

ESSAY

A DEFENSE OF LEGAL WRITING

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Legal writing is on the run. Lawyers have long attempted, without much success, to reform it.¹ And now that scholars too have discovered that lawyers write badly,² and scientists have proven that most people

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¹ See, e.g., Beardsley, *Beware of, Eschew and Avoid Pompous Prolixity and Platitudinous Epistles!*, 16 CAL. ST. B.J. 65 (1941); Beardsley, *Wherein and Whereby Beardsley Makes Reply to Challenge*, 16 CAL. ST. B.J. 106 (1941); Bowman, *Are Lawyers Lousy Writers?*, 6 GA. ST. B.J. 285 (1970); Dick, *Legal Language*, 2 CAN. B.J. 204 (1959); Gerhart, *Improving Our Legal Writing: Maxims from the Masters*, 40 A.B.A. J. 1057 (1954); Kanter, *Effective Legal Writing—Some Thoughts and Reflections on Learning and Teaching*, 42 CHI. B. REC. 112 (1960); Kellog, *A Plan for Drafting in Plain English*, 56 CAL. ST. B.J. 154 (1981); Rossman, *The Lawyers' English*, 48 A.B.A. J. 50 (1962); see also Lavery, *The Language of the Law* (pts. 1 & 2), 7 A.B.A. J. 277 (1921), 8 A.B.A. J. 269 (1922); O'Hayre, *A Look at Gobbledygook*, 8 L. OFF. ECON. & MGMT. 97 (1967); *Writing It Right: A Symposium*, 15 PRAC. LAW. 33 (1969).

² See, e.g., R. FLESCHE, *HOW TO WRITE PLAIN ENGLISH* (1979); R. GOLDFARB & J. RAYMOND, *CLEAR UNDERSTANDINGS: A GUIDE TO LEGAL WRITING* at x-xi (1982); D. MELLINKOFF, *THE LANGUAGE OF THE LAW* 24-29 (1963) [hereinafter cited as D. MELLINKOFF, *LANGUAGE*]; D. MELLINKOFF, *LEGAL WRITING: SENSE & NONSENSE* at xi-xiii (1982) [hereinafter cited as D. MELLINKOFF, *LEGAL WRITING*]; Hager, *Let's Simplify Legal Language*, 32 ROCKY MTN. L. REV. 74 (1959); Lindgren, *Style Matters: A Review Essay on Legal Writing*, 92 YALE L.J. 161 (1982); Raymond, *Legal Writing: An Obstruction to Justice*, 30 ALA. L. REV. 1 (1978); Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389 (1984); Wydick, *Plain English for Lawyers*, 66 CALIF. L. REV. 727 (1978); see also G. BLOCK, *EFFECTIVE LEGAL WRITING* (2d ed. 1983); R. DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* (1965); G. GOPEN, *WRITING FROM A LEGAL PERSPECTIVE* (1981); L. SQUIRES & M. ROMBAUER, *LEGAL WRITING IN A NUTSHELL* (1982); H. WEIHOFFEN, *LEGAL WRITING STYLE* (2d ed. 1980); Danet, *Language in the Legal Process*, 14 LAW & SOC'Y REV. 445, 464-69, 540-41 (1980); Gottlieb, *Teaching English in a Law School*, 49 A.B.A. J. 666 (1963). See generally Collins & Hattenhauer, *Law and Language: A Selected, annotated Bibliography on Legal Writing*, 33 J. LEGAL EDUC. 141 (1983). For the critique from the previous generation, see F. RODELL, *Woe Unto You, Lawyers!* (2d ed. 1957); Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936) [hereinafter cited as Rodell, *Goodbye*]. See also Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279 (1962).

do not understand what lawyers write,³ several jurisdictions have prohibited traditional legal writing by statute.⁴ In fact, few can be found to defend it.⁵ Legal writing is one of those rare creatures, like the rat and the cockroach, that would attract little sympathy even as an endangered species.⁶

This Essay examines the premises underlying the view that lawyers cannot write and the solutions that have been proposed to solve the problem. It also offers an alternative remedy based on a different conception of the law. I begin by reviewing what the critics dislike about the way lawyers write, the explanations they have offered for why lawyers write as they do, and an idea implicit in their suggestions for improvement: namely that lawyers should write like novelists. Though I believe that lawyers often do not write well, I conclude that the common diagnosis and purported cure are really further symptoms of the disease. I then attempt to distinguish between the language of the law and the language of literature. I suggest that legal writing can be improved only by an increased awareness of the conceptual structure of the law. Finally, I explain why I believe that the quality of legal writing will probably not improve.

At the outset, there is a definitional problem. If the term "legal writing" is meant to encompass everything lawyers write,⁷ it seems to define a category too heterogeneous to merit uniform treatment. Very few meaningful propositions would apply equally to appellate briefs, judicial opinions, law-review articles, letters to clients, memoranda to partners, contracts, wills, statutes, and regulations. Behind much of

³ See, e.g., A. ELWORK, B. SALES & J. ALFINI, *MAKING JURY INSTRUCTIONS UNDERSTANDABLE* 12-17 (1982); Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979); Elwork, Sales & Alfini, *Juridic Decisions: In Ignorance of the Law or in Light of It*, 1 LAW & HUM. BEHAV. 163 (1977); Sales, Elwork & Alfini, *Improving Comprehension for Jury Instructions*, in *THE CRIMINAL JUSTICE SYSTEM* 23 (B. Sales ed. 1977).

⁴ For statutes requiring the use of plain language in contracts, see, for example, CONN. GEN. STAT. ANN. §§ 38-68s to 38-68x, 42-152 to 42-158 (West Supp. 1985); MINN. STAT. §§ 325G.29-36 (1982); N.J. STAT. ANN. § 56:12-2 (West Supp. 1985); N.Y. GEN. OBLIG. LAW § 5-702(a) (McKinney Supp. 1984-1985); see also D. MELINKOFF, *LEGAL WRITING*, *supra* note 2, at 205-18 (reviewing the statutory material).

⁵ The defenses include Aiken, *Let's Not Oversimplify Legal Language*, 32 ROCKY MTN. L. REV. 358 (1960); Friedman, *Law and its Language*, 33 GEO. WASH. L. REV. 563 (1964); Morton, *Challenge Made to Beardsley's Plea For Plain and Simple Legal Syntax*, 16 CAL. ST. B.J. 103 (1941); Steuer, *Legal Vocabulary—Its Uses and Limitations*, 15 PRAC. LAW. 39 (1969).

⁶ "[T]oo much of the language of the law is anachronism, a deservedly endangered species, that needs only a little help to become what befits it—extinct." D. MELINKOFF, *LEGAL WRITING*, *supra* note 2, at 106.

⁷ "The language of the law . . . is the customary language used by lawyers . . ." D. MELINKOFF, *LANGUAGE*, *supra* note 2, at 3.

what the critics write, however, lies the view that there should be a unifying theme to all varieties of legal writing: the law should be written for the people, for those whose obligations the writing governs. Lawyers, in other words, should write so that non-lawyers can understand them.⁸ The proposition may seem so innocent that no one could object to it. Yet I believe that lawyers must obey a different principle when they write: they must write neither for non-lawyers nor even merely for each other; rather, they must write to meet the demands of conceptual thought. One of the objectives of this Essay is to explain this alternative view.

The critics have compiled a catalogue of the problems with legal writing. They object to archaic lawyerly terms such as "hereinbefore," "notwithstanding," and "arguendo,"⁹ legal doublets such as "null and void" and "cease and desist,"¹⁰ compound prepositions like "in the event that" and "with reference to,"¹¹ general verbosity,¹² multiple negatives,¹³ frequent qualification and exception,¹⁴ the corruption of common words by assigning to them purely legal meanings,¹⁵ dangling modifiers,¹⁶ long strings of nouns,¹⁷ poor punctuation,¹⁸ "convoluted

⁸ Yet why—if you think it over for a minute—should people not be privileged to understand completely and precisely any written laws that directly concern them, any business documents they have to sign, any code of rules and restrictions which applies to them and under which they perpetually live?

F. RODELL, *supra* note 2, at 126.

⁹ See R. DICKERSON, *supra* note 2, at 125; R. FLESCHE, *supra* note 2, at 33; R. GOLDFARB & J. RAYMOND, *supra* note 2, at 3, 136; G. GOPEN, *supra* note 2, at 123-24; D. MELLINKOFF, LEGAL WRITING, *supra* note 2, at 2-9; L. SQUIRES & M. ROMBAUER, *supra* note 2, at 103; Danet, *supra* note 2, at 476-77; Hager, *supra* note 2, at 78; Wydick, *supra* note 2, at 728, 739-40.

¹⁰ See G. BLOCK, *supra* note 2, at 39; R. DICKERSON, *supra* note 2, at 50-51, 125-26; R. FLESCHE, *supra* note 2, at 40; G. GOPEN, *supra* note 2, at 16-17; D. MELLINKOFF, LANGUAGE, *supra* note 2, at 363-66; D. MELLINKOFF, LEGAL WRITING, *supra* note 2, at 4-5; L. SQUIRES & M. ROMBAUER, *supra* note 2, at 110; H. WEIHOFEN, *supra* note 2, at 50-51; Danet, *supra* note 2, at 477; Wydick, *supra* note 2, at 734.

¹¹ See R. DICKERSON, *supra* note 2, at 126-30; H. WEIHOFEN, *supra* note 2, at 45-46; Danet, *supra* note 2, at 477; Wydick, *supra* note 2, at 731-32.

¹² See R. FLESCHE, *supra* note 2, at 33-43; D. MELLINKOFF, LANGUAGE, *supra* note 2, at 24; Wydick, *supra* note 2, at 729-39.

¹³ See R. FLESCHE, *supra* note 2, at 94-101; R. GOLDFARB & J. RAYMOND, *supra* note 2, at 11-13; D. MELLINKOFF, LEGAL WRITING, *supra* note 2, at 28-38; Chertow & Chertow, *supra* note 3, at 1324-25.

¹⁴ See Hager, *supra* note 2, at 78.

¹⁵ See R. FLESCHE, *supra* note 2, at 58-69; Danet, *supra* note 2, at 476; Hager, *supra* note 2, at 78.

¹⁶ See G. BLOCK, *supra* note 2, at 8-9; Wydick, *supra* note 2, at 749.

¹⁷ See R. GOLDFARB & J. RAYMOND, *supra* note 2, at 16-17; Wydick, *supra* note 2, at 752.

¹⁸ See R. GOLDFARB & J. RAYMOND, *supra* note 2, at 42-45.

sentences, tortuous phrasing, and boring passages filled with passive verbs."¹⁹ The objections to legal writing extend beyond criticisms of vocabulary and sentence structure to complaints that lawyers create "misty abstractions,"²⁰ write about rules rather than facts and about abstractions rather than characters and stories, and fill their writing with "logical analysis and dozens of footnotes."²¹

Quality in writing is easier to recognize than it is to define,²² but the critics have offered concrete rules and a clear vision. To begin with, legal writing should be plain, active, direct, and verbal:²³ lawyers should write short sentences in the active voice, use familiar and concrete words, and employ them only in the sense in which they are understood in common speech.²⁴ They should avoid conceptual discussion²⁵ and footnotes,²⁶ or at least illustrate their abstractions with concrete examples.²⁷ They should write in the first person in a sponta-

¹⁹ Stark, *supra* note 2, at 1389; accord G. BLOCK, *supra* note 2, at 32-34; R. GOLDFARB & J. RAYMOND, *supra* note 2, at 13-15; G. GOPEN, *supra* note 2, at 29-31; D. MELLINKOFF, LANGUAGE, *supra* note 2, at 366-74; Danet, *supra* note 2, at 477-81; Hager, *supra* note 2, at 78. New Jersey courts and officials must consider similar factors in determining whether a consumer contract is "simple, clear, understandable and easily readable": confusing cross references, sentences of greater length than necessary, double negatives, exceptions to exceptions, sentences or sections in confusing or illogical order, the use of words with obsolete meanings or words whose legal meanings differ from their common meanings, and the frequent use of words and phrases from Old and Middle English, Latin, and French. See N.J. STAT. ANN. § 56:12-10(a) (West Supp. 1985).

²⁰ Wydick, *supra* note 2, at 728.

²¹ Stark, *supra* note 2, at 1391. Fred Rodell protested against these same failings in the 1930's. See Rodell, *Goodbye*, *supra* note 2, at 39-41. In 1946, George Orwell found most of the same objections in a criticism of political writing. See G. ORWELL, *Politics and the English Language*, in 4 THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 127, 133 (S. Orwell & I. Angus eds. 1968).

²² See R. PIRSIG, *ZEN AND THE ART OF MOTORCYCLE MAINTENANCE* (1974).

²³ See Lindgren, *supra* note 2, at 166.

²⁴ See L. SQUIRES & M. ROMBAUER, *supra* note 2, at 105-06; Hager, *supra* note 2, at 85; Wydick, *supra* note 2, at 736-40.

²⁵ See D. MELLINKOFF, LEGAL WRITING, *supra* note 2, at 80 ("Legal terms of art should not be used except as a last resort."); *id.* at 83; Hager, *supra* note 2, at 85.

²⁶ See D. MELLINKOFF, LEGAL WRITING, *supra* note 2, at 94.

²⁷ [A]ll of us find it much easier to follow the abstract reasoning required in legal controversies if we can imagine the concrete reality—the brutal murder, the devious dealings, the leaky pipes and spoiled merchandise—to which the abstractions are being applied. . . . [A]ll readers are naturally interested in stories, especially stories that involve conflicts between human beings or conflicts between human beings and their environment. And finally, the reader's sympathy is more likely to be aroused if the case is presented as a concrete injustice being perpetrated on an innocent victim than if it is presented as a technical violation of an abstract code. At the heart of every legal action is a good story. Although lawyers can't tell these stories in exactly the same way novelists or journalists would tell them, it is foolish to ignore their dramatic interest

R. GOLDFARB & J. RAYMOND, *supra* note 2, at 70-71.

neous, conversational style,²⁸ so that everyone can understand them.²⁹ In other words, they should bring life into their writing and their sentences to life.³⁰ The classic examples are Holmes's epigrams.³¹ The proper style is that of the essayist, the journalist, and the novelist.³² The writings of Hemingway come to mind, particularly *The Sun Also Rises*, to which the critics occasionally refer.³³

Deep in the easy chair, even a lawyer generally prefers a good novel to points and authorities from opposing counsel. Why then do lawyers not write—not even try to write—like Hemingway? Many of the critics who offer tips about effective writing seem to believe that lawyers write badly out of habit or lack of experience. After discovering, however, that “even some of the brightest and most learned members of our profession write grotesque sentences,”³⁴ other critics have probed further. They contend that the educational system is at fault: English teachers in high school and college teach writing badly.³⁵ But poor instruction in secondary school and college does not explain why writing in the law is particularly poor. Some critics have therefore sought systemic or structural causes in the nature of the legal profession itself. They have found two. First, lawyers have a financial interest in writing badly. Second, the legal view of the world as an interrelation-

²⁸ “As I see it, the best English today . . . is informal, it is written exactly the way it is spoken, it's in the first person singular, it is specific, and it is conversational” R. FLESCHE, *A NEW WAY TO BETTER ENGLISH* 149 (1958).

²⁹ “[T]hey ought to learn to write so that any cabbie could make sense of their work.” R. GOLDFARB & J. RAYMOND, *supra* note 2, at 84.

³⁰ “[T]he lawyer must give *life* to what he has to say, to make up for the inherent lack of interest which his subject has for the reader's imagination. None of us wish to be informed, but all of us wish to be interested and especially to be moved.” Lavery, *supra* note 1, at 271.

³¹ “[E]ven a dog distinguishes between being stumbled over and being kicked.” O.W. HOLMES, *THE COMMON LAW* 3 (1891), *quoted in* D. MELLINKOFF, *LANGUAGE*, *supra* note 2, at 29, *and in* H. WEIHOFEN, *supra* note 2, at 116. “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.” *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.), *quoted in* H. WEIHOFEN, *supra* note 2, at 114. “[T]he machinery of government would not work if it were not allowed a little play in its joints.” *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931) (Holmes, J.), *quoted in* R. GOLDFARB & J. RAYMOND, *supra* note 2, at 87.

³² “In the end, there is just plain good writing. Lawyers can master it more quickly if they think like journalists.” Goldstein & Lieberman, *Writing Like Pros(e)*, *CAL. LAW.*, Jan. 1986, at 43, 46. *But see* R. GOLDFARB & J. RAYMOND, *supra* note 2, at xv (“We are not so naive as to suppose that lawyers should write like journalists or novelists”).

³³ *See* Stark, *supra* note 2, at 1391; R. GOLDFARB & J. RAYMOND, *supra* note 2, at 146.

³⁴ Lindgren, *supra* note 2, at 164.

³⁵ *See* R. GOLDFARB & J. RAYMOND, *supra* note 2, at 26; Lindgren, *supra* note 2, at 165-67.

ship of abstract rules prevents lawyers from writing concretely.

Legal fees now run to \$150 an hour and more. Even after lawyers deduct secretarial and administrative salaries and overhead, they are generally well paid. The pay differential between lawyers and others is often justified by reference to the lawyer's skill at legal thinking. But, according to the critics, even lawyers apparently wonder whether the skill of thinking like a lawyer is really worth more than the skill of thinking like a mechanic.³⁶ The critics believe that, to dissemble the difficulty, lawyers have created an arcane language, a professional "doublespeak."³⁷ Lawyers fear that they will seem unprofessional and even incompetent if they write simply.³⁸ They also believe that the shroud of mystery will maintain and increase the public's dependence on lawyers.³⁹ In the end, lawyers are con artists, magicians of language.⁴⁰ The critics contend that the problems with legal writing arise because lawyers are less interested in communicating than in defending their privileged position.⁴¹

There is much to be said in favor of the perception of the bar and the judiciary as a secret cult and the language of the law as the privileged communication of the initiate. In fact, many have noted the similarity between the judiciary and the priesthood—the black robes, the stylized formulae of address, the sanctification of the witness's testimony by a hand on the holy book.⁴² The symbols of the medieval judiciary elevate modern judges above the parties, above even all personal interest in civil society, and bestow upon them the absolute impartiality of the prophetess Deborah sitting under her palm tree.

The problem with this thesis is that it does not explain why lawyers cannot write. The critics contend that lawyers, by lengthening their sentences and filling them with strange words, have developed an esoteric language that protects their monopoly. But even texts that draw on the arcane language and occult learning of secret cults need

³⁶ See Stark, *supra* note 2, at 1390.

³⁷ See *id.* at 1389.

³⁸ See G. GOPEN, *supra* note 2, at 13, 123.

³⁹ See G. BLOCK, *supra* note 2, at 39; G. GOPEN, *supra* note 2, at 13, 123; Caplan, *Lawyers and Litigants: A Cult Reviewed*, in *DISABLING PROFESSIONS* 93, 102 (1977).

⁴⁰ See Stark, *supra* note 2, at 1392.

⁴¹ "Complexity and obscurity have professional value—they are the academic equivalents of apprenticeship rules in the building trades. They exclude the outsiders, keep down the competition, preserve the image of a privileged or priestly class. The man who makes things clear is a scab. He is criticized less for his clarity than for his treachery."

Wydick, *supra* note 2, at 755-56 (quoting Galbraith, *Writing, Typing & Economics*, ATLANTIC, Mar. 1978, at 102, 105).

⁴² See, e.g., Leff, *Law and*, 87 YALE L.J. 989, 995-97 (1978).

not be badly written. *Under the Volcano* was constructed from Malcolm Lowry's personal synthesis of Mexican and Mediterranean mythology with the Cabala.⁴³ Yeats's poetry grew out of his commitment to Rosicrucianism, the Order of the Golden Dawn, the Enochian Tablet, Celtic mysteries, Tarot exercises, and Talismanic experiments.⁴⁴ Mallarmé cultivated an oracular obscurity—he was, as Verlaine noted, so preoccupied with beauty that “he viewed clarity as a secondary grace”⁴⁵—and the Symbolists, in turn, made a cult of his insights and gathered to venerate him every Tuesday evening on the *rue de Rome*.⁴⁶ At least one Platonic dialogue—a superb example of classical Greek prose—floats on a playful undercurrent of Pythagorean numerology, a doctrine that was obscure even in antiquity.⁴⁷

The second explanation for why lawyers write badly is based on the notion, propounded by Steven Stark, that the language of the law determines the way lawyers view the world.⁴⁸ Unlike a normal person, who feels compassion on hearing the story of a life-worn individual, the lawyer sees only abstract fact situations to be subsumed under general rules. For Stark, the case of *Rummel v. Estelle*⁴⁹ clearly exemplifies this lawyerly blindness. In *Rummel*, the Supreme Court upheld a life sentence imposed on a man who, in three thefts, had taken less than \$250. According to Stark's theory, lawyers find the holding fair because they consider only abstract rules and not the personal consequences of their argument. This dehumanization of legal argument prevents lawyers from recognizing a good story. Since lawyers do not perceive the world like novelists, they are unable to write like them.

The contention is that the language of the law mediates between the world and lawyers' perceptions of it and prevents lawyers from feeling compassion as would their neighbors. The thesis is thus neither that everyone perceives the world abstractly (a kind of Kantian tran-

⁴³ See P. EPSTEIN, *THE PRIVATE LABYRINTH OF MALCOLM LOWRY* (1969).

⁴⁴ See Harper, *Yeats's Occult Papers*, in *YEATS AND THE OCCULT* 1, 3 (G. Harper ed. 1975). “Yeats himself suggested that he might not have been a poet at all if he had not made magic his ‘constant study.’ ‘The mystical life,’ he wrote to John O’Leary, ‘is the centre of all that I do and all that I think and all that I write.’” *Id.* at 10.

⁴⁵ P. VERLAINE, *Stéphane Mallarmé*, in *OEUVRES EN PROSE COMPLÈTES* 657, 657 (J. Borel ed. 1972) (my translation).

⁴⁶ See C. MAUCLAIR, *MALLARMÉ CHEZ LUI* (1935).

⁴⁷ See PLATO, *TIMAEUS* 17A, at 55 (R. Archer-Hind trans. 1888) (“One, two, three—what is become of the fourth, my dear Timaeus . . . ?”); see also 1 PROCLUS *DIADOCHUS, THE COMMENTARIES OF PROCLUS ON THE TIMAEUS OF PLATO* 11-15 (T. Taylor trans. London 1820).

⁴⁸ See Stark, *supra* note 2, at 1390, 1393; accord R. GOLDFARB & J. RAYMOND, *supra* note 2, at 3.

⁴⁹ 445 U.S. 263 (1980), discussed in Stark, *supra* note 2, at 1390.

scendental aesthetic)⁵⁰ nor that a dehumanized language creates dehumanization (an idea related to the Heideggerian view that language brings things into being).⁵¹ Rather it is a comment on the limiting effect that a specific language has on perception, a version of the Whorfian hypothesis that differences in the habitual thought and behavior of different societies can be traced to structural differences in their languages.⁵²

This second explanation is entirely at loggerheads with the first. While the first explanation conceives of the law as a confidence game and of the purpose of legal writing as client deception, this second theory asserts that lawyers are unaware of the truth behind their language and thus are unable to maintain a critical distance from it.⁵³

This second thesis also fails to explain why lawyers write badly. First, to the extent that the case of *Rummel v. Estelle* proves anything, it shows that lawyers and judges do not all agree. Of the twenty-four federal judges who heard the case, ten found Rummel's punishment cruel and unusual.⁵⁴ Even some of the judges who voted to uphold the

⁵⁰ See I. KANT, *CRITIQUE OF PURE REASON* 65-91 (N.K. Smith trans. 1929).

⁵¹ "Where word breaks off no thing may be." M. HEIDEGGER, *The Nature of Language*, in *ON THE WAY TO LANGUAGE* 60 (P. Hertz trans. 1971) (quoting the poem "Das Wort," from the collection *DAS NEUE REICH*, in 1 S. GEORGE, *WERKE: AUSGABE IN ZWEI BÄNDEN* 466, 467 (1958)).

⁵² See B. WHORF, *The Relation of Habitual Thought and Behavior to Language*, in *LANGUAGE, THOUGHT, AND REALITY* 134, 134 (J. Carroll ed. 1956).

Though the idea has led to productive research, the unqualified versions of the theory—those, like Stark's, that claim that language completely determines aspects of thought and behavior—have not withstood critical examination. "Languages differ not so much as to what *can* be said in them, but rather as to what is *relatively easy* to say." Hockett, *Chinese versus English: An Exploration of the Whorfian Theses*, in *LANGUAGE IN CULTURE* 106, 122 (H. Hoijer ed. 1954); see also G. KELLING, *LANGUAGE: MIRROR, TOOL, AND WEAPON* 27-92 (1975) (criticizing the evidence offered in support of the Whorfian hypothesis); J. PENN, *LINGUISTIC RELATIVITY VERSUS INNATE IDEAS* 32-40 (1972) (evaluating the Whorfian hypothesis and its disrepute among those with a historical perspective).

⁵³ I do not mean to suggest that the two theories could not be reconciled. It might be argued—though it would also have to be demonstrated—that the lawyer's use of an arcane language is a strategy without a strategist or a process without a subject of the kind Foucault has described. See M. FOUCAULT, *THE HISTORY OF SEXUALITY* 95 (1978); see also Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 *HARV. L. REV.* 625, 635-36 (1984) (discussing the Foucaultian notion of strategies). The logic of the strategy could be clear, yet no lawyer would be hypocritical for employing it. Lawyers would simply be enmeshed in a system of power, or rather the system of power would reside within them. That system of power would also dictate the abstractions that constitute the lawyer's view of the world. The critics' suggestions, however, are based on the assumption that the arcane language is reproduced by countless decisions of individual lawyers and that any individual lawyer might decide to abandon it: "When and when not to use particular language is the lawyer's daily decision." D. MELLINKOFF, *LANGUAGE*, *supra* note 2, at vii.

⁵⁴ After the Texas courts affirmed his conviction and refused to grant post-conviction relief, Rummel filed a habeas petition in federal court. The federal district court

punishment found it inappropriate.⁵⁵ Their holding was based on the limitations of the eighth amendment and not on any lack of compassion for the prisoner.⁵⁶ Furthermore, Stark's criticism seems odd in the age of post-Realism, when American legal education focuses on piercing the precedential justifications in a judicial opinion in order to reveal the personal prejudice at its base. The more typical criticism of the American judiciary is that cases are decided on the basis of the judge's political and moral preferences rather than on the basis of abstract legal principle.

Another problem with Stark's argument is that it is circular. If it is lawyers' language that determines their perception, their limited perception does not cause their language limitations. A baneful language seems to be at the root as well as in the flower of the law, but there is no indication of the source of the poison. The circularity reveals the real criticism many critics seem to have of lawyers and the law. The problem with the law is that it is the law—and not life. The problem with lawyers is that they are lawyers⁵⁷—and not ordinary people.⁵⁸

denied his petition without a hearing. *See Rummel v. Estelle*, 568 F.2d 1193, 1195 (5th Cir. 1978), *rev'd en banc*, 587 F.2d 651 (5th Cir. 1978), *aff'd*, 445 U.S. 263 (1980). On appeal, a panel of the Fifth Circuit, by a vote of 2-to-1, reversed the district court and held that Rummel's punishment was unconstitutional. *See id.* at 1200. On rehearing en banc, the Fifth Circuit voted 8-to-6 to affirm the district court's holding on the eighth amendment. *See Rummel v. Estelle*, 587 F.2d 651, 662 (5th Cir. 1978) (en banc), *aff'd*, 445 U.S. 263 (1980). By a vote of 5-to-4, the Supreme Court affirmed. *See Rummel v. Estelle*, 445 U.S. 263, 285 (1980).

⁵⁵ "If the Constitution gave me a roving commission to impose upon the criminal courts of Texas my own notions of enlightened policy, I would not join the court's opinion. . . . But the question for decision is not whether we applaud or even whether we personally approve the procedures followed in [this case]. The question is whether those procedures fall below the minimum level the [Constitution] will tolerate."

Rummel v. Estelle, 445 U.S. 263, 285 (1980) (Stewart, J., concurring) (quoting Spencer v. Texas, 385 U.S. 554, 569 (1967) (Stewart, J., concurring)).

⁵⁶ "[W]e must remember that we can uphold a punishment as judges and disagree with that punishment as men." *Rummel v. Estelle*, 587 F.2d 651, 655 (5th Cir. 1978) (en banc), *aff'd*, 445 U.S. 263 (1980).

⁵⁷ "[T]he main problem with legal writing has less to do with writing than with lawyers themselves." Stark, *supra* note 2, at 1392.

⁵⁸ Lawyers are ordinary people, when they are not acting like lawyers.

These ordinary people, who communicate quite effectively in the course of everyday affairs, shift gears intellectually whenever they decide they should be acting like lawyers. The same lawyers who write clear and interesting letters to a kid in camp or a mother in the hospital go through a Jekyll-and-Hyde mental transformation when they sit down to write (or dictate) a business letter, a law review article, a judicial opinion, a law, a regulation, a contract, whatever. They begin writing the way they think lawyers are supposed to write. The result is stark and ludicrous.

R. GOLDFARB & J. RAYMOND, *supra* note 2, at 130; *see also* Raymond, *supra* note 2, at 2 (describing this transformation in greater detail).

Truth is present not in abstractions but rather in the world of normal perception, in everyday life as perceived innocently, in ordinary language, in daily conversation. Once again, a certain reading of Hemingway can be heard in the overtones.

All of this—the circularity, the faulty reasoning—suggests to me that the essays on legal writing are not what they purport to be. On first reading, it seems that they examine a problem (lawyers cannot write), explain its causes (lawyers are greedy and narrow-minded), and propose a solution (lawyers, like novelists, should write for ordinary people). A closer reading, however, reveals that the explanations are inconsistent and that they do not explain the phenomenon. The explanations—greed and narrow-mindedness—are really causes in search of a problem. The problem the critics have chosen is the difficulty non-lawyers have understanding the law. Since lawyers at work never think like ordinary people,⁵⁹ it must be the lawyers' fault. There is a barrier, a distance, between lawyer and client;⁶⁰ that must be because lawyers speak a foreign language.⁶¹ Since simple is best, and since the language of the law is not simple, the difficulty must be the way lawyers write.⁶² The differences could be overcome if lawyers would simply surrender to the language of the average human being, who, honest, worthy, and compassionate, perceives the world accurately, fairly, and, in the end, beautifully.⁶³

Despite the critics' rebellion against precedent's dominion over the law and their striving for "a new message, or at least a new way of expressing that message,"⁶⁴ their own message is a classical construct of Enlightenment thought. Rousseau, whose ideas so inspired the French bourgeoisie that they adorned their Convention with his portrait and voted to erect his statue in a Paris square, also believed that jurisprudence is unnecessary for a people of innocence and virtue. Following Montaigne, Rousseau preferred the simple justice of the American Indians to Plato's *Laws*,⁶⁵ and, again following Montaigne, approved the

⁵⁹ See R. GOLDFARB & J. RAYMOND, *supra* note 2, at xiii.

⁶⁰ See *id.* at xiii-xiv.

⁶¹ "Legalese" isn't listed in the foreign language section of any college catalogue, but it probably should be. It takes as long to learn as French or Spanish, and to most people it is just like Greek." Pertschuk, *Foreword* to R. FLESCHE, *supra* note 2, at xi; see also R. GOLDFARB & J. RAYMOND, *supra* note 2, at 3 (stating that lawyers learn "a foreign language called legalese").

⁶² "[O]ne reason lawyers suffer a bad public image—the reason we are interested in discussing and one that easily could be avoided, to everyone's benefit—is their atrocious and pretentious prose." R. GOLDFARB & J. RAYMOND, *supra* note 2, at xiii.

⁶³ "Everybody knows Plain English. It's the language you've known since childhood." R. FLESCHE, *supra* note 2, at 2.

⁶⁴ Stark, *supra* note 2, at 1391 (said of Hemingway).

⁶⁵ See J.-J. ROUSSEAU, *Discourse on the Sciences and Arts (First Discourse)*, in

decision of the Spanish King Ferdinand to deny lawyers passage to America.⁶⁶ As Rousseau's characters report, what reigns under the name of law is simply private interest and human passion.⁶⁷ We should seek the rules for conduct not in jurisprudence or philosophy, but rather in an internal guide far more infallible than all the books:⁶⁸ the innate principles of justice and virtue written by nature in ineffaceable characters at the bottom of the human heart.⁶⁹ In other words, we can be human without being learned; we are excused from consuming our lives with the study of morality and the "terrifying apparatus of philosophy."⁷⁰ In fact, Rousseau contends, once learning appears among a people, the virtuous are quietly eclipsed.⁷¹ It is thus only natural to resist conceptual science and the elevated terminology of enlightenment, knowledge, law, morality, and reason.⁷² We should strive to be more simple and less vain, and to limit ourselves to the first sentiments to which study always leads us when it does not lead us astray:⁷³ "Everything I sense to be good is good; everything I sense to be bad is bad."⁷⁴

Rousseau's ideas are an interesting parallel to the notions that I think underlie the critics' explanations for the poor quality of legal writing, but they are also more than that. The championing of the average reader's common sense over lawyerly sophistication is an expression of confidence in unaffected human nature, a confidence that is well rooted in the society in which we live.⁷⁵ The belief is that we all share basic human values, but that these values are less accessible to those who are overconcerned with intellectual and cultural refinement. At the

THE FIRST AND SECOND DISCOURSES 31, 42 n.* (R. Masters & J. Masters trans. 1964). The passage from Montaigne is found in 1 M. MONTAIGNE, *THE ESSAYS OF MONTAIGNE* 275-76 (G. Ives trans. 1925).

⁶⁶ See J.-J. ROUSSEAU, *supra* note 65, at 42 n.† (referring to 4 M. MONTAIGNE, *supra* note 65, at 288, 292).

⁶⁷ See J.-J. ROUSSEAU, *EMILE* 473 (A. Bloom trans. 1979).

⁶⁸ See J.-J. ROUSSEAU, *Sur la Réponse qui a été faite à son Discours*, in 3 *OEUUVRES COMPLÈTES* 35, 42 (B. Gagnebin & M. Raymond eds. 1964).

⁶⁹ See J.-J. ROUSSEAU, *supra* note 67, at 286, 289.

⁷⁰ *Id.* at 290.

⁷¹ See J.-J. ROUSSEAU, *supra* note 65, at 45.

⁷² See J.-J. ROUSSEAU, *Lettre à Monsieur l'Abbé Raynal*, in 3 *OEUUVRES COMPLÈTES*, *supra* note 68, at 31, 33.

⁷³ See J.-J. ROUSSEAU, *supra* note 67, at 290.

⁷⁴ *Id.* at 286.

⁷⁵ [T]he ordinary man knows as much about justice as does the ordinary judge. As a matter of fact, he usually knows more. For his ideas and ideals about human conduct are more simple and direct. They are not all cluttered up with a lot of ambiguous and unearthly principles nor impeded by the habit of expressing them in a foreign language.

A training in The Law cannot make any man a better judge of justice, and it is all too likely to make him a worse one.

F. RODELL, *supra* note 2, at 169.

beginning of this century, for example, Picasso stripped art of centuries-old layers of metaphor and convention after he recognized himself in the masks and totems of African tribes.⁷⁶ Gauguin had made a similar discovery in Polynesia.⁷⁷ The German Expressionists came to the same conclusion.⁷⁸ The idea even contributes to our notion of the picturesque—the guidebook's two stars for the unspoiled fishing village, where life is kept to the essentials and follows the rhythm of nature.⁷⁹ In other words, the scholarly critique is based on the unstated and unexamined premise that truth lies in the concrete as the average non-lawyer perceives it and as the novelist records it.

This premise is rooted in a naive empiricism: the belief that all that is important in the world—reality, in short—occurs in plain view. That is the concrete. There is no need to make distinctions where empirical reality itself does not do so. Concepts, on the other hand, cannot be seen. They are labels applied after the fact to action; they have no referent in the observable world. They are therefore abstract. Concepts—abstractions—simply clutter the page; the world is an open book, written in the simplest of styles.⁸⁰ Those who record their reflections about the world should not make it seem mysterious when it is not.

Unfortunately, this point of view—that it is possible simply by pointing to indicate all that is concrete about the world—is a perspective that, as Hegel remarked, the cow grazing in the pasture has already overcome.⁸¹ For even though the world can be nothing for us until we perceive it, perception is nothing until it is conceived. Thinking about reality always means thinking the particular and the universal concurrently. Thoughts vary, but whether they are chiefly involved

⁷⁶ [W]hat Picasso recognized in [African] sculptures was ultimately a part of himself, of his own psyche, and therefore a witness to the humanity he shared with their carvers. He also realized that the Western artistic tradition had lost much of the power either to address or to change the inner man revealed in those sculptures.

Rubin, *Modernist Primitivism: An Introduction*, in 1 "PRIMITIVISM" IN 20TH CENTURY ART 1, 73 (W. Rubin ed. 1984).

⁷⁷ See Varnedoe, *Gauguin*, in 1 "PRIMITIVISM" IN 20TH CENTURY ART, *supra* note 76, at 179, 180-83. Gauguin's "primitivism" also involved a rejection of the naturalist antiprimitive pessimism of the time. See *id.*

⁷⁸ See Gordon, *German Expressionism*, in 2 "PRIMITIVISM" IN 20TH CENTURY ART, *supra* note 76, at 369, 369-71.

⁷⁹ "The port [of Le Croisic] is a picturesque and busy scene in winter with the arrival of the prawn catchers." MICHELIN GUIDE TO BRITTANY 75 (7th ed. 1983).

⁸⁰ "At its core, the law is not abstract; it is part of a real world full of people who live and move and do things to other people." Wydick, *supra* note 2, at 745.

⁸¹ See G.W.F. HEGEL, *THE PHENOMENOLOGY OF MIND* 159 (J. Baillie trans. rev. ed. 1931).

with perception of the particular, or whether their concern is more for the universal, they are always involved in both. That is why I rarely see the splotches of maroon, ultramarine, brown, red, and navy blue in front of me; I "see" rather the last five years of the *Code of Federal Regulations* on my bookshelf. And even when I am startled by an unconceived perception, as when two glowing spheres rise before me in a dark street, I struggle to force them into a recognizable pattern and see the eyes of a cat sitting on a fence. When standard categories fail, I may even grasp at categories from the supernatural and try to recognize the eyes of a ghost or the retreating taillights of a flying saucer. What varies is only the degree to which thought has structured the categories that guide perception.

Idle conversation, literature, and the law each involve different degrees of conceptual understanding. Ordinary conversation is generally structured by categories derived from daily life.⁸² The language of literature and the language of law, on the other hand, are organized around more developed categories: literature, by representation; the law, by conceptual thought. It is only the myth of the universal applicability of the Hemingway style that makes it seem as if the various levels of language and thought can be telescoped into one.

One of the ways literature differs from daily conversation is that it is tightly organized around an idea. When a story is well written, all of its elements point in the same direction, and the novelist is able to communicate the idea through the form and the language of the story. No novelist simply records an event or a snippet of dialogue. Novelists attempt rather to restructure the way their readers perceive the world.⁸³ At the same time, however, the thought is not expressed directly, but appears only through the language and the story. The most frequent mistake in literary interpretation, even among critics, is to disregard the epic function of literature and to take the pronouncement of one of the characters for the meaning or message of the story. Another way of expressing this idea is to say that meaning in literature is not expressed conceptually but rather by representation.

The critics occasionally invoke the names of writers like Hemingway as symbols for clear, concise, simple writing.⁸⁴ And even when

⁸² Cf. 3 K. MARX, CAPITAL 967 (E. Untermann trans. 1909) (People feel comfortable with economic conceptions that reflect their own experiences with the productive relations of society.).

⁸³ See U. ECO, POSTSCRIPT TO *The Name of the Rose* 48 (W. Weaver trans. 1984) ("[W]riting means constructing, through the text, one's own model reader.").

⁸⁴ "A number of writing teachers would solve this problem by invoking the name of Ernest Hemingway and demanding short, clear sentences." Raymond, *supra* note 2, at 6. Rudolf Flesch lists Pearl Buck, John Gunther, John Hersey, J.P. Marquand,

they do not mention Hemingway by name, they prefer a style that, on the surface, resembles his. But Hemingway does not stand metonymically for all of literature or for all novelists, or even for all novelists writing English in the twentieth century. To my knowledge, no one has suggested that lawyers imitate *Finnegans Wake* or Molly Bloom's soliloquy in *Ulysses*.⁸⁵ Nor has anyone recommended the prose styles of Faulkner, Barthelme, or William Gass. Instead, Hemingway stands for a particular reading of modern literature, namely the view that literature aspires to an idealization of daily perception and conversation. As amanuensis for the simple life, Hemingway escapes Rousseau's critique, which ran against art and science as well as jurisprudence.

It is easy to be seduced by Hemingway's dialogue and descriptions. He wrote more than his share of the few perfect pages in the language. But his dialogue does not in the least resemble a transcription of daily conversation, even as edited and reorganized, and few of his readers experience the details of their surroundings as intensely as Hemingway was able to re-create the details of his. In fact, the intensity of dialogue and descriptive detail is neither a reflection of daily life nor a simple mastery of style; rather, it is itself one of the ideas that Hemingway sought to convey.

Hemingway portrayed a generation—Gertrude Stein called it “a lost generation”—that had been abandoned by meaning and criteria of value. The familiar values all seemed to have led inevitably to the devastation of the Great War, which tarnished not merely the ideas of patriotism, valor, and sacrifice, but also the very idea of transcendence by which life is imbued with meaning. Hemingway wrote for the part of that generation that abjured abstractions, for those who were left with no alternative but to grasp madly at sensation. In momentary illumination, however, both Hemingway and his audience understood that sensuousness provides no transcendence and that life without value or meaning is simply lost.

John O'Hara, Carl Sandburg, Rex Stout, James Thurber, and Thornton Wilder. See R. FLESCH, *A NEW WAY TO BETTER ENGLISH* 150 (1958). All of the authors Flesch named were contemporaries. Most wrote in an “idiomatic” style. In fact, several of them fell under Hemingway's influence. To John O'Hara, Hemingway was “[t]he most important author living today, the outstanding author since the death of Shakespeare, . . . the most important, the most outstanding author out of the millions of writers who have lived since 1616.” F. MACSHANE, *THE LIFE OF JOHN O'HARA* 153 (1980) (quoting O'Hara's review of Hemingway in the *N.Y. Times Book Rev.*, Sept. 10, 1950, at 1).

⁸⁵ Cf. *United States v. One Book Called “Ulysses,”* 5 F. Supp. 182, 183 (S.D.N.Y. 1933) (“‘Ulysses’ is not an easy book to read or to understand.”), *aff'd sub nom.* *United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705, 707 (2d Cir. 1934) (A. Hand, J.) (“Page after page of the book is, or seems to be, incomprehensible.”).

Hemingway's characters express these ideas directly at times.⁸⁶ Even when they do not, the ideas saturate Hemingway's language; they are part of the meaning of the Hemingway style. It is a style from which abstractions have been consciously banished, leaving the detail, feverishly reworked, to stand alone. The critics have long recognized Hemingway's penchant for concealing abstractions⁸⁷ and have recently traced it through the manuscripts of *The Sun Also Rises*.⁸⁸ In fact, Hemingway himself freely discussed the technique.⁸⁹ In other words, it is precisely by its systematic avoidance of abstraction that Hemingway's language conveys a specific, complex, and vigorously developed insight. His style is every bit as particular as that of the Naturalists or the Symbolists or the Expressionists, and no more valuable in itself.⁹⁰

Of course, the law too tells its stories. But it isolates from the story the legally relevant facts and subsumes them under a rule of law. In other words, the law does not remain on the level of representation, but interprets the facts theoretically—and therefore conceptually.

Legal concepts are elements of a legal theory. The law is constructed of "structured tiers of legal argument,"⁹¹ with principles arranged according to their level of abstraction.⁹² Where two principles

⁸⁶ I was always embarrassed by the words sacred, glorious, and sacrifice and the expression in vain. We had heard them, sometimes standing in the rain almost out of earshot, so that only the shouted words came through, and had read them, on proclamations that were slapped up by billposters over other proclamations, now for a long time, and I had seen nothing sacred, and the things that were glorious had no glory and the sacrifices were like the stockyards at Chicago if nothing was done with the meat except to bury it. There were many words that you could not stand to hear and finally only the names of places had dignity. Certain numbers were the same way and certain dates and these with the names of the places were all you could say and have them mean anything. Abstract words such as glory, honor, courage, or hallow were obscene beside the concrete names of villages, the numbers of roads, the names of rivers, the numbers of regiments and the dates.

E. HEMINGWAY, *A FAREWELL TO ARMS* 196 (1929).

⁸⁷ See P. YOUNG, *ERNEST HEMINGWAY* 177-78 (1952).

⁸⁸ See F. SVOBODA, *HEMINGWAY AND THE SUN ALSO RISES* (1983).

⁸⁹ If a writer of prose knows enough about what he is writing about he may omit things that he knows and the reader, if the writer is writing truly enough, will have a feeling of those things as strongly as though the writer had stated them. The dignity of movement of an ice-berg is due to only one-eighth of it being above water.

E. HEMINGWAY, *DEATH IN THE AFTERNOON* 192 (1932).

⁹⁰ "[T]he terseness of style for which [Hemingway's] early work is justly celebrated is no more valuable, as an end in itself, than the baroque involutedness of Faulkner's prose, or the cold elegance of Wescott's." Schorer, *Technique as Discovery*, in *ESSAYS IN MODERN LITERARY CRITICISM* 189, 203 (R. West ed. 1952).

⁹¹ Fletcher, *The Right and the Reasonable*, 98 *HARV. L. REV.* 949, 971 (1985) (referring to levels of thought in continental legal analysis).

⁹² See Fletcher, *Two Modes of Legal Thought*, 90 *YALE L.J.* 970, 994 (1981)

yield contradictory implications for conduct, the principles are accommodated in a more concrete rule.⁹³ A legal concept represents a tightly woven fabric of such rules and principles. For example, "contract," as a legal concept, represents the entire system of legal rules and principles that govern the formation and performance of contracts.⁹⁴

A legal concept fastens upon the common features of what, on the surface, appear to be unrelated phenomena, such as a loan-participation agreement and the sale of a stick of butter. Legal concepts make it possible to find, in the diversity of appearances, cases that are similar in relevant ways, and thereby permit the law to achieve its fundamental mission of deciding like cases alike.⁹⁵ It is also by virtue of its concepts—and not its stories—that the law attempts to have an effect upon those subject to it. The concepts indicate the similarity among various situations so that individuals will know to act similarly. Since the law is a normative enterprise, however, neither all lawyers nor all legal systems will necessarily use concepts in the same ways.

The separation of meaningful similarities from irrelevancies is work that legal concepts, but not stories, can perform. The elements of a story are undifferentiated and undifferentiable. Nothing in a story, however well told, indicates how to recognize a second story that is, in

(describing the structure of the European legal codes).

⁹³ Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889), discussed in Fletcher, *supra* note 91, at 981, provides a good example. The rule of the case is that a designated heir who murders the testator may not take under the will. The two principles in conflict are (1) that a properly designated heir has a right to inherit, and (2) that people should not profit from their own wrongs.

⁹⁴ The structure of the rules and principles that make up a concept such as "contract" can be summarized in a chain of definitions. Unfortunately, in most existing systems, the actual definitions are too complex to offer an easy demonstration. However, in a simplified legal system, such as the one contained in the United Nations Convention on Contracts for the International Sale of Goods, approved Apr. 11, 1980, U.N. Doc. A/Conf. 97/18 (1980), "contract" might be defined as a binding agreement involving two or more parties that produces legally enforceable obligations. As the definition implies, the Convention is divided into two principal parts, one of which deals with questions of formation (arts. 14-24) and the other with questions of performance and breach (arts. 25-88). A binding agreement, in turn, results from the coincidence of a valid offer and a valid acceptance. A valid offer is a proposition of terms that is sufficiently definite and indicates an intent to be bound. *Id.* art. 14(1). An offer is sufficiently definite if it provides an indication of the goods and a method for determining the quantity and the price. *Id.* In different legal systems, the concepts have different meanings because they are part of different legal theories.

⁹⁵ Most legal problems turn on the question whether two cases are similar enough to be governed by the same rule or whether they are distinct enough to be governed by different rules. The criteria of similarity and difference develop as the law develops. Nothing inherent in the law commits it to the blind, formal equality that is satisfied simply by preventing both princes and paupers from sleeping under bridges. See C. PERELMAN, *Concerning Justice*, in *THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT* 1, 16 (1963).

relevant respects, like the first. That is why a good story does not suggest only the single meaning that certain commentators attempt to wring from it. For example, even though we know from the first words of the *Odyssey* that the poem is about the man of many devices,⁹⁶ precisely what Homer says about that man, and particularly about his relationship to thought and Athena (or are they the same?), remains, after two-and-a-half millennia, entirely unclear. Nor can the meaning of *Hamlet* or *Eugene Onegin* or, for that matter, *The Sun Also Rises* be stated while standing on one foot. Even though the meaning of legal concepts is also frequently unclear, more is lost by summarizing a novel in a sentence than by defining a legal concept. If prejudice is to be ignored and like cases decided alike, legal analysis must use concepts and not representation.

Because legal concepts are elements of a legal theory, lawyers do not—and may not—use language as it is used in literature. Descriptions in the language of representation differ from descriptions in the language of the concept in much the same way as, for Homer, the names of certain places and objects as they are known to mortals differ from the names of the same places and objects as they are known to the gods.⁹⁷ This difference is the truth behind the definition of a “legalism” as “a word or phrase that a lawyer might use in drafting a contract or a pleading but would not use in conversation”⁹⁸

A further indication of the difference between the two languages—that of literature and that of the law—is the extent of their associational flux. Words in literature are exposed to constant connotational shift. Even when a legal term is used in literature, its meaning is not restricted to that of the legal concept. For example, when the Poet writes, “When to the sessions of sweet silent thought / I summon up remembrance of things past,”⁹⁹ I, at least, hear only a distant echo of procedural law. The legal terms have become metaphors softened with alliteration and the perspective of solitude and reflection. Today, after

⁹⁶ “Of the man of many devices, tell me, muse” The first words of the Homeric poem state the subject of the poem. See van Groningen, *The Proems of the Iliad and the Odyssey*, 9 MEDEDEELINGEN DER KONINKLIJKE NEDERLANDSCHE AKADEMIE VAN WETENSCHAPPEN, AFDEELING LETTERKUNDE (NIEUWE REEKS) 279, 284-85 (1946).

⁹⁷ The parallel between the language of representation and the language of mankind, on the one hand, and the language of the concept and the language of the gods, on the other, is Hegel’s. See Hegel, Book Review, 11 WERKE 353, 378 (A. Moldenhauer & K. Michel eds. 1970) (reviewing K.F. GÖSCHEL, APHORISMEN ÜBER NICHTWISSEN UND ABSOLUTES WISSEN IM VERHÄLTNISSE ZUR CHRISTLICHEN GLAUBENSERKENNTNIS (Berlin 1829)).

⁹⁸ Smith, *A Primer of Opinion Writing, For Four New Judges*, 21 ARK. L. REV. 197, 209 (1967).

⁹⁹ W. SHAKESPEARE, Sonnet XXX.

Scott Montcrieff chose the last hemistich for the title of his translation of Proust, the lines have gained additional resonance. Even in the language of the law, of course, context and connotation occasionally overwhelm the "plain meaning" of words, but the relevant contextual factors are more limited and are usually phrased in terms of the "purpose of the statute" or the "intent of the parties."¹⁰⁰

Cases like *Rummel v. Estelle* demonstrate that conceptual thinking is essential to the law.¹⁰¹ Many people, even lawyers, feel uneasy about the Court's decision, feel intuitively, as Stark notes, that it is unfair.¹⁰² But, as intuitions, the notions of fairness and justice are abstractions, by anyone's definition. The difficult job—and that is the lawyer's—is to unpack intuitions, transform them into reasons, and argue the reasons convincingly.¹⁰³ Lawyers must understand the structure of the law and create for their clients' cases convincing legal constructs. As *Rummel* shows, that is often an extremely difficult task. What the thousands of Mr. Rummels in this country need is not a more sympathetic story but a more convincing legal argument.¹⁰⁴

¹⁰⁰ Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.) (L. Hand, J.), *aff'd*, 326 U.S. 404 (1945).

¹⁰¹ See *supra* notes 49, 54-56 and accompanying text.

¹⁰² "The sentence imposed upon the petitioner would be viewed as grossly unjust by virtually every layman and lawyer." *Rummel*, 445 U.S. at 307 (Powell, J., dissenting).

¹⁰³ It is about forty years too late to claim that difficult questions of law and social organization should be resolved solely by intuition. The "uncritical glorification of intuition" was an essential feature of the destruction of reason, which prepared the way for the destruction of the Weimar Republic. See G. LUKÁCS, *THE DESTRUCTION OF REASON* 10 (P. Palmer trans. 1980).

¹⁰⁴ For example, *Rummel* might have questioned the "unique nature" of the death penalty, which was the linchpin of the majority's analysis in *Rummel*: "Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to *Rummel*." *Rummel*, 445 U.S. at 272.

The majority's distinction between capital punishment and life imprisonment seems strange when considered in light of the history of criminal punishment. When life imprisonment was first proposed, it was considered more severe than the death penalty:

Perpetual slavery, then, has in it all that is necessary to deter the most hardened and determined, as much as the punishment of death. I say it has more. There are many who can look upon death with intrepidity and firmness; some through fanaticism, and others through vanity, which at-

Thus, though I have cited Hegel for the proposition that the language of the concept differs from the language of representation,¹⁰⁵ that does not mean that only a German idealist would recognize the conceptual nature of the law. In fact, a certain notion of the legal concept is perfectly consistent even with ordinary language philosophy. Wittgenstein seemed to recognize concepts as structures of rules when he hinted that one of the meanings of the king in chess is the complex of rules that determines its movement.¹⁰⁶ The Scandinavian Realists, who believed that the legal concept is completely meaningless—“[I]t is nothing at all, merely a word, an empty word devoid of all semantic reference”—understood the necessity of concepts for the presentation of legal rules in their systematic order.¹⁰⁷ Even these philosophers would agree that the language of the law is more highly structured than is ordinary discourse.

Unfortunately, Anglo-American legal scholarship no longer recognizes even a minimalist concept of the concept.¹⁰⁸ Certainly the term “concept” does not generally appear in the vocabulary of those who write about legal writing.¹⁰⁹ Instead, critics of legal writing believe that

tends us even to the grave; others from a desperate resolution, either to get rid of their misery, or cease to live: but fanaticism and vanity forsake the criminal in slavery, in chains and fetters, in an iron cage; and despair seems rather the beginning than the end of their misery.

C. BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 107-08 (4th ed. London 1785).

Of course, it would be difficult to argue today that life imprisonment, all things considered, is more severe than the death penalty. Nonetheless, for eighth amendment purposes, the qualitative distinction between the two punishments cannot be maintained. The relevant criterion for evaluating punishment today is not the individual's perception of pleasure and pain, as it was for Beccaria, but rather the social effect of punishment, the extent to which it isolates an individual from social activity. Since life imprisonment prevents the prisoner from leading a meaningful, productive life in society just as effectively as does the death penalty, it must be judged by the same criteria. Rummel failed to make this argument, and he even conceded “the unique severity of the death penalty.” Brief for Petitioner at 61, Reply Brief for Petitioner at 3 n.2, *Rummel v. Estelle*, 445 U.S. 263 (1980).

¹⁰⁵ See *supra* note 97.

¹⁰⁶ See L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 31 (G. Anscombe trans. 3d ed. 1967). Wittgenstein notes that words may function as concepts when their use is rigidly circumscribed by rules. See *id.* § 68.

¹⁰⁷ See Ross, *Tû-Tû*, 70 HARV. L. REV. 812, 818-19 (1957).

¹⁰⁸ I am thinking about the concept *in* law and not the Hartian idea of the concept *of* law. See generally H.L.A. HART, *THE CONCEPT OF LAW* (1961). Nonetheless, even though “concept” appears in the title, Hart does not, as I recall, define it in the book.

¹⁰⁹ Lawrence Friedman has the word but not the concept. He approves of legal concepts because they are useful for “speedy communication” among lawyers. But he does not explain what concepts communicate. See Friedman, *supra* note 5, at 564-66. Reed Dickerson has long recognized the importance of conceptual clarity to good legal writing. Unfortunately, he seems to think of a concept chiefly as the name for a class or

legal meaning is carried by special words called "terms of art."¹¹⁰ A term of art is defined as "a technical word with a specific meaning,"¹¹¹ or "a short expression that (a) conveys a fairly well-agreed meaning, and (b) saves the many words that would otherwise be needed to convey that meaning."¹¹² These definitions, however, do not distinguish terms of art from other words in the language. Most words are short, most have fairly well-accepted meanings, and most are more economical than the corresponding circumlocution. The critics recognize that there is something special about legal terms, but they are unable to specify the difference.

The conceptual nature of the law produces two unpopular consequences. First, those who do not learn to think conceptually will be unable to understand many of the texts that govern their legal obligations. Of course, the general function, importance, or effect of a legal concept in a particular situation can be described in short words and simple sentences. But the courts, when there is difficulty, must rely on the legal concept to determine the meaning of the plain words, or their decisions will be wholly arbitrary. The situation in Poland after World War II is instructive: the Polish government apparently attempted to draft all laws so clearly that workers and peasants could understand them, but it soon became clear that, without legal concepts, the application of the law was capricious and unpredictable.¹¹³ Thus, despite the critics' fervent wish and the idea's utopian appeal, legal concepts cannot be translated into Plain English by looking in a thesaurus,¹¹⁴ and it is either delusion or demagoguery to proclaim that those with no legal training might understand a legal document merely because their vocabulary includes all of the words in which it is written.¹¹⁵ Some of the

group of individual entities. See R. DICKERSON, *supra* note 2, at 7, 13-17. George Gopen agrees that a legal concept summarizes a legal discussion: "It [takes] a few hundred words to communicate one part of the legal concept of 'intent'; it takes only one word, 'intent,' to recall it for the lawyer." G. GOPEN, *supra* note 2, at 12.

¹¹⁰ See, e.g., D. MELLINKOFF, *LANGUAGE*, *supra* note 2, at 16-17; Wydick, *supra* note 2, at 735; see also N.J. STAT. ANN. § 56:12-2 (West Supp. 1985) ("Use of technical terms or words of art shall not in and of itself be a violation of this act."); R. GOLDFARB & J. RAYMOND, *supra* note 2, at 7 ("[W]e distinguish between terms of art that are legitimate because they have no equivalents in ordinary English and terms of art that are vestigial and should be stated plainly.").

¹¹¹ D. MELLINKOFF, *LANGUAGE*, *supra* note 2, at 16 (citation omitted).

¹¹² Wydick, *supra* note 2, at 735.

¹¹³ See L. FULLER, *THE MORALITY OF LAW* 45 (rev. ed. 1969).

¹¹⁴ But see R. FLESCH, *supra* note 2, at 27 ("If you can't think of a good substitute, use any good thesaurus or book of synonyms. You'll find that there's no complex, legalistic word that can't be translated into Plain English.").

¹¹⁵ Professor Dan-Cohen argues that there may be some benefit to having a system in which the public does not understand the full meaning of the legal concept. According to his theory, the law communicates to the citizenry through the ordinary

critics may advocate Plain English because they fear that a majority of Americans will never comprehend any but the simplest prose.¹¹⁶ But they are looking through the wrong end of the telescope. The ideal society is not one in which conceptual thought has been abandoned, but rather one in which everyone is able to engage in it. A critic once suggested to Bertolt Brecht that he clarify a difficult passage in one of his plays, since the public otherwise would not understand it. "Why must the public be able to understand everything on a first hearing?" Brecht asked. "The audience will simply have to see the play twice." The critic reminded Brecht that many people could barely afford to see the play once. "Then you'll simply have to create for me a society," Brecht replied, "in which they can afford to see it twice."¹¹⁷

The second consequence is one that most practitioners probably already understand: the law must be written to meet the demands of conceptual thinking, and that can be done well only by those who think clearly. Of course, sentences in the law, as elsewhere, must conform to the rules of grammar and proper punctuation. But even those rules, though partially conventional, are fundamentally concerned with the organization of thought. Even they cannot be taught formalistically. It is even less useful to treat other elements of the thought process in a formal manner. In other words, though a disciplined legal prose style can be taught, it cannot be promulgated. That explains part of the problem with the critics' tips about effective legal writing. There is simply no way, for example, to legislate the appropriate distance between two periods. The tips, therefore, are either wholly arbitrary—such as the suggestion that sentences should average no more than a certain number of words in length¹¹⁸—or meaningless platitudes, like the reminder that sentences should be no longer than neces-

meaning of legal terms and leaves to the legal community the task of defining those terms in a technical manner. See Dan-Cohen, *supra* note 53, at 652. He suggests that the divergence between the two levels is designed to further legitimate goals. See *id.* at 665-77. But it is easy to imagine cases in which citizens ignore the meaning of the legal concept at their peril. One example is the notion of "holder in due course" before the enactment of the Uniform Consumer Credit Code.

¹¹⁶ Cf. *supra* note 29 and accompanying text.

¹¹⁷ GESCHICHTEN VOM HERRN B.: 99 BRECHT-ANEKDOTEN 35 (A. Müller & G. Semmer eds. 1967) (my translation). I thank Professor Jost Hermand of the University of Wisconsin at Madison for telling the story and pointing me to the source.

¹¹⁸ See, e.g., CONN. GEN. STAT. ANN. § 42-152(c)(1)-(2) (West Supp. 1985) (The average number of words per sentence must be less than 22 and no sentence may exceed 50 words in length.); L. SQUIRES & M. ROMBAUER, *supra* note 2, at 77-78 (Sentences should average less than 25 words in length.). For comparison, note that sentences in the passage from *A Farewell to Arms* that is quoted *supra* note 86 average 34.2 words in length, and the longest sentence is 76 words long.

sary¹¹⁹ and not so complex as to confuse the reader.¹²⁰ Legal arguments carry conviction not because of the length of the advocate's sentences, but rather because of the validity of the legal constructs.

However, the structure of a legal argument should not be considered a transcendent essence, looming beyond or behind the language, unrelated to the choice of words and the length of the sentences. A legal argument is convincing only if the readers are convinced, and they can be convinced only where each sentence carries the idea from the end of the previous sentence to the beginning of the next, that is, where the structure is present in the language. The persuasiveness of a legal text appears on the surface as discursive elegance, but that elegance can be achieved only where the conceptual structure withstands critical examination. In other words, elegance of style refers not merely or even chiefly to the rhetoricians' concinnity—the sense of harmony and balance at the level of language—but rather to the adaptation of form to sense, the adequate expression of argument in language. Style is the other side of structure; it is appearance and not mere show or seeming, *Erscheinung* and not *Schein*.¹²¹

In one sense the critics are right: lawyers are generally not inspired writers of prose. The real difficulties of legal writing, however, are far more serious than technical problems of prose style; they are the irrelevancies that reveal the absence of disciplined thought. Out of sentimentalism, for example, some lawyers write statements of facts "like a novelist," in order to win the judge's sympathy. Yet the pity in the tale vanishes when judges attempt to subsume the facts under a rule of law and are left on their own to discover which facts are legally relevant. Sometimes, like Hamlet's soliloquies, the structure of the paragraphs reveals more about the author's voyage of discovery than about the legal argument. At other times, the lawyer fails to provide all the links of the logical chain required to make a coherent legal argument and must rely on the reader's sense of fairness to bridge the gaps. Occasionally, economic, sociological, or political considerations are used not to bolster a legal argument but to replace one. When lawyers do not understand the

¹¹⁹ See N.J. STAT. ANN. § 56:12-10(a)(2) (West Supp. 1985); R. DICKERSON, *supra* note 2, at 113 ("The draftsman should avoid long sentences when shorter ones will say the same thing as well.") (footnote omitted).

¹²⁰ See H. WEIHOFEN, *supra* note 2, at 148.

¹²¹ As Hegel explains it, the essence of things does not exist immediately for consciousness. The relationship of consciousness to essence is mediated by something whose independence tends to vanish in the process of understanding. This is appearance (*Erscheinung*). However, being can also be conceived as isolated from or entirely without essence. It is then mere semblance, show, or seeming (*Schein*). See G.W.F. HEGEL, *supra* note 81, at 190.

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 of the rules of Plain English will then not prevent passive voice and dangling modifiers.¹²²

These few examples make clear the absurdity of the constant litany that lawyers should write plain, clear, simple English. I have yet to meet a lawyer who wishes to write anything else. The problem with legal writing is not that there are too many "hereinbefores" 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. Rudolf Flesch examined dozens of examples of what he considered to be badly written legal prose.¹²³ In almost every case, the difficulty with the text was that it had not been thought through. The texts were artifacts of the thought process, conglomerates of several unsuccessful attempts to state the thought clearly. After disciplined rethinking, Flesch was able to restate each example as a clear proposition. The fact that he preferred to use short words and short sentences is simply a stylistic restraint he imposed upon himself. He might also have tried iambic pentameter.

The real problem with the tips for effective legal writing, and especially with the implication that lawyers should write like novelists, is that they do not address the difficulties of conceptual understanding. To the extent lawyers believe that their problem lies exclusively in an underdeveloped prose style, they are condemned to write poorly forever.

The difficulty lawyers face in learning to write legal argument is that they have little access to training in conceptual thought, either outside the law or within it. At one time, conceptual thinking was learned indirectly, by the reading of good books, but much less of that is done today. By far the most powerful method was instruction in the classics. Through the careful fitting of word to word and phrase to phrase in translation, the study of Latin and Greek traditionally provided an insight into the intimate relation between form and sense, lan-

¹²² A few critics, including George Gopen, recognize that muddled writing is most often the product of muddled thinking: "Thought and expression of thought (in this case, writing) are so inextricably intertwined that the quality of either one reflects the quality of the other. Therefore good writing . . . cannot exist in the absence of good thought. Conversely, poor writing indicates a lack of clarity or care in thought." G. GOPEN, *supra* note 2, at 19. Gopen is an exception; most of the critics continue to focus on the technical problems. *But see also* H. WEIHOFEN, *supra* note 2, at 6-7, 135 ("The lawyer who tries to be precise and clear in his writing may find that he must think a point through more thoroughly before he can make an ambiguous statement more clear.").

¹²³ *See* R. FLESCHE, *supra* note 2.

guage and argument. Even more importantly, the classics offered intimacy with a complex structure of rules. In order to parse a Greek verb, the modern reader must analyze its half-dozen constituent elements and place it in one of the most intricate structures of rules and exceptions ever developed. Today, in the wake of the jet airplane, foreign language training employs, almost exclusively, repetition and patterned variation, a technique that yields no insight into the structure either of the foreign language or of one's own. The schools have abandoned humanism and instead stumble to keep pace with technological development. As a result, a reading knowledge of classical Greek is probably as rare in contemporary America as it was in pre-Erasman Europe. Yet no substitute has been found for the classics.¹²⁴

Despite the ritual of the first year of law school, many lawyers do not learn to think conceptually. The reason may be that doctrinal analysis, the specifically legal training in conceptual thinking, is in decline.¹²⁵ Those who find economic motive everywhere else also find it here: they suggest that the doctrinal analysts prefer the salaries at large law firms to teaching.¹²⁶ I believe another factor is more important: legal reasoning itself is in crisis, and we simply cannot agree on how judges decide cases. Contemporary legal education has responded to the difficulty by avoiding it. Instead of probing the structure of American law, law professors and their students are tempted to regard it externally, from the perspective of their undergraduate majors: microeconomics, analytic philosophy, political science, sociology, psychology, anthropology, literary theory, or whatever.¹²⁷ From that per-

¹²⁴ It was due to [Harvard President] Eliot's insistent pressure that the Harvard Faculty abolished the Greek requirement for entrance in 1887, after dropping required Latin and Greek for freshman year. His and Harvard's reputation, the pressure of teachers trained in the new learning, and of parents wanting 'practical' instruction for their sons, soon had the classics on the run, in schools as well as colleges; and no equivalent to the classics, for mental training, cultural background, or solid satisfaction in after life, has yet been discovered. It is a hard saying, but Mr. Eliot, more than any other man, is responsible for the greatest educational crime of the century against American youth—depriving him of his classical heritage.

S.E. MORISON, *THREE CENTURIES OF HARVARD 389-90* (1936).

¹²⁵ See Posner, *The Present Situation in Legal Scholarship*, 90 *YALE L.J.* 1113, 1113-18 (1981).

¹²⁶ See *id.* at 1117.

¹²⁷ The brightest of the [law teaching] candidates, though typically "willing to 'do' torts," have as their principal interest some body of scholarship outside the law. They have discovered in, say, economics or social-choice theory, some lance of insight with which they are prepared to take a tilt at the law—any body of legal rules should do—in some way it has not been tilted at before.

Stone, *From a Language Perspective*, 90 *YALE L.J.* 1149, 1151 (1981).

spective, it is difficult to see—and far more difficult to communicate—the conceptual structure of a legal argument. Since scholars themselves no longer conceive of legal concepts as elements of a legal theory, as complex structures of determination, their students learn conceptual thinking only with great difficulty. Little do the scholars suspect that their own teaching is one of the reasons lawyers write poorly.

The sheer mass of the modern law encourages this flight from the basics. The proliferation of new fields of practice requires the practitioner to be acquainted with ever more rules—tax, securities, anti-trust—but the acquaintance with the whole becomes more and more superficial. The increase in regulations and administrative interpretations and decisions makes it seem more important to find the apposite sentence in an obscure no-action letter than to construct a reasoned legal argument. On-line research provides the only access to much of this material. Yet, despite its advantageous potential, Lexis deemphasizes the lawyer's systematic knowledge of the law and makes it more difficult to place the structure of the law at the center of legal education. "Law and whatever" jurisprudence, whether based on marginal utility theory or democratic socialism, succeeds because it offers a framework for these rules that is more accessible than that provided by an overview of the constantly changing structure of the law itself. But the extra-legal framework, even when supplemented with a good sense for search logic, cannot generate a well-written appellate brief or a carefully constructed contract.

It is easy to forget, because we tend to cite their epigrams rather than read their opinions, that those whose legal prose we admire—Holmes, Brandeis, Cardozo—were masters of legal construction. Their fine prose style is really a reflection of their ability to create legal theories that are appropriate to the facts. They gained that ability precisely through their formalist legal education. But legal construction remains the essence of the lawyer's task regardless of the lawyer's theory of adjudication: good legal writing is still clear conceptual thinking, convincingly displayed. Of course, there is today no path back to the innocence of pre-Realist legal education. If, after the death of Contract, legal writing is to improve, alternative access must be found to the structure of the law and the nature of legal argument.

One of the few substitutes I know for formalist legal training is a background in comparative law, the discovery of the particular structure of one legal system by comparing it to another. The comparison,

which begins by comparing the solutions that various legal systems provide in response to similar problems, makes it clear that legal theories, even those applied in similarly advanced industrial nations to the tranquil problems of private law, are remarkably diverse. If systems of comparable economic sophistication solve the same problems differently, the solutions are not compelled by practical necessity. In other words, even the comparison of individual norms can emancipate legal education from the illusion, fostered by some versions of the "law and whatever" jurisprudence, that scientific knowledge can determine a legal result. Just because the world is a certain way does not mean it should remain that way. The comparison makes it clear that the law is a normative science in which reasons and convincing presentation are decisive.

The real benefit of comparative law, however, lies elsewhere. It provides access to a realm of universality beyond that of the legal concept, to the principles that provide the foundation for a legal system. For the differences in legal construction are not arbitrary. Each legal system is a discrete hierarchy of norms based on its own set of—often unspoken—premises and principles.¹²⁸ Comparative law shows that an elegant legal solution is one that produces a convincing result with the elements and within the framework of a given legal system.

Goethe noted that those who have no acquaintance with foreign languages know nothing of their own.¹²⁹ The statement is equally true of the law.¹³⁰ Yet despite the critical importance of comparison for the

¹²⁸ The conveyance or passage of title under French civil law provides a good example. Under French law, as between the parties, title generally passes at the conclusion of the contract, unless the parties have agreed otherwise. *See* CODE CIVIL [C. Civ.] arts. 1138, 1583 (Fr.). Passage of title does not depend on a separate act, such as the delivery of goods or the execution and delivery of a deed. Thus, if we were to meet on a street corner in Paris and you were to offer me your Chateau Blackacre for 10,000,000 FF and I to accept, we would not only have concluded a land-sale contract, but would also have conveyed title to real property. One of the bases for this rule was the Enlightenment's confidence in the power of human reason and its expression as a declaration of will. According to this view, it would have insulted human reason to require an additional act to convey property rights. "Thus human will, assisted by all the power of the law, traverses every distance, transcends every obstacle, and becomes present everywhere like the law itself." Portalis, *Présentation au corps législatif*, in 14 RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 108, 113 (P. Fenet ed. 1827) (my translation).

¹²⁹ J. VON GOETHE, *THE MAXIMS AND REFLECTIONS OF GOETHE* no. 414, at 154 (B. Saunders trans. 1893).

¹³⁰ The best way to appraise the limitations and the niceties of one's own language, and so to learn some of the secrets of its use, is to look at it from the observation post of another language. Acquaintance with a second tongue makes one self-conscious and critical about one's own. It is not different in the study of law. We gain a healthy skepticism in regard to the completeness and permanence of our own solutions. We gain a per-

study of the law, the comparative method has not made great strides in America. During the nineteenth and early twentieth centuries, comparative law was "the jealous mistress' indigent relative," a subject "of no apparent immediate utility to the private practitioner."¹³¹ During the 1930's, largely due to the influx of foreign legal scholars, the topic seemed full of promise.¹³² Yet Richard Posner was able to survey recent American legal scholarship without even mentioning comparative law as a legal discipline.¹³³ Whatever their own doctrinal impact, the visitors were unable to convince American legal scholars that there was anything to be learned from abroad. To be fair, one must admit that the difficulties were formidable. To begin with, there were those damned foreign languages. And then, irritatingly, the importance of the comparative method was lost on those without a conceptual understanding of the law. Whatever the reasons, the opportunity has passed, and it is now unlikely that comparative law will ever become a primary focus of American legal thought.

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.¹³⁴ Legal writing will become increasingly technocratic as prescriptions generated by unexamined premises are continually applied to misperceived situations.

But there is no reason to lament. Prose itself seems to be losing its hold as the prime medium for the communication of thought. It was Victor Hugo's insight that the printing press had destroyed the cathedral.¹³⁵ Once writing replaced stone sculpture and stained glass as the principal medium for education, the days of stonemasonry as a fine art

spective and a sense of proportion, learning that our system, like any other system, is not a true norm, but that all systems are only partially successful attempts.

Smith, *Report of the Dean*, COLUM. U. BULL. INFORMATION, 36TH SERIES, NO. 20, at 5-6 (1935), quoted in Deák, *The Place of Foreign and Comparative Law in the American Law Reviews*, 23 VA. L. REV. 22, 22 (1936).

¹³¹ Hug & Ireland, *The Progress of Comparative Law*, 6 TUL. L. REV. 68, 68 (1931) (quoting A. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 299 (1921)).

¹³² Ernst Rabel, one of the founders of modern comparative law, was one of the refugees, and two of his close collaborators—Friedrich Kessler and Max Rheinstein—were at the center of American legal education for several decades.

¹³³ See Posner, *supra* note 125.

¹³⁴ See Collins & Hattenhauer, *supra* note 2, at 142 ("[M]any authors note among prelaw students, law students, and working attorneys the decline in writing skills noted generally over the last decade.").

¹³⁵ See 1 V. HUGO, NOTRE-DAME OF PARIS 129 (J. Beckwith trans. 1892).

were numbered. Today, tapes, film, video, and floppy disks offer extraordinary possibilities for the multidimensional presentation of ideas and argument.¹³⁶ The time is coming when prose composition will take its place beside stonecarving as one of the lost arts.

¹³⁶ Even in the traditional academic disciplines, the new media are replacing language skills. At Indiana University, for example, a doctoral candidate in political science may meet the "Foreign Language/Research-skill Requirement" by demonstrating "proficiency in any two of the following: French, German, Spanish, Russian, mathematics, logic, statistics, or computer science." See 82 IND. UNIV. BULL.: GRADUATE SCH. 191 (1984). Masters students generally must demonstrate proficiency in one foreign language or in one of the approved research skills, but "[s]tudents specializing in public administration, law, and policy must use an approved research skill, not a foreign language, to meet this requirement." *Id.*