or especially easy. Like most law students, I did not consider myself a writer when I entered law school. I had written papers as an undergraduate and did not fear writing as do so many students today. I was neither a writer nor fearful of it. Pulling cases, reading them, mapping out an argument, getting the argument down in writing, was so far as I knew before becoming a teaching of appellate advocacy, simply an exercise of synthesis for one who has taken law school seriously. For a reader of hundreds and hundreds of cases, mapping out doctrinal developments in various areas of law, reading law review articles, constructing course outlines, and then responding to essay examination questions posed by excellent teachers, seemed more than adequate preparation for brief writing. It was the habitual close reading of judicial opinions, and the use of these cases to construct course outlines, the perusal of law review articles on doctrinal developments introduced in class, and careful preparation for examinations that lead to a measure of comfort in the legal writing I did as a lawyer.

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We try to teach and learn writing by a kind of reductive functionalism. Following this approach, legal brief writing is taught by taking the brief apart, learning to write by learning to reproduce the various structural parts of the brief and then putting the brief back together much like a bicycle. In this industrial or manufacturing approach to writing the focus is on parts, reproduction, replication. There may indeed be a level of skill and technique involved in writing a legal brief but the learning is more a matter of exposure and experience than a highly developed, complex art. The most straight-forward way to learn how to write an appellate brief is to write one. (It helps to do the writing in a context in which the final result matters, the writing takes place in a community of fellow learners, and is done under the tutelage of one who has had the experience of writing such texts. The "form" of a legal brief is straight-forward and easy to replicate. Writing briefs is the kind of activity you get good at by doing, by repetition, familiarity, and habit. Legal writing, like gardening and sailing, is not learned from instructional manuals. To profit from reading about gardening and sailing you need to put out a garden and have ready access to a sail boat.

Legal writing ultimately depends upon the quality of legal education. The instruction in the technical skills associated with writing can never replace the education that makes good writing possible.

## Appendix

Legal writing gets us back to basics — craft, skill, discipline, performance — and in doing so, the translation of reading and thinking into writing. In classical Greek philosophy, *arche*, is the beginning, the starting point, the origin of a thing.<sup>62</sup> *Arche*, it might be noted, is a root of archetypes, and if we follow Jung and the archetypal psychology school of thinking, these archetypes are most vividly and dramatically expressed in the pantheon of Gods and Goddesses that we have taken up from Greek mythology. Archetypes are original forms from which things are formed, or from which they are copies. In the psychology of Carl Jung, archetypes were lived patterns of thought and imagery associated with the collective unconscious.

When an enterprise, like legal writing becomes too linear, straight-forward, literal, and concrete it gives itself over, in totality, to a dominate myth. Legal writing grounded in form (and formula) and stylistic appearance represent Apollo's order. Legal writing is mythic (no enterprise can escape the influence of myth) and needs myth, first in order to amplify its own basic nature, its fundamentalism, its order, its discipline. But there is a second reason for legal writing to turn to myth, to recapture a more vital, lived, sustainable, soul in writing. If work is to have soul, to be sustainable, to avoid harm to those who engage in the practices demanded by the work, then the mythic qualities of the work should be understood. If legal writing represents the craft of law, the work of law, law's rationality and objectivity, its form and appearance, its rule and order, then we would do well to know what gods and goddesses take their place in this kind of work. What are the gods doing here? How do the gods of law work? What do we become when particular gods/goddesses dominate in a form of work?

The gods and goddesses represent first stories, stories that come with beginning. *Archai*. They bring us around to see the arche-types in our work. Locating in the archetypes in work and habitual practices, we gain perspective on who we are and who we have trouble being. We cannot be all things, all-knowing, so we become this and not that, admire this and disdain that. We become more amendable and pleased by the appearance and working of a particular archetypal energy in our professional lives: Apollo or Dionysus. Hephaestus or Athena. Perhaps, Hermes. (Legal writing creates a hermetic, closed world and thus a one-sidedness of the God, Hermes, the god of boundaries and boundary

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<sup>62</sup> Peter A. Angeles, THE HARPERCOLLINS DICTIONARY OF PHILOSOPHY 19 (New York: HarperPerennial, 2nd ed., 1992).

crossings.) And Aphrodite (do we not seduce with language)? We are always in the reign of Zeus who rules the realm of will and power—the judge; and Hades (god of the underworld, who rules the realm of the unconscious) and Ares (god of war, warrior god).

The stories of the gods and goddesses introduce us to origins, patterns, organized patterns by which our energies are expressed and subsumed. They introduce us to the pull of the positive and the disarray of the negative, to polarity, to the ups and downs, to heaven and earth, immortals and mortals. The mythic stories are of us, part of our being and direction, our proposals and follies. We may have come a long way from these first stories and our mythic inheritance, but hardly so far as we assume. The claim to being rid of myth, myth-less, charting our own paths, human-directed, rational to the core, is so much bluster in the face of myth. If legal writing represents Reason (nous), it must also account for and represent Necessity (ananke).<sup>63</sup> The Goddess Ananke/Necessity represents fate or errancy. James Hillman turns to Plato who observed that

the soul has a special relationship to this errant principle of aimless necessity . . . . [S]ouls enter the world by passing beneath the throne of the Goddess, Ananke, whose three daughters govern the destiny of every soul.

For Plato the truth of intelligent reason was not enough to account for man and the universe. Something else was necessary, especially in accounting for what governs the psyche. Some wandering necessary force also comes into play, and in fact, it is through errancy that we see Necessity at work.<sup>64</sup>

Legal writing, without new myths, different myths, drives relentlessly toward an instrumental flatness, an unpersuasive soul-lessness, awful in its mediocrity. (*Mediocris*, Latin, the literal meaning translates, halfway up a mountain and from *medi-* + *ocris* stony mountain.)

Legal writing attracts the gods and goddesses, unwanted as they may be, because the writing is mendacious, given to deception and falsehood. Mendacious, deceptive and false, evolves from the word amend (from the root *mend* or fault.) To amend is to change or modify for the better, to improve, to alter in phraseology, to correct or reform. Legal writing sets out to restate, to translate, and to amend. Obviously,

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<sup>63</sup> See James Hillman, RE-VISIONING PSYCHOLOGY 159-161 (New York: Harper Colophon Books, 1977)(1975)(outlining an archetypal approach to psychology that honors the Greeks and their gods and goddesses).

<sup>64</sup> Id. at 159.

we want to think the translation and correction reach for what is best, for truth and justice. The irony is that amend has other roots: a Latin root, *mendax*, lying; *mendicus*, beggar; and Sanskrit *minda*, physical defect. Seeking the better by amendment and correction, we engage in begging and lying, and expose our defects.

Steven Stark has suggested that one of the reasons lawyers write so badly is that we use language for deception. "Face it: if lawyers know they have a losing case—and half the time they should — confusing the court may be the best they can do for their clients. Indeed, attorneys may be our most respected con artists; after all, their job in many cases is to try to make something out of nothing."<sup>65</sup>

Myth and story offer amends (compensation for a loss or injury) for the defects of work. Like Hephaestus, we work the way we do because of our defects, our wounds. We plead to the court as beggars. We tell the lie (the lay) of the client's story with reckless disregard for the truth. Our rootedness in the lie, in translations that serve limited purposes, place us in a peculiar situation, straddling the profane and the sacred. We fight for justice (truth) and in the fight use strategies (rooted in law) that suggest we have less regard for truth than the ordinary person is expected to have. We play with truth because we are vested with godly powers. We leave to law (and the system that produces it) the concern for truth. (We treat law like a God.) Lawyer/priests have little confidence in the worldly notion of truth expressed by mortals. For lawyers, truth is contestable, arguable, decidable one way or another. Truth is decidable in a contest between athletes of advocacy, warriors for opposing interests, whose truth can be known only through the occasion of mythic struggle. (*Agon*: Greek, contest, conflict; the dramatic conflict between the chief characters in a literary work.) Lawyers are agonists who gather to engage in struggle not unlike the athletic contests of ancient Greece. We are agnostic, that is argumentative, striving for effect in our speaking for others. With enough agon we come to agony, to torture ourselves with anguish from the torturous way we use words.

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<sup>65</sup> Stark, *supra* note 35, at 1392 (Deception has its costs: lawyers "recognize their role as deceivers and understand that language is the means by which they work their magic. And after a while, they begin to lose faith in the honesty of words. Language is a human invention, one designed to bring people closer together. But after a lifetime of using words to strange communication, lawyers begin to view speech as a barrier that separates them from others and others from the truth . . . [L]awyers begin to despise their language, and their distaste reflects itself in poorly written prose. Why bother to write clearly if communication itself is a lie.")(Id. at 1392).



Does legal writing need myth? Without myth legal writing will forever be orphan, step-child, having a place in the family (near the hearth) only to place in more stark relief its forever lowly status, at home but cast-out, rejected, burdened, unloved, waiting to be discovered, acclaimed, promoted, tenured. Legal writing is the burdened with dirty tasks gray-frocked Cinderella, waiting for marriage to a Prince.

