Voices, Values and Community: Some Reflections on Legal Writing

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I. Introduction

Bob Dylan once wrote “Something is happening, but you don’t know what it is, do you, Mr. Jones?” Law school — particularly the first year — eerily echoes these enigmatic sentiments. Something is happening. The gulf between law school and life widens daily, if not hourly. Students often feel like the victim of an assault; severely disoriented and dispossessed from any emotional and moral center. Their common language of discourse is stripped away and replaced with the baffling lexicon of case analysis — facts, issues, rules, holdings, reasons. It is a puzzling vocabulary unhinged from any apparently meaningful connection with ordinary experience.

The early law school experience, despite appearances, is not grounded in misanthropy, but is, instead, rooted in a radical personal and professional transformation. This process involves learning and mastering a new language — the language of law and legal analysis. Yet it also involves a good deal more that goes to the core of personal values and professional competence. This article is not about stratification and class; rather it is about what the personal experience of studying law can be like, intellectually and emotionally, and about voice, values and community and how they are part of a student’s personal fulfillment in law school and a lawyer's in practicing law. In finding that fulfillment, it will still be true that the touchstones for becoming a professional lawyer are the individual traits of integrity, self-worth, and self-expression.

The questions about this process ought to be vital for both students
and teachers "for it is no small thing to subject yourself to training in a system of thought and expression that in time affects you and your mind." More pointedly, as also suggested by Professor James B. White, the question is "how well you, you personally as an independent mind, respond to an attempt to control the pressure of your training in the law?" The armature of this experience is aspiration; that is, what does each person seek to gain from the law school experience and what is he or she willing to endure to get it. The window through which I have chosen to examine this training and pressure is the first year course in Legal Writing.

The emphasis here is not on how Legal Writing is taught for it is taught in many ways, but rather on the larger concerns that give legal writing its truer and more enduring meaning. These are the issues of voice, values, and community. These elements provide critical signposts to assist students and teachers in their pursuit of larger personal and professional goals that can guide, and even transcend, the labor of legal writing learning and instruction. The nexus between excelling and proficiency in legal writing is strong and this connection may be extended if there is a corollary perception about legal writing and students' sense of themselves.

II. Legal Writing, the Community, and the Self

The importance of Legal Writing centers on the attempt to establish a right relationship to language. Without a right relationship to the language of the law, effective legal education and practice are not really possible. Intelligence and raw enthusiasm provide the necessary, but not sufficient, conditions for the process to develop. The learning and practice of law take place within a community of practitioners that is charged with a special responsibility in society, but is also clearly set off from the rest of society for the purpose of carrying out this responsibility. Entrance into this interpretive community is premised on the mastery of the legal conversation that animates and defines legal practice and structure.

Legal education and practice are not solitary endeavors, but rather constitute deeply communal affairs (despite the significant swath of individualism that is permitted and even encouraged) that demand substantial
adherence to and mastery of the interpretive strategies that are the language of the legal community. This dynamic creates a good deal of pressure on the new law student to understand and to capitulate to these processes of change that condition acceptance into the legal community.

Understanding the nature of the legal community's special responsibility and the nature of its unique language of expression can help to illuminate the purposes of the Legal Writing course in the curriculum. As aptly described by Professor Burton:

[What distinguishes the legal community from other interpretive communities is the presence of order and justice at the center of our webs of belief about law, the principles of legitimacy, stare decisis, and legislative supremacy near the center, and the commitment to legal reasoning in bringing these values and principles to bear in particular cases. The legal conversation is a conversation about the implications of these values and principles in particular cases.]

The actions of the legal community — particularly in our democratic society — are also intimately related to the larger political issues involving the principles of legitimacy. That is, do the actions of the legal community actively contribute to the legitimacy of the larger legal and political system as a whole in its social, and historical context?

This notion of an interpretive community, whose skills are employed to insure the legitimacy of the legal system in society, provides a basis for seeing Legal Writing as different from advanced academic hazing and professorial 'hiding the ball.' There are manifold variations on this view of Legal Writing but the central object — whether expressed or not — remains to encourage and to direct thought and communication in this common community of endeavor. Without this understanding, the legal system, at least as it is currently constituted, could not function for very long. This does not mean, of course, that the legal system and legal writing itself are not in need of serious reform, but only that these two are inextricably linked and that it is crucial to understand their relationship. Because law students are being trained to join a unique, interpretive community, they need both the skills to participate successfully in that community and the sensitivity to examine its values and commitment.
III. Context and Form

Legal writing — perhaps more than any other component in the law school curriculum — requires a clear understanding of context in order to properly anchor its instruction. The context is, of course, the law school. However, it is not the law school simply as a place where the curriculum is offered, but rather the law school as a very powerful and insistent social environment. This environment demands — often without saying so — that students not only learn but also change. Change not only their ways of thinking but also their understanding of their values, their sense of what is meaningful, and the social obstacles that limit what is possible.

Most students resent this but offer little overt resistance. Legal Writing courses often seem to be the leading source of their discomfort and discontent. Legal Writing teachers must understand this. We must inform and caution students. Students need confirmation of the fact that the pressures they feel are real and that the pressures are not just free floating anxieties, but are deeply embedded in the law school environment. They must come to grips with these forces and the Legal Writing course provides an opportunity to do so.

Legal Writing provides an opportunity to begin the process of modulating the pressure and preserving the self against unwarranted invasion and encroachment. This process of modulation constitutes, for many students, a necessary condition that must be met before growth can occur. Students cannot grow or protect what is important without understanding the dynamics and the styles of discourse in the law school.

The principles and forms in the legal writing course are the grammar and syntax for effective communication in the law school. Students cannot be heard or understood without this mastery. The law school (for better or worse) is designed to support and produce students and lawyers who are at 'home' in their new milieu and can robustly demonstrate a mastery of legal reasoning and writing.

This mastery, of course, suggests the possibility of losses in individuality and values. It is these perceived losses that are often at the heart of much student disenchantment. Therefore, while the proper understanding of form is the key to effective legal communication, it needs the complements of voice and values to address questions of individuality and
integrity. While Legal Writing is primarily directed to the issue of form, the course must be set, not only in the context of the law school, but also in the socially broader and personally more meaningful one of voice and values.

The concept of form often greatly perplexes students and lawyers alike. Yet form is crucial to the law, especially as a means to embody the analogical reasoning that is so basic to case analysis. A case opinion is no more than a short story that must be parsed (i.e., 'briefed') in a particular way for the purpose of identifying its elements (e.g., facts, issue, rule, holding, and reasoning) in order to facilitate an understanding of how legal analysis works. The case brief is the elemental building block, the primordial form, of legal writing.

The case brief standing alone, however, is hermetic, because it has no outside referents. Other forms are needed with which to extend a student's understanding of a particular case to other cases and fact patterns. The heart of legal analysis, of course, involves comparing and contrasting cases because that is how cases are decided in our system of jurisprudence. The case synthesis and memorandum of law are the two most logical and sequential forms to follow the case brief.

Each of these forms — the case brief, the synthesis, and the legal memorandum — is closely interrelated and lead one into another. The case brief constitutes the basic building block — the understanding of what an individual case, standing alone, means. The case synthesis places several of these building blocks together in a way that measures their relationship to each other as a family of cases. The memorandum of law takes the synthesis and the relationships it elucidates and applies them to an extrinsic fact problem and therefore completes the conceptual process of legal reasoning. These building blocks, when mastered and properly understood, finally open the way to vivid and lucid legal writing.

IV. Voice

The idea of voice for law students and lawyers is just as critical as it is for all those who are interested in their work as a means of expressing their individuality, both of mind and character. The practice of law — as any deeply committed professional knows — often places exorbitant in-
tellectual and personal demands on practitioners. The time demands are
great and regardless of compensating extrinsic motivation, whether it be
money or social change, the work of the lawyer must provide intrinsic
opportunity for the expression of the self in order to be truly fulfilling.

It is perfectly reasonable — egomania aside — to want to express
what is unique about one’s self in one’s work. On some critical level, this
is the very point of work, an idea best captured in the words vocation and
calling. Yet training in legal education often seems the exact antithesis.
Any desire for personal expression is directly or indirectly cast aside as
inappropriate or irrelevant, and, even, at times, with ultimate derision as
weak or ‘soft.’ Such criticism — often blatantly political and ideological —
is not entirely unfounded but it is also misleading. There is room — even
the necessity — for the personal voice, but only as it is mediated through
the rules and forms that are the working materials of the profession. The
uniqueness of voice must have its roots in the common legal conversation
and forms of expression that animate the profession and its work.

Voice provides the irremediable stamp of the personal that bridges
the gap between the legal writer and his or her materials. The forms of
legal writing — the case brief, the synthesis, and the memorandum — are,
indeed, the building blocks of legal writing and much of legal writing
instruction concerns developing an understanding of these building
blocks and how they may be combined in increasingly complex and so-
plicated ways. Yet the ways these building blocks may be combined
often seem rigidly prescribed by the rules defining analogical and deduc-
tive reasoning. Despite appearances, this is not so.

On one level, students are informed that they should avoid the use of
personal pronouns and personal opinions. To many students, this means
the erosion of the personal and the cultivation of the artificial composite
of the ‘reasonable person.’ If these strictures are not properly explained
to students, such deadening conclusions will harden into a brittle, boring
sensibility, regardless of skills. On another level, therefore, students must
be informed what these rules are so that they can not only master them,
but transmute them into a vehicle of self-expression as unique as any
poem or painting. And as with any art, voice develops only through a
thorough understanding and mastery of the medium and the rules for
working in the medium. Voice cannot obtain without a mastery of the
rules. Neither art nor law works this way. Mastery of legal rules and reasoning is the precondition to full professional and personal expression, especially that expression that actually changes the possibilities in the legal forms.

There are, of course, constraints, but that is true of any art or form of expression. In fact, constraints constitute the heart of form. Constraints identify the parameters which are approximate, not fixed, and are subject to modest change through the talent and eloquence of voice. Voice emanates from engagement and struggle with the apparent strictures of form. It does not come from the rhapsody of the personal or from casual acts of circumvention of formal elements and requirements. Professor James B. White has made this point in his classic text:

There is no body of rules expressing the art of the lawyer any more than that of the sculptor or painter. You are as free as they, and as responsible for what you do. It is true that one of the mediums of the lawyer's art is rules, and the lawyer must know rules, and other materials of the law, as the sculptor must know clay and the painter paint and canvas. You must know what they are and how they work, before you can work with them. But what you must ultimately learn is what to do with rules and judicial opinions and all the other forms of expression that are the working stuff of a lawyer's life, just as the sculptor must learn what to do with clay and marble.¹⁵

For obvious reasons, voice is not a focal point in most legal writing courses. Necessity dictates otherwise. The exigencies of time and the need to learn legal rules and to understand the forms of legal writing preclude attention to much else. Yet it is a serious omission not to alert students¹⁶ to the possibility and promise of voice. Without this goal, too much of the law student's and the profession's writing will continue to be needlessly confined in sterile prescriptions that serve neither the individual nor the profession.

V. Values

The elements of form and voice ultimately raise the larger questions of values and purpose. That is, what are the goals and values law students
hope to advance and achieve through the learning and practice of law? The question is particularly pertinent because one of the unfortunate (and largely unintended) consequences of legal education is to make personal values seem irrelevant or even inappropriate. This process is subtle and not always visible, yet it is deeply embedded in the law school curriculum. It is artfully described by Professor Morton Horwitz of Harvard Law School:

Throughout most of human history, law and justice have been inextricably linked. By contrast, one of the most important hidden messages in the modern law school curriculum is contained in the varying contrast between ‘tough-minded’ and ‘tender-minded,’ ‘rational’ versus ‘emotional’ or ‘law’ versus ‘justice.’ There are various ways through which you will learn that ‘hot’ arguments are weak, ‘cool’ arguments are strong. To become a real professional, you are often taught, you must be cool, unemotional, and not confuse ‘strictly legal’ considerations with those of justice and morality. Little by little, many HLS [Harvard Law School] students refashion their identities to correspond to the bureaucratic technocratic image of professionalism that is part of the hidden curriculum.17

Students need warning and caution and teachers need to be reminded of this critical point. Personal values are subject to transformation in law school. As a result, students need to examine what their values are and, where appropriate, to protect them from erosion, dilution, and invasion. It is therefore important for students to remain sensitive and absorbed in the law school curriculum in order to know how the process is affecting them at the level of personal (and political) values. The commitment to values and their realization ultimately defines the self and this complex interaction is central to one's own sense of integrity and self-worth.

The law school experience can undermine and threaten values, but it can also strengthen them. It has the capacity to strengthen and to refine cherished notions and beliefs about such important concepts as liberty, justice, and fair play. Yet this is possible only if students and teachers are resolutely self-conscious about what they believe, and are willing to risk and to test closely held values. At times, this may even mean resisting the
pressures of classmates and teachers, but such is the price of clarity and integrity.

In addition, the law school curriculum often extols a corrosive skepticism and what is sometimes called the 'cult of complexity,' but teachers should not let this process corrode their instruction. Legal argument is complicated and that is one of the intellectual pleasures of the profession. Yet such complication does not have to exclude moral passion and social commitment. In fact, the general absence of bright line distinctions in the law ought to intensify and purify the process of analysis. As noted by Shalom Spiegel in Amos v. Amatziah, "Justice cools the fierce glow of moral passion by making it pass through reflection." Legal education must seek to elucidate the complex and often painful human dilemma — but it ought not stifle creativity and flatten aspiration in the process.

The analytic focus of legal education often drains attention and meaning away from the political and moral values inherent in many legal problems. This pressure skews attention away from values and toward an arid formalism solely concerned with efficiency and trade-offs. Such a curriculum denudes the landscape of its sticky human firmament. Students need to scrutinize the values inherent in law as well as how these values correspond with personal values. The legal profession — like any profession one might give his or her life to — cannot claim the necessary and abiding commitment of any thoughtful individual unless it provides a meaningful opportunity to realize deeply held values. Legal education, with appropriate rigor and precision, must facilitate social analysis and personal introspection in order to maintain its highest tradition of enlightened service and erudition.

VI. Conclusion

The first year of law school begins a time of substantial academic challenge and also initiates the process of socialization into the legal profession. Both of these processes instruct novices in new ways of thinking, writing, and perceiving. This difficult intellectual encounter is often exacerbated by its apparent conflict with the concepts of individual voice and personal (and political) values. The course in Legal Writing, when
properly taught and understood, provides a laboratory of opportunity in which to both master and scrutinize this engulfing process.

Legal Writing constitutes the hands on experience with the materials and forms that are the lifeblood of a lawyer's work. This opportunity confronts students and teachers with stark and pervasive questions such as whether they can make a fruitful, coherent, and satisfying life's work from these rough and despotic elements and whether they can find a supportive and enriching niche in the legal community. It is the willingness not only to struggle with the quandary of the demands of legal writing, but also the willingness to confront the companion elements of voice and values that holds the key to authentic transformation and equilibrium.

Notes

1. "Ballad of a Thin Man" from the classic Highway 61 Revisited (1965) album.
2. For such a discussion, see Duncan Kennedy, Legal Education and the Reproduction of Hierarchy (Cambridge, MA 1983).
4. Id.
5. Legal Writing is a two semester course sequence at the University of South Dakota School of Law. The first semester component covers five generic writing topics: the case brief, a case synthesis, a statutory analysis exercise, a closed memorandum of law, and an open memorandum of law. The second semester covers the appellate process and involves the writing of a brief and participating in oral agreement. The specific focus here is on the first semester experience — and the attendant trials, joys, and tribulations.
6. See generally, Stanley Fish, Is There a Text in This Class?, 13-17 (Cambridge, MA 1980) describing interpretive communities as a community of practitioners whose responsibility is to determine the meaning of a text (particularly a literary text). These observations are also clearly pertinent to the role of the practicing bar as an interpretive community whose text is the law and legal experience.
8. Id. at 210.
9. All approaches to Legal Writing are, ultimately, directed to the goal of enabling students to effectively communicate within the common endeavor of the legal community. It is helpful to make these facts and processes explicit to students in order to
increase and enhance the necessary learning and understanding by reducing what may appear to be the arbitrariness of the entire undertaking in Legal Writing.

10. This is, I think, a commonplace caveat. Everything is not all right with the legal system. Justice and equality for all are not manifest and this discordance challenges us and our students to extend the range and persuasiveness of legal writing.

11. For example, not as mere employment but as a strong inner impulse to pursue the ideals of the profession.

12. This is particularly true in the first semester of Legal Writing when there is not even the opportunity for advocacy which comes in the second semester with the course in Appellate Advocacy.

13. These building blocks are not, of course, the only building blocks for the (beginning) legal writer. Law students must also develop skills with the form of statutory analysis with its emphasis on deductive reasoning, as well as the advocacy of brief writing which usually comes in the second semester of most legal writing programs. Yet the forms of the case brief, the case synthesis, and the memorandum of law are clearly primary in the arsenal of beginning legal writers.

14. See, e.g., note 12 supra. For most students, the opportunity to engage in advocacy (structured as it is) provides a welcome opportunity to temporarily, at least, abandon reasoned neutrality.

15. White, supra note 3, at XXXV.

16. This is difficult to do, but it is best done in the context of instructor's comments on students' written work and in individual conferences with students where this can be discussed and explored with the individual student in a one-to-one situation. It is also relevant to note here that voice may be affected by matters of race, class, and gender. See, e.g., Carrie Menkel-Meadow, "Portia in a Different Voice: Speculations on a Woman's Lawyering Process," 1 Berkeley Women's L.J. 39 (1985).


18. Id.
