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Wed Sep 11 18:21:26 2019

Citations:

Bluebook 20th ed.

George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 Mich. L. Rev. 333 (1987).

APA 6th ed.

Gopen, G. D. (1987). *The state of legal writing: Res ipsa loquitur*. Michigan Law Review, 86(2), 333-380.

ALWD

Gopen, G. D. (1987). *The state of legal writing: Res ipsa loquitur*. Mich. L. Rev., 86(2), 333-380.

Chicago 7th ed.

George D. Gopen, "The State of Legal Writing: Res Ipsa Loquitur," Michigan Law Review 86, no. 2 (November 1987): 333-380

McGill Guide 9th ed.

George D Gopen, "The State of Legal Writing: Res Ipsa Loquitur" (1987) 86:2 Mich L Rev 333.

MLA 8th ed.

Gopen, George D. "The State of Legal Writing: Res Ipsa Loquitur." Michigan Law Review, vol. 86, no. 2, November 1987, p. 333-380. HeinOnline.

OSCOLA 4th ed.

George D Gopen, 'The State of Legal Writing: Res Ipsa Loquitur' (1987) 86 Mich L Rev 333

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ESSAYS

THE STATE OF LEGAL WRITING: *RES IPSA LOQUITUR*

George D. Gopen*

When Shakespeare made Hamlet say to the grave-digger:

“Why may not this be the skull of a lawyer?

Where now be his quiddities, his quilletts,

His cases, his tenures, and his tricks?”

he was paying the profession a real compliment; and a compliment none the less because it was intended as a slur. A quiddity is defined by Webster as a “trifling nicety,” and the word quillet is another form of “quibble.” Both words seem to have been in fairly common use three hundred years ago and Shakespeare used them to express the sharpness of the lawyer and his facility in the use of words even in that day and time. For the ability of the lawyer to confuse others by the use of words has long been the subject of proverbs. The reasons for this distinction — or if you prefer, for this reproach — are not hard to find; they lie in the lawyer’s training and in the work he is called upon to do. And yet, no matter what else may be said of him, the lawyer, in his field — even as the physician and the priest in theirs — remains the last resource of other men and women. When the wisdom of common men fails them and disaster is at hand, when the layman’s brain is overworked until his mental fuse burns out, when the motor car of “Business” blows out its tires and piles up in the ditches of insolvency, when the human derelict is finally tossed upon the rocks by the stormy seas of life, then the lawyer is sent for and his “quiddities” and his “quilletts” are more than welcome; then the myriad complexities of human frailty, and the baffling chicanery of men, test out all “his cases, his tenures, and his tricks.”¹

Ask the public: The first thing they associate with professors is tweed; the first with doctors (a tie here) is lots of money or bad handwriting; and the first with lawyers, written language that is impossible to understand. The lengthy quote above is from a 1921 article entitled *The Language of the Law: Defects in the Written Style of Lawyers, Some Illustrations, the Reasons Therefor, and Certain Suggestions as to Improvement*, and, ironically, it pronounces on the profession some-

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1. Lavery, *The Language of the Law: Defects in the Written Style of Lawyers, Some Illustrations, the Reasons Therefor, and Certain Suggestions as to Improvement*, 7 A.B.A. J. 277 (1921). Urban A. Lavery was the chief legislative draftsman for the Illinois Constitutional Convention.

thing of a slur, even though it was intended as a real compliment. There is a glory, it seems, in the mystery of a language that can be deciphered only by initiates of the secret society; there is a great sense of power and an even greater actuality of power in controlling a language that in turn controls the most pressing affairs of individuals and communities; and there is a monopolistic safety in being able to manipulate a language which because it was part of the creation of legal problems must be part of their solutions as well. It was true in 1921, and it is still true sixty-six years later. This essay will suggest some possible causes of traditional legal style and then explore some of the current attempts to do something about it.

I. LEGAL LANGUAGE: USE AND ABUSE

“Legal writing” is a misnomer. Every rhetorical problem that faces lawyers faces other professionals as well; only the particular *combination* of those rhetorical needs is special to the law. We continue to use the term “legal writing” because we have not found a simple way of defining that combination, and because (as Justice Potter Stewart once said of hard-core pornography) we know it when we see it. Is there no “legal writing” of high quality, deep perception, and broad vision? Of course there is. Every firm or legal department I deal with (as a writing consultant) is quick to point out to me the two or three “really fine” writers in their midst; but that seems rather like Boswell’s pointing out a tree in Scotland to disprove Johnson’s complaint that there were no trees in Scotland. The demonstration of the exception is good circumstantial evidence of the aptness of the rule — or so a lawyer might say.

In one of the best articles on the subject written to date, Professor Robert W. Benson neatly summarizes the major problems of what has come to be called “legalese”:

There is plentiful evidence that lawyer’s language is hocus-pocus to non-lawyers, and that non-lawyers cannot comprehend it. There exist scores of empirical studies showing that most of the linguistic features found in legalese cause comprehension difficulties. Legalese is characterized by passive verbs, impersonality, nominalizations, long sentences, idea-stuffed sentences, difficult words, double negatives, illogical order, poor headings, and poor typeface and graphic layout. Each of these features alone is known to work against clear understanding.²

When I speak pejoratively of “legal writing,” “legal language,” or

2. Benson, *The End of Legalese: The Game Is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 531 (1984-1985).

“legal prose,” I am referring not only to the recognizable professionalisms:

Provided always that these presents are upon this condition, heretofore agreed upon, that if the said rent shall be in arrears for a period of not less than two months, the party of the first part, or its assignees,

nor only to the statutory monsters:

Any person who obtains payment or acceptance and any prior transferor warrants to a person who in good faith pays or accepts that . . . he has no knowledge that the signature of the maker or drawer is unauthorized, except that this warranty is not given by a holder in due course acting in good faith . . . to a drawer with respect to the drawer's own signature, whether or not the drawer is also the drawee³

I am referring as well to the failed attempts to communicate clearly and swiftly:

Appellant's attempt to characterize the funds by the method of payment (reimbursement), rather than by the actual nature of the payment misses the mark.

Lawyers need to be able to articulate clearly the steps and connections in a logical argument. Lawyers need to be able to maintain clarity of expression, even in the face of complexity of thought. Lawyers need particularly to be able to write with both precision and anti-precision: for some documents they have to nail down particulars in order to avoid vagueness and ambiguity, while for others they will have to keep the letter free in order to protect the plasticity of the spirit in the advent of unforeseen circumstances. But none of these rhetorical needs need produce problematic prose; the causes of the problems lie elsewhere. Here are eight of them.

A. *Ejudicated Jargon*

Many lawyers will respond to an attack on their obfuscatory legal style by insisting that they *have* to write that way. By this they usually mean that so many words and phrases have been defined as terms of art by courts or by traditional professional usage that to use simpler synonymous words or structures would raise the presumption that they did not intend to mean what the legal term of art would have meant. Of course, the need for some arcane vocabulary hardly excuses all the other sins of legalese; but to a limited extent, the lawyers have a case.

Historically, there is an extraordinary importance granted to accuracy of detail in legal proceedings. In medieval times trials often depended on oath-taking and the accurate repetition of precise

3. U.C.C. § 3-417 (1987).

statements by members of the community. The original "juries" were not fact-finders, but rather people who were willing to swear (French "jurer") that a certain thing happened a certain way. In some cases this meant that they each would have to read without error the same previously prepared statement. A single stumble (presumably caused by God who would not allow injustice to triumph) would indicate the falsehood of the statement and prove conclusive to the proceedings. Not all of medieval English law functioned in this manner; but enough of it did to impute a quasi-religious significance to the existence of particular words in a legal context.

To make matters worse, the English and American common law systems were developed not by simplification and clarification but by addition and qualification. Not until 1968 could a case decided by the British Supreme Court be overturned; a precedent could not be defeated, but only distinguished away. Therefore the specifically *legal* meanings of words and concepts became the specialized knowledge of the practitioners; before the awesome complexity of the traditions, nonlawyers could only stand in fear and trembling.

There was in this process of addition and qualification, too, a touch of the religious. In many orthodox religions, it is more common by far for prayers and observances to be added to established rituals than to be deleted. As time goes by, the liturgy becomes longer, more dense, and less understood by the laity; it takes more of its meaning from the fact that it has existed than from the significance it was once intended to convey. Until quite recently the same has been generally true for the Law. Is granting a piece of property to *X* the same as granting it to "*X* and his heirs"? Was it always so? If it once was not, can it be so now? And who besides a lawyer would know?

So it is true, to an extent: lawyers have to know their jargon and know its probable effects. They are probably safer in using the traditionally effective incantations than writing their own more modern, more streamlined tunes. But *must* they be confined to expressing something only as it has been expressed in the past? Example: A small business wants to hire a particular company to handle its investments. To be "legal" about it, the Board of Directors must sign a consent vote to the following text:

Pursuant to the provisions of applicable law, Chapter 156B of the Massachusetts General Laws, the undersigned, being all of the Directors of Acorn Products, Inc., hereby consent to the following:

VOTED:

That the resolutions contained in the attached resolutions for the Thomas Mackay Securities Inc. Corporation Cash Account be and they hereby are adopted as actions of the Corporation, and that the clerk be

and he hereby is authorized and directed to execute and deliver said resolutions and the certificate contained therein in the form attached hereto and made a part hereof.

Lacking the space here to investigate all the history of this off-putting bit of prose, let me point out only the fear and trembling in the “be and hereby are” formula. Quite possibly, someone long ago wrote such a document with the simpler phrase “that the resolutions be adopted” and learned in some court at a later date that the document *meant* “that the resolutions will be adopted at some time in the future but not necessarily now.” Not to be burned twice, that someone eliminated the loophole by adding the present tense, thereby resolving the ambiguity between the subjunctive and the future — “that the resolutions be and hereby are adopted.” Once that crept into the form books, who would dare put it otherwise? If something works, why take a chance with something else, merely for the increased reading ease of nonprofessionals?

There is no simple way out of this. Leadership in this kind of reform must come from the institutions above, not from the individuals below. Such help is now to hand in many states, where “Plain English” laws are not only allowing but requiring that the ancient bandaid rhetoric be replaced by language that the populace at large can understand — at least for documents like insurance policies and layaway plans, which directly affect large numbers of consumers.

Leadership can also come from important law firms and large corporate legal departments who dare to simplify. First, however, they must be convinced that the sanctity of their form books came not from God but from convenience, caution, and inertia. I recently succeeded in converting one corporate lawyer in a skirmish that bears repeating here. She had been specializing in her field for eight years but had been with her present firm only one year. I was consulting with the firm about writing skills and had a thirty-minute individual conference scheduled with her. She appeared at the appropriate time but denied that she needed any help, since she mostly spent her time piecing together the appropriate bits of boiler plate prose she found in the firm’s form books. That boiler plate, she argued, had stood up successfully in the courts and therefore was not to be tampered with under any circumstances. I asked her if this firm’s boiler plate was identical to that which she had used for seven years in her previous firm; she said no. I asked her how long it had taken her to adjust to the new boiler plate; she said that after a full year she was only just then starting to feel comfortable. So there it was: two completely different sacred pieces of prose, neither one of which could be altered in any detail,

even though they did precisely the same job. She was willing to take a closer look. Here is the paragraph on which we worked:

1.08 *Ownership*

All property and interests in property, real or personal, owned by the Partnership, will be deemed owned by the Partnership as an entity, and no Partner, individually, will have any ownership of such property or interest owned by the Partnership except as a tenant in partnership as provided in the Act. Each of the Partners irrevocably waives, during the term of the Partnership and during any period of the liquidation of the Partnership following any dissolution, any right it may have to maintain any act for partition with respect to any of the assets of the Partnership. The General Partner shall be authorized to provide for the holding of legal title to all or any part of the Partnership property in the name of any entity or person as trustee on behalf of the Partnership; provided, that any such trustee or nominee shall execute a certificate, suitable for recording, acknowledging that the beneficial owner of such property is the Partnership and agreeing to hold and dispose of legal title to such property in accordance with the terms of this Agreement.

We applied certain structural revision techniques (further explored below) sentence by sentence, and in fifteen minutes produced the following, which she now insists differs not at all from the original in substance:

1.08 *Ownership*

Partnership property shall be owned by the Partnership entity and not by the Partners individually. Each Partner irrevocably waives any right to partition the property. Although the Partnership owns the property, the General Partner may authorize any person to hold legal title to the property as trustee or nominee for the Partnership. Such trustee/nominee shall execute a recordable certificate in which (i) s/he agrees to dispose of legal title to the property in accordance with this Agreement and (ii) s/he acknowledges that the Partnership is the beneficial owner.

The boiler plate battle can be won, but it will not even be engaged until the legislatures, the courts, and the leading lawyers become convinced it is worth fighting.

B. *The Problem of Precedent*

Lawyers work primarily with legal concepts that have been established by statute or private agreement and have been elaborated upon by court decisions. The lawyers may be called to action by the facts of the present case, moved by those facts, and even convinced by those facts; but those facts will work against the client unless they can be properly and persuasively associated with principles of law that will resolve the issue in favor of the client. Lawyers, therefore, fill relatively little space with interesting, human specifics, and are forced to

concentrate instead on the relatively nonhuman (some would say inhuman) legal concepts. Professor Steven Stark has put it nicely:

But anyone 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* [a particularly thorny case, often used to begin courses in Civil Procedure] 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.⁴

Concentrating on what the law has said and how the present facts fit those concepts, lawyers keep foremost in mind the goal of making a totally subjective task (representing their client) accord as well as possible with that legal chimera, objectivity. Again, Stark:

Legal language and style make the task easier. To begin with, lawyers can use labels to objectify and simplify: Ms. Jones and Mr. Smith become tortfeasors or lessees. Or lawyers can resort to a style of writing replete with logical analysis and dozens of footnotes designed to show the objectivity of the legal process. Finally, because it aspires to objectivity, legal language may refuse to recognize troublesome concepts such as hope, candor, or even love. If the doctrine of standing means anything, it must be that certain perceived hurts are not recognized in conventional legal discourse, perhaps because in an objective world they can have no universal meaning.⁵

C. *The Club*

While many lawyers might feel discomfort in departing from the traditional diction, usage, and constructions of legal language, they also derive a sense of comfort and identity from the language that marks them as a tribe unto themselves. They belong to one of the largest clubs in American society, a group that uses language and technicality to distinguish itself from the public. One has to work hard to be admitted to the training ground and even harder to be accepted into the inner sanctum. The status of the profession comes from its power: "And yet, no matter what else may be said of him, the lawyer, in his field — even as the physician and the priest in theirs — remains the last resource of other men and women."⁶ Its livery is its language.

4. Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389, 1391 (1984) (footnotes omitted).

5. *Id.* at 1391-92.

6. Lavery, *supra* note 1, at 277.

There are practical, historical reasons for the existence of much of the “legal sound.” In many cases the reasons have faded away but the language remains. For example, the familiar legal “doubling” (e.g., “cease and desist,” or “made and entered into”) probably began as a result of the translation of British law from Anglo-Norman (“Law French”) into English. It was feared at the time (early sixteenth century) that certain terms of art would be reexpanded in definition and lose their peculiarly legal significance by their translation into English. Where this was feared to be the case, the translation was made but the Anglo-Norman term was retained as well, thus producing the doubling effect. We no longer need have the fear, but we still have the doubled terms. (Can one “cease” from doing something without “desisting” as well?)

Some lawyers will defend the retention of the doubled terms by recourse to a new fear — that some judge somewhere will insist that neither “cease” nor “desist” by themselves will have the same hallowed legal effect of “cease and desist.” Personally, I cannot imagine such an event; I suggest rather that lawyers have grown accustomed to their sound and are pleased with the way it sets them off from all others. It will be as difficult in some circles to dispossess the profession of its sound as it was for certain religions to abandon the original languages of their liturgy in favor of the vernacular.

D. *The Hostile Audience*

The lawyer’s rhetorical task is arguably among the most difficult because, unlike other professionals, lawyers are constantly writing for hostile audiences. When a doctor writes an article for a journal or a report on a patient, the audience tends to spare no pains in trying to interpret the prose as the author intended. But when a lawyer writes, who is the audience? — a senior partner, who will play the devil’s advocate in order to ensure its combat readiness; a judge, who will subject it to comparisons with the brief on the other side; or, worst of all, an opposing counsel who, fully cognizant of what the author intended, will spare no pains to demonstrate that it might not, indeed cannot, mean that very thing. This is a great problem, not to be underestimated. No wonder lawyers are so willing to repeat themselves, to plug small holes that might not even exist, to pile on much more information than the argument requires, and in general to use a shotgun approach (instead of a crossbow approach) to rhetoric.

I would suggest that the main hope for overcoming this substantial problem lies in teaching lawyers structural stylistics. That is, if lawyers can learn where readers tend to look in units of discourse for

(*e.g.*) emphasis, they can fill that slot with their emphatic material, thereby diminishing the possibilities for ambiguity. The same is true for the placement in the sentence of context and action, the placement in the paragraph of the point, and the placement in the document of the thesis. This approach has been used with great success in the last several years by some consultants and at some law schools.⁷

E. *Practical Pressures*

These are several. They all explain in part why lawyers turn out prose that is difficult to read, but they do not excuse it. In order to prepare lawyers to face these pressures, we should be teaching them a great deal more than we do about the language and about writing processes.

The most pervasive practical pressure, especially in large firms, is time. Lawyers are almost always up against a deadline or up against the need to finish with the present problem in order to turn to others. Those needs translate into anxiety about speed and a heightened awareness of the passage of time. (Many a new law clerk, having been for so long a student, has had painful difficulties in adjusting to the requirement of accurately billing each minute of the day's work to the appropriate client.)

These time pressures neither allow for long prewriting processes (at least not without an accompanying sense of great guilt or incompetence) nor encourage patient revision; nor do they foster the kind of fruitful creative fervor experienced by some journalists. Lawyers are regularly producing texts under conditions singularly ill-suited to the production of clear, readable prose.

Add to that the pressures that result from camel creation — that is, from writing by committee. In all large firms, most medium-sized firms, and even many small firms, documents are created by several hands. Sometimes the task is divided into subtasks, each handled by an individual; other times several hands are set to the same problem. In either case the prose may well bounce from one individual to another, then to a committee, then to a senior partner or two, then back to the committee, etc. In large corporations it might travel up and down several rungs of the corporate ladder several times.

Problems arise in such multi-authored prose for two main reasons: (1) It is a hard enough task for any individual to attain a consistent style; without commonly shared principles of rhetoric, it is excruciatingly difficult for a committee to do it. (2) As prose travels upwards to

7. See text following note 42 *infra*.

higher and yet higher authorities, the handgun principle of power sets in — that is, if you have power, sooner or later you will use it just to demonstrate that you have it. A senior partner or a vice-president, unaware of the committee's methods of arriving at the proposed text, will send it back down with *some* changes made simply out of this sense of power or, failing that, out of a sense of duty. All too often the final prose product will suffer from incohesions and incoherences, the explanations for which lie in the needs of each of the participants to be heard.

Another significant practical pressure, most often overlooked by the antilegale literature: writing on legal subjects is usually immensely difficult. Combine the nature of the substantive material with the complexity of the concepts, the hostility of the audience, and the time pressures of production, and which of us would 'scape whipping? It is always easier to note the flaws in someone else's work than to produce that revised quality from scratch. While we criticize legalese — justifiably and needfully — let us not condescend unnecessarily. There but for the lack of a law degree go most of us.

The combined effect of these practical pressures is especially overwhelming for lawyers who write (as far too many of us tend to write) by ear. With Time's winged chariot hurrying near, the committee chattering, the boss complaining, and the clients whimpering, one cannot *hear* very much. Again, the solution must lie in the mastering of *methods* of argumentation and *principles* of style.

F. *The Toll Booth Syndrome*

A great many lawyers misconceive the nature of the writing task. In this the lawyer is not alone; any writer who neither enjoys the writing process nor is uplifted by the intellectual challenge presented may suffer from it as well. I call it the Toll Booth Syndrome.

Picture the following as vividly as you can. You are a lawyer. You arrived at the office in New York at 6:30 a.m. to work on the big case. You have worked straight through to 9:00 p.m. You have redeemed your car from the parking lot and have fought both the traffic and the incipient inclement weather up into Connecticut. You approach a toll booth. The sign says "40¢ — Exact Change Left Lane." You search in your pocket and come up with a nickel, a dime, and a quarter — all the change you have. You enter the Exact Change lane. In front of you is a shining red light, but no barrier; to the left of you, the hopper. You are tired and irritable as you roll down the window, the wind and rain greeting you inhospitably. You heave the change at the hopper. The quarter drops in; the dime drops in; but the nickel

hits the rim and bounces out. What do you do? Do you put the car in park, get out, and grovel in the gravel for your nickel? Do you put the car in reverse and change to another lane where a human being can make change for your dollar bill? No. You go through the red light.

You go through the red light, I would argue, because of a misconception of the purpose of tolls. At this anxious moment you are not feeling that before you continue on that road the government must receive from you 40¢, with which it will keep the roads in good repair and pay the toll booth operators. Instead you believe that before continuing on that road you must be dispossessed of 40¢. You have been dispossessed of 40¢. It is therefore moral, if a bit risky, for you to plunge further into the Connecticut darkness.

That is the misconception lawyers (others too, but especially lawyers) have concerning the writing task. So much work has preceded the actual writing: You may have interviewed the client, discussed the case with your associates, delegated tasks to your assistants, done the research, conceived of the strategies, taken the depositions, and organized the entire project. The thinking is done; now you have only to *write* it. You cast all of your knowledge on the subject out of your mind onto the paper, not caring if the audience will actually receive your 40¢ worth of wisdom, but caring only that you unburden yourself of it. It's all out there — on the paper, in the gravel — and that is what matters.

Of course that is *not* what matters. The writing process is not to be separated from the thinking process; it *is* a thinking process. That concept, commonplace enough in English Departments nowadays, has not reached the majority of our lawyers. They get all the relevant information down on the paper; they refer to all the possible issues and suggest a number of different approaches and counterapproaches; and all the while they have no perception of how a reader not already knee-deep in the case will be able to wade through it all.

G. *The Lure of Money and Power*

In *Woe Unto You, Lawyers!*, Fred Rodell thunders:

In tribal times, there were the medicine-men. In the Middle Ages, there were the priests. Today there are the lawyers. For every age, a group of bright boys, learned in their trade and jealous of their learning, who blend technical competence with plain and fancy hocus-pocus to make themselves masters of their fellow men. For every age, a pseudo-intellectual autocracy, guarding the tricks of its trade from the uninitiated, and running, after its own pattern, the civilization of its day.⁸

8. F. RODELL, *WOE UNTO YOU, LAWYERS!* 3 (1939); see also Benson, *supra* note 2, at 531.

There are no greater powers than those of creation and dissolution. Lawyers have both, on a daily basis, because of the nature of their relationship to language. They create binding relationships between people where none existed before — a God-like task, making something out of nothing. They create whole entities (corporations) by the Adam-like power of naming. Those powers remain with the lawyers as long as nonlawyers cannot pierce the veil of legal language.

Many people today, and presumably in the past, have seen through this mystical veil and perceived the secular nature of law. . . . What we have to consider is that, in essence, law is little different from political policy, administrative decision and military strategy. In itself therefore it would be seen for what it is, a form of political control, without much difficulty. Now clearly such transparency is contrary to the interests of ruling classes who always want to give their directions some universal legitimacy. It is also contrary to the interests of lawyers who need special status and esoteric services in order to continue — who would pay so much for mere political administrators?⁹

Law professor Robert Benson cites the above passage and confesses:

One need not be a neo-Marxist to find these social theories plausible. A noted Cambridge law professor once observed matter-of-factly: "For lawyers language has a special interest because it is the greatest instrument of social control." An American law professor has boasted about the fact that "[a] common vocabulary and style enable lawyers to recognize one another as lawyers and to distinguish themselves collectively from laymen The immense, baffling, and obscure vocabulary of the law is an important weapon in the hands of the established lawyers and professors for asserting superiority over the student." Every lawyer's personal experience bears witness to the fact that legalese can be a weapon. Is there a lawyer among us who has not employed the magic of legal language as a psychological device to dominate some lay person? I confess I have done so many times — particularly when dealing with recalcitrant bureaucrats and corporate clerks — and I have frequently seen my comrades-in-law do the same. If there breathes a lawyer who is free from this taint, I shall immediately nominate him or her to receive the next Saint Thomas More Award from my law school.¹⁰

Along with that power comes the pay. In teaching lawyers how to clarify their language, I have often heard them express the fear that if their prose were to lose its arcane, ponderous, and technical qualities, their clients would be likely to protest the stunningly high costs incurred. For those who are not up on such things: In 1987, lawyer's fees of \$200 per hour are quite common in many places, and \$400 per

9. C. SUMNER, *READING IDEOLOGIES: AN INVESTIGATION INTO THE MARXIST THEORY OF IDEOLOGY AND LAW* 275 (1979).

10. Benson, *supra* note 2, at 530 (quoting Williams, *Language and the Law* (pt. 1), 61 L.Q. REV. 71, 71 (1945), and Friedman, *Law and Its Language*, 33 GEO. WASH. L. REV. 563, 567 & n.16 (1964)).

hour is by no means out of the question. Starting positions in Wall Street firms now offer upwards of \$70,000 a year to the new graduates of law school. Clients who pay such prices, the argument runs, want to see their received value in terms of the degree of difficulty of the product. It is annoying when immoral arguments find their basis in truth.

Here, perhaps, is the core of the matter: It is in the lawyer's self-interest to keep legal prose unreadable. If money, power, and prestige are all protected by keeping the layperson confused and awestruck, why should any lawyer voluntarily opt for clear, concise, communicative prose? I can see only two possibilities: (1) if governments make it illegal to be obscure, then lawyers will be forced to clean up their prose; and (2) if lawyers discover that they can make a profit from the time saved in reading and writing clear prose, then they will accept the idea as a new professional challenge. Both projects are under way.

H. *Lack of Linguistic Awareness*

A lawyer who has risen above all of the problems already mentioned may still be a poor writer. That is, the lawyer who knows which bits of legal language are essential to maintain and which are not, who has learned to disdain the clubbiness of linguistic obfuscation, who has learned to deal with the hostile audience and the practical pressures, and who is able to keep in mind at all times both the right of the audience to straightforward communication and the need of the audience to receive that which it gets thrown — that lawyer will still write poorly if he or she has not somehow (either by intuition or education) become expert at fitting the substance of the thought to the linguistic structures and expectations that are inescapably part of the English language.

Some people pick this up by ear; they "hear" what good writing sounds like and are then able to imitate what they think is style (but is more often structure) in their own prose. Others pick this up (with considerably more stress on the lower lumbar region) through education. Unfortunately, those two groups combined do not represent a large percentage of the populace. Few read enough good prose to have an opportunity to use whatever ear they might have been born with; not many more have been lucky enough to study writing under a pedagogy that is effective for those without the good ear.

II. WORKING ON THE PROBLEM: ATTACKS ON SEVERAL FRONTS

With all the above problems and abuses, there is still at present a sense of hope in the air.

- Public concern for the problem has never been more evident. There is actually a "Plain English movement," which has managed to foster several successful attempts to have "Plain English" legislation passed in many states.
- There are signs of progress in education: Some effort is being made to awaken pre-law students to the need to study writing more seriously than their classmates; greater efforts are evident at the law school level, though few schools are claiming successful breakthroughs; and both law firms and state bar associations are investing substantial sums in Continuing Legal Education programs in writing.
- The Law has recently come to be perceived by Humanists as an excellent field for cross-disciplinary attention. Particularly interesting work is being done in the new fields of "Law and Literature" and "Law and Language."
- Academic and intellectual interest has been sparked. The number of books and articles on the subject has been increasing dramatically since 1960.

A. *Manifestations of Public Concern*

In recent years we have heard a great deal from the "Plain English movement," a somewhat organized, already effective, partial response to the problem of unreadable legal writing. It is difficult to date its inception, because the critics of legalese have been legion through many centuries now. Shakespeare's "The first thing we do, let's kill all the lawyers" (spoken by a butcher turned revolutionary) was not the first outcry by any means.¹¹ At least as early as the thirteenth century there were provisions for citizens who lived far from London (and therefore far from most lawyers) to write their legal complaints in plain language instead of using the proper legal forms and formulas. (These complaints were called Bills in Eyre, and they give remarkable insights into medieval English life that the far more formal writs do not.)¹²

Neither are we the first to try to do anything about the situation. In 1566 the judge in *Milward v. Welden*¹³ was incensed at a lawyer's having expanded what should have been a short pleading to 120 pages. He ordered a hole cut in the middle of the document, through which the offender's head was thrust; this interlocking pair was then to be led around Westminster Hall during court sessions as an example to future padders and expanders. Thirty-four years later Sir Francis Bacon

11. W. SHAKESPEARE, 2 KING HENRY VI, Part 2, IV, ii, 76 (G.W. Williams ed. 1967).

12. For an excellent essay on the Bills in Eyre and an interesting selection of them, see 30 SELECT BILLS IN EYRE, A.D. 1292-1333 (W. Bolland ed. 1914).

13. 21 Eng. Rep. 136 (Ch. 1566).

was able to bring into effect Chancery Ordinance Rule 55 which simplified the punishment somewhat: "If any bill shall be formed of an immoderate length both the party and the counsel under whose hand it passeth shall be fined." Neither of these bold attempts seems to have made a lasting effect on the profession.

Sir Thomas More, Dean Swift, Jeremy Bentham, Charles Dickens, and a host of others have attacked lawyers for their language in the plainest and sometimes most acrimonious terms. (The lawyer has for four centuries been so much a stock character on the stage as not to require a proper name; "the lawyer" will do.) Bentham in particular had at the lawyers for "poisoning language in order to fleece their clients,"¹⁴ calling the resulting prose "excrementitious matter" and "literary garbage."¹⁵ In our century Fred Rodell led the way with a whole book on the subject, *Woe Unto You, Lawyers!* (1939). David Mellinkoff followed with two fine books, *The Language of the Law* (1963) and *Legal Writing: Sense and Nonsense* (1982), filled with debunking good sense and scholarly evidence.

We have gone beyond complaining to actually doing something about the problem. Minnesota led the way in 1977, shortly to be followed by Maryland, by insisting through statute that insurance contracts be written in language the average consumer of insurance contracts could understand. For all their predictions of disaster, many insurance companies have done a fine job of it, without suffering any long-term ill consequences. In 1978 New York passed a broader law, expanding the requirement to cover consumer contracts in general. As of mid-1986, twenty states¹⁶ had passed legislation requiring readability in insurance policies, and twelve states¹⁷ had yet more generalized laws.¹⁸ These are real victories, not to be underestimated.

But there are problems, even with this high-principled, well-intentioned effort. What exactly is meant by the term "Plain English" in this context? George H. Hathaway, chairperson of the Plain English Committee of the Michigan State Bar, offers the following:

Plain English is the writing style that (1) all legal writing textbooks recommend, (2) the ABA Committee on Legal Writing recommends, (3)

14. 5 J. BENTHAM, WORKS 236 (Bowring ed. 1843).

15. 3 *id.* at 260.

16. Arizona, Arkansas, Connecticut, Delaware, Florida, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Texas, Virginia, Washington, and Wisconsin.

17. Arkansas, California, Connecticut, Hawaii, Kentucky, Maine, Minnesota, Montana, New Jersey, New York, Oregon, and West Virginia.

18. Information from the Document Design Center, American Institutes for Research, Washington, D.C.

all law students study in their law school course in legal writing, and (4) many law students and lawyers give lip service to, but often ignore for the rest of their law school and entire legal careers.¹⁹

The combination of hyperbole and wishful thinking exhibited in (1) through (3) here suggests one of the problems with the movement: There seems to be a belief that such a writing style can actually be identified and that we all could learn it from existing sources and practice it by the sheer will to do it. The facts are that (a) most writing textbooks recommend what the product should look like without offering helpful advice on how to achieve it, and (b) a great majority of the legal writing courses in our law schools are poorly taught, reluctantly taken, undercompensated on all parts, and therefore abject failures. Plain English, I would argue, is not quite as available a commodity as Mr. Hathaway suggests; nor, in the grey area cases, will we be sure to know it when we see it. Foes of plainer English will eventually attempt to use this imprecision to impede the progress of reform.²⁰ It behooves us to make sure that we prepare a valid defense.

Mr. Hathaway goes on to name "[t]ypical elements of Plain English":

- (1) a clear, organized, easy-to-follow outline or table of contents,
- (2) appropriate captions or headings,
- (3) reasonably short sentences,
- (4) active voice,
- (5) positive form,
- (6) subject-verb-object sequence,
- (7) parallel construction,
- (8) concise words,
- (9) simple words, and
- (10) precise words.²¹

One can only be pleased with the general intent of such attempts at definition; however, some of the details viewed more closely leave something yet to be desired.

(1) A clear outline or table of contents: Often of great help. However, the worst-offending legalese document imaginable might still boast a stunningly clear table of contents.

(2) Appropriate captions or headings: indeed. But once again, many offenders do well in this category.

19. Hathaway, *An Overview of the Plain English Movement for Lawyers*, 62 MICH. B.J. 945, 945 (1983).

20. I wonder, for example, how the courts will handle the cases of conflicts of laws arising from Plain English statutes. What is to be done when the same J.C. Penney layaway plan is deemed "Plain English" by a court in Ohio but "Legalese" by a court in Arizona? On whom will the courts call? And what will be the consequences for future drafters?

21. Hathaway, *supra* note 19, at 945.

(3) Reasonably short sentences: a real problem. Much of the Plain English movement's activity has been geared towards getting lawyers to write shorter sentences. Readability tests, especially that of Rudolph Flesch, have been used to argue that since sentences which contain more than twenty-nine words are hard to read, then lawyers should not write many sentences over twenty-nine words. The logic here is false.²² If sentences with more than twenty-nine words are often harder to read, it is more than often because they were written by people who did not know how (in Joseph Williams' words) to "control the sprawl."²³ Simple declaratory sentences can be kept under twenty-nine words with little difficulty. But lawyers spend much of their writing effort trying to articulate the connection between two simple declaratory thoughts. They cannot afford to juxtapose "here's a fact" with "here's a legal concept" and expect an impartial judge or hostile opposing counsel to supply the appropriate logical process which will lead to the conclusion desired. In order to link the facts to the concept, or the concepts to other concepts and therefore to a specific conclusion, the lawyer must articulate the connection; that necessarily produces longer sentences. The problem is not how to make lawyers write shorter sentences, but rather how to get them to manage long sentences far better than they now are able. In the process, the redundancies, the loophole plugs, and other assorted "fat" will naturally be trimmed away. The typically long legal sentence is a manifestation of our lawyer's rhetorical inabilities, not its cause.

(4) Active voice: trouble here. Just because the passive voice is grossly abused by most professional writers, legal or otherwise, we have no cause to exclude it as a rhetorical strategy. Authoritarian powers (most high school teachers, some governments, a few religions) who condescend to their populations as indiscriminating children find it easier to forbid all of an activity than to instruct the children how to choose between good and bad. If 85% of all passives are bad passives, then ridding prose of all passives will be a net gain of 70% (the 85% gain minus the 15% loss of good passives). We ought to shoot for 100% instead.

If agency is unknown, and that particular lack of knowledge is not

22. I do not by any means intend by this simplification to deny totally the worth and interest of the work done with readability formulas. But the final products of their numbers can be used abusively by a reformer who has not taken the time to explore all the ramifications of the studies. For an intriguing summary of the applicability of these formulas to the problem of legalese, see Benson, *supra* note 2, at 547-58.

23. Although not written expressly for lawyers, J. WILLIAMS, *STYLE: TEN LESSONS IN CLARITY & GRACE* (2d ed. 1985) remains the single best text for lawyers to read. Its methodology is ideally suited to the kinds of complexities spawned by legal problems.

the point in question, the passive does well. ("The note was left before 4:00 p.m.") If agency is known but would be intrusive if articulated, the passive does well. ("Each horse will be tested for drugs at the end of each race.") If the passivity of a person is the point to be emphasized, then the passive does well. ("The Senator was led by his theory to the following ludicrous conclusion: . . .") And more.

It is true that lawyers tend more than most to hide agency by recourse to the passive. It is also true that because of this, lawyers have learned to "hear" legal arguments as being predominantly set in the passive, and therefore by imitation to diminish yet further the use of the active. However, we should not let the fear of abuse lead us to do away with such a useful rhetorical device; instead we need to teach people when and how to use it effectively.

(5) Positive form: not always possible, but where possible, usually better.

(6) Subject-verb-object sequence: ??. Nearly every grammatical English sentence that is not a question proceeds syntactically in this order. Native speakers of German have a problem now and then, and some poets (like Milton) delight in moving things around; but nearly all lawyers write nearly all their sentences, good ones and bad ones, in the subject-verb-object sequence. There is no problem here.

(7) Parallel construction: a good technique to master. Of course, the construction by itself has no virtue. It works well only where the substance is parallel in nature. On occasion the substance might be antithetical in nature, which would better be served by chiasmus (xyyx) than by parallel construction (xyxy). Such exceptions aside, a greater awareness and skillful use of parallel construction would help to remedy certain problems with legal prose.

(8)-(10) Concise words: they would help;

simple words: yes, but only where simplicity is attainable without sacrificing accuracy and depth;

precise words: certainly.

But to concentrate on the most evident manifestations of legal prose (here the jargon) is to miss that far more destructive force of dilapidated structure. If all the units of discourse in an atrocious legalese document were restructured so that the relationships between the various words, actors, acts, and concepts were clearly delineated, then the presence of elongated and complex words would matter relatively little. (The restructuring would necessitate the choosing of precise words.) At the least, we would know quite specifically what questions to ask — *e.g.*, "What is meant by 'bailee'?"

My criticisms here are aimed not at the intent of the Plain English

movement, but at the lack of sophistication of some of its linguistic precepts. Our gratitude to those involved in the leadership of the movement should not be allowed to render us uncritical. We must take care not to treat the symptoms in place of the diseases, and we must not neglect a prime source of the problem — the widespread absence of effective programs for teaching the art and craft of clear writing to law students and lawyers.

We should also take a quick look at the offerings of the allegedly responsible opposition. Their battle has not been waged much in print. The practitioners of legalese simply refuse delivery; they do not often attempt to justify their refusal on paper. An exception is Ray J. Aiken, who responded to John Hager's 1959 article, *Let's Simplify Legal Language*,²⁴ with his own 1960 article, *Let's Not Oversimplify Legal Language*.²⁵ (In 1960 it was still respectable to defend legalese in public.)

Aiken took the high road, defending the complexity of legal language with great pride and condescension: "[T]o cry for simplification in a te[c]hnical field is much like criticizing D[a] Vinci because his paintings so little resemble those of Al Capp or Grandma Moses."²⁶ He claimed he would "feel a bit foolish" instructing his class in the doctrine of "the thing speaks for itself" instead of the doctrine of *res ipsa loquitur* (Latin for "the thing speaks for itself").²⁷

He offered eight improvements. Some are straightforward and uncontroversial, like requiring law students to buy dictionaries. Some boomerang: those who wish to become lawyers should study foreign languages, not to understand language better, but to be able to substitute foreign words for English words whenever the foreign word is more precise. Some are sheer bravado: that it be made "a professional misdemeanor, publicly punishable as such by the organized profession, for any lawyer to utter any document which flagrantly abuses recognized principles of composition, or demeans the high standard of literacy which the legal profession has traditionally sought to uphold."²⁸ (This sanction is to be visited not only upon the obfuscators, but also upon those who oversimplify.) But the telling "improvement" brings us back to the issue of power by and over language:

24. Hager, *Let's Simplify Legal Language*, 32 ROCKY MTN. L. REV. 74 (1959).

25. Aiken, *Let's Not Oversimplify Legal Language*, 32 ROCKY MTN. L. REV. 358 (1960); see also Morton, *Challenge Made to Beardsley's Plea for Plain and Simple Legal Syntax*, 16 CAL. ST. B.J. 103 (1941); Friedman, *supra* note 10; Steuer, *Legal Vocabulary — Its Uses and Limitations*, PRAC. LAW., Apr. 1969, at 39.

26. Aiken, *supra* note 25, at 362.

27. *Id.*

28. *Id.* at 364.

5. That no person unlicensed in law be permitted to draft, or to advise another respecting the proper interpretation of any will, conveyance, trust instrument, formal contract, law, ordinance, or government regulation.

To this he adds the following footnote:

It might be supposed that this is but a slight extension of present unauthorized practice regulations. It is intended, however, to obviate the problem which so greatly concerns Professor Hager — that the non-lawyer cannot interpret the law, or the lawyer's document. I would discourage the attempt of the non-lawyer to do so, thereby saving him his inevitable failure.²⁹

A quarter of a century later, no one is willing to go on the record with these sentiments; but, in my estimation, they still command the majority opinion.

A somewhat more sophisticated attempt to stem the tide of the Plain English movement is David S. Cohen's lengthy reply to Carl Felsenfeld's comments in the published panel discussion, *The Plain English Movement*.³⁰ Cohen expresses five serious concerns:

[1.] [P]lain English contracts and legislation are not the only vehicles for achieving increased information access in consumer contracting. . . .

[2.] [B]ecause plain English contracts use the process of market transfer to encourage information flow, the result may be a disproportionate level of benefits being received by a limited, select group of consumers.

[3.] [P]lain English legislation . . . has focused on simplicity of language which may not bring about a concomitant reduction in the complexity of contracts. . . .

[4.] [T]he plain English movement . . . reintroduces a concept of contract as a bilateral *event* rather than a multilateral process, focusing judicial attention on a discrete, simple document, with the possible result that the reality of consumer decision-making may become less relevant to a determination of legal rights. . . .

[5.] . . . a cynical but realistic appraisal of the likelihood that any amelioration of consumer contracts will come about as a result of the plain English movement. The conceptual complexity of a great deal of contractual information, the difficulty of inter-contract comparisons of the value of various mixes of price and non-price terms, and the contracting process itself, persuade [Cohen] that all that will result [from the plain English movement] is the transfer of paper bearing simple language.³¹

I find Cohen's arguments highly imaginative and worth contemplating; but in the end they seem to me based on the straw man argument that the Plain English movement intends to cure all contract language ills. His final cynicisms are likely to have the effect either of clinching his arguments or of discrediting his motivations entirely:

29. *Id.* at 364 & n.17.

30. *The Plain English Movement: Panel Discussion*, 6 CAN. BUS. L.J. 408 (1982).

31. Cohen, *Comment on The Plain English Movement*, 6 CAN. BUS. L.J. 421, 422 (1982).

For the majority of consumers, plain language contracts may simply make us feel better. Feeling better may be valuable, indeed that may be all that we are paying for in contracting for consumer goods. If that is so, then it makes little difference if we derive pleasure from the good or the contract language. And if feeling better is worth the price, then the transaction — the purchase of the psychological satisfaction of believing that we know what we are doing — may be efficient.³²

There has recently been a most interesting attempt in print to combat the rising forces of antilegalese critics — Richard Hyland's *A Defense of Legal Writing*.³³ Although more articulate and intellectually grounded than most of the articles in the field, it nonetheless seems *not* to produce what its title implies (a defense of legal style), but rather to mount an attack on the impracticality of some of legal style's main detractors. Hyland spends what seems to me a disproportionate amount of time rebutting those who suggest that lawyers simplify their language and imitate Hemingway — a suggestion I do not find as omnipresent in the literature as he does. But eventually he abandons this tack and himself joins what he identifies as a minority of the critics of legalese, arguing that poor legal thinking has indeed produced a great deal of poor legal writing. "When lawyers do not understand the structure of their argument before writing the final draft, their writing will be loose and flabby and the easy prey of syntactical and other grammatical errors. All the rules of Plain English will then not prevent passive voice and dangling modifiers."³⁴

Hyland's partial equation of bad writing with bad grammar is unfortunate ("the easy prey of syntactical and other errors"); but elsewhere he makes the sounder point that shallow intellectuality in the legal profession is tending to produce shallow thought, which is in turn manifested by (not merely productive of) poor writing.

The problem with legal writing is not that there are too many "herein-befores" and not enough metaphor. The problem is that lawyers cannot write clearly unless they can think clearly, unless they can recognize and construct a convincing legal argument — unless, in other words, they understand the structure of the law.³⁵

His penultimate paragraph:

I do not hold much hope for the future of legal writing in America. Because few sources remain for the widespread infusion of conceptual understanding into legal education, I suspect that each generation of lawyers will write at least as badly as its predecessor. Legal writing will

32. *Id.* at 445. Professor Cohen's arguments may also be undercut by his own highly nominalized and often turgid writing style.

33. Hyland, *A Defense of Legal Writing*, 134 U. PA. L. REV. 599 (1986).

34. *Id.* at 620-21.

35. *Id.* at 621.

become increasingly technocratic as prescriptions generated by unexamined premises are continually applied to misperceived situations.³⁶

Thus the author of *A Defense of Legal Writing* ends with a despairing comment far more cynical than most of the opinions he began by attacking. More damaging testimony would be hard to produce.

Civil and civilized readers owe a great deal of thanks to the energetic and farsighted people who have led the Plain English movement. The Document Design Center of the American Institutes for Research, under the leadership of Janice Redish, Veda Charrow, and others, has done a great deal of good work on the structuring of governmental and technical documents. Because of the hard work of local bar associations and state legislatures, many insurance companies, landlords, banks, department stores, and others that deal regularly with the populace at large now must say what they mean in a way that the meaning can be easily perceived. The fear of having something put "in writing" has been transferred in part from the purveyee to the purveyor. (As a result there is a growing tendency among lawyers to communicate with clients orally instead of by letter.) Ever since Connecticut legislation was passed in October of 1978, no insurance company can afford to be seen walking around Hartford with its head sticking through a hole in a 120-page document. Plain English is beginning to have an effect in these particularly public areas; but now that the law says we must write in Plain English, we have to educate our new lawyers so they will be able to do so.

B. *Efforts to Improve the Teaching of Writing to Lawyers*

1. *Writing Courses for Pre-Law Students*

I find it curious that relatively so little effort has been made to train pre-law students with advanced composition courses. One would think this was the ideal opportunity to deal with some of the questions of language that seem to law students an unnecessary burden added to legal studies. Yet there are few articles on the subject³⁷ and only one textbook produced specifically for this purpose.³⁸

36. *Id.* at 625 (footnote omitted).

37. See Gopen, *A Composition Course for Pre-Law Students*, 29 J. LEGAL EDUC. 222 (1978); Hirsh, *Writing About the Law: A Composition Course for Pre-Law Students*, 2 J. BASIC WRITING 82 (1980); White & Brand, *Composition for the Pre-Professional: Focus on Legal Writing*, 27 COLLEGE COMPOSITION & COMM. 41 (1976).

38. See G. GOPEN, *WRITING FROM A LEGAL PERSPECTIVE* (1981). A writing text that can be adapted for an undergraduate course is N. BRAND & J. WHITE, *LEGAL WRITING: THE STRATEGY OF PERSUASION* (1976). A fascinating text, though significantly harder to adapt to such a writing course, is J.B. WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (1973).

Sources of hope for future discussion of the problems and possibilities are the Association for the Teaching of Advanced Composition (ATAC), founded in 1982, and the pages of the *Journal of Advanced Composition*.

Stranger still than this silence was the structure of the nation's leading (perhaps only) pre-law major program, at Rice University. The program was founded about ten years ago, lived a vibrant, intriguing life, and presently is being dismantled for lack of faculty availability. (Apparently the student interest is still high.)³⁹ The program offered every area of pre-law study imaginable with one exception: there was no composition course. In the light of statements from law school deans across the country that the most important pre-law abilities to develop are those of critical reading and critical writing,⁴⁰ this absence of a writing course from the Rice program remains a mystery.

Schools that have offered special composition courses for pre-law students (Illinois, Utah, Wayne State, Loyola of Chicago, amongst several others) have generally found them well received and oversubscribed. Here is clearly a fertile area for expansion.

2. *Writing Courses and Programs at Law Schools*

Here much has been written about, tried, discarded, reinstated, and reconsidered. The main strivings have been towards discovering the perfect structure for law school writing instruction. The results have not been encouraging, with a few notable exceptions. Many courses have been established, but few programs have resulted.

The typical nonprogram in writing at law schools is shaped something like this:

- (1) First year
 - (a) Fall semester: Legal Methods, Research, and Writing (one or two credits, compared to three for other courses). Much time spent on tasks other than writing; instructor either a part-time adjunct not trained in writing pedagogy or an upper-class student, equally untrained.
 - (b) Spring semester: Moot court experience (one credit or no credit), for which a brief is written; criticism offered by upper-class students.
- (2) Second year
Nothing.
- (3) Third year
Either
 - (a) One twenty-page paper written in conjunction with a semi-

39. Telephone interview with Professor Baruch Brody, Rice University (June 19, 1986).

40. Letters from 72 law schools to the author (on file with the author).

nar; little or no attention paid to the writing process; revisions rarely allowed; or
b) Nothing.

Even in schools where the first-year program has some efficacy, students tend to lack reconfirmation of their newly gained skills because of the lack of later writing opportunities. In light of the importance to lawyers of controlling the language and the particular rhetorical difficulties that confront the legal profession, this absence of care and of competence in the teaching of writing at law schools is stunning. Absolutely everyone at these schools complains — the students of having to take a course undervalued and poorly taught, the instructors of not knowing how to engage their students and manage the task effectively, and the administration of having to schedule, staff, and pay for the whole affair.

As one might expect, the major variations (and many of the published articles) concern who will do the teaching — upper class law students? part-time faculty (either lawyers who have an interest in teaching or English teachers who cannot find other employment)? full-time faculty hired specifically for the purpose? or regular law school faculty? These variations are explained and well-documented in two review articles.⁴¹

A few of these variations in structure have achieved a certain measure of success. Some law schools, like John Marshall (Chicago) and the University of Puget Sound, have added writing requirements in the second year. Others, like Harvard and Indiana, offer elective writing seminars with great regularity, the popularity of which is due in great part to the skills of the instructors, Steven Stark and Perry Hodges respectively, who have taught there for several years and have established substantial reputations as part-time members of the faculty. Significantly, this sense of permanence (or at least continuous presence) seems to be the one factor that distinguishes attempts like these that work from those that do not.

Through the stability of a sense of continued presence, Notre Dame has found a successful formula for a course, if not yet for a whole program. Six years ago it hired Theresa Phelps, an English Ph.D. with no legal training, to run a legal writing course that was, for the first time, to be separate from the legal research and methods instruction. After two successful years under one-year contracts, Phelps was offered a tenure-track position to teach legal writing in the re-

41. See Boyer, *Legal Writing Programs Reviewed: Merits, Flaws, Costs, and Essentials*, 62 CHI.-KENT L. REV. 23 (1985); Gale, *Legal Writing: The Impossible Takes a Little Longer*, 44 ALB. L. REV. 298 (1980).

quired first-year course (160 students), to offer a Law and Literature elective on the upper levels, and to be available for individual tutorial six hours weekly. Notre Dame thus legitimized instruction in writing by establishing a potentially permanent spot on their faculty for an appropriate specialist. Professor Phelps has now developed two substantial volumes of legal materials for her writing assignments and, through her own studies and directing a staff of teaching assistants, has garnered enough legal knowledge to put her safely ahead of her students. She has proved that a J.D. is not necessary to success as a teacher of legal writing. She is also one of a new breed of professionals proving that one now can make a career of legal writing.

To my knowledge, only one law school in the country has been bold enough to do what logic and sound pedagogy demand — to implement a three-year writing requirement for all law students. That school is Chicago-Kent, affiliated with the Illinois Institute of Technology. The director of the program is Ralph Brill, former Associate Dean and former Acting Dean — in other words, a person of stature in the school, no underpaid “specialist” invited from the outside and given a part-time salary and half an office.

In their first year at Chicago-Kent, students take a two-semester writing course, three hours each term, in which they learn to do research, to write memos, to revise effectively, to construct appellate briefs, and to argue orally. Of the three memos assigned in the Fall and the twenty-five-page brief and twenty-page law review type article assigned in the Spring, all but one undergo substantial revisions. These courses are taught by nine full-time instructors, most of whom hold the J.D. and all of whom are paid substantially more than a new Ph.D. in English (although a bit less than a new law professor). They are assisted by third-year law students of the highest promise, who help to prepare materials but do no teaching. Classes are limited to enrollments of twenty-two students.

In the second year, all students again take two writing-intensive courses. In the Fall they study legal drafting with local practitioners in real estate law, commercial law, or in general practice. Typically they will be assigned five different documents to draft. The classes meet once a week for two hours, receive two credits, and are limited in enrollment to fifteen. In the Spring term the course is called “Advanced Research” and concerns the law of one of the following five fields: tax law, securities law, labor law, environmental law, or international law. Each student writes two fifteen-page papers and does several smaller research exercises. Classes are again limited to fifteen students and are taught either by local practitioners or by full faculty.

The third-year writing requirement can be fulfilled either by taking an independent study with a faculty member (twenty-five page paper, several drafts, one or two credits) or by taking one of a number of seminars (same length paper, plus oral presentation of material, two credits).

Reports on this program are uniformly positive. It owes its success, it seems, to the following: (1) The directorship is in the hands of a respected senior faculty member; (2) full credit is given for student effort at every stage of the requirements (to a maximum of eleven credits total); (3) much of the instruction is done by full-time faculty, some of whom specialize in teaching writing; and (4) over a quarter of a million dollars is spent on this instruction yearly. For its pains and its money, Chicago-Kent has clearly profited in the following ways:

1) The school has increased its visibility and its reputation, some Chicago firms preferring to hire Kent graduates over others "because they know how to write";

2) The students graduate with the experience of having written a great many different kinds of legal documents, of having had them scrutinized by academics and practicing professionals alike, and of having the opportunity through revising papers to gain confidence in their ability to handle professional prose;

3) Many of the students who act as teaching assistants are able to find opportunities teaching legal writing at other schools;

4) Many of the adjunct faculty continue on to full-time teaching positions elsewhere.

This is a model that works and that should be imitated by others.

From the few successes we have seen to date, it appears that success in constructing legal writing programs remains a question of cash and credit. Certain elements are required for a writing program to work at a law school:

1) Sufficient money must be expended on competent faculty specialists (that is, on people trained or experienced in the teaching of writing);

2) Sufficient credit must be given to students for their labors to allow them to expend as serious an effort on improving writing as they do on learning Torts or Trusts or Tax law;

3) A certain amount of writing instruction must be made available, preferably required, in all six terms of law school, not just in the first half of the first year;

4) Perhaps most importantly, a consistent methodology must be adopted by the program as a whole, so that students of any one section or year may talk intelligibly with any faculty member and all other students about the standards of cohesive and coherent prose.

“A consistent methodology”: perhaps it is the consistency that is essential here, the methodology being an orderly way of achieving it. Cunning writers assess their audience before adopting a tone and a strategy. Students are forced by their role in life to be amongst the most cunning of writers (whether or not they are the most capable). Bright undergraduates spend the first half of any course figuring out what that particular teacher wants and the second half of the course producing it. The subtle but pervasive cynicism in our students (which often develops into a straightforward anti-intellectualism) stems in great part from their perceiving their education as a series of audience-detection problems. For the cause of that perception we have but to consider our own peevish idiosyncracies concerning their writing.

It may or may not be too much to expect an entire faculty of an undergraduate college to agree on how to approach the criticism of written work. (Programs christened “Writing Across the Curriculum” are now in the process of trying to affect this at many institutions.) It should not be too much to expect a law faculty to give it a whirl. Legal audiences are limited in number and character: thorough senior partners, impartial judges, partial administrators and politicians, cautious allies, hostile adversaries, and questioning clients. The genres of legal writing are even more limited in number and character: memos to files and to collaborators, letters to clients and to adversaries, contracts both precise and anti-precise, briefs of persuasion. Surely there must be ways of regarding and manipulating language — which after all is a system of functioning structures — that would most adequately fulfill these particular and somewhat well-defined needs. Even more than the choice of methodologies, it matters that the school adopt a single, consistent approach to the language that will be shared by all the students and encountered in many of the classes. The recent activity in the textbook market provides and promises to continue to provide a number of alternatives from which to choose.

One such methodology has proved extremely effective recently. It is a product of practicality, spawned not in the classroom but in the conference rooms of law firms, corporate legal departments, and governmental agencies across the country. Its four developers are Joseph Williams and Frank Kinahan (of the University of Chicago), Gregory Colomb (of Georgia Tech), and the present author.⁴²

42. Some of this methodology is currently available in print. See J. WILLIAMS, *supra* note 23; Gopen, *Let the Buyer in the Ordinary Course of Business Beware: Suggestions for Revising the Prose of the Uniform Commercial Code*, 54 U. CHI. L. REV. 1178 (1987); Gopen, *Perceiving Structure*, HARV. L. SCH. BULL., Summer/Fall 1984, at 27. A textbook for law schools is forthcoming from Little, Brown & Co. The same publishers will also be releasing in the near future

There is not room enough here to present that methodology in detail; but its guiding concepts can be succinctly enough stated and have been introduced above.⁴³ It has been discovered that readers expect certain things of the structure of any unit of discourse, be it a clause, a sentence, a paragraph, an essay, a memo, a brief, or a book. Readers also have a certain limited amount of energy they expect to have to use for each of those units of discourse. If a writer can learn where readers expect to find the different components of the writer's substance, then the writer can manipulate that substance so that it appears where the reader expects to find it. The results: ambiguities decline, and readers are freed to use their energy for perceiving the writer's substance instead of expending most of it to untangle the writer's structure.⁴⁴

To exemplify this concept briefly, I return to an example quoted near the beginning of this essay. Reconsider the following typically annoying bit of legal prose:

Appellant's attempt to characterize the funds by the method of payment (reimbursement), rather than by the actual nature of the payment misses the mark.

This sentence is difficult, I suggest, not simply because it is "too long" or "wordy" or "awkward" or "unclear." It may be all those things to the reader, but not to the writer. It fails, instead, because it frustrates certain reader expectations of sentence structure, most particularly the expectation that a subject will be followed almost immediately by its verb. Here the subject ("attempt") is separated from its verb ("misses") by nineteen words, almost 80% of the sentence. While the reader waits for the verbal shoe to drop, the reader is not free to concentrate on what seems to be interruptive material. As it turns out, the "interruption" was the whole shooting match. The reader discovers that only in retrospect. Solution: put the subject and verb together, and the structure reveals itself:

Appellant misses the mark in her attempt to characterize the funds by the method of payment (reimbursement), rather than by the actual nature of the payment.

We are now free to see that the important substance of this sentence is the contrasting of the words "method" and "nature." We are

R. WEISBERG, *WHEN LAWYERS WRITE*, aimed primarily at practitioners. Other books of great interest that are currently in print include V. CHARROW & M. ERHARDT, *CLEAR AND EFFECTIVE LEGAL WRITING* (1986), Richard Lanham's two books, *REVISING PROSE* (1979) and *REVISING BUSINESS PROSE* (1981), and David Mellinkoff's two books, *THE LANGUAGE OF THE LAW* (1963) and *LEGAL WRITING: SENSE AND NONSENSE* (1982).

43. See text at note 7 *supra*.

44. These discoveries have been independently confirmed by a great deal of recent work in Psycholinguistics and Cognitive Psychology.

also free to be clear-minded enough to complain that “nature” lacks the helpful example that accompanied “method”; the sentence needs a parallel to “reimbursement” in order to be clear in itself.

Note how an extension of this one principle opened the door for our erstwhile defender of boiler plate prose⁴⁵ to be able to reconsider the value of the supposedly sacred prose. Here is just one sentence of the original boiler plate:

Each of the Partners irrevocably waives, during the term of the Partnership and during any period of the liquidation of the Partnership following any dissolution, any right it may have to maintain any act for partition with respect to any of the assets of the Partnership.

Readers expect objects to follow verbs as closely as verbs are to follow subjects. But here, the verb “waives” is oceans away from its object, “any right” Getting those two close together, the first revision looks like this:

Each of the Partners irrevocably waives any right it may have to maintain any act for partition with respect to any of the assets of the Partnership during the term of the Partnership and during any period of the liquidation of the Partnership following any dissolution.

This new structure frees us to perceive redundancies and to ask questions. Question: Is there anything that one could “partition” that was *not* “with respect to any of the assets of the Partnership”? Answer: No. Question: What are “the assets of the Partnership”? Answer: Only its property. Question: Is there any legal difference in this instance between “maintaining an act for partition” and “partitioning”? Answer: No. The second revision, without altering a jot of the substance, would read like this:

Each of the Partners irrevocably waives any right it may have to partition the property during the term of the Partnership and during any period of the liquidation of the Partnership following any dissolution.

One more question: What period of time is covered by “during the term of the Partnership and during any period of the liquidation of the Partnership following any dissolution”? Answer: all the rest of the life of the partnership. That concept is already implied by the word “irrevocably.” Pare down “each of the partners” to “each partner,” and eliminate the other duplication of “any right” and “it might have,” and the final revision appears:

Each Partner irrevocably waives any right to partition the property.

The solving of the structural problem (verb-object separation) made it possible to notice and deal with the redundancies. It is quite natural

45. See pages 337-38, *supra*.

that repairs to one part of a weakened structure will lead to the discovery of yet other weaknesses.

This methodology has been used by the present author since 1984 in an elective course for second-year and third-year students at the Harvard Law School. The course has been well received, enrolling 125-140 students yearly. Students who take the course one year are eligible to apply for teaching assistantships in the course for the following year. The Moot Court board and the Legal Methods staff also have been exposed to some of the materials. As a result, there are now at Harvard several hundred students who can talk the same language to each other about language and who have had similar experiences in revising their own prose and editing the prose of others.

Law school is an appropriate place for students to encounter particular methods for handling the particularly complex rhetorical tasks they will be faced with as professionals; but until faculty and students alike cease being embarrassed that this "skill" has not been developed at earlier stages, little that is effective will be done. The writing process is part of the thinking process. Students come to law school "to learn to think like a lawyer"; they should also have the opportunity to learn there how best to express those new and complicated thoughts. This calls for far more than the possession of some remedial "skill" or the knowledge of public rhetorical manners. Until recently most efforts have been limited to learning how to *sound* like a lawyer; current stirrings in legal education lead us to hope that help is on the way.

3. *Efforts in Continuing Legal Education*

Law firms, corporations, and governmental agencies have inherited the writing problems faced (or not faced) by the law schools. In recent years there has been a growing awareness that poor rhetorical abilities have been the cause of much wasted time and many inferior legal written products. Bad writing actually costs money. This realization came primarily to the more enlightened companies and firms, who in turn became willing to expend money to solve the problem. This has resulted in legal writing consultants paid for by the private sector and writing seminars sponsored by bar associations.

One major Chicago firm has hired the same consulting team for six years now, each year allowing twenty more lawyers to take the five-day program. The positive effects seem to be expanding by osmosis and increasing geometrically instead of arithmetically. This year's "new crop" of twenty wrote significantly better than their predecessors at the start of the program, yet proved to be no brighter nor more previously aware of principles of good writing. It can be surmised that

these people had been silently influenced in their clearer style by role models in the firm who had previously been through the program. Moreover, there was a healthy sense of how hard it was to write well and how important it was to achieve that result. These lawyers have stopped conceiving of good writing as a skill that should have been learned much earlier and now think of it as a continuing professional challenge.

A new institution has appeared that promises to offer aid to those struggling in the wilderness. The Legal Writing Institute was founded in 1984 during a conference held at the University of Puget Sound. The board of directors now includes people from Puget Sound, Carnegie-Mellon, Notre Dame, Northeastern, Georgia, CUNY at Queens, John Marshall, Queen's University (Ontario), Willamette, Southwestern, Florida, Duke, and New Mexico, appropriately demonstrating the widespread concern. The board's first acts were to provide for a newsletter, a journal, and a second conference. One of the organizers, Professor Chris Rideout from Puget Sound, identifies the Institute's goals:

The goals of the LWI are to provide a forum for exchange of information, through its newsletter; to encourage research and scholarship on legal writing and analysis, through the journal; and to sponsor a national conference, at least bi-annually. If we ever get rich, we can further encourage research through research awards.⁴⁶

C. *Work in Related Fields*

The ties between law and sociology, psychology, psychiatry, business, economics, and history have long been acknowledged and studied; but a new interest in law *as* language has generated some fascinating work in the relatively new fields of (1) Law and Literature and (2) Law and Language. As yet the relationships between these fields and composition have not been explored; those efforts should produce some meaningful and interesting ideas.

The godfather of Law and Literature is Benjamin Cardozo, whose essays and utterances are the most often quoted in contemporary articles in the field.

We find a kindred phenomenon in literature, alike in poetry and in prose.

The search is for the just word, the happy phrase, that will give expression to the thought, but somehow the thought itself is transfigured by the phrase when found. There is emancipation in our very bonds. The restraints of rhyme or metre, the exigencies of period balance, liberate at

46. Letter from Professor Chris Rideout to the author (Apr. 15, 1986). Several issues of the newsletter have already appeared; the first number of the journal appeared in the summer of 1986; and the second conference was held in July 1986. The journal is called *LEGAL WRITING: JOURNAL OF THE LEGAL WRITING INSTITUTE*; the newsletter is called *SECOND DRAFT*.

times the thought which they confine, and in imprisoning release.⁴⁷

The Law and Literature movement has had a guide out of the wilderness in the person of Richard Weisberg, who for many years has organized and chaired Law and Literature sessions at the Modern Language Association meetings, has helped to found the Law and Humanities Institute, and has written much that is interesting in the field. His article *Literature and Law* offers both a summary view of new developments and a helpful bibliography.⁴⁸

1984 saw the publication of three substantial books on the subject: James B. White's *When Words Lose Their Meaning*, Robert Ferguson's *Law and Letters in American Culture*, and Weisberg's *The Failure of the Word*. All three offer ways of using perspectives and theories from one field in interpreting the other. It seems strange that it has taken so long for the legal and the literary to discover their common interests and mutual fascination; but now that it has begun, look for the avalanche.

For the decade from the mid-70s to the mid-80s, much of literary criticism concerned itself with critical theory. Influenced by the work of Jacques Derrida and others, the critics sought new concepts of signification and new methods of interpretation. The resultant playing with words and contexts, which curiously resembles Talmudic exegesis, reinforced a reader-response theory of literature — that no text exists without the context of the perception of a particular reader. Ears of law professors across the country must have started to burn. Was not that concept essential to the way law is made, taught, and interpreted? Partially as a result, the controversial movement called Critical Legal Studies was born. One of its main concerns is to demonstrate how the manipulative interpretation of legal texts can keep people in power who have always been in power, without regard for the welfare of the populace at large. If this sounds familiar, it should: it is much the same complaint made about legal writing several pages back.⁴⁹ And here it is, I suggest, that good work can be done in meaningfully bringing law, literature, and composition studies together. All the concerns of structural stylistics — the manipulation of reader expectations, the creation of context, the control of ambiguity — are of equal interest to lawyers, to literary people, and to all kinds of writers.⁵⁰

47. B. CARDOZO, *THE GROWTH OF THE LAW* 89 (1924).

48. Weisberg & Barricelli, *Literature and Law*, in *INTERRELATIONS OF LITERATURE* 150 (1982).

49. See Part I.G. *supra*.

50. For those who wish to investigate these issues, two law review issues will serve well. The *Texas Law Review* printed a symposium on "Law and Literature." 60 *TEXAS L. REV.* 373

A completely different set of people are drawing near the same meeting ground from a completely different direction. They are linguists and social scientists (especially sociologists and cultural anthropologists), and they are studying (primarily oral) Language and the Law in order to understand how tools of communication actually determine legal relationships between people. The potential here seems to me unlimited.⁵¹

In summary, then: The abuse of the language in law, intentional or otherwise, exists and has existed for hundreds of years. What is new is a growing consciousness of that abuse and a will to do something about it. New structures for writing programs, combined with new structural methods of teaching writing, offer a great deal of hope that we will not long continue to pass the problem onward and upward. Continuing legal education programs seem interested in developing rhetoric as a topic for serious study. Legislative willingness to enact statutes that demand rhetorical reforms are increasing in number and are already taking effect. Critical theorists, literary interpreters, rhetoricians, law professors, social scientists, and linguists are all becoming increasingly fascinated with the effects that words have on audiences. Things are happening, and for the first time in our history, legal writing has become a topic of great interest, depth, and variety.

III. BIBLIOGRAPHY

If numbers of publications produced are directly representative of the professional interest in a field, then there is a strong and growing interest in legal writing. The following bibliography is by no means exhaustive. I have restricted myself mainly to American publications and have omitted all articles of fewer than three pages and some older books which seemed completely uninspired copies of each other. This still leaves a good amount to read.

This bibliography demonstrates the recent, steady surge of interest

(1982). Particularly representative is the match between Ronald Dworkin, *Law As Interpretation*, *id.* at 527, and Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, *id.* at 551. (Professor Fish now holds a joint appointment between the English Department and the Law School at Duke University, thus personifying the new connection between the fields.) For a symposium on Critical Legal Studies, see 36 *STAN. L. REV.* 1 (1984).

51. For an overview of what is now being done in this regard, see Brenda Danet's excellent and lengthy article, Danet, *Language in the Legal Process*, 14 *L. & SOC. REV.* 445 (1980). See also the work of sociologist William M. O'Barr, especially *LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM* (1982), and the work of linguist Judith N. Levi, especially *LINGUISTICS, LANGUAGE, AND LAW: A TOPICAL BIBLIOGRAPHY* (1982). Levi and Anne Graffam Walker have directed a conference on language in the judicial process (Georgetown University, July 1985).

in the field. Of the more than 200 articles listed, approximately twenty percent were published from 1975-79 and slightly more than forty percent since 1980. Of the seventy or so books listed, approximately half were published since 1978. While it is always profitable and pleasurable to read anything by Zechariah Chafee, William Prosser, Fred Rodell, or Rudolph Flesch, in general the newer work seems to me the more intriguing.

For those who wish to sample a representation of the best now available, I suggest the following from this bibliography:

- A. *Books and Pamphlets*
Charrow & Erhardt; Levi; Mellinkoff; Redish; Rodell.
- B. *Articles on the Teaching of Legal Writing*
Gale; Rombauer; Squires.
- C. *Articles Concerning the Plain English Movement*
Allen & Engholm; Charrow & Charrow; Davis; Felsenfeld, Cohen & Fingerhut; Procaccia.
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