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The Path, Posner, and Persuasion: Jurisprudential Stances and Style in Judicial Writing and Their Influence on Legal Education

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Introduction

The Path of the Law, a speech by Justice Oliver Wendell Holmes, Jr.¹ established the framework for legal pragmatism and the limitations of logic in judicial decisions.² Holmes identifies the illusion of certainty, and the danger of viewing law as a system comparable to mathematics.³ The plasticity of law requires a pragmatist like Holmes to be capable of seeing the limitations of language and the various influences at work in judging. As the promotion of Holmes's legal legacy, Judge Richard A. Posner advances and expands legal pragmatism to include the use of style and rhetoric in justifying legal outcomes when logic fails. Posner's captivating use of rhetoric pervades legal thought through his profuse publications, and law schools currently teach his decisions in most areas of the law. This use of judicial decisions, known as the casebook system in legal education represents a judge's words as "The Law," and fails to acquaint students with the jurisprudential stances and rhetorical devices judges employ in defending their decisions. Only through awareness of the philosophy of jurisprudence and the stylistic tools employed in opinion writing will this generation of legal scholars be able to scrutinize the decisions of the judiciary instead of blindly accepting them as truth.

The first section of this paper discusses Oliver Wendell Holmes's *The Path of the Law*, and his theories on logic and pragmatism in judicial opinions. The second section discusses Judge Richard A. Posner and his contributions to logic and pragmatism, including the role of rhetoric in justifying outcomes. Posner contemplates the use of a specific writing style to legitimate a pragmatic ruling. The third section discusses how Holmes and Posner's use of style and pragmatism are not taught to law students and explores their influence on the casebook

¹ Hereinafter Oliver Wendell Holmes.

² Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

³ *Id.* at 462.

system of legal education. Law school promotes an environment of persuasion and justification as the greatest tools for future advocates; to assume judges do not employ those same cornerstones of legal practice in their opinions is folly and willful blindness.

I. Justice Oliver Wendell Holmes, *The Path of the Law*, Logic, and Pragmatism

Stanford Law Professor Thomas C. Grey describes Justice Oliver Wendell Holmes as “the great oracle of American legal thought.”⁴ Judge Richard A. Posner calls him “the most illustrious figure in the history of American law.”⁵ Born in 1841, raised in Boston, Holmes was wounded three times in the American Civil War serving with the Twentieth Massachusetts Volunteers.⁶ He attended Harvard Law School after the war, and in 1883 was appointed to the Supreme Judicial Court of Massachusetts.⁷ After serving on that court for twenty years, In 1903 President Theodore Roosevelt appointed Holmes to the U.S. Supreme Court from which he retired in 1932.⁸

On January 8, 1897, Justice Holmes gave his influential speech *The Path of the Law* at the dedication of a new hall at the Boston University School of Law, later published in April of 1897 in the Harvard Law Review.⁹ According to Posner, *The Path of the Law* together with Holmes’s book *The Common Law* “supplied the leading ideas for the legal-realist movement (more accurately, the legal-pragmatist movement) – the most influential school in twentieth-

⁴ Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 787 (1989).

⁵ Richard A. Posner, *Introduction to OLIVER WENDELL HOLMES, JR., THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.* ix (Richard A. Posner ed., The University of Chicago Press 1992).

⁶ *Id.* at ix-x.

⁷ *Id.* at x.

⁸ *Id.* at x-xi.

⁹ Holmes, *supra* note 2, at 469.

century American legal thought and practice.¹⁰ In general legal pragmatism rejects a strict interpretation of law and acknowledges various factors influencing a judge's decision including its consequences, not merely a logical end.

Justice Holmes's most notable quote, "[t]he life of the law has not been logic; it has been experience," comes from his book *The Common Law*, published a few years before his speech *The Path of the Law*.¹¹ Holmes continues this line of thought in his speech stating it a "fallacy ... that the only force at work in the development of the law is logic."¹² Conceding in a broad sense the law has a logical development, he exposes the danger of believing the legal system "can be worked out like mathematics from some general axioms of conduct."¹³ While lawyers learn logic and judicial decisions strive to appear logical, Holmes states, "The logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man."¹⁴

Justice Holmes's particular definition of law gives insight into this introductory idea of pragmatism. Holmes defines law as "the prophecies of what the courts will do, and nothing more pretentious."¹⁵ Frederic R. Kellogg more clearly states Holmes's definition of law as "the prediction of the courts' use of official coercion."¹⁶ Holmes looks to the "bad man" to determine the crux of law.¹⁷ The bad man "cares only for the material consequences."¹⁸ Law has a

¹⁰ Posner, *supra* note 5 at xi.

¹¹ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Little, Brown and Company 1923) (1881).

¹² Holmes, *supra* note 2, at 462.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 459.

¹⁶ FREDERICK R. KELLOGG, OLIVER WENDELL HOLMES, JR., *LEGAL THEORY, AND JUDICIAL RESTRAINT* 38 (Cambridge University Press 2007).

¹⁷ Holmes, *supra* note 2, at 459.

¹⁸ *Id.*

tortuous history phrased in morality, but Holmes rejects comparing law to morals. Equating law and a specific morality or sense of conscience is a quagmire Holmes refuses to entertain, but rather prefers the bad man's view of consequences.¹⁹ What is morally wrong is of no import to the bad man; however, the actions that garner punishment from the court potentially affect the deeds of the bad man. This prophecy Holmes calls law becomes more critical the further the case presented applies to current jurisprudence.

What Holmes calls jurisprudence is “simply law in its most generalized part,” or “the effort to reduce a case to a rule.”²⁰ In his article *Holmes on the Logic of the Law*, Thomas C. Grey describes the need for adjudicating outside the role of jurisprudence. Grey explains:

[T]he farther out from the core a case fell, the less power the rule had to generate expectations and the less evidence it provided about relevant collective preferences. For these reasons, at some point ... the court should give up interpreting and take over the role of sublegislator, formulating a ground of decision for the case that could take account of dominant wishes and the need for clear rules.²¹

During Holmes's time on the bench, “preexisting law deductively decided every case through the operation of an exact, consistent, and complete system.”²² This paper will later discuss this approach in what Judge Posner identifies as the formalist stance while he explains its concepts in more detail. What Posner calls formalistic, Holmes identifies as orthodox. Justice Holmes's theory argued the law left to judicial discretion a few cases that could not be decided adequately under current law, as opposed to the orthodox view of Christopher Columbus Langdell of none.²³

¹⁹ *Id.*

²⁰ Holmes, *supra* note 2, at 467.

²¹ Thomas C. Grey, *Holmes on the Logic of the Law*, in *THE PATH OF THE LAW THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 137 (Steven J. Burton ed., 2000).

²² *Id.* at 138.

²³ *Id.* at 137.

According to Grey, Christopher Columbus Langdell, dean of Harvard Law School during this time, argued that once the rules were extracted from a case, “they *were the law*, and individual decisions shown to conflict with them were thereby shown to have been wrongly decided.”²⁴ Professor Grey states, “Langdell believed that through scientific methods lawyers could derive correct legal judgments from a few fundamental principles and concepts, which it was the task of the scholar-scientist like himself to discover.”²⁵ Langdell figures prominently in the discussion of the casebook system of legal education later in this paper; however, he was also the proponent of formalism in his day, and often clashed with Holmes. Considered the founder of the casebook system, Langdell was never a judge and as such did not face the problems of jurisprudence as his philosophical opponent Holmes.

In his article *A Plea for Lawyer-Schools*, Jerome Frank calls Langdell “a cloistered, bookish man, and bookish, too, in a narrow sense.”²⁶ Langdell “haunted the library” in his student days at Harvard, and spent the majority of his sixteen years of practice seeing little of clients while writing briefs and drafting pleadings for other lawyers.²⁷ He then became a professor at Harvard, later becoming its dean. Frank describes Langdell as “neurotic,” “inaccessible,” and anti-social.²⁸ This man saw law as a mathematical science not a profession; his orthodoxy germinated from an academic bubble, entirely without consideration to real-world applications.

In his article *One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, Gary Minda clarifies that Holmes agreed with Langell’s notion of

²⁴ Grey, *supra* note 4, at 805.

²⁵ Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1, 4 (1983).

²⁶ Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L. J. 1303, 1303 (1947).

²⁷ *Id.*

²⁸ *Id.*

comparing law to science; however, Holmes preferred “the softer version found in the social science curriculum.”²⁹ Minda states, “Although Holmes believed that law ought to be a science, it was a science of experience, facts, and induction drawn from social and historical context.”³⁰ Holmes acknowledges the utility of a softer science in *The Path of the Law*. He declares, “the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.”³¹ This statement appears practically prophetic considering Judge Richard A. Posner’s current influence in the law and economics movement, and this paper will consider this “man of the future” later.³²

In *The Common Law*, Holmes describes the various factors that influence and create law:

The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.³³

To know and understand the present rule of law, history and tradition are the first places to turn in evaluating its utility to the current matter. The study of history in law is critical “because it is the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules.”³⁴ Holmes argues against relying solely on tradition to justify law stating,

²⁹ Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, 28 IND. L. REV. 353, 358 (1995).

³⁰ *Id.*

³¹ Holmes, *supra* note 2, at 464.

³² *Id.*

³³ HOLMES, *supra* note 11, at 1.

³⁴ Holmes, *supra* note 2, at 464.

“[I]t is revolting to have no better reason for a rule of law than ... it was laid down in the time of Henry IV.”³⁵

The formalist or orthodox judge relies heavily on precedents in deciding cases, however, Holmes acknowledges the need to scrutinize:

In form [the law’s] growth is logical. The official theory is that each new decision follow syllogistically from existing precedents. But just as the clavicle in the cat only tells of the existence of some earlier creature to which a collar-bone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten. The result of following them must often be failure and confusion from the merely logical point of view.³⁶

The orthodox stance emphasizes upholding the present rule rather than adjudicating on the merits of a particular set of facts. Precedents become a tool of the orthodox that inevitably widens the divide between society and law through cementing the law to the past. Justice Holmes argues law is constantly straining to catch up to society, and the failure of the orthodox to look outside of pure logic only makes law less beneficial and relevant to the people.

In *Traversing Holmes’s Path toward a Jurisprudence of Logical Form*, Scott Brewer describes four theses in Holmes’s *The Path of the Law*, one of which he calls “anti-logic.”³⁷ Brewer articulates Holmes’s anti-logic thesis as: “The law of a living legal system, such as that of the United States, cannot be adequately explained as an axiomatic deductive system, in large part because a significant role is inevitably played by the ‘inarticulate’ in a judge’s discernment and application of the law.”³⁸ According to Brewer, “The life of the law is, and should be, logic

³⁵ *Id.*

³⁶ HOLMES, *supra* note 11, at 35.

³⁷ Scott Brewer, *Traversing Holmes’s Path toward a Jurisprudence of Logical Form*, in *THE PATH OF THE LAW THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 94 (Steven J. Burton ed., 2000).

³⁸ *Id.* at 95.

suffused by experience and experience tempered by logic.”³⁹ The term anti-logic is a harsh portrayal of Holmes’s legal theory. Holmes never advocated for a unilateral dismissal of reason in judicial decisions; rather he acknowledged the fallacy of logic as the *only* instrument employed by judges. Brewer’s belief of what law should be does not clash with Holmes; however, characterizing Holmes as anti-logic places Holmes in the light of a rogue justice, applying law willy-nilly.

The true issue is not necessarily an excessive use of logic by the orthodox, but a particular style of interpretation.⁴⁰ The orthodox judges’ strict adherence to logic leaves them blind to different interpretations of a rule. According to Grey, “Holmes thought of words and their associated concepts pragmatically, as tools useful in identifying particulars for purposes of inquiry or communication.”⁴¹ Holmes states his greatest issue with classical orthodoxy in his famous dissent in *Lochner v. New York*.⁴² He declares: “General principles do not decide concrete cases.”⁴³ Holmes advocated that general principles, concepts, and categories of the law were meant to make the law easier to understand.⁴⁴ General principles are merely another tool to use in analyzing a case, not a concrete concept incapable of various interpretations.

Problems in judicial interpretation have long been the subject of heated debate; however, the inexactness of language will never allow a permanent resolution. Justice Holmes exposed this reality in *Towne v. Eisner*, a case concerning owed income taxes, stating, “A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color

³⁹ *Id.* at 94.

⁴⁰ Grey, *supra* note 21, at 135.

⁴¹ *Id.* at 135-146.

⁴² 198 U.S. 45, 76 (1905) (Holmes, O., dissenting).

⁴³ *Id.*

⁴⁴ Grey, *supra* note 21, at 145.

and content according to the circumstances and the time in which it is used.”⁴⁵ Holmes’s description of the capricious nature of language is not only accurate but beautiful prose. Judge Posner says, “Holmes was a great judge *because* he was a great literary artist.”⁴⁶ Only a master of language could comprehend the malleability of law, and the need to remain responsive when applying rules to reality.

In his review *Searching for Holmes Among the Biographers*, Gerald Caplan acknowledges the awe and reverence given Holmes by posterity.⁴⁷ He accepts “to the broader public he is not just a name. He enjoys a status typically reserved for a political figure, a statue on a pedestal, a life so compelling that it exists independent of actual accomplishments.”⁴⁸ Holmes is not without critics, however their voices are largely drowned out by the admirers. Whether Holmes’ influence on the law is described as profitable or “pernicious,” his impact cannot be ignored.⁴⁹

Justice Holmes understood the role of theory in application to reality and the need to call together interdisciplinary tools and skillful writing to exact just rulings. While Holmes faced a judiciary lashed securely to the orthodoxy in black-letter law, he saw the future of the judiciary in “the man of statistics and the master of economics.”⁵⁰ Judge Richard A. Posner is such a “man of the future.”⁵¹

⁴⁵ 245 U.S. 418, 418 (1918).

⁴⁶ Posner, *supra* note 5, at xvii.

⁴⁷ Gerald Caplan, *Searching for Holmes Among the Biographers* 70 GEO. WASH. L. REV. 769 (2002).

⁴⁸ *Id.* at 770.

⁴⁹ *Id.* at 770.

⁵⁰ Holmes, *supra* note 2, at 464.

⁵¹ *Id.*

II. Judge Richard A. Posner, Pragmatism, and Rhetoric

Prolific does not begin to describe the Honorable Richard A. Posner of the Seventh Federal Judicial Circuit. He has authored 53 books, published more than 150 law articles, and a plethora of miscellaneous comments and reviews, not to mention his constant forthcoming works.⁵² A cursory search of Lexis Nexis verifies Judge Posner has published more than three thousand opinions. While Justice Holmes saw the interdisciplinary man of statistics and economics as the future, Posner fits this idea exactly.⁵³ Posner long has been one of the most notable figures in the law and economics movement, as well as the law and literature movement.⁵⁴

In his book *Law and Literature: Revised and Enlarged Edition*, Posner describes what the best judicial opinions contain.⁵⁵ A good opinion is expressed clearly, and dramatic, contains a lucid presentation of the particulars, relates the particulars to larger themes, and embraces clear and forceful statements with a high degree of sensitivity to the expectations of the audience.⁵⁶ This opinion writing style follows the pragmatic school in the impure style. The connection between pragmatism and rhetoric is important because Posner's expert use of the two is popular to publishers, and in turn, greatly influences this generation of legal scholars inside the casebook system of legal education.

⁵² Richard A. Posner – Publications, <http://www.law.uchicago.edu/node/79/publications>

⁵³ Holmes, *supra* note 2, at 464.

⁵⁴ John Giuffo, *Judging Richard*, 44 COLUM. JOURNALISM REV. 36, 37 (2005).

⁵⁵ RICHARD A. POSNER, *LAW AND LITERATURE: REVISED AND ENLARGED EDITION* (Harvard University Press 1998).

⁵⁶ *Id.* at 276.

In *Judges' Writing Styles (And Do They Matter?)*, Posner relates how writing styles compare to the two jurisprudential stances he calls the formalist and the pragmatic.⁵⁷ The formalistic stance is narrow, and “the model is that of deducing legal outcomes from a major premise consisting of a rule of law laid down by a legislature and a minor premise consisting of the facts of the particular case.”⁵⁸ A formalist judge is inclined to a strict interpretation of statutes, staying close to “the surface meaning of the text as its authors would have understood that meaning.” This type of interpretation minimizes judicial discretion, or according to Posner “at least pretends to.”⁵⁹

The pragmatic approach is broader, “judicial discretion is acknowledged and an outcome that is reasonable in light of its consequences sought.”⁶⁰ Judges of the pragmatic school are inclined to apply a loose construction in an attempt “to adjust for the limitations of foresight of legislators and the framers of constitutional provisions.”⁶¹ According to Posner in his article *Legal Pragmatism Defended*, the pragmatic is ultimately based on reasonableness, is forward-looking, empiricist, does not distinguish legal reasoning from practical reasoning, and is sympathetic to rhetoric as a mode of reasoning.⁶² Posner clarifies legal pragmatism as not hostile to all theory, “merely hostile to the idea of using abstract moral and political theory to guide judicial decisionmaking.”⁶³ In general, legal formalists are prone to use what Posner calls the

⁵⁷ Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1428 (1995).

⁵⁸ Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952, 954 (2003).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Richard A. Posner, *Legal Pragmatism Defended*, 71 U. CHI. L. REV. 683, 683-684, (2004).

⁶³ *Id.* at 684.

pure style of judicial opinion writing, while the pragmatists employ the impure.⁶⁴ Judge Posner defines what he means by style:

We can think of it most broadly as the specific written form in which a writer encodes an idea, a “message,” that he wants to put across. His tools of communication are, of course, linguistic. But they include not only vocabulary and grammar but also the often tacit principles governing the length and complexity of sentences, the organization of sentences into larger units such as paragraphs, and the level of formality at which to pitch the writing. These tools are used not just to communicate an idea but also to establish a mood and perhaps a sense of the writer’s personality.⁶⁵

Next, he dives into the two styles of judicial opinions, the pure and impure. Pure style opinions “tend to be long for what they have to say, solemn, highly polished and artifactual – far removed from the tone of conversation – impersonal, and predictable in the sense of conforming closely to professional expectations about the structure and style of a judicial opinion.”⁶⁶ The pure opinion quotes heavily from previous judicial decisions, includes unnecessary detail, and is written for an audience of lawyers.⁶⁷ Opinions employing the pure style are epitomized through Justices Benjamin N. Cardozo, Louis Brandeis, Felix Frankfurter, and William J. Brennan, Jr.⁶⁸ Posner juxtaposes the pure with the impure: “Impure stylists like to pretend that what they are doing when they write a judicial opinion is explaining to a hypothetical audience of laypersons why the case is being decided in the way that it is.”⁶⁹ Impurists try “to be candid and not pretend to know more than they do or speak with greater confidence than they feel.”⁷⁰ Other marks of the impure include avoiding long quotations from previous decisions, the shunning of clichés,

⁶⁴ Posner, *supra* note 57, at 1421.

⁶⁵ *Id.*

⁶⁶ *Id.* at 1423-1425.

⁶⁷ POSNER, *supra* note 55, at 289.

⁶⁸ *Id.* at 291.

⁶⁹ *Id.* at 289.

⁷⁰ *Id.* at 290.

imitating the movement of thought, and avoiding unnecessary detail.⁷¹ Judges who use the impure style include Hugo Black, Learned Hand, and, of course, Oliver Wendell Holmes and Richard A. Posner.⁷²

According to Posner, the ultimate approach to judicial writing is significant because it can affect content:⁷³

We tend to believe that words enable thought. But words can also substitute for thought. The pure style is an anodyne for thought. The impure style forces – well invites – the writer to dig below the verbal surface of the doctrines that he is interpreting and applying. There he may find merely his own emotions, but if he is lucky, he may find the deep springs of the law.⁷⁴

While Posner obviously favors the impure style, his arguments are compelling. He pontificates, “Language is not just a medium of communication; it is an aid to thinking; and ‘thinking on paper’ is often necessary to bring the resources of language fully to bear on a problem.”⁷⁵ The purists do not have this freedom of language due to the constraints of their style and fear of being literary. Posner concedes the danger of judges who try to be literary “is that they will muddy the law.”⁷⁶ However, the glory a literary opinion may bring is alluring. A judicial opinion becomes a piece of literature when it is “detachable from the specific setting in which [it was] created.”⁷⁷ According to Posner, “The vivid and therefore memorable opinion is not chained to the immediate context of its creation. It can be pulled out and made to exemplify law’s abiding

⁷¹ *Id.*

⁷² *Id.* at 291.

⁷³ *Id.* at 294.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 279.

⁷⁷ *Id.* at 257.

concerns.”⁷⁸ As literature, Judge Posner’s opinions are not bound merely to their legal audience, but may educate the world with Posner as professor. While being literary has its risks, rhetoric holds the greatest power and poses the greatest danger.

The element of rhetoric in Judge Posner’s style is by far the most crucial weapon in his writing arsenal. He defines rhetoric as “the subset of stylistic devices that is used to persuade readers or listeners to believe or to do something.”⁷⁹ The most powerful type of persuasion according to Judge Posner is practical reason, which “includes appeals to common sense, to custom, to precedents and other authorities, to tradition, to empiricism, to intuition, to institutional considerations, to history, to consequences, to the social sciences, to our just or good emotions, and to the test of time.”⁸⁰ In her article *Rhetoric Counts: What We Should Teach When We Teach Posner*, Kate O’Neill breaks down Posner’s three most used rhetorical strategies as “citation of seminal authorities, distinctive organizational techniques, and colloquial style.”⁸¹ This use of rhetoric is quite dangerous because “a judge, who is a skilled writer, may persuade himself and other judges, and the public, that a decision is wise despite not having very good reasons for it.”⁸²

Rhetoric also may hide in the cracks of a writing, leading the unaware audience toward a desired end. Judge Posner intentionally “lowers” his writing to increase the effectiveness of his rhetoric.⁸³ He explains, “Short sentences and sentence fragments, suppression of ornamentation and parentheticals, and simplicity and brevity all tend to “lower” the tone of a writing, to make it

⁷⁸ *Id.* at 258

⁷⁹ *Id.* at 255.

⁸⁰ *Id.* at 272.

⁸¹ Kate O’Neill, *Rhetoric Counts: What We Should Teach When We Teach Posner*, 39 SETON HALL L. REV. 507, 510 (2009).

⁸² *Id.* at 512.

⁸³ POSNER, *supra* note 55, at 287.

more like speech.”⁸⁴ He avoids headings, subheadings and footnotes because “no one speaks in footnotes and headings.”⁸⁵ “A fondness for everyday speech,” “candor and spontaneity,” and infusing “personality” all work together to produce a lowering effect of the writing.⁸⁶

Judge Posner’s opinion *Indiana Harbor Belt Railroad Company v. American Cyanamid Company* illustrates his particular approach to writing.⁸⁷ The case concerned a major chemical manufacturer that loaded twenty thousand gallons of a highly toxic chemical named acrylonitrile into a railroad tank car the company had leased. Workers discovered the car leaking at the Blue Island yard just south of Chicago. To stop the leak took two hours, and local authorities ordered the homes near the yard evacuated because the chemical was flammable at a temperature of thirty degrees or above and highly toxic. The Department of Environmental Protection ordered the railway line to pay nearly one million dollars to decontaminate the soil and water, and instituted this suit for recovery.⁸⁸

Judge Posner begins his opinion with a clear layman’s depiction of the facts and the procedural history. This is the part of the opinion Judge Posner would describe as the conceptual content, or the paraphrasable content, that when put into different words would not lose the meaning conveyed.⁸⁹ Then he puts forward the issue: “whether the shipper of a hazardous chemical by rail should be strictly liable for the consequences of a spill or other accident to the shipment en route.”⁹⁰ David Rosenberg’s article *The Judicial Posner on Negligence Versus Strict Liability: Indiana Harbor Belt Railroad Co v. American Cyanamid Co.*, states once Posner

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 288.

⁸⁷ 916 F. 2d 1174 (7th Cir. 1990).

⁸⁸ *Id.* at 1174.

⁸⁹ POSNER, *supra* note 2, at 255.

⁹⁰ *In. Harbor Belt Railroad Co. v. Am. Cyanamid Co.*, 916 F. 2d 1174, 1175 (7th Cir. 1990).

determines this issue to be novel under Illinois law and will require developing a ruling of first impression, “the reader anticipates the unfolding of a modern torts classic.”⁹¹

Judge Posner next describes the district court’s opinion finding the transportation of acrylonitrile in the Chicago metropolitan area to be an abnormally dangerous activity as “dicta.”⁹² To further reduce any credence of the district court’s statements he calls it “careless dicta,” a “mistake,” “not even considered or well-reasoned dicta,” and “[n]o court is required to follow another court’s dicta.”⁹³ What Judge Posner calls dicta are actually the district court’s holding. Judge Posner is especially persuasive in dismissing the lower court’s conclusions and justifies his actions by stating, “We are not required to follow even the *holdings* of intermediate state appellate courts if persuaded that they are not reliable predictors of the view the state’s highest court would take.”⁹⁴

Judge Posner has not even begun his argument, and already he has demonstrated himself as the trusted authority. He has torn down the ill-conceived holding or “dicta” of the lower court and will rebuild a new holding point by point with a Posner stamp of approval. This is the colloquial use of rhetoric Posner employs best. Posner knows the power of candid and forceful writing, stating, “[f]ew people dare to speak plainly, so when we hear a plain speaker we tend to give him a measure of trust.”⁹⁵ Judge Posner presents his opinions in such a straightforward manner that critical reading becomes less common. This style of writing is beguiling yet quite dangerous. No judge’s writing should be given implicit trust. Active readers become mollified by Judge Posner’s lowered tones and fail to follow his reasoning.

⁹¹ David Rosenberg, *The Judicial Posner On Negligence Versus Strict Liability: Indiana Harbor Belt Railroad Co. V. American Cyanamid Co.*, 120 HARV. L. REV. 1210 (2007).

⁹² *In. Harbor Belt Railroad Co. v. Am. Cyanamid Co.*, 916 F. 2d 1174, 1176 (7th Cir. 1990).

⁹³ *Id.* at 1176-1177.

⁹⁴ *Id.* at 1176-1177.

⁹⁵ POSNER, *supra* note 2, at 259.

In *Indiana Harbor* the important provisions in determining whether the defendant is strictly liable lies in the *Restatement of Torts* which “sets forth six factors to be considered in deciding whether an activity is abnormally dangerous and the actor therefore strictly liable.”⁹⁶ Now that Judge Posner has located where the answer will be found, he returns to the roots of the section to snuff out the remedy. He mentions the most famous case in the area, *Rylands v. Fletcher*, and dismisses it in favor of “a more illuminating one,” *Guille v. Swan*.⁹⁷ These are seminal cases in strict liability, and his use of these authorities will be discussed more later in depth concerning his motives.

Judge Posner exhibits an imaginative and literary portrayal of the facts in the 1822 *Guille v. Swan* that captivates with what could only be described as story time:

A man took off in a hot-air balloon and landed, without intending to, in a vegetable garden in New York City. A crowd that had been anxiously watching his involuntary descent trampled the vegetables in their endeavor to rescue him when he landed. The owner of the garden sued the balloonist for the resulting damage, and won. Yet the balloonist had not been careless. In the then state of ballooning it was impossible to make a pinpoint landing.⁹⁸

The little story is delightful, concise, and imaginative, with a spattering of adjectives and adverbs not normally seen in the average fact pattern. Judge Posner next takes the six factors of the *Restatement of Torts* and applies them specifically to each fact of *Guille v. Swan*, clearly illuminating how the factors determine strict liability. While still only at the second page of the opinion, Judge Posner packs it solid with information while managing to be absurdly clear.

Also, Judge Posner cleverly inserts clues to how he will rule, once again using the power of rhetoric. Judges can push their audience in a direction by stating the facts of a case in a

⁹⁶ 916 F. 2d 1174, 1176 (7th Cir. 1990).

⁹⁷ *Id.*

⁹⁸ *Id.*

manner depicting one party favorably, whether subtly or blatantly. They also may state their conclusion at the beginning, and then explain how they arrived at their verdict. Judge Posner does not do this. He is too astute for such pedestrian persuasion. In this case, he first destroys the holding of the lower court by dismissing it as dicta. Judge Posner then describes the defendant in *Guille v. Swan* as landing “without intending to,” an “involuntary descent” in which the defendant was “not ... careless.”⁹⁹ Judge Posner has not appeared to be facially sympathetic to American Cyanamid Company; however, if *Guille v. Swan* is the “more illuminating” seminal case, he obviously is portraying their position with empathy.¹⁰⁰

Judge Posner becomes didactic. He states an accident that cannot be prevented by taking care, which would fall under a negligence tort liability, is subject to strict liability.¹⁰¹ He relates strict liability as an equation:

The greater the risk of an accident and the costs of an accident if one occurs, the more we want the actor to consider the possibility of making accident-reducing activity changes; the stronger, therefore, is the case for strict liability. Finally, if an activity is extremely common, like driving an automobile, it is unlikely either that its hazards are perceived as great or that there is no technology of care available to minimize them; so the case for strict liability is weakened.¹⁰²

Cases involving driving a car are more likely to fall under a negligence claim, while cases involving the use of dynamite and other explosives would be more likely to fall under a strict liability claim. Judge Posner explicates, “Blasting is not a commonplace activity like driving a car ... that the imposition of liability is unlikely to have any effect except to raise the activity’s

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 1177.

cost.”¹⁰³ Judge Posner has introduced the concept, explained how it works, and given an example. If the reader of the opinion knew nothing of strict liability they could still follow along because Judge Posner specifically writes for an audience of laymen under the impure style.

After explaining negligence versus strict liability, Judge Posner turns to the chemical in question, acrylonitrile. Out of a list of 125 hazardous materials shipped on the nation’s railroads, “acrylonitrile is the fifty-third most hazardous on the list.”¹⁰⁴ Judge Posner is not finished belittling the lower court’s opinion, and he brings the plaintiff’s attorney into it:

The plaintiff’s lawyer acknowledged at argument that the logic of the district court’s opinion dictated strict liability for all fifty-two materials that rank higher than acrylonitrile on the list, and quite possibly for the seventy-two that rank lower as well, since all are hazardous if spilled in quantity while being shipped by rail.¹⁰⁵

He stresses, “No cases recognize so sweeping a liability.”¹⁰⁶ Judge Posner reemphasizes his role as trusted authority, remaining clear in his systematic approach of analysis. Judge Posner begins to turn his argument analysis on the plaintiff. He states, “We have been given no reason ... for believing that a negligence regime is not perfectly adequate to remedy and deter, at reasonable cost, the accidental spillage of acrylonitrile from rail cars.”¹⁰⁷ He describes this accident as a failure to maintain or inspect the rail car properly, and “[a]ccidents that are due to a lack of care can be prevented by taking care ... [and] are adequately deterred by the threat of liability for negligence.”¹⁰⁸

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1178.

¹⁰⁸ *Id.* at 1179.

Judge Posner launches into his conclusion: “The case for strict liability has not been made.”¹⁰⁹ He removes remand from the plaintiff, and justifies it because the plaintiff has not disputed any facts that could be resolved on remand.¹¹⁰ American Cyanamid Company has been vindicated in his claim. No strict liability exists here; however, a negligence count that was previously thrown out must now be reinstated.¹¹¹ Judge Posner has ruled. He inserts some friendly advice to the parties and ends with a snarky jab: “We trust the parties will find it possible now to settle the case. Even the Trojan War lasted only ten years.”¹¹²

It is a fascinating opinion, entertaining even; however, David Rosenberg states it “stirs up more important questions than it resolves.”¹¹³ Judge Posner’s clear and concise opinion built brick by brick has cracks. Rosenberg asserts “the inquiry Judge Posner prescribed and conducted would have courts determine not only the extent to which the negligence rule leaves residual risk, but also the efficacy of strict liability in reducing that risk.”¹¹⁴ This is the major problem in rhetoric; it camouflages faults of analysis with convincing pronouncements. Rosenberg finds no need to choose between strict liability and negligence in these types of cases because they produce the same deterrent effects.¹¹⁵ Judge Posner is wrong, and his “concerns misplaced.”¹¹⁶ According to Rosenberg, these types of cases “present no need to address the big torts questions of negligence versus strict liability because they are better treated as contract rather than tort cases.”¹¹⁷

¹⁰⁹ *Id.* at 1181.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1182.

¹¹² *Id.*

¹¹³ Rosenberg, *supra* note 91, at 1213.

¹¹⁴ *Id.* at 1214.

¹¹⁵ *Id.* at 1215.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1216.

Rosenberg conjectures about what Judge Posner is attempting to accomplish with this case if Posner is purposefully overlooking the case's contracts grounds. In essence, Judge Posner is using this case to add new facets to the case law.¹¹⁸ Rosenberg states, "Few torts decisions (or commentators) even mention deterrence, let alone apply the theory in any sustained and knowledgeable way. By introducing crucial insight regarding the activity-level effect, Judge Posner fundamentally changed the portrayal of strict liability in case law."¹¹⁹ Judge Posner either has missed or ignored purposefully a better method of resolving the case under contracts law. He does this to either expand the understanding of strict liability or merely to add to the areas in which he has created judge-made law. The blatant use of judicial discretion and rhetorical strategies to influence and make law must be discussed in detail regarding Judge Posner's motivations and their consequences.

Judge Posner's popularity is frightening considering his influence on this generation of legal thought. In Kate O'Neill's article previously introduced, she observes, "Judge Posner uses certain rhetorical strategies to attract casebook editors and law professors to his opinions, and ... the editors and professors happily succumb."¹²⁰ Rhetoric again is the principal reason law professors so commonly teach using his decisions. If rhetoric's power was not clearly understood before, O'Neill is definitive: "Judge Posner is not only influencing several generations of lawyers in their understanding of legal doctrine but is also normalizing for them a specific judicial rhetorical approach to legal controversies."¹²¹

¹¹⁸ *Id.* at 1218.

¹¹⁹ *Id.*

¹²⁰ Kate O'Neill, *Rhetoric Counts: What We Should Teach When We Teach Posner*, 39 SETON HALL L. REV. 507 (2009).

¹²¹ *Id.* at 508.

Seemingly, Judge Posner writes his opinions with the specific intention of publication as educational texts. The more powerful his rhetoric, the more he publishes, and the greater his influence on legal thought. As suggested earlier, while Judge Posner supposedly seeks to write “literary” opinions, he does so precisely because a literary opinion is apt for publishing. O’Neill venerates Judge Posner too much to characterize his actions as pandering; however, not to make that conclusion is difficult. She is in awe of Judge Posner, not without reason. O’Neill gushes, “[s]ome of his opinions are like art; he re-envision[s] the law, stripping away the accretions of lesser artists, revealing the deep structures beneath and recasting conventional wisdom into shiny, new forms.”¹²² Part of the problem is Judge Posner’s superstar status makes it difficult to find much blatant criticism of his work. Many do not care for his judicial personality, or perhaps his decisions, but no one has really shined the light on his motives or the unconscious influence his opinions have on law students.

While not overtly critical, O’Neill does describe Judge Posner’s intentional efforts toward casebook publication. “First, he often invokes old “chestnut” cases.”¹²³ She writes this, “[g]oing back to basics increases the odds that the opinion will be anthologized in casebooks and thus remembered by subsequent generations of lawyers.”¹²⁴ Judge Posner’s second rhetorical strategy, according to O’Neill, “is a discursive or exploratory organization for presenting the analysis.”¹²⁵ She clarifies: “Judge Posner rarely states a conclusion at or near the start of an opinion, and he typically proceeds through a number of issues and analyses before revealing to the reader the analysis he believes determinative.”¹²⁶ Judge Posner likes to take his audience on

¹²² *Id.* at 509.

¹²³ *Id.* at 518.

¹²⁴ *Id.*

¹²⁵ *Id.* at 519.

¹²⁶ *Id.*

a journey, and giving away his conclusion at the beginning would hinder his rhetoric. O'Neill describes the genius in this tactic:

Judge Posner's discursive organization also adds some suspense, making his opinions more interesting to read than the run of the mill opinions. A Judge Posner opinion has a beginning, middle, and end that build and then resolve a certain legal tension – an opinion that begins with issue and conclusion cannot create much suspense. Sometimes, where the facts are key to the legal issue, Judge Posner lets them drive the plot, but more typically his fact descriptions are remarkable more for clarity and brevity than rhetorical flair. ... Judge Posner creates suspense by tempting readers down superficially plausible analytic pathways and then, just when he has them going, reveals an obstacle they had not anticipated. He may repeat the trick several times until at last he reveals the direct line to the most sensible outcome.¹²⁷

Attempting to make the law appear more interesting and exciting to law students is a noble endeavor. Dry is a charitable description of most material students read; however, legal education must alert students to the power of rhetoric in these more entertaining opinions.

Posner is included in casebooks in part due to his status as judge.¹²⁸ His words are represented as “law,” without any obligation to be critical of his methods.¹²⁹ Law professors must be conscious of the folly in teaching Judge Posner with blind allegiance. As Judge Posner's influence spreads farther across the canvas of legal thought, students must be attentive not merely to learning the law, but the role of persuasion in creating and justifying law.

In David Rosenberg's article previously introduced, he observes, “To teach this judge's work and to ignore his rhetorical strategies is, if nothing else, to miss an opportunity to improve law students' rhetorical sensitivity and facility.”¹³⁰ While teaching why Judge Posner is so

¹²⁷ *Id.* at 519-520.

¹²⁸ *Id.* at 528.

¹²⁹ *Id.*

¹³⁰ *Id.* at 529.

influential will make him even more of a powerhouse is highly unlikely, awareness is far more preferable than continued ignorance. Including rhetorical analysis of judicial opinions in the study of law “permits discrimination between the form of an argument and its merits.”¹³¹

Robert F. Blomquist’s article *Playing on Words: Judge Richard A. Posner’s Appellate Opinions, 1981-82 Ruminations on Sexy Judicial Opinion Style During An Extraordinary Rookie Season* clearly describes why delving into appellate judicial opinion style matters.¹³² He says, “It matters because, from a practical standpoint, good substantive legal reasoning is inextricably intertwined with attractive style.”¹³³ Blomquist understands the crux of the issue: “Lawyers, judges, scholars and citizens need richer, more particularistic, more nuanced, more comparative, more historically situated assessments of the nature and practice of appellate judicial opinion style.”¹³⁴ From a legal education standpoint, these examples of judicial writing styles are ignored by the casebook system.

III. The Casebook System of Legal Education

Matthew Bodie in his article *The Future of the Casebook: An Argument for an Open-Source Approach* describes Langdell’s innovation:¹³⁵

In 1870 Christopher Columbus Langdell introduced the case method to his students at Harvard Law School. Prior to that time, Harvard students had been taught the law primarily through lectures and textbooks that focused on legal definitions and rules. Langdell, however, focused on actual cases and forced students to work through how the law had been applied in that case. ... The purpose of his casebook was to provide his

¹³¹ *Id.*

¹³² Robert F. Blomquist, *Playing on Words: Judge Richard A. Posner’s Appellate Opinions, 1981-82 Ruminations on Sexy Judicial Opinion Style During an Extraordinary Rookie Season*, 68 U. CIN. L. REV. 651, 692 (2000).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Matthew Bodie, *The Future of the Casebook: An Argument for an Open-Source Approach*, 57 J. LEGAL EDUC. 10 (2007).

students with direct, unlimited, and continuous access to the cases that they would be studying.¹³⁶

According to Gary Minda, Langdell believed the right answers could be discovered through legal analysis.¹³⁷ Langdell's approach to teaching provided for studying a limited amount of appellate court decisions for each area of the law to discover its universal principles. Minda writes, "It was the law professor's responsibility to collect these cases in a single text, called a casebook, and to instruct law students how to discover the principles of law in the cases through Socratic case instruction."¹³⁸

Robert Steven's book *Law School: Legal Education in America from the 1850s to the 1980s* discusses the inception of Langell's casebook method.¹³⁹ Langdell's approach to law modeled itself on the formalism of the English, "with the heavy emphasis on the law as a series of interrelated objective rules motivated exclusively by an internal logic of their own."¹⁴⁰ England had "a tiny bench, a small and tightly organized bar, a highly centralized legal system, and a highly selective method of law reporting."¹⁴¹ American legal culture contained none of these features.¹⁴²

Langdell viewed the common law as a manageable and knowable set of principles.¹⁴³ However, Justice Holmes recognized the realities of the American approach to common law:

The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history

¹³⁶ *Id.* at 11.

¹³⁷ Minda, *supra* note 29, at 360.

¹³⁸ *Id.*

¹³⁹ ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (The University of North Carolina Press, 2001)(1983).

¹⁴⁰ *Id.* at 131.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 132.

at the other, which have not yet been absorbed or sloughed off.
It will become entirely consistent only when it ceases to grow.
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The United States population, land size, and sheer number of judges and jurisdictions left the English approach doomed to failure.¹⁴⁵ Langdell's effort to create consistency, while noble, ignored the peculiar realities of the American legal system.

Jerome Frank, in his previously introduced article, stated unequivocally, "American legal education went badly wrong ... when it was seduced by a brilliant neurotic. I refer to the well-known founder of the so-called case system, Christopher Columbus Langdell."¹⁴⁶ Frank stressed the consequences of the Langdellian approach to legal education. One consequence of the casebook system is professors have little or no experience in legal practice; and therefore teach law from a purely academic viewpoint without regard to its practical applications.¹⁴⁷ A Langdellian form of legal education places the library at its heart, not the courtroom or the law office. An exasperated Frank exclaims: "Our leading law schools are still library-law schools, book-law schools. They are not, as they should be, *lawyer-schools*."¹⁴⁸

Law schools generally teach appellate decisions, which Frank called "relatively unimportant for most clients."¹⁴⁹ Upper court decisions are less useful because the vast majority of cases take place at the trial court level, and are never appealed. Every decision a court renders applies to that specific case because "courts do business in retail, not wholesale."¹⁵⁰ If a case is appealed, the facts are usually accepted as the trial court determined; therefore, the appellate

¹⁴⁴ HOLMES, *supra* note 11, at 36.

¹⁴⁵ STEVENS, *supra* note 139, at 132.

¹⁴⁶ Frank, *supra* note 26, at 1303.

¹⁴⁷ *Id.* at 1304.

¹⁴⁸ *Id.* at 1309.

¹⁴⁹ *Id.* at 1306.

¹⁵⁰ *Id.* at 1308.

court concerns itself mostly in rule application.¹⁵¹ A more useful approach to the casebook system would be to read and analyze the complete record of a case to truly grasp the workings of the law.¹⁵² An appellate decision merely relates the outcome, not the journey.

Jerome Frank advocated for a clinical approach to legal education, harkening back to the days of apprenticeship in becoming an attorney. While a valid and compelling argument, the limited field of vision in the casebook system is what this paper criticizes. In dissecting appellate cases under a Socratic approach, professors disregard anything outside the four corners of the opinion. The failure to teach jurisprudential stances and the vital role of language in shaping law leaves law students unprepared for practice.

The American Bar Association has shown great interest in analyzing the current state of legal education and the need for addressing the issues involved in preparing students for practice. In 1992 the Task Force on Law Schools and the Profession under the ABA published an extensive report known as the “MacCrate Report” addressing its findings and recommendations.¹⁵³ The report proposed:

To be effective, the teaching of lawyering skills and professional values should ordinarily have the following characteristics: development of concepts and theories underlying the skills and values being taught; opportunity for students to perform lawyering tasks with appropriate feedback and self-evaluation; reflective evaluation of the students' performance by a qualified assessor. (Chapter 7.B and Chapter 4.D)¹⁵⁴

If an effective legal education requires a development of the underlying theories and concepts of a skill, jurisprudential stances and writing styles of appellate judges must be taught.

¹⁵¹ *Id.*

¹⁵² *Id.* at 1311.

¹⁵³ TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, A.B.A., NARROWING THE GAP (1992). *available at* <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html>.

¹⁵⁴ *Id.*

In *The Problems of Jurisprudence*, Judge Posner describes the goals and realities of legal education.¹⁵⁵ The methodological side of legal education teaches “a culture, a vocabulary, a set of representative texts and problems.”¹⁵⁶ He also states; “The immersion in judicial opinions and other legal materials that is the hallmark of a legal education provides the student from the outset with a simulacrum of practice; he is like an airline pilot training on a simulator.”¹⁵⁷ But he also acknowledges the practical limits of the casebook system:

The “voluminous case materials are not a reliable guide to the social phenomena depicted in them. The immersion in cases that is so characteristic of both legal education and legal practice may be less a source of strength than a brute necessity indicative of weakness a stopgap pending better (more scientific, empirical, interdisciplinary) legal theory rather than a superior alternative to such theory.”¹⁵⁸

Posner contends thinking like a lawyer does not mean a mind geared towards analysis, but “an awareness of approximately how plastic law is at the frontiers.”¹⁵⁹ Understanding the malleability of law is crucial to legal education because simple rule-based learning connotes a false idea of the law as static.

Appellate judges are by far the most influential figures in legal education. Casebooks consist almost entirely of appellate opinions. Law students know law permeates from a variety of sources including legislative acts, executive orders, administrative rules and codes; however, it is the appellate analyses of these sources of law in which students have direct and continued contact. In Robert Leflar’s article, *Some Observations Concerning Judicial Opinions*, he recognizes, “in a legal system built on stare decisis, the law-announcing function of opinions as

¹⁵⁵ RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE*, (Harvard University Press 1990).

¹⁵⁶ *Id.* at 99.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 100.

¹⁵⁹ *Id.*

precedents is constantly thought about. It is the function most emphasized among law students, law teachers and members of the bar, particularly as they study opinions in an attempt to ascertain ‘what the law is.’”¹⁶⁰

When considering law students as an intended audience for judicial opinions, with the clear exception of Judge Posner, most judges gloss over them. When in 1960 a panel of twenty-five state Supreme Court and Federal Court of Appeals judges were asked “To whom do you write your opinions?,” law students came in fifth.¹⁶¹ Notably, ahead of law students as the audiences the panel of judges wrote for ranked “posterity” as first and “future judges” as third.¹⁶² This is typical of the general consideration law students are given as an intended audience of judicial opinions. Scholarship abounds on how judges write opinions, but the effect of that opinion writing on law students has been mostly ignored.

While this paper criticizes the classic form of the casebook system Langdell created, clearly that system has evolved since its inception. Posner says, “no major law school and few minor ones fail to bring other disciplines into the law-school curriculum.”¹⁶³ This is due in part because “other fields, notably economics, have worked their way so deeply into the fabric of law that a legal education seems incomplete without some instruction in them.”¹⁶⁴ Law schools regularly teach classes in Law and Economics, Law and Literature, Law and Medicine, Law and Society and other post-modern legal movements; however, an education in jurisprudence and rhetoric would be of even greater value to students. When available, courses in jurisprudence, legal philosophy or judicial writing in law schools are electives. These courses should exist as

¹⁶⁰ Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810 (1961).

¹⁶¹ *Id.* at 813.

¹⁶² *Id.*

¹⁶³ *Id.* at 438.

¹⁶⁴ *Id.*

electives, but as a deeper study to complement earlier required courses implementing these topics.

For example, constitutional law appears most appropriate to introduce basic jurisprudence and judicial rhetoric to the student. Professors often describe the particular constitutional stances held by justices of the Supreme Court, and a justice's unique personality and writing style consistently emerge in their opinions. A breakdown in the devices of persuasion used by the various justices compels the student to consider the active molding of law through language. The casebook system's failure to educate law students on the theoretical justifications and stylistic methods judges employ in formulating their decisions creates generations of lawyers unaware of the undercurrents moving law. Teaching rhetoric and jurisprudence (which includes both pragmatism and formalism as well as ways of thinking about law) makes students mindful, and this awareness is the check on the judiciary necessary to understanding what is legal evolution and what is activism.

The use of Langdell's casebook system was appropriate when legal education lacked singular structure; however, its continued use does not have the same justification. Preparing generations of minds for legal combat deserves critical thinking about legal education's present state. Abraham Lincoln said, "The dogmas of the quiet past, are inadequate to the stormy present. As our case is new, so must we think anew, and act anew"¹⁶⁵ Lincoln spoke to a nation torn by war; however, his words are incredibly valid today. Law is a war battled with words, less bloody but just as bold. Oliver Wendell Holmes described the fraternity of lawyers as an army. He observed, "to one who has shown himself a master, they pay the proud reverence of men who know what valiant combat means, and who reserve the right of combat against their

¹⁶⁵ ABRAHAM LINCOLN, *THE COLLECTED WORKS OF ABRAHAM LINCOLN* Vol. V, 537 (Rutgers University Press, 1953).

leaders even, if he should seem to waver in the service of Truth, their only queen.”¹⁶⁶ The greatest heroes and foes are the masters of language. Law students are only partially prepared for practice when given the weapons to wield at the bar. Students must also study the weapons of the bench.

A continued devotion to an outdated past will not benefit a unique present. The casebook system has become a “dogma” no longer useful in its present form.¹⁶⁷ While law itself is slow to catch up to society, this is not a valid reason for legal education to lag behind. Law students of today deserve an open conversation on their susceptibility of accepting the normalization of rhetoric and jurisprudential stances found in casebooks.

Conclusion

Justice Oliver Wendell Holmes introduced the jurisprudence of pragmatism as an approach to discovering legal outcomes by recognizing the plasticity and realities of law. Judge Richard A. Posner expanded the effectiveness of pragmatism through an artful use of opinion writing, employing rhetoric to convince his audience of the rightness of his conclusions. This skillful writing style beguiles the publishers of casebooks, and as such, normalizes judicial rhetoric to law students without restraint. The casebook system Christopher Columbus Langdell introduced does not teach students these jurisprudential stances and stylistic devices at work in any given opinion. Teaching these methods and theories broadens the mind of the law student, and presents a check on the judiciary. Awareness replaces a blind trust in the judiciary with cautious skepticism, leading in turn to a better-prepared student for the rigors of practice, and generations of lawyers capable of distinguishing judicial evolution from activism.

¹⁶⁶ OLIVER WENDELL HOLMES, JR., *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.* 225-226 (Richard A. Posner ed., The University of Chicago Press 1992).

¹⁶⁷ LINCOLN, *supra* note 165, at 537.

Table of Authorities

Cases

In. Harbor Belt Railroad Co. v. Am. Cyanamid Co., 916 F. 2d 1174 (7th Cir. 1990).

Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, O., dissenting).

Towne v. Eisner, 245 U.S. 418, 418 (1918).

Law Review And Other Legal Periodicals

Robert F. Blomquist, *Playing on Words: Judge Richard A. Posner's Appellate Opinions, 1981-82 Ruminations on Sexy Judicial Opinion Style During an Extraordinary Rookie Season*, 68 U. CIN. L. REV. 651 (2000).

Matthew Bodie, *The Future of the Casebook: An Argument for an Open-Source Approach*, 57 J. LEGAL EDUC. 10 (2007).

Gerald Caplan, *Searching for Holmes Among the Biographers* 70 GEO. WASH. L. REV. 769 (2002).

Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L. J. 1303 (1947).

Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989).

Langdell's Orthodoxy, 45 U. PITT. L. REV. 1 (1983).

Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1987).

Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810 (1961).

Gary Minda, *One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag*, 28 IND. L. REV. 353 (1995).

Kate O'Neill, *Rhetoric Counts: What We Should Teach When We Teach Posner*, 39 SETON HALL L. REV. 507 (2009).

Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U.CHI. L. REV. 1421 (1995).

Legal Pragmatism Defended, 71 U.CHI. L. REV. 683 (2004).

Reply: The Institutional Dimension of Statutory and Constitutional Interpretation, 101 MICH. L. REV. 952 (2003).

David Rosenberg, *The Judicial Posner On Negligence Versus Strict Liability: Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.*, 120 HARV. L. REV. 1210 (2007).

Books, Reports and Other Scholarly Non-Periodic Non-Legal Resources

Scott Brewer, *Traversing Holmes's Path Toward a Jurisprudence of Logical Form*, in *THE PATH OF THE LAW AND ITS INFLUENCE THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 94 (Steven J. Burton ed., 2000).

THE PATH OF THE LAW AND ITS INFLUENCE THE LEGACY OF OLIVER WENDELL HOLMES, JR. 94 (Steven J. Burton ed., 2000).

Thomas C. Grey, *Holmes on the Logic of the Law*, in *THE PATH OF THE LAW AND ITS INFLUENCE THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 137 (Steven J. Burton ed., 2000).

OLIVER WENDELL HOLMES, JR., *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.* (Richard A. Posner ed., The University of Chicago Press 1992).

THE COMMON LAW (Little, Brown and Company 1920) (1881).

FREDERICK R. KELLOGG, OLIVER WENDELL HOLMES, JR., *LEGAL THEORY, AND JUDICIAL RESTRAINT* (Cambridge University Press 2007).

ABRAHAM LINCOLN, *THE COLLECTED WORKS OF ABRAHAM LINCOLN VOL. V* (Rutgers University Press 1953).

RICHARD A. POSNER, *LAW AND LITERATURE: REVISED AND ENLARGED EDITION* (Harvard University Press 1998).

THE PROBLEMS OF JURISPRUDENCE (Harvard University Press 1990).

ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (The University of North Carolina Press, 2001) (1983).

TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, *A.B.A., NARROWING THE GAP* (1992). available at <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html>.

Non-Legal Periodicals Online and in Print Including Magazines and Newspapers

John Giuffo, *Judging Richard*, 44 COLUM. JOURNALISM REV. 36 (2005).

Websites and Other Online Resources

Richard A. Posner – Publications, <http://www.law.uchicago.edu/node/79/publications>