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by Jack L. Sammons*

INTRODUCTION

Some of the central issues addressed at the 2009 Mercer Law Review Symposium "Celebrating the 25th Anniversary of the Founding of the Legal Writing Institute" involved questions about the scholarship potential of the discipline of legal writing. Those on the fringe of the academy, as legal writing professors are now and as clinicians were in the 1960s, often offer the clearest perspective on it, and in the case of the legal academy, on the practice itself. What scholarship, I wondered as I listened to the speakers, would best take advantage of this privileged perspective and of legal writing's necessary focus on rhetoric? There are at least two ways of approaching this question, both of which I want to use here, and these two ways can be related one to the other as I will try to do here as well. The first is to wonder what subjects for the discipline are most naturally generated by teaching it. Here, I will pursue this approach immodestly by trying to display how my own recent scholarship could have naturally arisen (and to some extent it did naturally arise) from teaching an Advanced Legal Writing section as

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part of the Advanced Legal Writing Certificate Program at Mercer. The second approach is normative: what subjects should legal writers contribute to the academy and why? For the first I will ask you to join me in an imagined internal monologue as I wonder about what to say to my students in my Advanced Legal Writing section. For the second I will offer an argument that what emerges from this internal monologue, and I believe, would also emerge from the similar internal monologues of other legal writing professors, can offer a central perspective for legal writing scholarship, a perspective that could define it. It is a perspective much needed, I will argue very briefly in conclusion, by both the legal academy and the practice. Perhaps it would not be an exaggeration to say: desperately so.

I.

Imagine, if you will, a classroom setting in which I am a legal writing professor waiting to comment on a student's draft fact statement for an appellate brief in a negligence case involving a slip and fall at a restaurant one rainy evening in San Diego. I have not read this draft fact statement before nor have any of my students other than its author. We started this classroom exercise by taking ten minutes or so to permit everyone to read it for the first time. As I wait, I listen to five students offer their suggestions for improving the statement before it is my turn to comment. What, I wonder, is going to be left for me to say about it? How can I connect what is left for me to say with what has been said before by the students? If I can make connections, does a theme emerge from these that we, as a class, can explore further in the little time that remains for such? And, if a theme does emerge, what should I say about it?

You are, of course, being asked to imagine improvisational teaching within an advanced legal writing course. Because it is so improvisational, this teaching for me always includes an internal monologue—Hannah Arendt's "two-in-one,"[1] really—in which I very quickly try out potential themes for the class.

Now, before I plunge you into an exaggerated version of this stream of conscious thinking (and stream of conscience for they go hand-in-hand in such a setting) let me tell you a little more about it. Typically in such a setting I am far more focused on rhetoric than I normally am; not just on thinking about rhetoric, but also on thinking rhetorically, that is, thinking within a world that is, more obviously than most, rhetorically created. Because I am, rhetoric's ability to unsettle my ordinary

1. *See* HANNAH ARENDT, THE LIFE OF THE MIND 185 (1978).

perceptions—which is what I am most interested in here—is very strong. In fact, in this setting, rhetoric's ability (an ability I think I am willing to defend as unique) to make everything seem strange is strong enough to turn upon rhetoric itself and to reveal anew those rhetorical insights that are now almost hidden from us because they have been implicit in Western culture for centuries. It is also strong enough to generate utter nonsense. In addition, however, to restating the obvious—sometimes useful, sometimes not—and producing nonsense, rhetoric's ability to make the world, including its own world, seem strange will often yield insights (most often in the form of good questions) that are interesting and, occasionally, potentially important for law students, lawyers, and others as well. This is what we are after here: a demonstration of how subjects for scholarship can emerge from such teaching. (And, in the footnotes, I have brazenly cited to my own work to make the connections for you to at least one example of how this might work.)

In what follows, however, I honestly have no clear idea which rhetorical insights (and which potential articles these insights might have generated) are which—which are restatements of the obvious, which are nonsense, and which are interesting and worth pursuing further. Just like in the improvisational classroom, I have not yet thought through many of these with any care because doing so is not the point.

To cabin this experiment a little further, imagine that I have already determined that what *is* left for me to say, when the fifth student finishes her comments, is to suggest that additional details should be added to the fact statement's description of the defendant, our client, who owned the restaurant where the accident occurred, and to do so in a way that would connect him more closely with the restaurant. This was, let's imagine, my initial, rather mundane, editorial (and rhetorical) instinct.

So what follows is an exaggerated internal monologue about this one simple editing suggestion. Please remember that this is not an exposition. There is not a single theme here; it is instead a struggle to find one. Some thoughts will lead nowhere and some will surely contradict others.

II.

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> Okay, I think what I'll say to them then is this old standby: We need to make him seem more human. And then perhaps I should suggest describing his style of

management as personal, as motivated by his desire to pass the restaurant along to his children as his father had done before him. Something along these lines. His statement and his testimony were so very detailed, suspiciously so. Perhaps, however, that detail can be our excuse for going on a bit about him and a way of keeping this fact statement from being too obviously manipulative.

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But wait, I can't just say we need to make him seem more human. That's likely to mean different things to different students. What does it mean? More importantly, how does it work to persuade? These would be fair questions to be asked here. Seeing him as human, even if we agreed on what that meant, could evoke many things, couldn't it? It could even be negative—familiarity breeds contempt—or it could be just a value conferred by his being seen as a member of the same species rather than his being seen as some other abstraction. Here, however, I think to see him as more human would mean to see him as vulnerable in some sense. Surely this is a large part of its persuasiveness. Vulnerable to others to be sure, but not just that. Also—well—ontologically vulnerable in some sense; maybe only ontologically vulnerable.

I wonder if this vulnerability is related to Joe Vining's idea of the inherent transcendence in our use of the word "person" in the law?[2] There's a certain unspoken vulnerability in that at its essence, isn't there? A vulnerability in the idea of something beyond what we are giving value to us, perhaps the idea of our being created. But if this *is* like that, then we are not making him seem "more human" at all if by "more human" we mean seeing a shared humanity in some form. We would instead be personalizing him more radically. I should say it this way to the students because it captures much better the idea that the persuasive value of making him more human

2. *See* Joseph Vining, *Donald A. Giannella Memorial Lecture: The Mystery of the Individual in Modern Law*, 52 VILL. L. REV. 1, 12–13 (2007); *see also* JOSEPH VINING, FROM NEWTON'S SLEEP ch. IV (1995). For a very recent and very interesting discussion of the role of "person" in Vining's work, *see* Steven D. Smith, *Persons All The Way Up*, 55 VILL. L. REV. (forthcoming 2010).

arises from uniqueness; each of us is the last one of a species and we need to be careful with each other—something along these lines. What is more important in this then is not what we share but what we do not share. This isn't what I expected, but perhaps it is why we are persuaded by the details of a life. Okay, good enough for now, and maybe if this is right, there's some guidance in it for selecting the details we should add here, at least for this context, and we can unpack this guidance later.

But, if this *is* right, what about an expression like "real person" as in "the author treated the people she was describing in the article as 'real people.'" Surely this means "in all their complexity" and that could mean nothing more than "like us" in this way. Yes, but it is not just the fact of our shared complexities, right? It is, instead, that in our complexities we become different, become unique. So maybe this is the same. Maybe there isn't a tension there. I'm not sure.

Wait a minute! I think I'm saying that a judge would likely care about the defendant's uniqueness because it displays his vulnerability. The more we make this defendant a "person" by increasing the details of our description of him, the more the judge may come to care about him in his vulnerability. What I need to say here is that we can be more persuasive in representing individuals by insisting that each person . . . *and, therefore, each issue?* . . . each person is unique, irreplaceable, ultimately unique, and each is then . . . well . . . mysterious in this way. I wonder if this is true for all representations of individuals? I wonder if what we attempt to do in some fashion is to speak their mysteriousness?

But what does this do for us as a legal argument? Uniqueness, especially the implied uniqueness of each issue, doesn't really provide the judge with any real resource for decision-making. In fact, it works in the opposite direction. It takes resources away. If the "person" is unique, then placing him or her in categories for fairness, for equal treatment, for rule applications, and so forth, is suspect. And yet a lot of our legal arguments work exactly this way, don't they? They take resources away and push the judge, at least ideally perhaps, towards resources that are themselves, well, non-linguistic, non-

cognitive[3] perceptions, and . . . uh oh . . . mysterious again.[4] Can this possibly be right? It does seem that good competing arguments on any good legal issue point in this odd direction: to a basis for judgment that is beyond the arguments themselves.

Okay there's something to this, but I'm going too far afield. I need to think about this in terms of the particular language of the law first. Whatever "person" evokes, I think the class would agree that the thought of him we would be trying to encourage here is much more than just a more detailed mental image. It has got to work harder than that as rhetoric. The meaning of the words we'll add then, whatever those words might turn out to be, can't be thought of as just associational. They are not just ideational either, for the thought we want to encourage, if the thought of a real "person" is to work as I've described it, must remain fully connected to the physical and material while invoking a value, mysterious or not, beyond these. These seem the right criteria.

So it is back to Joe Vining again.[5] If he is right about the law making the word "person" express a transcendence, it is surely an imminent transcendence. It arises from the empirical, as Joe would say.[6] Okay, this sounds about right to me and gives me a way of imagining what we are doing here. Is there a simple way, true to their own experiences, to say this to the class?

Maybe we should add something about the client's family. I could point them to Linda Berger's good discussion of underlying metaphors of family, but she was thinking of a specific context in which the issue was

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3. By "non-cognitive" I mean not reducible to empirically based factual knowledge. I do not mean emotivism. The closest analogy to my use of the term here would be to intuitions that, while grounded in experience, cannot be captured within the totality of the various factors that produced them. This is not to say that we are currently unable to capture them, but that they cannot be so captured. There is in this an obviously close connection to *phronesis*.

4. For my view of the way in which the processes of opposing legal arguments move the judge towards reliance upon what I have called here the "mysterious," see Jack L. Sammons, *Justice as Play*, 61 MERCER L. REV. 517 (2010).

5. *See* Vining, *The Mystery of the Individual in Modern Law*, *supra* note 2, at 12–13.

6. For a discussion of Joseph Vining's resort to the empirical in this context, see Jack L. Sammons, *The Law's Melody*, 55 VILL. L. REV. (forthcoming 2010).

family.[7] What are the metaphors that best capture a vulnerability turning upon our uniqueness? Family, in fact, does the opposite in some ways because family tends to stand as a buttress against vulnerability. And yet describing a person's family is the paradigm trope of making them into "real people" so I can't end up in a position calling into question this ordinary usage. Can I?

But then being family *could* mean being more vulnerable in a sense, for the vulnerability would then extend to those in the relationship. I am more vulnerable in certain ways if I am family, for the risk of personal harm to me is then extended to others who are also me. "I and I," as they say in Jamaica.[8] And maybe family is also a reminder to the judge of a group who cares ultimately about the vulnerability of the particular person because of his uniqueness. It is more than a "reminding"; it is an appeal to mimic their thinking in the judge's. We should use descriptions of family, then, if we use them at all, that serve rhetorically to remind the judge that others see the client as unique.

I'm getting far afield here and none of this is going to be useful without thinking about it much more carefully. I wonder, though, if I am on to something broader here? Is it possible that the mysteriousness of "person" is the smallest element involving all the various fundamental forces of persuasiveness? The quark of persuasiveness? Is it just possible that other elements—all elements: not just *pathos*, but *ethos* and *logos* as well—are persuasive in their relationship to this quark, however distant this relation-

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7. *See* Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: An Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259 (2009).

8. The expression "I and I" is a Rastafarian way of saying "we" that makes clearer than any other English expression that what we think of as an "I" is itself communal. For Rastafarians, in addition, any self, including communal ones, is defined in its relationship to—indeed, its identity with—a divine. As Rastafari scholar E. E. Cashmore described it: "I and I is an expression to totalise the concept of oneness . . . the oneness of two persons. So God is within all of us and we're one people in fact. . . . The bond of Ras Tafari is the bond of God, of man." ERNEST CASHMORE, RASTAMAN: THE RASTAFARIAN MOVEMENT IN ENGLAND 67 (1979) (internal quotation marks omitted). The term, I am told, is often used in place of "you and I" among Rastafari, and especially in Rastarfarian inspired reggae music. *See* Tom McArthur, *Rasta Talk*, *in* THE OXFORD COMPANION TO THE ENGLISH LANGUAGE 846 (Tom McArthur ed., 1992).

ship may seem to us at times, especially in regards to *logos*? I wonder if I can take each of the suggestions the students have made thus far and display how they are ultimately connected to this sense of person in some fashion? This is too much for now, and I'm running out of time, but I should try this later.

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Would it help if I thought about this more linguistically? Because we want to create a real person, perhaps we should think of words with "per" as a shared morpheme.[9] We could see if we can't work the words "personal," "perspective," "perceived," and so forth, into the fact statement without being too silly about it. I wonder if the shared morpheme carries over to "persuade." Is "persuade" a silent context for the word "person"? Or, perhaps more likely, the other way around? Is it part of the adaptive unconsciousness of the meaning of each of these terms? And, especially because it is more opaque than other shared morphemes, does it better facilitate both uses? (Perhaps I need to try to connect this with the idea of person as the basic element of persuasion and trace the etymology of the words. And I should connect it to the mysteriousness of each person, which also means that in persuasion, each of us retains an ultimate authority to say no to any offered argument.[10])

The students would likely think of this as foolishness, but if the morpheme does work this way, that is, as an unconscious shaping of meaning, then by definition we shouldn't just trust our conscious perceptions. It should seem foolish if it is true. But I need a simple and obvious example of this before I introduce it to them. The most I should do now, I think, is just note generally that other unspoken similar words are part of the context in which words take on meaning, and note the shared morpheme

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9. *See Introduction to* VICTOR TURNER, FROM RITUAL TO THEATRE 17–18 (1982). And, although I am fairly certain that she does not agree with my use of it here, I owe special thanks to my daughter-in-law and linguist, Clara Shirley-Appel, for a helpful discussion of this morpheme.

10. *See* Jack L. Sammons, *A Rhetorician's View of Religious Speech in Civic Argument*, 32 SEATTLE U. L. REV. 367, 367 (2008).

casually. Later, I'll find the right poem to use to make this point and to give them the tools to find it in other legal text.

Okay, if we are going to make this a real "person" when should this "person" appear in the fact statement? There is surely a hint of causality simply by putting events in a sequence. *Post hoc ergo propter hoc.* And, it is not just the logical fallacy at work, for if all there is of causation, as is sometimes said, is that one event routinely follows another, then the ordering is the argument of causation. No, this is stretching. But does it work this way rhetorically? If so, I should certainly not introduce the defendant before, but after, the event he is said to have caused. I'm not sure this will fit here, however, for readers' expectations may be opposed to this ordering, but I think it is worth mentioning. They will start thinking in terms of shaping the context in which the meaning of the words arise.

In any case, it seems pretty clear that the form of the expression here must reflect and participate in the content expressed just as, for example, in music. What then is the form in this context that best expresses the appeal of "person?" It should be something that works like *vibrato* does for vocalists, making the song more moving because the singer seems more involved and more vulnerable.

Yes, this sounds right, and the form of the expression that could work won't do so by any magic, I should say, but because we lawyers have appropriated for our own proper use modes of presentation produced by artistic practices or, and better, *other* artistic practices—the *vibrato* connection is a good one. Those forms of expression that we are likely to deem most persuasive are so because they were made so by other artistic practices. Yes, I like that, and they will too. There's a romanticism to it, of course, in making more explicit the artistic nature of their work. It's possible to go too far with this and have one practice corrupting another, *etc., etc.*, but I'm tired of thinking about practices for now.[11] (I wonder what I'd be

11. *See, e.g.*, Jack L. Sammons, *"Cheater!": The Central Moral Admonition of Legal Ethics, Games, Lusory Attitudes, Internal Perspectives, and Justice*, 39 IDAHO L. REV. 273 (2003).

like if I'd never read Aristotle? It's almost like asking what I'd be like if I'd never been married or had children. I'm no longer capable of knowing this. How very strange to be situated so strongly by someone so ancient.)

Even so, I must tell them that we can't forget in all this that we want our fact statement to appear to be submissive to a legal (and moral) narrative form—a required form—and not as creating one. And the question for us is how are we to be submissive to this authority of form while being creative in the ways I'll describe? Other artists, I might say, describe themselves this way all the time.[12] The muse speaks. But here the muse is the appearance of a certain legal requirement, a legal reality if you will, that controls us in this context. Perhaps all muses can be thought of in this way. So the judge is looking to see to whom the legal muse has spoken most clearly. What an odd way of thinking of this, but true to experience and true to our expressions of it. I wonder if I can connect it to the mysteriousness stuff? I am so glad I've been teaching long enough for the students to accept this from me.

Even so, if I suggest something too unexpected here, some cleverness that will seem out of place to them initially, knowing, as I do, that it is possible to be poetic within this language once you have embraced it as your own, could I get them to understand the way in which this cleverness might be considered "right" and "fitting" in the language's own terms? If I introduce the poetic use of this language prior to the students' embrace of the language and of its own terms, I will have changed what it is they embrace and, if I am wrong, done harm. But then staying true to the language's own terms in a narrow way is the definition of bad art.[13]

This is all too Bloomsbury'ish. But it is beginning to sound like there is a particular aesthetic of legal persuasiveness. And it is not an aesthetic grounded in beauty so much as it is a fittingness or, perhaps better

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12. For a discussion of the role of necessity in artistic creation, see ROWAN WILLIAMS, GRACE AND NECESSITY: REFLECTIONS ON ART AND LOVE (2005). For my own use of this idea in regards to the law, see Sammons, *The Law's Melody*, *supra* note 6.

13. *See, e.g.*, Quentin Bell, *Bad Art*, *in* CHANGING PERSPECTIVES IN MORAL PHILOSOPHY 160, 161, 163 (Stanley Hauerwas & Alasdair MacIntyre eds., 1983).

said, the beauty of a certain fittingness. Can we go further to say that this is a legal aesthetic? That lawyers live in an aesthetic polity of their own making? And, if so, that they are as close to poets as previous generations thought they were?[14] I wonder if thinking of a legal aesthetic is a way of connecting all the students' comments? I'm pretty sure I could pull this off here and it might be good, too. Is there a legal aesthetic community to which we all now belong? Can I say that this is what the course is about? I think it is, but it is an odd aesthetic going back to "person." We are the poets through whom, when we are virtuous in our work, other people speak, and law is revealed. Is this saying too much?

Got to get back now to my particular suggestion for the editing.

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Of course, we want to appear not to be persuading at all but offering something for discovery. If this is right, then we really are arguing to a judge who we assume is thinking of persuasion in Aristotle's terms of an identification between speaker and audience that occurs within the conversation rather than as a result of it or as the recognition of a prior shared identity.[15] This is an experienced judge at home with the possibility of being surprised by what the argument requires of him or her. (And thus receptive to the arguments towards uniqueness.) Perhaps this understanding of persuasion, encouraged by the forms of arguments like this one, does remain an ideal of judging, even among the current crop of judges and justices. But haven't I been thinking, at least in regards to the persuasiveness of "person" of something akin to *pathos*—although that's not right, for the persuasion of "person" involves all of who we are. Sharp distinctions between *pathos* and *logos* are surely just wrong. This aside, however, what does *pathos* mean in a context in which the authoritative decisionmaker is said to be living

14. *See* KATHY EDEN, POETIC AND LEGAL FICTION IN THE ARISTOTELIAN TRADITION (1986).

15. *See* Jack L. Sammons, *The Lawyer's Moral Obligation to Write Well* (2009), http://ssrn.com/abstract=1336542 (last visited Mar. 25, 2010).

up to the ideals of his or her role, an ideal, that is, that is outside of him or her in this sense and disembodied in a way that *pathos* cannot be? Is the ideal disembodied? It can't be; it arises within a practice rooted in the person. To what within this role does "person" appeal? Why should we call such a thing, when it does persuade, justice? Why should we trust this persuasion in this extraordinary way?[16]

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I wonder if it is a mistake to focus, as we teachers of rhetoric do, upon persuasion, which implies that others must be convinced of something before they will assent to it. I wonder if perhaps people are instead quite naturally inclined not only towards *seeking* assent, agreement, an identity of speaker and listener, of writer and reader, but naturally inclined to *give* these. We don't have to be convinced, in other words, at least not initially. This isn't something that popular culture or popular legal culture would accept, but there are good arguments for it, aren't there? Think, for example, of how we are in social settings. We disagree or distance ourselves from some thought some person offers quite reluctantly, and we often do so in a manner that minimizes our differences as much as we possibly can. This is a matter of manners to be sure, but shouldn't we take manners seriously as indicators of what we are like?

Why do we do this? If we are naturally inclined towards agreement, why? Do we do so because each of us looks to the other for confirmation of our individualized constructions of reality? We want to know that we have the world right and the only way we can do this is through others agreeing with us, even if only a few? In agreement, then, we have our sanity—which is to say our identity—confirmed; we learn what being human requires and what it means to be a good one. These are ongoing human enterprises in which we are mutually dependent and our inclination to assent reflects that they are.

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16. *See* Sammons, *Justice as Play*, *supra* note 4.

> Perhaps then the arguments we teach as teachers of legal rhetoric are not so much about convincing people —including judges and jurors—but about attempts to avoid disruptions of this natural inclination or to encourage them on the other side. Does this make any difference? There seems to be a different ontology at work in it and it is one very much at odds with the way we usually view our differences.
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> There's a connection here! We make our narratives more persuasive by increasing the sense of the decision-maker's living through them. And living through them tragically because we don't offer the most persuasive, but the most persuasive in light of the competing narrative. I wonder if the fact that there are always competing narratives moves us away from extreme forms of argument? Surely concerns with the persuasiveness of character reduces aggression in the argument. This, too, seems so contrary to public perception, but surely it's true.
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> Perhaps narrative is too pale a word to describe this theatrical nature of persuasion. Perhaps we should say cinematic. To encourage the judge and jury to "live through" the experience is to encourage them, like an audience of tragic theater or a good film, to treat the experience as an aesthetic. To let it affect them in the moment as they would with music—a different sense of time, a certain form of patience, a willingness to let something happen to you as a way of knowing, and so forth. This seems a reflection (and maybe a confirmation) of what I might call a theatrical or performative justification for trusting legal judgments, especially in comparison with the political.[17] We trust the judgments of jurors and judges, I could say, because they have lived the issue through the trial and arguments or reflected upon its performance. It is not that they have thought more carefully about it in the usual sense—far from it! But that they have thought about it in this way. It is like trusting intuitions that arise from experience; trusting practical

17. *Id.*

wisdom as opposed to knowledge;[18] trusting poetry as opposed to prose. And such is the role of our audience here.

So, the law *is* an aesthetic judgment upon competing, tragic, cinematic narratives. And because it is, it draws upon all of what we are and of who we are at its best. Ironically, given the lay understanding, we trust this judgment, even in comparison with the political, because it is *more* human than other judgments are and yet, oddly again, it is so within structured roles as it must be. I should say this to them at some point and I should connect this with the mystery of judgment as its justification for being trusted. This sense of justice is so frighteningly fragile and contingent. No one is going to like this understanding of law other than those who have made their peace with our fragility and our finitude.

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But why then are we most typically content with just two competing stories and deem this sufficient for determination of what justice requires? We can't say the story is true but only that it is better than the other story. Of course, dividing up the world this literary way reminds us that justice is not so much about the story being true but about the participation of disputants in a meaningful way in the resolution of their disputes. And yet the legitimacy of the law depends upon a determination of who "we" are when this "we" is much broader and more encompassing than the disputants. How peculiar. And, of course, we place the advantage of the multiplicity of stories on one side of the dispute or the other in the form of burdens of proof and persuasion. There is always someone who wins if the world is determined to be more complex than the performance allows; there is always a default story in this sense.

Even with this, however, we almost always see these disputes as agonistic rituals, as battles of competing stories offered to define us like the sacred games of the

18. For a wonderful analysis of practical wisdom for our time, see generally JOSEPH DUNNE, BACK TO THE ROUGH GROUND: 'PHRONESIS' AND 'TECHNE' IN MODERN PHILOSOPHY AND IN ARISTOTLE 91, 92 (1993).

> Greeks.[19] What of our differences? Are we, even in our most serious disputes, as sharply divided as it may appear at the beginning of a dispute, and what does legal rhetoric do to these divisions? Milbank says that we are created such that our differences are ultimately harmonious—not eliminated in harmony but required by it and always ongoing.[20] I wonder how legal rhetoric would look if we started from this ontological assumption or thought of this as emerging as a truth? Each story, in other words, being seen as required by the other for understanding the fullness of who we are. It's like the Brazilian expression: God made us all of different races because it is so very sexy. Perhaps rhetoric doesn't demand the skeptical critique, but refutes it. But if so, it has to avoid the politics of Sophocles' or Eurypides' tragic accounts of rhetoric and that's hard to do, especially for someone like me, because they are so appealing in a Holmesian way. Perhaps, though, the rhetorical ideals of the legal conversation can offer something like this, if it rests upon mystery in the way I've been thinking of that here or—I think it was Steiner who put it this way and I should check this—if we can "look out of [the] language [of law] not into darkness but light."[21]
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> Even though the law must choose within its agonistic rhetorical game, doesn't the legal conversation reveal the way in which opposing arguments need one another? And this choice only makes sense within the play of argument, as words make sense only in the play of signification. Are unanimous opinions always wrong—always a sign of some stupidity, some narrowness, some exclusion of a voice or voices, or some other lack on the part of the Court? Shouldn't we applaud 5-4s as being more likely to be right in the sense of judgment, as I am thinking of it here, as reflecting who we are? We are entitled to be suspicious of each unanimous opinion, for each likely masks questions that should be asked if we are to know ourselves through the resolution of the dispute.

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19. Sammons, *Justice as Play*, *supra* note 4.

20. *See generally* JOHN MILBANK, THE FUTURE OF LOVE: ESSAYS IN POLITICAL THEOLOGY 340, 341 (2009); JOHN MILBANK, THEOLOGY & SOCIAL THEORY: BEYOND SECULAR REASON 429, 430 (1994).

21. GEORGE STEINER, A READER 292 (1984).

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> Let me see where I am. What did the students suggest and what reasons did they give? Their typical reasons are sometimes disappointing: conciseness and clarity, as if those were not in tension and as if some combination of the two were always most persuasive. I wonder what the language is in which conciseness and clarity are always virtues? One in which the thoughts of one mind are transferred like bricks to another rather than one in which thoughts are created in the speaking of them. The implicit language of these critiques then may always be a technical one. What if I suggested that they try their hands at writing legal haikus or legal parables?
>
> Got to speak soon, but now I'm not at all sure how to present my one suggestion. The more I tell them I'm not sure, however, the more reliable my judgments seem to be. They don't want to accept that I really don't know. The effect is so strong that Socrates' "I know that I don't know" was surely a rhetorical move intended to create a more persuasive character for himself. I wonder why this collapsing of rhetoric and dialectic is so seldom mentioned, especially because the authorities condemned him as a rhetorician?

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To the class: "I have only one additional suggestion here. We need to personalize the defendant more than we have done so far and do so in a way that connects him as a real and vulnerable person to the restaurant. But before offering specifics let's see if we can unpack the image of the audience we are addressing implicit in all our suggestions so far: Who is this reader? How does this person read? In what contexts, including in what role or roles? For what purposes? And with what ideals? And, knowing these, what are the means of persuasion available to us in this case? So let's start very generally using what you have offered so far and then see if we can work our way towards the specifics of how best to personalize him."

III.

In these jumbled thoughts, you heard the way in which thinking rhetorically, as prompted by teaching an advanced legal writing class, makes things strange for me and the ways in which I try to make

something of its doing so. For others it would be quite different, of course. Once something is seen as strange, I immediately try to connect its rhetorical strangeness with things I have thought about before, as I did here, in an attempt to make sense out of it. The connections others would make would be dramatically different (and surely less jumbled). But, despite this difference, I do not think that what I have thought here is unique to me in teaching legal writing. Far from it. For every thought here, the good ones (if any there are), the useless ones, and the bad, are held together not by a single theme, or a single pedagogy, and certainly not by a politics or a social policy, but by a perspective—an aesthetic one.

Our central challenge as law professors and lawyers was laid out for us by Aristotle as he sought to justify rhetoric as something other than a knack in service to selfish interests through the degrading manipulation of power. He did so by arguing that rhetoric was an art: the art of revealing the means of persuasion available within each, typically tragic, case, and for this, requiring a (civilizing) agon.[22] But, I fear, as professors and as lawyers we have lost sight of our own art and no longer have the attitude towards the materials out of which it is created that any art (and any true interpretation of text, following Gadamer[23]) requires.[24] I do not wish here to identify culprits—those whose attitude towards law is instrumental and is so only in service to their own preconceived teleologies—and only wish to note that of all the professors within the academy, it is professors of legal writing who, by the nature of their work, are least prone to such fouling of our own nest. This is true because legal writing professors, like good lawyers, are those among us most required not to care which side of the argument is being made; they are those among us most likely to respect a legal text sufficiently to consider it as something that may be able to speak compellingly in a particular situation; they are those among us most likely to see that a text, because they do not have a *telos* in mind, can be new and different in each situation; they are those among us most likely to ask only what would persuade an idealized judge rather than what should; and *because of all this*, they are those among us most attuned to the morality of the

22. *See generally* ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 12–13 (George A. Kennedy trans., 1991).

23. *See* HANS-GEORG GADAMER, TRUTH AND METHOD 321–36 (Joel Weinsheimer & Donald G. Marshall trans., Crossroad Publ'g Corp. 2d rev. ed. 2004) (1960).

24. The fact that the enormous number of articles offering to legislators what is essentially advice that will go entirely unnoticed and certainly unheeded in most cases is treated with more academic respect than articles on the art of persuasion is, I think, proof enough of the point made in the text. This is not to say that there is not a role within the academy for both; it is to say that the former should be the byproduct of the latter.

argument—all of which is required if legal rhetoric is to be an art and justified in Aristotle's terms. And all of which describes an aesthetic attitude towards the law that permits the play of justice.[25]

This perspective is, I believe, a way of defining legal writing professors as legal educators and a way of giving a coherency to what it means to be professors of legal writing. But, truth to tell, I think there is more to it than this. For there is a potential in rhetoric, and in the lives of rhetoricians, for a much deeper appreciation of the meaning of the lives of lawyers and of judges, for an understanding of those lives as lived in a polity other than the political ones, for seeing in this otherness a gadfly on the steed of the state, for an alternative to the use of force, for an aesthetic appreciation of not just law, but our lives, that is not nihilistic, but transcendent, and for an understanding of our ontology in which our eternal differences are understood as gift. In other words, I think this is a noble cause for the discipline of legal writing. But then perhaps this is just rhetoric.

25. I use "aesthetic" here to describe not a disengagement from reality as in an "aesthetic distance" but as a particular form of engagement. There is a demanding morality to this engagement including the requirement of the humility upon which so much of any morality depends.