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Thoughts on Legal Education, the Curriculum, and the Importance of Process Over Substance

John O. Cole*

INTRODUCTION

Curricular reform conversations are valuable as a process of continually thinking about, and discussing, the form that a “proper” legal education should take. The key concepts here are “conversations” and “process,” for I would immediately suggest that the “substance” of whatever curricular reform that is created at the back end of this conversational process is itself of little importance or interest. That is to say, in the grand scheme of ideas concerning legal education, the specific ordering of courses and the particular list of required courses are of relatively minor importance in the development of a healthy curriculum.¹

I offer here a few thoughts concerning what I consider to be the essential center of all legal education, an education in many ways unlike any other. It will become clear that in my view legal education has two primary goals: to train legal practitioners and, no less importantly, to prepare lawyers for a central role in the governance of our country.

As to a couple of introductory matters, I believe that the curriculum should be designed with the overriding purpose of serving the consumers of the product, the students, to prepare them to be excellent practitioners of this practice we call the law.² This overriding purpose should

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1. I am aware of the continuing conversations and controversy concerning the place of practical education in the curriculum, but will only mention it in this Article in passing.
2. The focus here is on the word “excellent,” not simply on “practitioners,” as I hope to make clear.
inform decisions about when during the day various classes should be taught and what the basic content of each course should be. These decisions should be based primarily on pedagogical purposes, as opposed to faculty preferences concerning when they want to teach and what subjects they favor.

These decisions focus on the content of the curriculum, but specific content decisions are of lesser importance than decisions about the context in which that content is held. To speak generally about what lessons I believe should be taught in a law school in terms of the context in which a lawyer works, as opposed to the content of specific areas of law, requires a proper understanding of that context, and how that context should be taught. As an overview, I would assert the following brief description of what a legal education should be about, on the level of context.

The education of a law student should, above all, create in the student a sense of wonder concerning the openness and discretion in the legal system when dealing with problems that we characterize as “legal.” Law students need to experience on an intellectual and emotional level an understanding that there are no answers to the fundamental questions that arise in a legal context, and the questions are handled not by searching irritably for the answer, but by conducting a conversation carried on in the institutionalized framework of our legal system—a framework that has evolved as a means of enabling legal adversaries to seek a common ground. In this conversation we are not seeking a discoverable, true answer to a problem; rather, we seek clarity about who we are and what values we are willing to espouse.

3. To be excellent practitioners they must, of course, jump the hurdle of the bar exam, a kind of hazing initiation into the membership of this particular professional organization, and the students must be prepared for this hurdle.


5. When it is acknowledged that under disguise of dealing with ultimate reality, philosophy has been occupied with the precious values embedded in social traditions, that it has sprung from a clash of social ends and from a conflict of the inherited institutions with incompatible contemporary tendencies, it will be seen that the task of future philosophy is to clarify men’s ideas as to the social and moral strifes of their own day. John Dewey, Reconstruction in Philosophy 26 (2009). Oakeshott explained:

A morality, then, is neither a system of general principles nor a code of rules, but a vernacular language. General principles and even rules may be elicited from it, but (like other languages) it is not the creation of grammarians; it is made by speakers. What has to be learned in a moral education is not a theorem such as that good conduct is acting fairly or being charitable, nor is it a rule such as “always tell the truth,” but how to speak the language intelligently. . . . It is not a device for formulating judgments about conduct or for solving so-called moral problems, but a practice in terms in which to think, to choose, to act, and to utter.
The lawyer's role in this conversation is central and majestic. The purpose of a legal education is to sensitize students to the essential openness of language, including legal language, and to train them to understand the proper role of language in this creative process. This training prepares them to play an important role in the societal conversation concerning what kind of a society we want to create and why. The excitement of being a lawyer is that the lawyer stands in the center of the rhetorical process by which we create our society under law.6

Law students coming to law school seeking answers to how the legal world is made will be disappointed by this news. The legal process is one in which accommodation of various world-views is paramount in the creation process, not one in which one world-view is chosen over all others.

To understand the need for this education, I begin with a conception of what "law" is, and what its place is in our world. In terms of our world, Isaiah Berlin has written the following:

The world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate, and claims equally absolute, the realisation of some of which must inevitably involve the sacrifice of others. Indeed, it is because this is their situation that men place such immense value upon the freedom to choose; for if they had assurance that in some perfect state, realisable by men on earth, no ends pursued by them would ever be in conflict, the necessity and agony of choice would disappear, and with it the central importance of the freedom to choose. Any method of bringing this final state nearer would then seem fully justified, no matter how much freedom were sacrificed to forward its advance.7

And further,

We are doomed to choose, and every choice may entail an irreparable loss. Happy are those who live under a discipline which they accept without question, who freely obey the orders of leaders, spiritual or temporal, whose word is fully accepted as unbreakable law; or those who have, by their own methods, arrived at clear and unshakeable convictions about what to do and what to be that brook no possible doubt. I can only say that those who rest on such comfortable beds of dogma are victims of forms of self-induced myopia, blinkers that may

make for contentment, but not for understanding of what it is to be human.\(^8\)

I.

Legal education should prepare a student to live in this world: to understand that the “world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate, and claims equally absolute, the realisation of some of which must inevitably involve the sacrifice of others,”\(^9\) and not be happy to live under a discipline which they accept without question, who freely obey the orders of leaders, spiritual or temporal, whose word is fully accepted as unbreakable law; or those who have, by their own methods, arrived at clear and unshakeable convictions about what to do and what to be that brook no possible doubt.\(^10\)

Their education should prepare them, in other words, for an “understanding of what it is to be human.”\(^11\)

Given this world, law can be defined as an ongoing, never-ending, often changing, highly structured (yet flexible), procedural conversation, concerned with ways to keep the peace in society by negotiating a common ground “between [whose] ends equally ultimate, and claims equally absolute, the realisation of some of which must inevitably involve the sacrifice of others.”\(^12\)

Conversation is a process, a discussion among participants. To understand the law is to understand the process that forms the conversation that defines the law. The primary goal of legal education is, then, to develop a procedural skill, not to pass on specific content. This legal conversation is:

1. **Ongoing, Never Ending, and Often Changing:** Because there is no closure, except temporarily when a legitimate decisionmaker chooses a particular outcome, and those outcomes, the conversation itself, and the language used in those conversations, change through time.\(^13\)

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11. Id.
13. In speaking of historical periods, C.S. Lewis quotes G.M. Trevelyan speaking to this point about change well:

   All lines of demarcation between what we call “periods” should be subject to constant revision. Would that we could dispense with them altogether! As a great Cambridge historian [G. M. Trevelyan] has said: “Unlike dates, periods are not
2. **Highly Structured** (yet flexible): Structured first, because the law recognizes, as perhaps no other area of conversation does, that the explicit analysis of burdens is crucial to any conversation, and second, because our rules of procedure, including the rules of evidence, jury charges, and so on, structure and limit the conversation in various ways, while retaining a certain flexibility in interpreting those rules.

3. **Procedural Conversation**: Because all conversation is a process, as will be explained below.

4. **Concerning Ways to Keep the Peace**: All this conversation is designed to seek a peace among disputing parties, not to vindicate one or another ideal of justice. The following comment by Garry Wills is explicitly about politicians, but is in my view directly applicable to lawyers:

   [Politicians and especially lawyers] give cohesion to society, ease frictions, promote mutual deference. If we all got up every morning to argue over ultimate justice, there would be a continuing state of civil war where there is now a society. . . . Politics does not provide us with justice, but at least it gives us some peace, some convenience. And one should not underestimate the virtue in that. Peace, St. Augustine argued, is the precondition of every other social activity. It is the very soul of society. And for us, peace is the gift of the politicians [and the lawyers].

Joseph Vining makes a similar point when he states that:

A function of law may well be simply holding ourselves together. The motions and the talk in law may help maintain sanity. Polite discourse masks the most terrible cruelty and psychological assault—the very stuff of the novelist's observation—yet all might agree that no people could do without polite discourse or social form because they would disintegrate in worse explosions, inconsistent feeling let loose, passions of the moment. So legal talk, though unconnected to particular

facts. They are retrospective conceptions that we form about past events, useful to focus discussion, but very often leading historical thought astray.” The actual temporal process, as we meet it in our lives (and we meet it, in a strict sense, nowhere else) has no divisions, except perhaps those “blessed barriers between day and day,” our sleeps. Change is never complete, and change never ceases. Nothing is ever quite finished with; it may always begin over again. . . . And nothing is quite new; it was always somehow anticipated or prepared for. A seamless, formless continuity-in-mutability is the mode of our life. But unhappily we cannot as historians dispense with periods. . . . We cannot hold together huge masses of particulars without putting into them some kind of structure. . . . Thus we are driven back upon periods. All divisions will falsify our material to some extent; the best one can hope for is to choose those which will falsify it least.


outcomes, serves as a damping force, a lid, [an] order to cling to; and that, it may be said, is all it is.  

And all that it is, this damping force, is designed to keep the peace—a precondition of every other social activity.

5. By Negotiating a Common Ground Between Persons or Groups with Different Interests: As Stuart Hampshire has said:

[we should look in society not for consensus, but for ineliminable and acceptable conflicts, and for rationally controlled hostilities, as the normal condition of mankind; not only normal, but also the best condition of mankind from the moral point of view, both between states and within states. This was Heraclitus's vision: that life . . . consists in perpetual conflicts between rival impulses and ideals, and that justice presides over the hostilities and finds sufficient compromises to prevent madness in the soul, and civil war or war between peoples. Harmony and inner consensus come with death, when human faces no longer express conflicts but are immobile, composed, and at rest.]

In speaking of an early lawsuit, Gandhi was able to find common ground between the opposing parties to a lawsuit, and later wrote:

My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby—not even money, certainly not my soul.

For any excellent lawyer, whether it be in the practice of law or in the political arena, the bringing about of compromise and settling of disputes comprise the largest part of their public life. The possibility of a trial forms the background for this negotiating between parties, but, like war, trials are and should always be a last resort. Trials, in fact, are usually avoided when two excellent, well-trained lawyers are involved on opposite sides of a controversy.

In short, legal conversation is a process, a discussion among participants most often in disagreement. To understand the law is to understand the process that forms that conversation. The primary goal of legal education is, then, to develop a procedural skill, not to pass on

specific content. This “procedural” goal of all education, including legal, is well described in the following quote from an old schoolmaster in 1861, which captures the procedural nature of all education, including legal education:

[At school you are not engaged so much in acquiring knowledge as in making mental efforts under criticism. You go to a great school, not for knowledge so much as for arts or habits; ... for the art of expression, for the art of assuming at a moment's notice a new intellectual posture, for the art of entering quickly into another person's thoughts, for the habit of submitting to censure and refutation, for the art of indicating assent or dissent in graduated terms, for the habit of regarding minute points of accuracy, for the habit of working out what is possible in a given time, for taste, for discrimination, for mental courage and mental soberness.]

1. “[You go to a great school not so much for knowledge as for arts or habits”\(^{19}\): The law student does not so much acquire knowledge of the world—specific content—as he or she acquires procedural expertise. (Here is a clear statement of the relative unimportance of content, or “knowledge of the world” in education, including the study of law.) Insofar as curricular reform discussions emphasize “content,” they miss the most important aspect of a legal education. While the legal conversation is ongoing and never-ending, the content produced by that conversation is often changing, so today's content is far less important than the ongoing conversation that produced it.

2. “for the art of expression”\(^{20}\): The art of expressing thoughts in the language of the law is of fundamental importance to the student. Just as a teacher who teaches French does well to insist at an early point that only French be spoken in class, the law teacher should insist, after an introductory period, that only legal language may be spoken in class. In both cases, the content is of lesser importance than the manner of expression. The lawyer's voice in these conversations is a different voice than the voice of the non-lawyer because of the education the lawyer receives.

3. “for the art of entering quickly into another person's thoughts”\(^{21}\): This, of course, is a prerequisite to be powerful in the ongoing legal conversation. Legal discourse shares with moral discourse the attribute that it is one of “dialogue among persons who are actually involved in

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18. 2 William Johnson Cory, Eton Reform 7 (1861).
19. Id. (emphasis added).
20. Id. (emphasis added).
21. Id. (emphasis added).
what has happened; such discourse is very much contextual.\textsuperscript{22} Further, a moral (or legal) argument "must be addressed to the other man's cares and commitments or else it will not bear on, will not help to illuminate, his position truthfully."\textsuperscript{23} The point of this moral/legal discourse is to find a way to negotiate a peaceful settlement between parties with (sometimes) vastly different points of view.

4. "for the art of assuming at a moment's notice a new intellectual posture, for the habit of submitting to censure and refutation"\textsuperscript{24}. Learning the described art and habit is essential in order to achieve the flexibility that is so crucial if legal conversations are to succeed in negotiating a common ground.

5. "for the art of indicating assent or dissent in graduated terms"\textsuperscript{25}: This is perhaps the most crucial art of all, if the purpose of the conversation is to seek the common ground and to negotiate a peaceful solution to the dispute (be it political or legal).

6. "for the habit of regarding minute points of accuracy"\textsuperscript{26}: Negotiating a peaceful settlement between parties that disagree often turns on minute points of accuracy that can be agreed upon by the parties.

7. "for the habit of working out what is possible in a given time"\textsuperscript{27}: Here, we can borrow from Stanley Cavell, who speaks in terms directly relevant to legal discourse:

\begin{quote}
[I]t provides one possibility of settling conflict, a way of encompassing conflict which allows the continuance of personal relationships against the hard and apparently inevitable fact of misunderstanding, mutually incompatible wishes, commitments, loyalties, interests and needs, a way of healing tears in the fabric of relationship and of maintaining the self in opposition to itself or others\ldots [Moral or legal discourse] is a valuable way because the [other ways] are so often inaccessible or brutal; but it is not everything; it provides a door through which someone, alienated or in danger of alienation from another through his action, can return by the offering and the acceptance of explanation, excuses and justifications, or by the respect one human being will show another who sees and can accept the responsibility for a position which he himself would not adopt.\textsuperscript{28}
\end{quote}

\begin{enumerate}
\item HANNA F. PITKIN, WITTGENSTEIN AND JUSTICE 150 (1972).
\item Id. at 155.
\item Cory, supra note 18 (emphasis added).
\item Id. (emphasis added).
\item Id. (emphasis added).
\item Id. (emphasis added).
\item STANLEY CAVELL, THE CLAIM TO RATIONALITY: KNOWLEDGE AND THE BASIS OF MORALITY 353-54 (1961).
\end{enumerate}
It is crucial here to focus on the "what is possible in a given time." Negotiations always take place under time pressure, so that the art involved is to find a common ground in the time allotted. Indefinite conversation does not meet the needs of the law, as it does in so many other conversations.

8. "for taste, for discrimination, for mental courage and mental sobriety": More habits that form a necessary background for an authentic legal/moral conversation.

The core of these arts and habits he lists is thus procedural and flexible. Garry Wills makes this procedural and flexibility point well when speaking of the role of lawyers in the conversation:

[Again, lawyers] must struggle with each other, yet be friends the next day; make maximum claims as bargaining points, but aim at a compromise settlement; satisfy most people somewhat rather than a few people fully; represent diversity by muting differences; be always more neutral than hostile; deal in increments and margins only, but deal constantly; always adjusting, hedging, giving in a little, gaining a little; creeping toward one’s goals, not heroically striding there; always leaving oneself an out, a loophole, a proviso—what Willmoore Kendall used to call “a verbal parachute,” so that no alliance is irrevocable, no opposition adamant.

II.

If law is considered as this process of ongoing conversation, the aim of which is to keep the peace by finding a common ground between persons with often strongly held differing views, the question is, what kind of legal education would best prepare the student for this task? In a nutshell, this education must be about developing an understanding of the relation of language to the world.

This education begins with two basic insights: a) the world is everything that is the case (substance of the world)—Wittgenstein said that (with his special meaning)—and b) although that may be so, we have no access to that “substantive” world (that is, everything that is the case) through language—Wittgenstein (and many others) said that.

To understand this point more fully, we need to distinguish between the content of statements and their context. The following classroom example will help explain this distinction:

Professor: “Ms. Jones, you look especially beautiful today.”

29. Cory, supra note 18 (emphasis added).
30. Wills, supra note 14, at 176.
Ms. Jones: "Well, thank you, professor."

Third party student, commenting to a fellow student: "Did the professor really mean that, or was he up to something else with that statement?"

The professor's statement here is, to a typical English speaker, relatively clear and understandable. To such a listener, this statement would be a sensible (i.e. understandable) statement commenting on the appearance of Ms. Jones at a particular point in time (today). The content of the statement is relatively clear.

Ms. Jones replies to that content as a compliment.

The third party student's comment does not respond to the content of the statement, but switches the reaction to the statement to another level: the level of context. That is, the student asks, not what does that sentence mean (presumably he understands the content of the statement), but what is the context of that straightforward English sentence? In what broader context are we to hold the content of that sentence? Ought we hold that sentence as a simple description of Ms. Jones "today," or should we hold that content not as an attempt to describe Ms. Jones but as an attempt to perform some other function than a "mere" description? This question of context, of course, has little directly to do with the content of the sentence as understood by English speakers. This switch in categories, from content to context, has profound implications for our understanding and our approach to that sentence.

In moving to a contextual analysis of the professor's statement we can think of a continuum of possibilities of how we might "hold" the content of that sentence. On one end of a continuum of possibilities we could hold that sentence as a purely descriptive assertion of how Ms. Jones looks at a particular time. In that context we would hold that sentence as an attempt to simply picture or mirror the external world as represented here by Ms. Jones's appearance.

On the far end of this continuum of possible contexts, we could hold that sentence as a purely ascriptive assertion concerning her looks. In this context, we would hold the professor's sentence as a pure creation (ascription) concerning the appearance of Ms. Jones, that is, an ascription of the appearance of Ms. Jones in the mind of the speaker, with no relation to her "actual" appearance. Or, we could hold the statement as falling somewhere between these two ends of this continuum of possibilities and hold the statement as representing a mixture of description and ascription.

On the perfectly descriptive end, we would hold the statement in the manner of G.E. Moore when he held up his right hand and stated...
"Here's one hand" and held up his left hand and stated, "Here's another," or a statement like "Red here now." These statements stand as examples of attempts to find perfectly descriptive statements that can be definitively determined to be true or false by examining the world.

On the perfectly ascriptive end, we would hold the statement in the manner of a statement by Coleridge when he wrote, "In Xanadu did Kubla Khan / A stately pleasure-dome decree . . . ." Speaking of such a statement as true or false makes no sense since it is not a "constative statement," to use Austin's term, and thus is not susceptible to a true or false analysis.

The various possible contexts in which we can hold the content of this statement have profound implications for how we react to the statement and how we act on it. If we hold the statement as perfectly descriptive, we would react to it by looking immediately to Ms. Jones (to the world) to make a judgment concerning its truth or falsity, and judge the statement true or false depending on what we see. In this context, the statement by the professor would be either completely true or completely false, depending on the actual status of Ms. Jones at that moment. In such a case, we would achieve perfect certainty concerning the status of the sentence. "O brave new world that has such [sentences] in it."

On the other end of the continuum of possibilities, if we hold the statement as perfectly ascriptive, we would not look to Ms. Jones to determine the truth or falsity of the statement; we would look to the speaker to determine what effect the speaker sought to achieve by the statement, and whether the speaker was speaking authentically or inauthentically in his statement. (Mickey Gilley sings, "the girls all get prettier at closin' time.") Since in the context of a purely ascriptive statement, the appearance of Ms. Jones has little to do with our judging the statement.

31. G.E. Moore, Proof of an External World, in PHILOSOPHICAL PAPERS 127, 149 (Collier Books 1966) (using this example to show certainty that cannot be explained further).
32. DALE JACQUETTE, WITTGENSTEIN'S THOUGHT IN TRANSITION 209 (1998) (internal quotation marks omitted) (discussing the theory of logical atomism).
34. See generally J. L. AUXT, HOW TO DO THINGS WITH WORDS (1962).
35. ALDOUS HUXLEY, BRAVE NEW WORLD 94 (1946).
36. MICKEY GILLEY, Don't the Girls All Get Prettier at Closing Time, on GILLEY'S SMOKIN' (Playboy Records 1976). Gilley sings: "All the girls all get prettier at closin' time / They all begin to look like movie stars . . . ." Id.
Thus, we can identify two very different approaches to this statement. This dichotomy, however, only marks the two ends of this continuum. In between these two extremes lie an infinite number of possible combinations of descriptive and ascriptive elements of the sentence. If we choose to live in a world of either/or, which is the approach we take when we insist on one true answer, then we must decide which of these two possibilities is the appropriate one in this case. But if we choose, rather, to live in a world without definitive answers then that statement can be held as containing both descriptive and ascriptive elements at the same time, so that we hold that sentence in the context of a combination of descriptive and ascriptive elements.

Now here are three Truths (with a capital “T”) that I assert can be spoken in language:

(1) All verbal language is a product of the human mind.

(2) There is no possibility of a language produced by humans that is perfectly descriptive of the world, that perfectly describes “what is the case.”

(3) There is no possibility of a language produced by humans that is perfectly ascriptive of the world either, that completely ascribes the world without any descriptive reference at all. As to this point, which will not be developed here, the reader is referred to the voluminous discussion of the impossibility of a private language first discussed by Wittgenstein. Our language cannot be entirely divorced from our world (perfectly ascriptive) and still be intelligible as a communicative medium.

If we accept these statements as true, it follows that all language we speak or write is and must be a mixture of descriptive and ascriptive elements. The assertion of these statements as true is crucial: it avoids the paradox that haunts much of poststructural thinking, that is, if we assert that no language can be perfectly descriptive (true) of the world, then that sentence itself cannot be true. This paradox is solved by taking the position, as I have done above, that statements (1), (2), and (3) are in fact true and the only statements in language that are true about the world.

I take the first Truth above to be unassailable, for where else could our language come from? I take this second Truth to be an unassailable and essential center (or grounding) upon which all our linguistic analysis revolves, although this statement is more controversial than the first Truth. The point here is


38. Ignoring here possible religious references.
that, if we take this second truth as a Truth, this truth has huge implications for all language including legal. The Truth asserted here is that the point on the continuum that designates a perfectly descriptive statement is empty. There is and can never be perfectly descriptive statements in any language. All verbal words, sentences, paragraphs, and beyond have some ascriptive elements in them. There is not now and never will be any language that does nothing more than perfectly describe what is so about the world. If there were such a language, it would need no interpretation, it would only be judged for its truth value.

A brief explanation of this Truth is in order here. It is probably true to say that from the beginning of language, the human species\(^{39}\) has hoped and sought for a perfectly descriptive language that unproblematically and objectively describes the world. Without such a language, how can we be certain of anything? And, after all, what is it that our species constantly seeks? We long for certainty and truth. Why do we focus so much effort on this longing for certainty? In a nutshell, I would argue that to find a certainty and truth in any area relieves us of the responsibility of making a choice. Choosing between uncertainties of various kinds brings stress and anxiety, because, if we are faced with choices between what is so, rather than certainty, what if we get it wrong? If our sentences were perfectly descriptive of the world, then a sentence would be either completely true or completely false, and in either case (and this is huge) we have no responsibility in matter. If you want to blame someone for the sentence being true, blame the world, not me—I did not make it up! But if all sentences are partially ascriptive, then I do have at least partial responsibility for the statements I make—I cannot blame the world, only myself. And in such a case, I must realize my own responsibility in the matter, and that the choices I make are almost all tragic choices for “every choice may entail an irreparable loss.”\(^{40}\)

This fear of uncertainty (and responsibility), in the words of Stanley Fish:

> generates a succession of efforts to construct a language from which all perspectival bias (a redundant phrase) has been eliminated, efforts that have sometimes taken as a model the notations of mathematics, at other times the operations of logic, and more recently the purely formal calculations of a digital computer. Whether it issues in the elaborate linguistic machines of seventeenth-century “projectors” like Bishop Wilkins (An Essay Towards a Real Character and a Philosophical

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39. A species that self-describes itself as “homo sapien, sapiens,” that is wise, wise hominoids.
40. BERLIN, supra note 8.
Language, 1668), or in the building (à la Chomsky) of a “competence” model of language abstracted from any particular performance, or in the project of Esperanto or some other artificial language claiming universality (see Large 1985), or in the fashioning of a Habermasian “ideal speech situation” in which all assertions express “a ‘rational will’ in relation to a common interest ascertained without deception” (Habermas 1975, 108), the impulse behind the effort is always the same: to establish a form of communication that escapes partiality and aids us in first determining and then affirming what is absolutely and objectively true, a form of communication that in its structure and operations is the very antithesis of rhetoric.41

Bypassing for now a fuller explanation of this Truth, it is fair to say that, in the twentieth century, mainstream philosophers have given up the search for such a perfectly descriptive language. As Robert Scholes puts it:

We have all been brought up as imagists. We assume that a complete self confronts a solid world, perceiving it directly and accurately, always capable of capturing it perfectly in a transparent language. Bring ‘em back alive; just give us the facts, ma’am; the way it was; tell it like it is; and that’s the way it is.... [But] this set of assumptions... [has] been questioned so thoroughly, now, that the whole naive epistemology upon which they rest is lying in ruins around us.42

This, in a nutshell, sums up the underlying basis of this second Truth. The idea of a transparent language that just perfectly describes the facts has long been discarded as a dream. A couple other examples (of hundreds): “[This] logocentric error... [which] holds that language simply refers to things in the world and labels them, or in essentialist thinking, which takes the concepts expressed in a language to be real essences existing independently of language... has been under attack.”43

And Catherine Belsey says:

Common sense appears obvious because it is inscribed in the language we speak. Post-Saussurean theory, therefore, starts from an analysis of language, proposing that language is not transparent, not merely the medium in which autonomous individuals transmit messages to each other about an independently constituted world of things. On the contrary, it is language which offers the possibility of constructing a

41. Stanley Fish, Rhetoric, in Critical Terms for Literary Study 203, 205 (Frank Lentricchia & Thomas McLaughlin eds., 1990).
world of individuals and things, and of differentiating between them. The transparency of language is an illusion . . . . Ideology [in our language a "partial point of view"] is inscribed in language in the sense that it is literally written or spoken in it. Rather than a separate element which exists independently in some free-floating realm of 'ideas' and is subsequently embodied in words, ideology is a way of thinking, speaking, experiencing.44

While this position regarding language will always be controversial, we can say that lawyers know from their own experience that language cannot perfectly describe reality. If we take it as a given that the class of purely descriptive statements is empty, there are profound implications that we must deal with, and the law student's understanding of these implications becomes crucial to the practice of law. The first implication is that the meaning of any statement, necessarily containing some ascriptive element, is never determinate. A perfectly descriptive statement which "pictured" a state of affairs in the world would be determinably true or false by looking to the world: no interpretation of the meaning of the statement would be needed or appropriate.45

Once we hold all statements in the context that they contain some ascriptive elements, our approach to language changes radically. Now we are thrown (always) into an interpretative mode. What did the speaker mean by that statement (especially the ascriptive part)? And in interpreting a statement, there is no determinably true or false discovery.

44. CATHERINE BELSEY, CRITICAL PRACTICE 4-5 (2d ed. 2002).
45. On the other hand, we can agree with Brandom that all language contains some relation to our world, that is a descriptive element. For as Brandom points out:

What must not be lost is an appreciation of the way in which our current discursive practice is empirically and practically constrained. It is not up to us which claims are true (that is, what the facts are). It is in a sense up to us which noises and marks express which claims, and hence, in a more attenuated sense, which express true claims. But empirical and practical constraint on our arbitrary whim is a pervasive feature of our discursive practice. Words form a distinct and largely independent realm within the world—in the sense not only that the nonlinguistic facts could be largely what they are even if the specifically linguistic facts (thought of as a class of facts about words) were quite different, but also in the sense that the words—as noises, marks, and so on—could be largely what they are, even if the nonlinguistic facts were quite different. But discursive practices as here conceived do not stand apart from the rest of the world in this way. The nonlinguistic facts could be largely what they are, even if our discursive practices were quite different (or absent entirely), for what claims are true does not depend on anyone's claiming of them. But our discursive practices could not be what they are if the nonlinguistic facts were different.

ROBERT B. BRANDOM, MAKING IT EXPLICIT: REASONING, REPRESENTING, AND DISCURSIVE COMMITMENT 331 (1994).
concerning that statement that is available to us. There is no bird’s-eye view above the fray of competing claims from which those that deserve to prevail can be identified, nor from which even necessary and sufficient conditions for such deserts can be formulated. The status of any such principles as probative is always itself at issue in the same way as the status of any particular factual claim.\textsuperscript{46} Or, in the words of Richard Rorty, “any discursive practise will necessarily have an ‘is-seems’ distinction, but there is no way to rise above discursive practises and compare them in respect to their relation to what there really is.”\textsuperscript{47}

The point that there is no possibility of a perfectly descriptive language is not new. In fact, thousands of years ago, Zen Buddhists were perfectly aware of this truth. Jōshū,\textsuperscript{48} a Zen teacher who lived in the ninth century, presented the following Zen Koan\textsuperscript{49} to a student: “The monk asked [a zen master named] Jōshū, ‘Does a dog have Buddha-nature, or not?’” Jōshū replied, “MU.”\textsuperscript{50} (“MU” means roughly “no thing” or, more loosely “nothing.”\textsuperscript{51}) As Douglas Hofstadter points out, “By saying ‘MU,’ Jōshū let the other monk know that only by not asking such questions can one know the answer to them. . . . Jōshū ‘unasked’ the question.”\textsuperscript{52}

What Jōshū meant by his response is the subject of many different interpretations. For our purposes, I interpret his comment in the following way: Jōshū refused to answer this question because he understood that there is no language that is perfectly descriptive. Since all language is partially ascriptive, he understood that all language adopts a particular point of view about the world that is never complete but always partial. He thus understood that the question asked by the

\textsuperscript{46} Id. at 601.
\textsuperscript{47} Richard Rorty, \textit{What Do You Do When They Call You a ‘Relativist’?} 57 PHIL. & PHENOMENOLOGICAL RES. 173, 175 (1997).
\textsuperscript{48} Jōshū (A.D. 778-897) was a famous Chinese Zen teacher.
\textsuperscript{49} Koans can be briefly defined as stories or problems assigned to pupils undergoing Zen training.
\textsuperscript{50} Douglas R. Hofstadter, Gödel, Escher, Bach: An Eternal Golden Braid 233 (1979).
\textsuperscript{51} In the words of Robert Pirsig:

\textit{Mu} means “no thing.” . . . \textit{Mu} simply says . . . “not yes, not no.” It states that the context of the question is such that a yes or no answer is in error and should not be given. “Unask the question” is what it says.

\textit{Mu} becomes appropriate when the context of the question becomes too small for the truth of the answer. When the Zen monk Jōshū was asked whether a dog had a Buddha nature he said “\textit{Mu},” meaning that if he answered either way he was answering incorrectly.

\textsuperscript{52} Robert M. Pirsig, \textit{Zen and the Art of Motorcycle Maintenance} 320 (1974).
monk, being stated in language, has already adopted a particular point of view about reality, that is that there exists such a thing as a “dog,” and such a thing as “Buddha-nature,” and that these two “things” are such that they could or could not co-exist. Understanding that these assumptions are built into the question, Jōshū understands that answering the question as either “yes” or “no” would mean agreeing with these underlying assumptions about reality (that these separate things actually exist). To reach enlightenment, the monk must be taught that the assumptions that he builds into the question have already led him astray, and that any yes or no answer to the question would compound his confusion.

MU, thus interpreted, has a clear correspondence to a legal objection common at trial. In a trial setting, if a witness is asked, “Mr. Smith, does a dog have Buddha-nature,” the proper objection would be, “Objection, your Honor, the question assumes facts not in evidence!” The monk, by assuming in his question certain points of view about dogs and Buddha-nature, assumes facts “not in evidence” and thus cannot be answered without misleading the monk.

So we arrive at, and are left with, this essential insight. All language “assumes facts not in evidence”; all our language adopts a partial and incomplete description of reality, since there is, and cannot be, under this account, any language that is perfectly descriptive. All language is inscribed with ideology, a point of view.

So, if with Wittgenstein we would require clarity, we would be consigned to silence, since nothing that can be said in language is true or false concerning reality. A little more silence in the large cacophony of voices that constantly bear down on us might not be such a bad thing (especially in an election year), but of course silencing our communications is not an option.

The teaching of Zen fully realized the need for this imperfect and partial language. A second Zen Koan will help us here:

Shuzan held out his short staff and said: “If you call this a short staff, you oppose its reality. If you do not call it a short staff, you ignore the fact. Now what do you wish to call this?”

53. The standard example of this in law is, “Mr. Smith, have you stopped beating your wife?” Mr. Smith loses either way he answers. If he answers “yes” he admits that he used to beat his wife but has stopped, if he answers “no” he admits that he is still beating his wife. The sustainable objection points out that the question is objectionable until facts are put into evidence concerning the fact that he has been guilty of beating his wife.

54. LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 3 (A.J. Ayer ed., D.F. Pears & B.F. McGuinness trans., 1961) “what can be said at all can be said clearly, and what we cannot talk about we must pass over in silence.” Id.
Mumon’s Commentary: If you call this a short staff, you oppose its reality. If you do not call it a short staff, you ignore the fact. It cannot be expressed with words and it cannot be expressed without words. Now say quickly what it is.55

(In other versions Mumon says, “words are not available; silence is not available.”)

To label this, or anything at all, in language is to adopt a point of view about it which is inexorably partial. Thus, in so labeling, we “oppose its reality.” This is precisely the point made above. However, the master teaches that if you label it as something other than a short staff, “you ignore the fact,” because in our language it would be accurately, if partially, described as such. So language is necessary, though incapable of perfectly describing reality.

In a modern equivalent to this ancient Zen teaching, we can say, following Derrida, that all language is “under erasure.” All language is inadequate to describe reality, and therefore must be “erased” but must still be visible because we have nothing better to use. To put a term “under erasure” or “sous rature” is to write the word and then cross it out with a line or an X thus leaving the word legible.56 “This device, sous rature, indicates the equivocal status of the term erased, warning, . . . the reader not to accept the word at face value. The marks of erasure acknowledge both the inadequacy of the terms employed—their highly provisional status—and the fact that thought simply cannot manage without them.”

Richard Rorty sums up this approach to language as follows:

We need to make a distinction between the claim that the world is out there and the claim that truth is out there. To say that the world is out there, that it is not our creation, is to say, with common sense, that most things in space and time are the effects of causes which do not include human mental states. To say that truth is not out there is simply to say that where there are no sentences there is no truth, that sentences are elements of human languages, and that human languages are human creations.

Truth cannot be out there—cannot exist independently of the human mind—because sentences cannot so exist, or be out there. The world is

55. HOFSTADTER, supra note 50, at 251-52.
57. See generally JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri Chakravorty Spivak trans., 1998).
58. Id.
out there, but descriptions of the world are not. Only descriptions of
the world can be true or false. The world on its own—unaided by the
describing activities of human beings—cannot. . . .

The world does not speak. Only we do. The world can, once we have
programmed ourselves with a language, cause us to hold beliefs. But
it cannot propose a language for us to speak. Only other human beings
can do that. . . .

What is true about this claim is just that languages are made rather
than found, and that truth is a property of linguistic entities, of
sentences. . . .

For as long as we think that “the world” names something we ought
to respect as well as cope with, something personlike in that it has a
preferred description of itself, we shall insist that any philosophical
account of truth save the “intuition” that truth is “out there.” This
intuition amounts to the vague sense that it would be hybris on our
part to abandon the traditional language of “respect for fact” and
“objectivity”—that it would be risky, and blasphemous, not to see the
scientist (or the philosopher, or the poet, or somebody [for example, the
Courts]) as having a priestly function, as putting us in touch with a
realm which transcends the human.60

III.

The law student gets this education into the uses and abuses of
language in the first-year classes when he or she comes to the realiza-
tion through class discussion that even the clearest statute can be
interpreted in a variety of ways. Another example from the first-year
classroom will demonstrate the foundations of this kind of education.

Professor: Take the case of a young man, call him John, who is about
twenty-five years old and goes to a party where he meets a young
woman, call her Mary, who is about twenty-one years old and a senior
at a local university. John and Mary hit it off and spend several hours
talking to each other at the party. Later that evening, John takes Mary
home and, upon her invitation, goes with her to her apartment. They
talk for a while and then begin making out. They wind up having sexual
intercourse on the couch in Mary’s living room. About an hour later,
John leaves to go home.

The thing is, the sex between John and Mary was not consensual.
John became aggressive with Mary, and when she protested, he refused
to stop and forced Mary down on the couch. She struggled against him,
but John overpowered her. He then forced sexual intercourse on her.

60. RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 4-7, 21 (1989) (citation
omitted).
The statute in the state defines rape as follows:
(a) A person commits the offense of rape when he has carnal knowledge of a female forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ.
(b) A person convicted of the offense of rape shall be punished by death, by imprisonment for life, or by imprisonment for not less than ten nor more than twenty years.

Professor: Mr. Jones, under this scenario, is John guilty of raping Mary?
Mr. Jones: Yes, Professor, as you have described this scenario, the obvious answer is yes.

Professor: Mr. Jones, if you ask a lawyer whether John is guilty of rape in this situation, he or she would most certainly answer that John may be or may not be guilty of rape. Can you explain how such a lawyer could reply that John may not be guilty of rape in this obvious scenario?

First-year students struggle with this question. One student might say that perhaps John was intoxicated and did not know what he was doing or did not realize that Mary was refusing his advances. Or, another might say that perhaps John was mentally ill and therefore not responsible for his acts. Other students might point to other defenses that John conceivably might raise.

But the lawyer, knowing nothing more than the facts described above, would not base his or her answer on any specific defense that John might have. For the well-trained lawyer understands, based on the education sketched above, that this description of the events in Mary's apartment that night cannot be a perfectly accurate description of the events on that night. With this understanding, the first question that comes to the mind of the lawyer is, if this is not a perfectly descriptive account, then what is it? The narrative—especially the introductory phrase, "The thing is"—misleads the logocentric student to think of an objective neutral describer of the events in question. The lawyer knows that there is no objective, neutral account of that evening and that every description contains some portion of an ascriptive element.61

Thus, the initial question is, not whether John is guilty of rape under the above scenario, but rather who is speaking that scenario? Is it Mary's description/ascription of the events of the evening? Does John's description/ascription speak the same scenario? Was there a third party present in the apartment whose description/ascription speaks that scenario? Would a third party eyewitness speaking that same narrative be determinative of John's guilt? In any such description, who is it that

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61. Or, to put the matter more bluntly: the thing is, is that there is no thing.
is telling the story of the events of that evening, and what is the ratio of descriptive to ascriptive language in that account?\textsuperscript{62}

The well-trained lawyer understands that none of these three possible descriptions can be a perfectly accurate description of the events of that evening.\textsuperscript{63} Lawyers experience in their everyday practice, and have known for several hundred years, that there is no such thing in our language as a perfectly descriptive statement, but that all language, having an ascriptive element, requires interpretation. For example, Justice Chase understood this when, in 1798 in the case of \textit{Calder v. Bull},\textsuperscript{64} he stated, referring to the definition of the term “ex post facto” in the Constitution, that, “[t]he prohibition, ‘that no state shall pass any ex post facto law,’ necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing.”\textsuperscript{65}

The entering law student, in common with the populace at large, makes the mistake of taking the description in this scenario as a perfect description of the matter in clear and transparent language. The student does not understand the point made above about language, a point expressed well in the quote above from Catherine Belsey that language is not a transparent medium just reporting the facts; the transparency of language is an illusion, and that all language is inscribed with an ideology—a point of view.

The lawyer, knowing better, asks, “whose version of the events of that evening are we looking at?” If investigation reveals that Mary is the source, then a close examination of her language is necessary to uncover and examine the ascriptions always present in all language. What is the meaning of the story that Mary tells that includes terms such as John became “aggressive,” that Mary “protested,” that John “refused to stop” and “forced” Mary down on the couch, that she “struggled” and that John “overpowered” her? If all these terms were held in the context of perfectly descriptive terms, no interpretation would be needed—these

\begin{itemize}
\item \textsuperscript{62} As Foucault asks: “First question: who is speaking?” And he proceeds:
\item Who, among the totality of speaking individuals, is accorded the right to use this sort of language . . . ? Who is qualified to do so? Who derives from it his own special quality, his prestige, and from whom, in return, does he receive if not the assurance, at least the presumption that what he says is true? What is the status of the individuals who—alone—have the right, sanctioned by law or tradition, juridically defined or spontaneously accepted, to proffer such a discourse?
\item MICHEL FOUCAULT, \textit{THE ARCHAEOLOGY OF KNOWLEDGE & THE DISCOURSE ON LANGUAGE} 50 (1972).
\item \textsuperscript{63} This includes John’s version, of course, and, importantly, includes his version even if it agrees in essential points with Mary’s version.
\item \textsuperscript{64} 3 U.S. 386 (1798).
\item \textsuperscript{65} \textit{Id.} at 390.
\end{itemize}
descriptions would be held as perfectly true or perfectly false, and we would look to the world to determine its truth status. John would be guilty of rape or innocent of rape, depending on the verification or falsification of these perfectly descriptive statements.

Once we rule out the possibility of a perfectly neutral and transparent language and understand that Mary’s statement contains some ascriptive elements, then language, and life itself, becomes more difficult. In what context are we to hold Mary’s statement, if not perfectly descriptive? What do these terms mean in Mary’s language (for example, what is the role of ascription in these descriptions?) If the terms cannot unproblematically refer to some actual object or event in the world, then what do they mean? Mary must be, in some sense, ascribing the meaning of these terms in this situation. This indeterminacy of meaning is beautifully summed up in the following quote:

In courts of law, judges and juries cannot do what a correspondence theory of language would have them do; they cannot hold up testimony against events in the world to see which versions “match” better. . . . Some procedures would have to be devised for working out when a description corresponds to reality and then those procedures, not the “matching,” would be doing all the work. Most of the time, the traces left over from historical events are accounts by people who were present at or otherwise involved in the event, and such accounts—narratives—are often the best evidence available. . . . The whole idea of matching descriptions against the world is misleading because, apart from being metaphorical, it assumes that there is only one perspective, only one point of view, only one ideology, no room for multiple readings, and no potential for disagreement. In short, it assumes no problem with understanding how accounts as socially situated cultural products relate to evidence of the world. But particular “true” stories and particular descriptive statements are often selected from among a set of arguably accurate versions of reality—it is just that other descriptions in the set give very different impressions about what is going on. The vexing question is not just whether the descriptions are accurate in some way, though it is crucially important to screen out lies, but rather, how it is that some particular description instead of some other description comes to be forwarded as the authoritative version of events. This raises questions of power and ideology, of the “situatedness” of the descriptions that pass for truth, and of the social agendas they support. . . .

In addition to these worries about abstract legal legitimacies, a more immediate practical issue is involved in working out whose conventions of truth-finding are to be invoked when more than one set of conventions applies in the social settings that a given legal system embraces. If we have learned anything in recent years about the operation of social practices, it is that they are usually specific to time, place, social
location, and embodiment in the lives of particular people. Saying that “we” have a set of conventions for truth-finding begs the questions of who the “we” are and whether “we” share these practices at all. So, working out how information is constituted as fact or, at the risk of creating an unwieldy neologism, how information is “enfacted” requires both looking at the way conventions of practice are historically, socially, and culturally situated in the lives of particular people and asking whose truth is being found when jurors and judges find it. But when we look more closely, we see that the whole metaphor of “finding” rather than “constructing” the truth relies on the assumption that truth is “out there” to be located rather than constituted through the operation of social practices. This way of talking about truth shows how the “facticity” of a truth-claim must be presented as if it is compelled by the “external-ness” of its referent rather than compelled or allowed by the agreement on conventions of description.

The law student’s education in the proper approach to language, and its uses and misuses, affords him or her the insight and power to understand the differences in the ideologies inscribed in the language of various actors; to carry on a civil and constructive conversation with the intent to work through this process of “enfactment” of the raw data as reported by various sources (in language); to work out what is possible in a given time; to enter quickly into the thoughts of the opposing party; and to seek a peaceful resolution to the dispute. Without this education, without an understanding of how language works and does not work, the lawyer lacks the insight necessary to carry on a sophisticated conversation, which includes the ability to enter into another’s ascriptive languaging of the world and to seek a common ground among the ascriptions of the various witnesses in such a scenario. To repeat, the point of this conversation is to find common ground between the disputing parties and, if possible, to seek a peaceful resolution to the dispute. The prosecutor’s role, often misunderstood, is not to ensure a guilty verdict, and the defense lawyer’s role, often equally misunderstood, is not to ensure a not guilty verdict. If either side misunderstands the mission of an excellent attorney, a breakdown in the conversation occurs. A prosecutor or defense lawyer who believes his or her role is to win, one way or the other, can easily face ethical dilemmas that are difficult to resolve. The role of both sides is to enter into a conversation concerning a proper disposition of the case—a disposition that is based on finding a common ground that is, under the

pressure of time, acceptable to each side. If the conversation fails to reach this common ground, then and only then does a resort to trial become necessary. It is a tribute to the excellence of a legal education and the excellence of the lawyers produced by that education that so few trials are necessary.