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Legal Writing: Its Nature, Limits, and Dangers

by Douglas Litowitz

Lawyers have a unique and highly technical manner of writing, one that differs significantly from standard English. Legal education involves an indoctrination into this new discourse, a process that ends when one awakens to find oneself writing in a manner that once seemed impossibly obscure. Of course, the mastery of legal language reflects a paradigm shift in thought, sometimes called "learning to think like a lawyer" or "seeing things from a legal perspective." The conceptual scheme and language of the law are so different from the ordinary way of thinking that Lord Coke was perhaps correct when he characterized the law as "artificial reason."1

Law students typically undergo a conversion experience during the first year of law school, when they begin to see the world in terms of property, contracts, torts, and remedies. For the great majority of students, this conversion is irreversible; once taught to think like a lawyer, the dye is cast and it is only a matter of time until the existing legal framework seems natural and inevitable. Although this conversion process lasts for months, most lawyers forget or repress their initial struggle to master legal concepts and to express themselves in legal terminology. Once acquired, the technical language of the law becomes a pair of glasses that one looks through but not at, a mere tool that does not merit contemplation in its own right. From day-to-day, lawyers are immersed in a specialized manner of writing to the point where they no longer pay attention to it, much as a person can wear a suit and tie for years without reflecting on it. Perhaps this helps to explain why legal

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scholars have failed to treat legal writing as a genre worthy of legal scholarship in its own right, and why law schools generally treat legal writing as a skills course instead of a substantive course.

When we temporarily suspend our use of legal writing as a mechanism for achieving particular results within the legal system and instead hold it up for inspection in its own right, serious and troubling questions arise. For one thing, we can rightfully wonder about the psychological effect on lawyers of producing this artificial language all day, every day. We also need to ask whether such tortured prose is really integral for the existence of law as a social institution, or whether we could plausibly replace it with a simpler, less formal manner of writing (or perhaps eliminate legal writing as a unique genre altogether). Finally, we need to explore the social and political consequences of propagating a discourse that is too complicated for ordinary citizens to grasp. With regard to the manner of thinking, speaking, and writing that has become second nature to us, we need to ask, “What are its limits, its dangers, its potential?”

In this Article, I assert that a unique and formal style of writing is necessary and inevitable, because legal writing functions as the medium for the expression of higher-order principles that bind and shape our interaction with other people and with the physical world. Through legal writing we bring one possible version of the world into existence, which means that legal discourse constitutes a “way of worldmaking,”


3. In this Article, I will be using the term “legal writing” in the broadest possible sense to denote the formal and substantive manner of writing employed in such distinctly legal documents as pleadings, contracts, inter-office memoranda, client letters, and judicial opinions.

4. NELSON GOODMAN, WAYS OF WORLDMAKING (1978); see also PETER BERGER, WAYS OF SEEING (1977). Pierre Bourdieu captures this point in his depiction of legal discourse as a “legitimate language,” a code used by authorities to construct the social world:

Legal discourse is a creative speech which brings into existence that which it utters. It is the limit aimed at by all performative utterances—blessings, curses, orders, wishes or insults. In other words, it is the divine word, the word of divine right, which, like the intuitus originarius which Kant ascribed to God, creates what it states, in contrast to all derived, observational statements, which simply record a pre-existent given.

PIERRE BOURDIEU, LANGUAGE AND SYMBOLIC POWER 41 (1991). Bourdieu is also correct in his rejection of language as a neutral medium, and his insistence that language must be understood as an “instrument of action and power.” Id. at 37.
a weltanschauung, or "conceptual scheme" by virtue of mapping out the world in a restricted and specialized manner. Because of the heavy burden carried by legal language—the fact that it is literally a matter of life and death, not to mention money—it must be somewhat abstract, detailed, and distanced. Having said this, I also want to point out that the classic, accepted style of legal writing carries dangers that need to be articulated if we are to adopt a critical posture toward our practices.

I begin this Article in Part I by distinguishing legal writing from legalese, so that we may appropriately focus on the former. In Part II, I argue that a unique legal language is necessary and inevitable, but also dangerous in certain respects. Finally, in Part III, I articulate four dangers of legal writing: First, it distorts, obscures, and legitimates unequal power relations; second, it narrows the range of thought and emotion; third, it emphasizes formality at the expense of substance; and fourth, it becomes hyper-technical and difficult to navigate by nonlawyers, thereby distancing and alienating them from the legal system.

I. LEGAL WRITING VERSUS LEGALESE

Law is a profession of language and writing; lawyers get paid for drafting persuasive documents and speaking for clients. Lawyers have no choice but to write, and they must write in a certain style for their writing to qualify as a distinctly legal work product. To write in this way is not optional, but is rather a condition for the possibility of practicing law.

Legal scholars have long recognized the disjunction between legal language and common parlance. In a careful study, David Mellinkoff noted nine major ways that legal language differs from standard English:

(1) Frequent use of common words with uncommon meanings; (2) Frequent use of Old English and Middle English words once in common use, but not now; (3) Frequent use of Latin words and phrases; (4) Use of Old French and Anglo-Norman words which have not been taken into the general vocabulary; (5) Use of terms of art; (6) Use of argot; (7) Frequent use of formal words; (8) Deliberate use of words and expressions with flexible meanings; and (9) Attempts at extreme precision of expression.6


Apart from the restriction imposed by using only approved words from a limited lexicon, lawyers are further constrained as a matter of syntax and form. For example, a complaint must be divided into counts, numbered paragraphs, and prayers for relief; a contract must contain a caption, recitals, agreements, and a signature page; a client letter must delineate the specific issue researched by the lawyer and then provide a carefully guarded opinion. In each case, the attorney works from prior forms, and while this provides a measure of security and efficiency, it also confirms and legitimates the use of traditional instruments and styles of writing.

Because of the mandatory nature of legal writing (the fact that an attorney must write in this way to practice), lawyers inevitably succumb to tradition, because their language is quite literally a *bricolage* of terminology and doctrines from earlier times. When practicing law, it is almost as if language is speaking the person instead of the person making use of the language. Lawyers take the language as they find it, and more to the point, they perpetuate this language regardless of their personal feelings about it. This linguistic determination of the free subject was captured in literary critic Mikhail Bakhtin's statement that "words have 'conditions attached to them': it is not strictly speaking, I who speak; I perhaps would speak quite differently."

The first step toward understanding legal writing is to distinguish it from legalese, since the two are often confused, especially by the general public. In looking closely at the legal writing that lawyers produce from day-to-day (such as pleadings, briefs, opinion letters, contracts, leases, securities offerings), it strikes me that we encounter two distinct types of legal writing: (i) legal writing that is highly technical but nevertheless necessary and appropriate to express a specific legal relation, and (ii) legal writing that is verbose and gratuitously technical, serving no purpose other than to mystify and shroud the subject matter in a veil of overblown prose. We can understand the former as *legal writing* and the latter as *legalese*. I want to focus initially on legalese before turning to legal writing.

The term legalese is generally employed in a pejorative sense to denote verbose technical jargon and Latin phrases that obscure an otherwise...

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7. As Karl Marx aptly stated, "The tradition of all the dead generations weighs like a nightmare on the brain of the living." *The Eighteenth Brumaire of Louis Bonaparte*, in *The Marx-Engels Reader* 595 (Robert Tucker ed., 1978). By way of example, one cannot practice real estate law without affirming a system of property holdings and land tenures dating from the Middle Ages.


straightforward text. Properly understood, legalese denotes a degenerate form of legal writing, where a document becomes distorted with formalities to the point that its message is no longer clear. This type of writing has raised suspicions for centuries. For example, Thomas Jefferson took a jab at legalese when he drafted a clearly written bill and sent it to a friend with the following instructions:

I should apologize, perhaps, for the style of this bill . . . . You, however, can easily correct this bill to the taste of my brother lawyers by making every other word a “said” or “aforesaid,” and saying everything over two or three times, so that nobody but we of the craft can untwist the diction and find out what it means; and that, too, not so plainly but that we may conscientiously divide one half on each side.  

For Jefferson, legalese was problematic because it did not add anything to the underlying point of a text, but instead choked a simple message with artificial terms and repeated phrases until the original meaning was lost. This understanding of the term neatly complies with a typical dictionary definition of legalese: “Language containing an excessive amount of legal terminology or of legal jargon.”

The central problem of legalese is that it constitutes a secret coding and phraseology that only lawyers can sort out. Legalese can convert a simple phrase into a technical one, much in the same way that pig Latin can convert the simple term “nix” into the otherwise indecipherable “ixne.” In this sense, legalese seems like a special language that lawyers have developed to fool lay people and create amorphous meanings that cause endless disputes. This point was expressed in a humorous way by Will Rogers:

The minute you read something and can’t understand it you can almost be sure that it was drawn up by a lawyer. Then if you give it to another lawyer to read and he doesn’t know just what it means, why then you can be sure it was drawn up by a lawyer. If it’s in a few


11. RANDOM HOUSE DICTIONARY 1098 (2d ed. unabridged, 1987). There is also a second sense to the term, this time captured by the definition of legalese found in the Oxford English Dictionary: “The complicated technical language of legal documents.” 8 OXFORD ENGLISH DICTIONARY 804 (2d ed. 1989). This is the notion of legalese as something that is perhaps inevitable in the sense that a highly technical language may be necessary to express the legal relationships which hold in a complicated society. I will be referring to this kind of language as “legal writing.”
words and is plain and understandable only one way, it was written by a non-lawyer.\textsuperscript{12}

To see how legalese obscures an otherwise straightforward text, consider the following passages, the first of which is expressed in legalese while the second is stated in straightforward legal writing:

\textbf{LEGALESE:} Know all men by these presents, that for good and valid consideration, the receipt and sufficiency of which is hereby acknowledged by the parties hereto, Mr. Jones (hereinafter referred to as the party of the first part) does hereby undertake, promise, and bind himself to that certain Mr. Smith (hereinafter party of the second part), that said party of the first part shall faithfully and honorably provide full and prompt payment of the sum of Five Hundred Dollars in lawful currency of the United States of America at such time and place and in the manner as may be requested at the will of said party of the second part as set forth in a duly executed notification from said party of the second part to said party of the first part, the aforesaid sum representing funds extended to the party of the first part without the offering of collateral or security from the party of the first part.

\textbf{LEGAL WRITING:} For value received, Mr. Jones ("Payor") hereby promises to pay to Mr. Smith ("Payee"), on demand, the sum of Five Hundred Dollars ($500.00), at the time and location set forth in a written notice to Payor. This promissory note is unsecured.

Notice that the first passage does more than simply convey information in a roundabout way—it also conveys a message by virtue of its cumbersome style, a message that something very formal is taking place, a special event shrouded in ceremony, artifice, and packaging; thus it says something by virtue of its form, though nothing of substance is added by virtue of the added language, and in fact the artificial style obscures the relative simplicity of its legal effect. It is also noteworthy that the second passage has been cleared of legalese, yet still contains technical legal terms in its own right, which suggests that a certain amount of formal terminology is essential for a legal document to have its intended effect because ordinary words are not sufficient to express complicated legal relations (here, the debtor/creditor relationship). So the impact of legalese is not derived from any genuine content that it delivers but rather from the \textit{mise en scene} that it provides, much in the way that church services are peppered with Old English or Latin phrases to add an element of tradition and high seriousness.

Intellectually speaking, legalese raises very little debate, because almost everybody (except a few hardliners) is convinced that legalese serves no purpose and ought to be eliminated.\(^3\) In addition, many jurisdictions have passed “plain-English” laws that require insurance companies, landlords, and car dealers to use contractual language that is clear and concise.\(^4\) And the Federal Rules of Civil Procedure now require merely a “short and plain statement of the claim” instead of the formal method of pleading that once prevailed.\(^5\) It seems that the over-formality and emptiness of legalese are something of a legal relic, dating from the days when pleadings had to be stated in precise terms, and where the law relied heavily on formal oaths and affirmations.\(^6\) Such language is out of place in a legal system that is moving toward informal styles of pleading and proof.

Clearly, then, we should try to eliminate legalese. But what about legal writing considered as a highly technical mode of expression in its own right? Is legal writing something that we should strive to eliminate as well? Would it be possible to not only rid the law of legalese, but to eliminate legal writing altogether, so that pleadings and other legal documents could be phrased completely in plain English? If so, this would make the law understandable by everyone and would eliminate the need for lawyers. This idealized vision of a lawyerless world recurs in utopian visions from Plato’s Republic to the Militia Movement, and finds expression in the enduring popularity of Shakespeare’s famous passage, “The first thing we do, let’s kill all the lawyers.”\(^7\) Obviously, much of the anti-lawyer sentiment is a hostile reaction to the powerlessness that clients feel when caught in a system that they do not understand. Hence the idea that if we could only get rid of the lawyers, everything would become crystal clear. Thomas More articulated such a vision in his depiction of a utopian state:


14. See, e.g., NEW YORK GEN. OBLIG. § 5-702 (1994), requiring leases to be “written in a clear and coherent manner using words with common and every day meanings.”

15. FED. R. Civ. P. 8. Despite this rule, in one case the Complaint and related papers totalled over four thousand pages spread throughout eighteen volumes. Gordon v. Green, 602 F.2d 743, 744 (5th Cir. 1979).

16. MELLINKOFF, supra note 6, at 183-85.

17. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH, Act 4, sc. 2. In its popularized form (as a catchphrase for lawyer-bashing), this quotation is taken out of context; in fact, Shakespeare probably intended this passage to seem comical. See DANIEL KORNSTEIN, KILL ALL THE LAWYERS? SHAKESPEARE’S LEGAL APPEAL 22 (1994).
For, according to the Utopians, it's quite unjust for anyone to be bound by a legal code which is too long for an ordinary person to read right through, or too difficult for him to understand. What's more, they have no barristers to be over-ingenious about individual cases and points of law. They think it better for each man to plead his own cause, and tell the judge the same story as he'd otherwise tell his lawyer. Under such conditions, the point at issue is less likely to be obscured, and it's easier to get at the truth—for if nobody's telling the sort of lies that one learns from lawyers, the judge can apply all his shrewdness to weighing the facts of the case, and protecting simpleminded characters against the unscrupulous attacks of clever ones.18

But is such an arrangement possible? On this question of whether formal legal writing could (or should) be eliminated, I will turn to the case against legal writing mounted by Fred Rodell, a Legal Realist from Yale Law School who advanced the position that legal terminology is a completely artificial language serving no useful purpose.

II. WHY LEGAL WRITING CANNOT BE ELIMINATED: THE CASE OF FRED RODELL

Fred Rodell was a notable figure in the Legal Realist movement during the 1930s.19 He taught at Yale Law School (an elite school) despite his thinly-veiled contempt for lawyers and the legal system. In an infamous book that has earned cult status, *Woe Unto You, Lawyers!*20 Rodell decried legal jargon as "professional pig Latin" and characterized the practice of law as a "high-class racket."21 Rodell saw legal discourse as a completely artificial language designed solely to obfuscate:

> The Law, regardless of any intellectual pretensions about it, does not at bottom deal with some esoteric or highly specialized field of activity like the artistic evaluation of symphonic music or higher calculus or biomedical experimentation. If it did, there would be reason and excuse for the use of language unfamiliar and unintelligible to ninety-nine people out of a hundred. Nor would the ninety-nine have any cause to care. But the fact is that Law deals with the ordinary affairs of ordinary human beings carrying on their ordinary daily lives. Why

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18. THOMAS MORE, UTOPIA 106 (1965).
20. FRED RODELL, WOE UNTO YOU, LAWYERS! (2d ed. 1967).
21. Id. at 11, 16.
then should The Law use a language . . . which those ordinary human beings cannot hope to understand? Rodell answered this rhetorical question by asserting that the complex nature of legal writing is a subterfuge for abuse by those inside the confidence game of the legal system:

The answer is, of course, that the chief function which legal language performs is not to convey ideas but rather to so conceal the confusion and vagueness and emptiness of legal thinking that the difficulties which beset any non-lawyer who tries to make sense out of The Law seem to stem from the language itself instead of from the ideas—or lack of ideas—behind it. It is the big unfamiliar words and the long looping sentences that turn the trick. Spoken or written with a straight face, as they always are, they give an appearance of deep and serious thought regardless of the fact that they may be, in essence, meaningless.

To support his position that legal writing is a purely fictitious language, Rodell relied on the positivist notion that legal terminology creates a fantasy world because it does not correspond to anything in the “real world”; legal relations are a kind of secret language that lawyers conjure up and impose on nonlawyers. Rodell concedes that doctors and engineers need a specialized language to describe physical phenomena for which ordinary language is lacking (such as “mitochondria” and “entropy”), but law deals with everyday occurrences that do not need a special language: “A common street brawl means nothing to a lawyer until it has been translated into a ‘felony,’ a ‘misdemeanor,’ or a ‘tort.’” Rodell’s utopian vision foresaw a society in which the law was clearly stated in terms that could be understood by laymen, where lawyers and technical lawyer-speak are superfluous. Rodell’s point is that lawyers live in a make-believe world of their own creation, that they propagate empty words, “full of sound and fury, signifying nothing.” Rodell tries to bolster this position by comparing two criminal statutes. The first statute simply states, “Anyone who spits on this platform will be fined five dollars;” the second provides, “Anyone who

22. Id. at 126-27.
23. Id. at 127-28.
24. The positivist claim here is that a term is meaningless if it does not generate a statement that can be empirically verified by the senses. A.J. AYER, LANGUAGE, TRUTH, AND LOGIC 35 (1952): “We say that a statement is factually significant to any given person if, and only if, he knows how to verify the proposition which it purports to express.”
25. RODELL, supra note 20, at 10.
26. WILLIAM SHAKESPEARE, MACBETH, Act V, sc. 5.
27. RODELL, supra note 20, at 13.
willfully and maliciously spits on this platform will be fined five dollars." According to Rodell, the addition of the phrase "willfully and maliciously" creates an amorphous standard that allows endless room for debate, because these terms cannot be pinned down—hence, a defendant can forestall conviction by arguing that he did not spit willfully and maliciously, thereby raising a disputed issue for trial. According to Rodell, most legal terminology operates like the terms "willfully and maliciously," producing interminable debate because such terms are impossible to fix with precision. Rodell's solution would be to revise the law so that we remove all the vague terminology and replace it with plain English.

In assessing Rodell's position, we should keep in mind that his importance lies not in the strength of his argument (which I will show is weak) but rather in the fact that he nicely articulates an anti-lawyer sentiment widely shared in the general population, and shamelessly propagates the ages-old desire to reduce the law to exact statements that do not admit of multiple interpretations and fuzzy boundaries. However laudable his intentions, Rodell's critique of legal writing falls victim to a series of key mistakes. First, he misses the fact that most legal relations are not "ordinary" events that can be described in simple terms. Even a standard commercial lease needs to be drafted so that certain key issues are addressed in advance—base rent, security deposit, cancellation procedure, duties of the parties as to repairs, condemnation, subletting, assignment, and so on. These matters are sufficiently complex to warrant a special terminology, because ordinary English would be too long and cumbersome. Suppose, for example, that it was always necessary to erase the phrase "This is an unsecured loan," and instead write out its full meaning in understandable English: "This is the type of loan that is not supported by any collateral, so if the person who signs the promissory note fails to make the payments, then the lender must sue to get a judgment against the borrower and then enforce the judgment to get at the borrower's property." This would make legal

28. Of course, we should note that Rodell's preferred statute would impose a fine on a person who spits out a rancid drink, thereby criminalizing a healthy reflex. Rodell also fails to see that the terms he finds objectionable in the second statute (willfully and maliciously) are precisely the terms that make the statute fair by restricting its application to cases of intentional spitting, a narrowing that is required precisely because the stripped-down version of the statute is overbroad. Rodell misses the trade-off inherent in legal drafting: if the statute is written in stark terms (as Rodell suggests), it imposes strict liability against those who spit for good reason; this can be remedied by adding the terms "willfully and maliciously," but only at the cost of introducing ambiguity and indeterminacy. Rodell's mistake is to naively presume that there is a perfect solution to this trade-off, when in fact we are inevitably forced to compromise.
documents impossibly long, especially when dealing with such complex notions as subrogation, convertible bonds, and summary judgment. In a highly-specialized world with an advanced division of labor, it is inevitable that lawyers draft some very complicated documents that can only be understood by other lawyers. Indeed, we should be thankful that shorthand terms are available to express the relations between the parties, even as we share Rodell's concern that the general public cannot understand such language.

Rodell's second and more fatal mistake is to think that legal concepts are meaningless because they do not correspond to physical objects; he mistakenly assumes that language must correspond to a material object to be meaningful, a view that makes little sense when we pause to consider how much time we spend talking about love, friendship, and faith, none of which are physical entities. Even money, which seems fairly concrete, takes its meaning not from its physical properties but from the collective intentionality imposed on it. Crudely put, certain little pieces of green paper have value because we collectively recognize this value, but value is not inherent in green paper. While Rodell and other legal realists are correct that a corporation is in some sense a fictional entity that cannot be found in a particular time and place (IBM is not some entity apart from its shareholders, directors, and employees) and a stock certificate is a mere piece of paper, they fail to appreciate the beauty of law (in this case, corporate law) in giving rise to nonphysical entities like corporations and shares. This is not "hocus-pocus" (to use Rodell's terminology) but rather a creative project of fashioning new forms of association and new social institutions. The legal entities that we create do not map onto an antecedent reality, but rather bring a world into being, so it is no wonder that they do not correspond to physical objects. Rodell sees this as a sign that the law has left the ground and spins circles in the air, but this conclusion is too dramatic. Our response to the make-believe quality of many legal concepts should be one of cautious celebration and wonder: through a series of speech acts and pronouncements, lawyers conjure up new realms of legal relations and new causes of action. In this sense, the law can be highly creative. One might say, following philosopher Nelson

29. This point was made famous in Gilbert Ryle's example of the visitor to Oxford who is shown the various buildings and dormitories and responds by asking, "But where is the University?", as if the University was something greater than the sum of the parts that he had just seen. GILBERT RYLE, THE CONCEPT OF MIND 16 (1949). A similar rejection of transcendental entities can be seen in Jerome Frank's claim that "Many lawyers are still infected with that scholasticism which converts abstractions into independent entities having an 'out there' character." JEROME FRANK, LAW AND THE MODERN MIND 315 (1930).
Goodman, that law is a “way of worldmaking,” a conceptual scheme that gets played out in the real world. Stephen Burton captured this point nicely when he noted that the “local law of a society represents a possible organization of human relations, and a public commitment to bring it into empirical being.” Understood in this sense, lawyers actually work wonders with language, creating something akin to a cognitive grid or conceptual scheme for human affairs. This ‘way of worldmaking’ is carried out on two levels: first, in the creation and destruction of new legal entities and new causes of action by legislators and judges; and second, in the actions of individual lawyers who use the concepts and language of the law to fashion solutions for clients (for example, by characterizing a client’s injury as a tort instead of a breach of contract, or by setting up unique business entities and arrangements, such as sale-leasebacks, convertible bonds, and irrevocable insurance trusts).

We should pause to consider this sense in which legal language does not simply map onto a pre-existing world but actually creates a world that is reinforced in subsequent legal discourse. Catharine MacKinnon captured this act of creation nicely when she noted that sexual harassment was a “feminist invention.” Amazingly, the act of creation is often followed by a forgetfulness that treats the created object as something that has always existed in roughly the same form. For example, the tort action for intentional infliction of emotional distress is a relatively recent invention, yet this cause of action is now so ingrained that most young lawyers are surprised to learn of its recent vintage. The corporation is a relatively recent invention, a legal fiction that, strictly speaking, does not exist as an entity in time and space, yet we treat corporations as if they are organic beings (indeed, corpora-

30. GOODMAN, supra note 4, at 22: “Comprehension and creation go on together.”
34. “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it . . . .” Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819) (Marshall, J.). More recently, the Seventh Circuit noted that “[t]he corporation is just a convenient name for a complex web of contracts among managers, workers, and suppliers of equity and debt capital.” Scandia Down Corp. v. Euroquilt, Inc., 772 F.2d 1423, 1427 (7th Cir. 1985).
tions are "persons" under the law, subject to formation, merger, and dissolution. Although corporations are created in words (by submitting articles of incorporation to the state authorities, adopting by-laws, and so on) and exist only on paper as it were, they nevertheless have a real physical effect on the world. Similarly, property law binds and structures the physical world, since nature does not automatically divide land into neat parcels, nor does nature dictate that land be held privately in fee simple. Yet this way of owning property is so ingrained that it seems inevitable, an attitude reinforced by the physical division of property into parcels and by such documents as deeds, title insurance, and land surveys.

If I am correct, Rodell was mistaken in his attempt to rid the law of abstractions and generalizations. Legal language is not something that we might otherwise avoid with careful or proper English, but is simply a built-in feature of the social practice of law, in the same way that medical terminology is an inevitable part of the practice of medicine. Just as a doctor says "hypothermia" instead of "the cooling of the blood to such an extent that damage may occur to the heart, lungs and brain," lawyers say "unsecured promissory note" instead of "a promise to pay a certain amount of money that is not backed by collateral." Even if we remove the verbiage and jargon from legal documents, there remains a layer of technical terminology that is necessary for the law to exist as a social practice.

Instead of wondering why legal writing is so abstract and indeterminate, perhaps we should reverse the inquiry and wonder why Rodell and his ilk pursue the impossible goal of perfect clarity in language. It seems that Rodell's project of demystifying legal language has a parallel in the Enlightenment's search for a perfect universal language that matched with reality point for point, with no excess terms or ambiguity. The Enlightenment philosopher Leibniz took this quest seriously,35 a project ridiculed by French philosopher Jacques Derrida as the search for a "transcendental signified," an absolute endpoint where language maps onto the world point for point.36 Derrida and other postmodern thinkers point out that words are elusive and slippery, full of ambiguity and polysemy, a point expressed nicely by literary theorist Roland Barthes:

We know now that a text is not a line of words releasing a single "theological" meaning (the "message" of the Author-God) but a multi-

36. JACQUES DERRIDA, OF GRAMMATOLOGY 76-93 (1976).
dimensional space in which a variety of writings, none of them original, blend and clash. The text is a tissue of quotations drawn from the innumerable centres of culture.\textsuperscript{37}

If this is correct, searching for absolute clarity of language is futile; the best that we can do is to reduce confusion by trying to write clearly while openly acknowledging that multiple readings are inevitable. In law, as in life, ambiguity must be expected.

Ultimately, Rodell's project smacks of the positivist quest to rid language of non-verifiable statements under the ruse of labeling such statements "meaningless." As philosopher John Searle notes, this quest arises because many of our cherished social institutions do not have a physical presence and exist solely by virtue of agreement and cooperation. Searle nicely captures the feeling of wonder at the ephemeral nature of social institutions: "In our toughest metaphysical moods, we want to ask . . . are these bits of paper really money? Is this piece of land really somebody's private property? Is making certain noises in a ceremony really getting married?\textsuperscript{38} The answer is, of course, yes. Just as it is a mistake to conclude that money, property, and marriage are not real because they do not relate to physical entities, it is equally mistaken to presume that lawyers do not do anything real because they deal with nonphysical entities such as corporations, or because they use amorphous terms like "willfully and maliciously." Legal writing and legal concepts create a real world of social institutions, a world that is more abstract than the "real" world of physical objects but also more important because it gives shape and order to human involvement with the world. For example, it is true that a building cannot be constructed without bricks and cement, but these resources can only be utilized in a coordinated way against a backdrop of property holdings, labor relations, architectural contracts, building permits, and other legal matters that must be in place before construction begins (in this sense, the abstract categories of the law precede the physical contact with real objects). Although Rodell draws a negative inference from the fact that legal language does not refer to physical phenomena, one should instead draw a positive inference, namely that legal writing provides tremendous freedom for lawyers to fashion new causes of action and new forms of association. To see legal writing in this light is to capture the sense in which it is a highly creative act, something akin to painting or literary creation. Sadly, however, an ever present danger is that the creative aspect of legal writing will be ignored, repressed, or denied, with the

\textsuperscript{37} \textsc{Roland Barthes}, \textit{The Death of the Author}, in \textsc{Image-Music-Text} 146 (1977).

\textsuperscript{38} \textsc{John Searle}, \textit{The Construction of Social Reality} 45 (1995).
result that legal writing devolves into conformist connect-the-dots drudgery, a downward trajectory that I will chart in the next section.

III. SOME DANGERS OF LEGAL WRITING

If I have established that legal writing (or at least some form of legal techno-speak) is necessary, it does not follow that it is ethically neutral. The problem does not lie with the use of technical language *per se*, but the rigid application and blind adherence that it engenders. As noted earlier, obedience to tradition is inevitable if one is to play the game of the law, but lawyers tend to get trapped in a hermeneutic circle that endlessly affirms the existing arrangement. For example, one can hardly broach the issue of real property from a legal perspective without somehow affirming the language of the existing power structure—fee simples, rights of reversion, easements, leaseholds, and rules of descent; a real estate lawyer must affirm and legitimate this system regardless of her personal feelings about it. Legal discourse will always be loaded in this way, but I believe that law can be changed for the better if we learn to recognize the dangers and distortions inherent in our use of standard legal writing. In what follows, I will articulate four such dangers: (1) the obscuring and mystifying of power relations; (2) the narrowing of thought and emotion; (3) the tyranny of formal rationality; and (4) the need for a privileged class of experts (lawyers) to unravel a legal system that is spinning out of control.

**Danger 1: The Obscuring and Mystifying of Power Relations**

Many legal documents are phrased in technical, formal, and neutral terminology that obscures the actual power relations at play between the parties. This is accomplished by presenting such an overwhelming amount of detail, using such formal language, that the reader loses sight of the ethical question of who is doing what to whom. This style of writing parallels the radical decentralizing of power relations in society over the last century. As sociologist C. Wright Mills pointed out, the individual is no longer physically coerced so much as intellectually manipulated through endless rules and bureaucracy:

Under the system of explicit authority, in the round, solid nineteenth century, the victim knew that he was being victimized, the misery and discontent of the powerless were explicit. In the amorphous twentieth-century world, where manipulation replaces authority, the victim does not recognize his status . . . . In this movement from authority to
manipulation, power shifts from the visible to the invisible, from the known to the anonymous.  

Mills's point is that the raw exercise of power is being replaced by a subtle, seemingly consensual coercion based upon formal rules and regulations. So instead of the ruthless landlord who throws tenants out into the street, one is evicted by a management company acting under a standard form lease that bears one's signature; instead of being fired at the whim of a maniacal boss, one is "downsized" pursuant to regulations in a four-inch thick employee handbook tucked away in a remote corner of one's desk. The modern power relations are not significantly less oppressive than they used to be, but they are highly rationalized and decentralized, to the point where the victims can only throw up their hands and blame "The System." The entire effect is captured brilliantly by John Steinbeck in *The Grapes of Wrath*, where a Midwestern farmer is told that the sheriff evicting him is the servant of a bank, which is itself subservient to a board of directors back East, at which point the farmer asks, "Then who can I shoot?"

To see how authority becomes diffuse and difficult to pinpoint, consider the following passage from an Industrial Building Lease that landed on my desk recently:

In the event of termination of this Lease for any reason, Landlord shall not be liable for any costs, expenses, fees, demands, setoffs, or accounts of Tenant, and Tenant shall receive a return of Security Deposit, subject to adjustment as set forth below; Tenant shall remain liable for (i) all sums owed to date to third parties (including without limitation, all taxes and charges for utilities and other services to the Premises), (ii) all Base Rent, Additional Rent and other amounts due Landlord and any third parties under this Lease, (iii) all damages, costs and expenses sustained, suffered, or incurred by Landlord or applicable third parties to the date of such termination, (iv) all costs, fees and expenses, including attorneys' fees, incurred by Landlord hereunder or in connection with any bankruptcy proceedings of Tenant or Tenant's guarantor, if any, and/or in connection with renting the Premises to others from time to time (collectively, "Termination Damages"), and (v) additional damages constituting accelerated rent, which shall be an amount equal to (as of the date of termination) all Base Rent and Landlord's estimate of all Additional Rent and other sums which, but for the termination of this Lease, would have become due during the remainder of the Term (collectively, "Residual Damages"). In calculating Residual Damages, for each Lease Year following termination (including the Lease Year in which the termination occurs) (A) annual

Additional Rent payable shall be conclusively presumed to be equal to the annual Additional Rent payable with respect to the prior Lease Year, or portion thereof (on an annualized basis), preceding termination and increased at a rate of 5% per year (or such higher rate as Landlord may reasonably determine taking into account reasonable estimates of future costs) for the remaining portion of the Term; and (B) annual Base Rent.

Two things are worth noting about this passage. First, the detail is so great that the reader loses sight of who is doing what to whom, let alone whether the provision is morally acceptable. Second, the use of formal terms creates an impression of equality and consent, when in fact the Landlord is a large management company while the Tenant is a sole proprietor with little bargaining power. The purpose of the provision is to allocate costs and expenses when the Lease terminates: it ensures that if the Lease is terminated by the Tenant, the Landlord will get every possible cent back for its troubles, while the Tenant will get nothing if the Landlord terminates. Witness the sleight of hand by which power becomes diffuse and coercion takes the form of a free contract: instead of a nakedly one-sided provision ("Landlord gets full reimbursement of all expenses if Tenant terminates, but Tenant will not get the same"), we find a mystifying provision so detailed that its one-sidedness is lost. A similar process takes place in litigation, where "kicking someone out of the house" becomes "a cause of action based on forcible detainer," and where "firing for no reason" becomes "discharge pursuant to employment at will." The formal legal terminology glosses over the power relations and covers them in a patina of rationality, distance, and dignity. When used in this way, legal writing legitimates and extends oppressive power relations by recharacterizing them as formal, consensual, and rational: remember that even an unconscionable contract takes the form of a voluntary transaction. Of course, those with bargaining power benefit from recharacterizing power relations as consensual; thus we find powerful corporations trying to convince courts that the hapless consumer consents to the minutiae in her form contract, and that a lessee consents to the forfeiture provisions.

41. The best example of how legal ideology and formalism obscure unequal power relations can be found in Anatole France's quip about the "majestic equality of the law": "[I]t forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." LE LYS ROUGE (1894), quoted in THE OXFORD DICTIONARY OF QUOTATIONS (Angela Partington ed., 1992). France's point is that the formal equality of the law is belied by the substantive inequality between members of the various social classes.
Danger 2: Narrowing the Range of Thought and Emotion

In Nineteen Eighty-Four, George Orwell painted a bleak picture of a totalitarian state ruled by Big Brother. The protagonist, Winston Smith, worked in the Records Department, where he had the task of rewriting the old newspapers. At lunch one day, Smith sits through a frightening speech by the government philologist, who is busy creating the dictionary for the new official language, Newspeak:

Don't you see that the whole aim of Newspeak is to narrow the range of thought? . . . Every year fewer and fewer words, and the range of consciousness always a little smaller . . . . By 2050—earlier, probably—all real knowledge of Oldspeak will have disappeared. The whole literature of the past will have been destroyed. Chaucer, Shakespeare, Milton, Byron—they'll exist only in Newspeak versions, not merely changed into something different, but actually changed into something contradictory of what they used to be . . . . The whole climate of thought will be different. In fact there will be no thought as we understand it now. Orthodoxy means not thinking—not needing to think. Orthodoxy is unconsciousness.43

Of course there is no Big Brother standing atop our legal system, but the language of the law (especially the language used in commercial transactions) nevertheless employs a restricted range of thought and emotion, as if all vestiges of affect have been repressed. In some ways, legal documents are like Newspeak, not a language specifically designed for thought control, but something that narrows the range of thought in a de facto way by drawing strict limits around what counts as a legal argument. The language of the law is like a game that one can play if one accepts certain basic concepts as building blocks of the game but which are not themselves open to debate. So we can write in a highly specialized way about property law (“springing remainders,” “fee simples,” “easements by prescription”) only if we assume that property should be privately held, a silent assumption that radically narrows the range of discussion because it rules out alternative property holdings, such as collective ownership or state ownership. There is little room within the practice of law to question the basic presuppositions of the

43. GEORGE ORWELL, NINETEEN EIGHTY-FOUR 46-47 (1948).
legal system (private property, wage labor, individual tort liability), which means that the great bulk of legal writing takes place within a limited theoretical range.

The danger here is that an air of inevitability attaches to the existing concepts and language in a particular area of law, as if these legal entities/concepts/doctrines were a part of nature itself. This phenomenon has been aptly described as *reification*, a process where contingent social relationships are mistaken for relations between objects or as the property of objects.\(^4\) This term has its origins in Marx's analysis of *commodity fetishism*, where he noted that people crave gold, diamonds, and paper money as if these objects were inherently vested with the magical property of generating income, when in fact social relations invest these otherwise useless objects with value.\(^5\) Commodification is complete when the worker relates to herself as a thing to be sold in the market instead of a person with value in her own right. The phenomenon of reification is common among lawyers, resulting chiefly from the mistake of projecting legal conceptions onto nature. By way of example, lawyers tend to see real property as if it were divided by nature into discrete parcels and held by individuals in fee simple, instead of seeing this arrangement as one of many ways that land can be distributed. In a similar sense, workers see it as natural and inevitable that they receive wages instead of an ownership stake in the enterprise where they work. Occasionally, we need to be reminded that the categories of legal thought are constructs that can be deconstructed, so we do not fetishize the existing arrangement as static and unchanging.

One could say that the law describes relationships formally and one-dimensionally, disguising the substantive differences between the parties. Thus we speak of "landlord/tenant relations" instead of "property controller/renter relations," "employer/employee relations" instead of "owner/hireling relations," and our court pleadings speak of "constructive discharge" instead of "making life miserable for a worker," "forcible detainer" instead of "kicking someone out on the street."\(^6\)

\(^4\) The leading analysis of reification is offered in GEORG LUKÁCS, *Reification and the Consciousness of the Proletariat*, in HISTORY AND CLASS CONSCIOUSNESS 83-110 (1971).

\(^5\) KARL MARX, *Capital*, in THE MARX-ENGELS READER, *supra* note 7, at 320-21: "A commodity is therefore a mysterious thing, simply because in it the social character of men's labour appears to them as an objective character stamped upon the product of that labour . . . . [A] definite social relation between men [assumes] the fantastic form of a relation between things."

\(^6\) Some of the older digests used legal categories that were less veiled, such as "master-servant" (now, employer-employee) and "bastards" (now, illegitimate children). See Permanent A.L.R. Digest (1949) for these categories.
Lawyers use language in a way that flattens out the world as experienced, by removing emotion from law, in a way that seems reasonable and rational but which nevertheless expresses a value choice precisely in the suppression of emotion, because those with power are more likely to frame their legal writing in a cold and calculating manner. For this reason, literary critic Roland Barthes was correct to assert a direct link between power and language:

Language is legislation, speech is its code. We do not see... that all speech is a classification, and that all classifications are oppressive... To speak, and with even greater reason, to utter a discourse is not, as is too often repeated, to communicate; it is to subjugate.... In speech, then, servility and power are inescapably intermingled.47

Because the language of the law tends to favor those with a stake in perpetuating the system, it comes as no surprise that few legal terms are available for describing oppression and coercion—"unconscionable" is one, "duress" is another—but in general the law is phrased in a way that stresses formality over nuance, ignoring the substantive lived experience of the actual people affected by law.

To some extent, the law should be rational and restrained, unaffected by subjective desires. As Aristotle pointed out, "He who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids men rule adds an element of the beast."48 However, all of this restraint and rationality can have a distorting effect when it glosses over social relations that are arbitrary and irrational. For example, we use the term "employment-at-will" to designate that both an employee and an employer can terminate the work relationship when they want, but since this terminology is neutral between the parties, it obscures the fact that the employee comes off much worse than the employer. After all, the employee labors in fear of being terminated and cannot compel the employer to give a guarantee of continued employment, whereas the employer can protect itself by having the employee sign a noncompetition agreement. Contemporary legal discourse as propagated by judges and lawyers seems like a neutral medium since it constitutes the only officially accepted manner of speaking and thinking about the law. But the existing discourse of law is not neutral—it codifies a particular world and then chastises alternative visions as extreme, impractical and untenable; in other words, the existing system of rights is fetishized.

This leads to a decline in critical and dialectical thinking among lawyers, who lose the ability to think beyond the current arrangement.\textsuperscript{49} There is doubtless an element of mental conversion that takes place when a lawyer is narrowly constricted to a closed universe of legal concepts and categories.\textsuperscript{50} And the confining stricture of legal thought and language has an adverse impact on the psychology of individual lawyers, because legal writing is such a stultifying genre. It creates a flat universe, one that is frankly boring, obscuring at the same time that it indulges in extreme detail, so that legal documents must be read carefully and with a skeptical eye to grasp what is really going on.\textsuperscript{51} For example, the following is an excerpt from a tender offer that came across my desk recently:

If, on or after the date hereof, the Company should declare or pay (or set a record date with respect to the payment of) any dividend on the Shares or make any distribution (including, without limitation, the issuance of rights for the purchase of any securities) with respect to the Shares that is payable or distributable to shareholders of record on a date prior to the transfer to the name of the Purchaser or its nominee or transferee on the Company's stock transfer records of the Shares purchased pursuant to the Offer, then (1) the purchase price per Share payable by the Purchaser pursuant to the Offer will be reduced by the

\begin{itemize}
\item \textsuperscript{49} Herbert Marcuse nicely captured the marginalization of critical thought: “As the power of the given facts tends to become totalitarian, to absorb all opposition and to define the entire universe of discourse, the effort to speak the language of contradiction appears increasingly irrational, obscure, artificial.” Herbert Marcuse, A Note on Dialectic, in THE ESSENTIAL FRANKFURT SCHOOL READER 447-48 (Andrew Arato & Eike Gebhardt eds. 1994).
\item \textsuperscript{50} Patricia Williams expresses this point nicely: “[Legal language flattens and confines in absolutes the complexity of meaning inherent in any given problem.” PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 6 (1991). Allan Hutchinson also stresses the narrow confines of legal language: Legal language shapes those social encounters that fall within its reach. As disputes move into the magnetic field of law, they are “translated” into the received argot. In this way, legal discourse enforces the canons of relevance and rationality that it generates for its self-serving purposes. This encoding process changes and thereby screens out many disputes. ALLAN HUTCHINSON, DWELLING ON THE THRESHOLD: CRITICAL ESSAYS ON MODERN LEGAL THOUGHT 15 (1988). Thinkers such as Williams and Hutchinson draw attention to the limits of the existing legal system as a closed system, and they want to investigate the forces that shape the contours of this system, thereby excluding certain claims (or ways of speaking and writing) as non-legal. This can be seen as an extension of the postmodern emphasis on that which lies at the margins—or outside—a given text, such as the text of the law. See, e.g., Jacques Derrida, Tympan, in MARGINS OF PHILOSOPHY x (1982).
\item \textsuperscript{51} In an astute assessment, James Elkins suggests that the affect of legal writing is “flat, technical, and formulaic. Its favorite color is gray. Its neurotic styles: depression and denial . . . .” Elkins, supra note 2, at 115.
\end{itemize}
amount of any such cash dividend or cash distribution and (2) any such
non-cash dividend, distribution or right to be received by the tendering
shareholders will be received and held by the tendering shareholders
for the account of the Purchaser and will be required to be promptly
remitted and transferred by each tendering shareholder to the
Depositary for the account of the Purchaser, accompanied by appro-
priate documentation of transfer.

Weeding one's way through this tortured prose, one would not suspect
that the basic idea here is fairly simple—to cover the situation where a
dividend is declared or paid before the shares are actually tendered, to
make sure that the purchase price is reduced by the amount of the
dividend. And the section is not badly written compared with other
documents that I spend my days reviewing. Nevertheless, this style of
writing is disturbing and distancing on some level.

In thinking about this passage and others like it, the first thing to
notice is the gulf that separates this type of language from our normal
way of speaking, how it hovers above the rhythm of life, like some type
of alien-speak that uses super-long, dry, emotionless sentences. This
emotional distancing insulates the attorney from the real-world effects
of his actions, much in the same way that a bureaucrat tells himself that
he is only doing his job and is not responsible for the effects of a system
in which he functions as a mere cog. That is, the attorney can rational-
ize that she is simply preparing a corporate document at the request of
a client, which is essentially a personal and not a political act. After all,
the lawyer is simply doing her job, and to do this she must write and
speak in this fashion—if she declined to do it, then another lawyer would
surely take her place.

Despite this disclaimer, the lawyer is nevertheless performing a
political act in preparing standardized documents, because by using such
dry and formalistic language, she is actually disguising the social
implications of the legal work she is performing, and this concealment
has ethical implications. Consider the tender offer document discussed
above: on one level, it merely states the terms and conditions for a
purchase of shares, and the lawyer can comfort himself that his task is
complete if the document is internally consistent and contains the
information required by the Securities and Exchange Commission and
the state corporation laws. But the tender offer is also a document with
a social impact that will alter the lives of workers and the community.
By isolating the legal formalities from the broader social context (by
focusing only on the rules instead of the social effect of the tender offer),
the attorney silently endorses the tender offer whether she wants to or
not, lending it legitimation. This is the beginning of the process by
which lawyers become apolitical, by distancing themselves from the
ethical implications of their clients' actions and focusing solely on the
production of legal materials as if they worked in a vacuum. Small wonder that this process produces lawyers who lack individuality and refuse to consider the social effects of the transactions that they facilitate, because the actual implications of their work are clouded in obscure language far removed from the flesh-and-blood of those affected by it. This often results in a psychological condition known as splitting,\(^{52}\) a defense mechanism where a painful experience is warded off by disownership; hence the lawyer reconciles herself by saying that she is really two separate people—one at work and one in private. This operates on two levels: on a psychological level it allows the lawyer to make it through the day by divorcing her “true” personality from the false self who is performing mundane legal work, and on a moral level it relieves the attorney of responsibility for the consequences of her work. As a split personality, the lawyer has a nagging sense of always standing outside herself, with her “true-self” watching her “lawyer-self.” Unfortunately, most lawyers do not recognize their own voice in the language that they use on a daily basis, nor do they see themselves reflected in their work. Perhaps this is why they often have a sensation of playing a role in a drama constructed by somebody else.

My point is not that legal writing always masks and distorts, but rather that it can work in this way, and that repeated exposure to it prevents one from seeing how it distorts. A person who drafts legal documents all day begins to think in the terms that he is using, narrowing his universe of thought until it becomes coterminous with the existing legal arrangement. As a remedy for this, lawyers should set aside time for nonlegal activities that introduce alternative viewpoints, through theater, movies, fiction, or simply by envisioning a more multidimensional world than the one depicted in their legal documents. It is crucial to remember that the legal world that we create and perpetuate is a contingent world, one among many possible worlds that we might bring into existence. The evils of this society—poverty, racism, alienation, homelessness—are tied up with the existing legal system, which creates these evils just as surely as it creates multinational corporations, insurance trusts, and limited liability companies. An inescapable irrationality confronts any person who studies law and the legal system: we have constructed an edifice of dizzying complexity when it comes to business and taxation, but we still cannot provide basic rights to housing, child care, health insurance, and job security.

Danger 3: The Tyranny of Formal Rationality

Earlier in this Century, sociologist Max Weber pointed out that a new form of rationality—formal rationality—was gaining ascendancy in Western industrialized nations. This was due in part to the rise of science during the Enlightenment, as scientists became increasingly adept at devising formulae and schema for manipulating the physical world. A similar transformation was taking place in politics and morality, as formal rules gradually replaced the irrational and mystical elements of our culture (for example, marriage was transformed from holy matrimony to a secular contract, the divine right of kings was replaced with democratic rule, and the artisan was overtaken by the profit-driven corporation). Over time, rationality begins to eclipse the emotional, subjective, value-laden, qualitative side to our personalities. Weber calls the resulting experience disenchantment: loss of the sacred, the mysterious, the unexplainable.  

Weber pointed out that formal rationality employs a high degree of logic and rule-following, which we can understand as instrumental reasoning, the ability to pass from one point to another within a given system without stepping back to consider the substantive values and moral orientation of the system. Instrumental reasoning creates efficient systems for getting from point A to point B, but it leads to the eclipse of substantive reasoning about larger issues of politics, morality, and justice (for example, instrumental reasoning cannot tell you whether we should go from point A to point B). According to Weber, we are witnessing the rise of people who are totally rule-based and decry every attempt to look beyond the rules as impractical and pointless. That is, the rules become sacrosanct, an end-in-themselves, followed mechanically. Weber feared that an increasing number of daily activities would become excessively rule-governed and rationalized. Hence his prognosis for the men of the future: “Specialists without vision, sensualists without heart; this nullity imagines that it has attained a level of civilization never before achieved.” Weber referred to this tendency to get locked into formal rationality as the “iron cage” of rationality, sometimes understood as “the irrationality of rationality,” where a highly rationalized and rule-governed system is nevertheless irrational when viewed from a perspective outside the

53. Speaking of the rise of rationality, Weber writes, “[I]t means that . . . there are no mysterious incalculable forces that come into play, but rather that one can, in principle, master all things by calculation. This means that the world is disenchanted.” From MAX WEBER: ESSAYS IN SOCIOLOGY 139 (H.H. Gerth and C. Wright Mills eds. and trans., 1946).

system. A good example of hyper-rationalism and hidden irrationality is provided by the Internal Revenue Service and the Income Tax Code. Our tax reporting system is exceedingly rational and rule-governed—all of the necessary forms are provided along with detailed explanations—but tax lawyers get lost in these myriad rules and fail to see that the whole process (conceived from outside by the general public) is highly irrational, frustrating, and impossible to navigate. This sentiment was echoed by none other than Justice Learned Hand:

In my own case the words of such an act as the Income Tax, for example, merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of . . . . I know that these monsters are the result of fabulous industry and ingenuity [yet] I cannot help recalling a saying of William James about certain passages of Hegel: that they were no doubt written with a passion of rationality; but that one cannot help wondering whether to the reader they have any significance save that the words are strung together with syntactical correctness.

All of this relates to the practice of law in two ways. First, lawyers become so enmeshed within highly regulated areas of law that they lose sight of any alternative arrangement of the legal system—in Weber’s terms, they become “specialists without vision.” Second, legal practice takes on the quality of a highly complicated game where victory is narrowly sought at the expense of considerations of justice, where the law is viewed as a mere means to be manipulated in the service of a client instead of being respected as a social achievement of considerable magnitude.

I see these problems constantly among the lawyers with whom I come into contact—they will take any position allowed within the bounds of the law, totally unable to see a larger picture than their immediate task of winning a case. These lawyers are adept at rationalizing any action that their client wants (however dubious or unethical) because of their

55. As Karl Lowith explains, this condition involves an affirmation of the existing social arrangement and the inability to see beyond it to a better way of life:

The positive opportunity presented by this disillusionment of man and of the disenchantment with the world is the sober affirmation of this everyday life and its demands. At the same time, the affirmation of this everyday life signifies the negation of all transcendence, even that of progress. Progress then means merely a moving forward along the predetermined rails of fate, with passion and resignation.


duty to zealously represent the client. Here the lawyer sinks into his role as an advocate and forgets his larger role as a member of society and an officer of the court, indeed as a statesman. Because of this process, lawyers engage in highly complicated (and utterly rational) legal maneuvering, but in doing so they fail to question the ethics of what their client is directing them to do. They keep telling themselves that they have a duty to zealously represent the client, and this mantra prevents them from thinking about the ends (or values) that they are furthering in their unthinking application of the law as a mere instrument to be twisted or pushed in their client's favor.

By way of example, the law firm where I used to work had occasion to file a lawsuit on behalf of a sales agent who had not received commissions that he had earned. The Complaint attached a copy of the contract between the sales agent and the company, clearly showing that the company had failed to pay commissions. After we served the Complaint, the company's lawyer called me to talk about the suit, and he said the following, which struck me as bizarre: "I don't care what the contract says; I can turn anything into its opposite. I can tear apart any contract, no matter how airtight. I can raise a thousand defenses to stall you. I can poke holes in anything." I was not sure what this bravado was about, but no mention was made of the merits of the lawsuit—the entire discussion revolved around the rules of law and how they could be manipulated to reach particular outcomes. The conversation was completely rational in the sense that we debated legal rules and procedures, but in a broader sense the conversation was deeply irrational since it had nothing to do with the justice of the case. He was protecting his client and I was protecting mine, but we were each locked inside our private view of the law, discussing the rules as if we were playing a game. As the model of the ideal lawyer becomes that of a technician instead of a statesman, considerations of justice start to drop out of the picture, leaving only a war of each lawyer against all others in a frantic game from which nobody will raise their head for fear of losing ground. This situation can only get worse as the law becomes hyper-specialized, with each attorney keeping her eyes fixed on a mere piece of the whole, with no regard for the direction of the system as a whole.57

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Danger 4: The Need for a Privileged Class of Experts to Unravel the Legal System

As insiders within the legal system, we forget that the mastery of legal language allows us special access to the law at the same time that it prevents outsiders from gaining entry. This is becoming more troubling as the law grows in complexity to the point where it is choked with details. When the law becomes encyclopedic with statutes and regulations, it loses the ability to inspire and becomes so technical that it cannot be used as a guide for ordinary citizens. In this way, legal language separates ordinary citizens from the law and causes them to feel alienated and bitter toward the law.

The ill effect of overregulation was captured brilliantly in an otherwise shrill book entitled The Death of Common Sense. Written by a frustrated business attorney, this New York Times Bestseller earned a wide readership for its portrayal of how regulations are strangling small businesses and entrepreneurs. The author pointed out that common law principles such as "reasonable notice" and "due care" were flexible and easily understood, whereas newly-minted statutes are exhaustive and exacting, to the point where strict compliance is impossible. Discussing a situation that was heavily reported in the media, the author reminds us,

Perhaps we should recall President Clinton's search for his attorney general. Rules about withholding taxes on a babysitter's wages, extremely precise, turn out to be widely ignored by some of the most prominent lawyers in the country . . . . When law is too dense to be known, too detailed to be sensible, and is always tripping us up, why should we respect it?

From my own practice, I can report that transactional law is now dominated by forms that must be filed with state agencies. When setting up a corporation, lawyers must file all sorts of forms that, to be honest, nobody is quite sure how to fill out. Every real estate transaction now requires an environmental declaration, not to mention state and municipal forms, all in addition to the actual legal documents for conveying the property. This means that whole areas of law that once involved drafting legal documents (a real lawyer's skill) are now dominated by forms. This also makes it difficult to learn new areas of

59. Id. at 49.
law, since each area is dominated by a special set of forms and regulations. The problem here is not merely that the law has become tedious and boring, or that lawyers no longer have basic principles of law to hang their hat upon, but rather that the law has become fragmented and complex to the point where even the people on the inside have lost sight of the system as a whole. The result is a Frankenstein monster of laws and regulations, one that threatens our ideal of populist democracy. After all, the democratic ideal is that citizens are consensually bound by laws that they have approved through their elected representatives. The moral force of the law rests heavily on the pillars of equal access to law and due notice of law for all citizens. This ideal is threatened when the mass of citizens cannot begin to understand the legal system or the documents that control their lives, a point captured nicely by Peter Goodrich:

I have been intrigued by one of the major paradoxes of contemporary legal culture, namely that its social practice is founded upon an ideology of consensus and clarity—we are all commanded to know the law—and yet legal practice and legal language are structured in such a way as to prevent the acquisition of such knowledge by any other than a highly trained elite of specialists in the various domains of legal study.

When taken to an extreme, the situation becomes that described by Kafka in his short parable The Problem of our Laws, where a group of nobles refuses to let the public see the law, so a segment of the population naturally comes to believe that there is no law apart from the arbitrary fiat of the nobles. In our legal system the law is available to all, but is so densely worded and cross-referenced that only a few specialists can make sense of its various pieces. The situation threatens to become similar to colonial legal systems where the official government language is spoken largely by imperialists and remains out of reach for the general population; in such systems, language functions as a political barrier.

The former dean of Stanford Law School, Bayless Manning, has termed our condition hyperlexis: "[T]he pathological condition of an overactive lawmaking gland." Manning was particularly outraged

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62. Bayless Manning, Hyperlexis and the Law of Conservation of Ambiguity: Thoughts on Section 385, 36 Tax Law 9 (1982). One law professor recently referred to the tangle of statutes, case decisions, and regulations as "Tyrannous Lex." Thomas Baker, Tyrannous Lex, 82 Iowa L. Rev. 689 (1997). We might also recall Grant Gilmore's famous equation:
when the Treasury Department issued 110 single-spaced pages of regulations to clarify the distinction between "debt" and "equity" under Section 385 of the Tax Code. As Manning complained,

[R]egulation has become so elaborate and technical that it is beyond the understanding of all but a handful of Mandarins . . . [and] only the largest enterprises can afford to pay for the professional help that is required to pick one's way through the thicket . . . . The law must rely fundamentally on the voluntary compliance of the citizenry. The legal system of a democratic society cannot operate—and that means that a democratic society cannot operate—if the law is allowed to become so elaborate that it is beyond the reach of the informed, literate citizen who would like to be law abiding. An automobile driver must not be forced to consult an expensive law firm to find out (a) that the speed limit is 55 miles per hour and (b) whether he is doing 55 miles an hour as defined by the regulations. If we let that happen to our law, the people of the United States are simply going to say "To hell with it."

Part of the problem here is that the rule of law is becoming too fragmented; in fact, there is no longer a rule in the strict sense but a complex and impenetrable web of regulations propagated by federal and state administrative agencies, municipalities, commissions, and other bodies. A set of regulations so diffuse and piecemeal cannot command respect or legitimacy, because nobody can be put on notice of it in advance, and so few people can understand it.

The pathology here lies in the erosion of the ideal of self-government, by the people for the people. The rules have become so complex that no person, no group of persons, could ever claim that the laws are self-imposed, precisely because the citizens cannot begin to understand the laws and regulations in the first place. Even the officials inside the system (that is, judges and lawyers) have only a small glimpse of pieces of the whole, because the entire system has grown baffling, unfathomable, like the infinite Library of Babel in Borges's fable. To those on the outside (that is, laypeople), there is no way to understand the law internally in terms of validity and legitimacy, but instead the law is understood externally, as a system of punishments imposed capriciously by an insular cadre of officials. Therein lies the pathology—the law is so complex and over-regulated that even to those on the inside, it often seems arbitrary and groundless.

"The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed." GRANT GILMORE, THE AGES OF AMERICAN LAW 111 (1977).

63. Id. at 13.
Brevity and succinctness mark the documents that continue to inspire successive generations of Americans, documents such as the Declaration of Independence and the Constitution. To be sure, rough edges and ambiguities abound in the Constitution (what exactly is "due process?"), but it is short enough to be understood as a whole, as a document with clear purpose and design, something that the individual citizen can affirm as his own. We cannot compare this sentiment with the feeling engendered by staring at five thousand pages of single-spaced Medicare regulations. What is lost is precisely the experience of seeing oneself reflected in the laws made by one's representatives, which is essential to democracy. To be sure, any society as complex as ours will need a complex legal system. Yet as I have documented, there is a widespread sentiment that the legal system is spinning out of control, like a monster that no longer heeds the call of its master. The language of the law is directly related to this sense of confusion. If we continue our present course, we are headed toward a legal system of mystifying complexity, administered by a select group of insiders who know only a small corner of the system, surrounded by an expanding ring of outsiders who are growing increasingly frustrated. Here we see that an overreliance on complicated legal writing has the adverse effect of alienating those who stand outside the legal system. This should give us pause before we employ legal language that is tortuous and far beyond the comprehension of reasonable, educated people.

IV. CONCLUSION

In this Article, I have tried to articulate how a certain amount of legal terminology and a certain formal style of legal writing are inevitable in a highly complicated society. I have also shown the folly of attempting to eliminate legal writing altogether and replace it with straightforward English. In making these points, I have tried to emphasize the creative aspect of legal writing, how new ways of speaking and writing can lead to improvements in our social practices and institutions, how lawyers fashion the world with language. At the same time, I have shown that the accepted use of legal terminology produces ideological distortions and lends legitimation to unequal power relations. In one sense, not much can be done about this because each person alone is somewhat powerless to change established patterns of speaking and writing, especially when one's livelihood requires the propagation of this very style. However, a critical awareness of the dark side of legal writing might cause lawyers to adopt an ironical or skeptical posture toward their language, or cause them to hesitate before applying legal language unreflexively. This would not have a measurable effect on legal practice or legal doctrine, but it could make the law more humane.
Our understanding of the power and dangers of legal writing would be heightened if legal writing courses were to assume a more central role within the law school curriculum. As noted earlier, legal writing is generally marginalized as a skills course where students apply doctrines learned in substantive courses. This creates the misleading impression that legal writing involves primarily the application of pre-existing rules to a static set of facts, a presumption reinforced by popular legal writing techniques such as the IRAC system. Under this approach to legal writing (which has its roots in Langdellian formalism), legal writing is neither creative nor dangerous, and it has no personal or social consequences; it is simply a mechanical skill that one picks up as an adjunct to “real” courses in the law. But if I am correct, legal writing is both creative and dangerous. Every time that a lawyer drafts a legal document and speaks in the language of the law, she is making a personal and political choice, depicting and shaping a world by following a tradition or subverting it. This is doubly true for those of us who teach legal writing because we invest our students with an orientation toward the nature of legal writing one way or another. Paradoxically, we empower our students by explaining how the law is creative, indeterminate, fluctuating, and malleable, how fact patterns are shaped by narrative framework, prejudice, and ideology. We disable students by telling them that the law consists of ready-made rules to be discovered and applied to pre-existing facts, because this shrouds the existing legal rules in a veil of necessity and legitimation. If I am correct in urging that legal discourse is a “way of worldmaking,” then we are morally responsible for both the legal world that we create with our language, and for the depiction of the law that we transmit to our students.

66. Christopher Columbus Langdell was Dean of Harvard Law School in the 1870s, during which time he introduced the casebook method of legal education, now the dominant paradigm in American legal education. Langdell advanced a formalist model which depicted the law as a system of autonomous, universal rules that could be applied deductively to pre-existing fact patterns. See Thomas C. Grey, Langdell’s Orthodoxy, 45 U. PIT. L. REV. 1 (1983).