

FOREWORD

SISYPHUS' LAMENT, PART IV: STYLE AND THE SEDUCTION OF THE SUPREME COURT*

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*"Don't let it be forgot
That once there was a spot
For one brief shining moment that was known
As Camelot."*¹

The first time I sat down in Justice Vicente V. Mendoza's class, he opened his lecture by stating that law has two elements: logic and rhetoric. He stated that logic forms the bedrock of our jurisprudence, but it is rhetoric that makes Constitutional Law so potent and so seductive. That is, he cautioned, one must read cases with great care, lest one be ensorcelled by the rhetoric and miss the actual logic.

* This article closes the discussion of Volume 79's philosophies in law review management. See Foreword, *Sisyphus' Lament, Part III: Citation and the Little Black Book*, 79 PHIL. L.J. 541 (2004); Foreword, *Sisyphus' Lament, Part II: Editing, or the Student's Art of Not Being One's Own Worst Enemy*, 79 PHIL. L.J. 233, (2004); Foreword, *Sisyphus' Lament, Part I: The Next Ninety Years and the Transcendence of Legal Writing*, 79 PHIL. L.J. 7 (2004).

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¹ "Camelot (Reprise)," sung by King Arthur in the musical *Camelot* by Alan Jay Lerner and Frederick Lowe. The play opened at the Majestic Theatre on December 3, 1960. The part was originally played by Richard Burton.

However, he asked, does this mean that one must separate the logic from the rhetoric like grain from chaff, and ignore the latter like so many sweet nothings whispered into a lover's ear? "No," he exclaimed, "we want those sweet nothings!"

Similarly, logic and rhetoric combine to form the substance of law reviews. Sound logic is what makes for a good journal. Thus, the Volume 79 student editors (and their loyal office intern sidekicks) have taken great pains in deliberating over article structures and patterns, in editing everything from grammar to awkward legal personifications and incongruous mixed metaphors,² and in implementing a citation format that conforms to international standards.

Only rhetoric, however, can make a good journal great.

Only style can inflame ideas with passion and give them the power to transcend the intellectual plane that is presumably the domain law lords over. Only style can imbue writing with its most powerful potential characteristic: immortality. It is style that infuses mere words with all the warmth of a lover's embrace, and allows them to linger in the mind as a lady's longing stare does before one is finally forced to turn and walk away.

Student editors, then, must seek to master style, both as they warmly inspire authors as evangelists rouse their flocks, and as they coldly prune and snip at words as sculptors coax beauty out of featureless stone. I stated at my induction as Chair that the JOURNAL must, first and foremost, "serve as a handmaiden of jurisprudence."³ To borrow Justice V.V.'s teachings, then, student editors must strive to do no less than seduce the Supreme Court on the academe's behalf.

I. LAW SCHOOL AND THE DEATH OF ART

Too many, however, appear to believe that this is best achieved by being frigid. A sophomore once made the mistake of entering the JOURNAL office with an editor and then initiating a discussion on the difference between creative and legal writing – implying that JOURNAL articles tended to lean away from the former. His mistake was that I happened to be sitting on

² See also James Lindgren, Review Essays, *Fear of Writing*, 78 CAL. L. REV. 1677 (1990).

³ Foreword, *Sisyphus' Lament, Part I: The Next Ninety Years and the Transcendence of Legal Writing*, 79 PHIL. L.J. 7, 7 (2004).

the other side of the room, and promptly turned around and asked, smiling, what the difference might be.

He had an immediate reply, but froze in midsentence, his face frozen in the expression of a child told that Santa Claus does not exist. This told me what his tongue suddenly declined to. He had been about to say that legal writing is, first and foremost, distinguished by the presence of footnotes. It must be "cluttered up with little numbers until it looks like the Acrosses and Downs of a cross-word puzzle,"⁴ and the clutter must itself be accompanied by a mess of parenthetical comments in small print that occupy at least half of each page.

Second, he had been about to say that legal writing must be characterized by grammatical eccentricities completely divorced from plain English. It must, for example, adhere to the passive voice, and turn sentence structures on their heads such that subjects are always at the ends of sentences. Pronouns, further, are profanities that must be avoided at all costs. In fact, in the name of precision, legal writing must employ lengthy noun phrases that are repeated at least every other sentence. Most of all, its legal nature must be made unmistakable not just with Latin maxims, but with alien artifacts such as "hence," "heretofore," "aforecited," "therewith," and most of all, the sacred "said." This last is paramount - no Volume 79 article has ever suffered any loss of meaning when I excised all its "saids," so it must serve solely to mark the passage of a lawyer's pen, a seeming mark of Cain but with less utility. Finally, it must be as disjointed as possible, and contain as many two-paragraph subsections as possible.

Third, he had been about to say that legal writing must not only be dry and neutral, it must be devoid of any soul whatsoever. I recall one deliberation for an Evidence article where the author slightly overused the metaphor of a treasure hunt. The article was itself hurriedly written and would require several heavy-handed deletions and the rewording of entire sections if the author proved incapable of curing all its verbosity and fluff by himself. Sitting across me, however, was an indignant editor who must have been a boring bean counter in a past life,⁵ and this editor launched into a tirade against lawyers and their corny imagery. The prescription was for all

⁴ Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 41 (1936).

⁵ I have nothing against accountants, boring or otherwise, but given my undergraduate degree in B.S. Management Engineering, it remains too tempting for me not to let an opportunity to poke fun at the stereotype pass.

JOURNAL articles to be "simple," "straight," "direct," and as antiseptic as a contract of sale for compost.

In short, my forever anonymous sophomore had been about to say that law school's daily lobotomy had implied to him that legal writing has become a necessary evil, that academic discourse has mandated an idolatry of the most grotesque abominations ever unleashed on the English speaking human population. So apparently powerful is this homogenization and hegemonization of thought that it never occurred to him until he stood openmouthed in the middle of the JOURNAL office to ask how the same collective human unconscious could produce passages as disparate as:

She walks in beauty, like the night
Of cloudless climes and starry skies;
And all that's best of dark and bright
Meet in her aspect and her eyes:⁶

And:

[H]ere is the legal translation that has been offered for the simple, everyday phrase, "I give you this orange."

Know all men by these presents that I hereby give, grant, bargain, sell, release, convey, transfer, and quitclaim all my right, title, interest, benefit, and use whatever in, of, and concerning this chattel, otherwise known as an orange, or citrus orantium, together with all the appurtenances thereto of skin, pulp, pip, rind, seeds, and juice, to have and to hold the said orange together with its skin, pulp, pip, rind, seeds, and juice for his own use and behoof, to himself and his heirs in fee simple forever, free from all liens, encumbrances, easements, limitations, restraints, or conditions whatsoever, any and all prior deeds, transfers or other documents whatsoever, now or anywhere made to the contrary notwithstanding, with full power to bite, cut, suck, or otherwise eat the said orange or to give away the same, with or without its skin, pulp, pip, rind, seeds, or juice.⁷

His, perhaps, may not be a unique mindset among law students. How many law review editors, for example, have ever questioned their self-perception that they must be the high priests who enforce slavish adherence to the incantations of this pseudo-religion mistaken for legal writing?

⁶ George Gordon, Lord Byron, *She Walks in Beauty*, in THE GOLDEN TREASURY (Francis Palgrave ed., 1875).

⁷ James Gordon III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1689 (1991).

Perhaps, at the very least, these frigid accountants reborn have never tasted love, nor have they ever seduced or been seduced.

II. RETRACING THE FALL OF MAN AND LAW STUDENT

One laughs at all this supposed legalese and gobbledygook, and at supposedly lesser law journals that showcase articles written as though they were contracts complete with the numbers in parenthesis such as "one (1)," and with covers that still blatantly clone the *Harvard Law Review's* even after more than a century's passage. It is easy to assume that the University of the Philippines College of Law, given how it prides itself in producing students with a pronounced analytical bent, is above such tomfoolery. This, sadly, is not the case, and I can say this with all the exhaustion of a Chair who has had to heavily edit several student articles for style or risk inducing bleeding in readers' eyes. I can also say this as someone who personally knows that the authors averred to were students of excellent academic standing and agile minds.

This begs the question: At which point between the admissions test and graduation day does this tainted facsimile of legal writing creep into law students' minds?

Perhaps the law professors are to blame? This, however, is impossible since they have been demanding clear, concise writing since time immemorial both to ease the burden of checking exam papers and to boost students' chances at the Bar exam. Moreover, the very best mount their own personal campaigns to preserve rhetoric. Justice V.V. makes his students memorize passages from *Marbury v. Madison*⁸ to, in his words, arm them with the proper vocabulary for the discussion of Constitutional Law.⁹ Dean Raul Pangalangan takes great care to emphasize the memorable lines in great precedents, down to Justice Louis Brandeis's:

⁸ 5 U.S. (1 Cranch) 137 (1803).

⁹ See also Vicente V. Mendoza, Foreword, *Enrique M. Fernando: Friend and Teacher*, 79 PHIL. L.J. 863, 867 (2005). "From him, generations of students – including no less than eleven who at one time or another were members of the Supreme Court – heard of Malcolm and Laurel in the same breath that they heard of Holmes, Brandeis, and Cardozo from him. But for Chief Justice Fernando, these great names would perhaps only be ancestral voices from a dim and distant past. Because of him, however, these great figures came to life, and it is now a mark of distinction for us to cite or quote them."

The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.¹⁰

Style is certainly at its most seductive at legal practice's highest tiers. Contesting the constitutionality of the Anti-Plunder Law¹¹ on deposed president Joseph Estrada's behalf, Dean Pacifico Agabin prefaced his opening pleading with a quote from Cicero. Curiously, the government could only retaliate with one from Hans Christian Andersen's *The Emperor's New Clothes*, saying that the former president stood naked before the Court, and that his arguments amounted to nothing. Dean Agabin's riposte bewailed how the government could only cite children's fairy tales against his client, and had to spend over fifty pages refuting "nothing." I kept the pleadings from that case during my freshman year, and have Dean Agabin to thank for saving my mind's tongue from corruption.

Perhaps, then, the Supreme Court is at fault, since it almost exclusively provides the classroom material for law schools. This, however, is an even more absurd proposition. While I have on occasion vented my ire against the indecipherable texts of some early American Justices, these are certainly overshadowed by the George Malcolm's scholarship:

Completely liberty to comment on the conduct of public men is a scalpel in the case of free speech. The sharp incision of its probe relieves the abscesses of officialdom. Men in public life may suffer under a hostile and an unjust accusation; the wound can be assuaged with the balm of a clear conscience. A public officer must not be too thin-skinned with reference to comment upon his official acts.¹²

Even assuming some decisions are below par, it is unimaginable how one could learn legalese from the likes of Justices Gregorio Perfecto and Jose B.L. Reyes. Finally, if the early United States Supreme Court had John Marshall, then its Philippine counterpart certainly had Jose P. Laurel:

[W]hen the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments; it does not in reality nullify or invalidate an act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them. This

¹⁰ *Olmstead v. United States*, 277 U.S. 438, 480 (1928) (Brandeis, J., *dissenting*).

¹¹ Rep. Act No. 7080 (1991); *Estrada v. Sandiganbayan*, G.R. No. 148560, 377 SCRA 538, Nov. 19, 2001.

¹² *United States v. Bustos*, 37 Phil. 731, 739 (1918).

is in truth all that is involved in what is termed "judicial supremacy"

...

But much as we might postulate on the internal checks of power provided in our Constitution... In the last and ultimate analysis, then, must the success of our government in the unfolding years to come be tested in the crucible of Filipino minds and hearts than in consultation rooms and court chambers.¹³

If the cream of the Philippine judiciary could give a good account of themselves vis-à-vis Holmes, Brandeis and Cardozo, who then is to blame for stultified student minds? Certainly not the practitioners, because I complain of *student* papers with sound logic but atrocious rhetoric. Cafeteria food, perhaps?

Whatever the problem's root, it is undeniable that too many students come to perceive the artifacts of legalese as an easy crutch in lieu of clarity, articulation, and truly regal writing, never mind how inexplicable it is to equate obfuscation with lawyerly caliber.

The bestselling novel *The Da Vinci Code* proposed:

"For the early Church... mankind's use of sex to commune directly with God posed a serious threat to the Catholic power base. It left the Church out of the loop, undermining their self-proclaimed status as the *sole* conduit to God. For obvious reasons, they worked hard to demonize sex and recast it as a disgusting and sinful act. Other major religions did the same."¹⁴

Perhaps a parallel argument can be made for the lingual docility I decry. If so, then law students must break free, come to grips with their suppressed intellectual passions, and seek to reclaim the full might of style.

III. THE ROLE OF STUDENT EDITORS

Law journals' student editors must be the first to shake off the sickening mindset I have described, and realize that they are the last defenders of academic civilization against the barbarians at the gates and the hordes of literary mediocrity. Theirs is a taxing and lonely vigil, but they must be willing to go to the lengths the most ardent of suitors would if the

¹³ *Angara v. Electoral Comm'n*, G.R. No. 45081, 63 Phil. 139, 158, Jul. 15, 1936.

¹⁴ DAN BROWN, *THE DA VINCI CODE* 309 (hardcover prtg., 2003).

Court is to take note of the academe's caress. Logic, again, is powerful, but it takes rhetoric to make it immortal.

Sadly, the grievances I have described are not even new. Yale professor Fred Rodell decried "the antediluvian or mock-heroic style in which most law review material is written" and protested: "There are two things wrong with almost all legal writing. One is its style. The other is its content."¹⁵ He added that "a pennyworth of content is most frequently concealed beneath a pound of so-called style."¹⁶

More recently, University of Wisconsin professor Lawrence Church bemoaned:

For most lawyers, bound by imperative constraints on time and energy, but assailed with the burgeoning mass of legal materials, the solution is entirely predictable: only the most succinct secondary materials can afford to be read. All the others can be spared at most a cursory glance to see if they might be interesting. Unfortunately, many law review articles, bulky and encrusted with form as they are, do not fare well in this selection process.¹⁷

Northwestern professor Robert Lansing quipped:

"My article has lungs.... It wishes to breathe; but I fear that before it can do so, it will inhale the sea of monotony that engulfs it. Its body will be made to wash up on distant shores - forgotten before it was gotten."¹⁸

University of Minnesota professor David Bryden stated:

The style of legal scholarship violates every precept in a manual of expository writing: it is abstract, plodding, pompous, and prolix.

...

...

In our profession, however, most reading is in the line of duty: getting ready for class or preparing an article. It is no accident that bureaucrats write just as badly as we do. Like us, they are free from the discipline of the market. ... If the leading article on equitable

¹⁵ Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936).

¹⁶ *Id.*

¹⁷ W. Lawrence Church, *A Plea for Readable Law Review Articles*, 1989 WIS. L. REV. 739, 742. See Alfred Conard, *A Lovable Law Review*, 44 J. LEGAL EDUC. 1, 1-2 (1994).

¹⁸ Robert Lansing, *The Creative Bridge Between Authors and Editors*, 45 MD. L. REV. 241, 243 (1986).

estoppel is boring, why that's just too bad. You still have to read it to get ready for your ten o'clock class.¹⁹

Finally, University of Puget Sound professor Pierre Schlag wrote:

On the whole, reading mainstream scholarship leaves one with the impression that the authors don't like their jobs very much – but that they have a strong sense of duty and that the rule of recognition for duty is pain.²⁰

Let it not be said in the UP College of Law, thus, that there is an irreconcilable difference between creative and legal writing, nor that lawyers are craftsmen and not artists. I have always believed that the sexiest part of a woman, if it is at all proper to admire a lady piecemeal, is her mind. That said, student editors cannot claim to have hurdled the bar of excellence until each article bears, on an intellectual level, all the warmth in a lady's tight embrace and each issue can extol society's most cherished values with all the radiance of a lady's smile. Perhaps one day, too, even taxation articles will partake of a setting sun's poetry.

So ends the PHILIPPINE LAW JOURNAL's 90th Anniversary term. I hope that the next student chair will continue this search for the full magnificence of style, for rhetoric to bolster logic. I hope, too, that he or she takes to heart all the many reforms Volume 79 has implemented, the many conventions it has initiated, and the many dreams that remain unfulfilled still. I hope, further, that he or she will be able to see beyond the much-hyped prestige and the much-coveted resume entry that comes with heading the JOURNAL, and instead finds the brand of passionate scholarship the institution continually demands. And most important of all to the true artist, I hope he or she believes in love at first sight.

AFTERWORD

It is hard to believe that my term is practically at an end, and that Issue 4 is in the press barely four months since the Volume 79 Board's induction. Surprisingly, of all the Malcolm community's student and faculty members, only Dean Pacifico Agabin gave me a knowing smile regarding the title of this series of forewords: *Sisyphus' Lament*. Little wonder, perhaps, that I consider him the man who nurtured my forays into legal writing, and told

¹⁹ David Bryden, *Scholarship About Scholarship*, 63 U. COLO. L. REV. 641, 647 (1992).

²⁰ Pierre Schlag, Comment, *The Brilliant, The Curious, and The Wrong*, 39 STAN. L. REV. 917, 927 (1987).

me one Saturday morning in the law library that good writing entails intellectual courage more than anything else.

Sisyphus is the epitome of hopeless labor, condemned to forever roll a boulder up a slope only to see it rush back down each time. No one else truly understood why I chose this cryptic mythological reference to depict the JOURNAL Chair's lot.

I still marvel at how the seven Volume 79 student editors and ten volunteer student interns – almost all freshmen and sophomores at that – accomplished so much in so short a time given all the problems we began with. Our computers are so slow and obsolete that I have actually ordered students *not* to work in the JOURNAL room, and the replacements got lost in a sea of UP red tape. We made do with an elaborate Internet chain that stretches from the Fajardo law offices in Makati to May Ann Rosales's workstation in the Department of Foreign Affairs.

A previous editorial board had incurred a 33% wastage rate – one out of every three pages from the full print run had to be replaced due to typographical errors – and this was mistakenly imputed to our Board. The printing presses ground to a halt for several weeks despite our violent protests until the matter was settled.

Some subscriber records were lost, but a number of past issues were apparently undelivered because subscribers declined to send payments for Volume 79 until these back issues were delivered. Our Board began with a grand total of *three* paid subscriptions. Worse still, we could not immediately solicit new subscriptions because I realized that the subscription price was below cost.

Perhaps the worst problem of all was my own emotional state. I had been appointed Chair at a time when I was so thoroughly disillusioned with the JOURNAL as an institution. I found out I had been named Chair when Dean Agabin walked up to me one Saturday morning and informed me personally, before the official announcement. I found myself in a pensive mood beside the Malcolm Theater, and another student, now curiously our neighbor in the adjacent Jessup Room, asked me how it felt to be the new Chair. Unsmiling and with quite a bit of sincerity, I believe I turned and answered her that I was not quite as happy as I expected I would be.

My thoughts had turned to what I felt were sometimes random article deliberations, editing that was at times crude or overly high-handed, a lack of deference to authors on doctrinal topics no student editor could

possibly have mastered already, an ever-higher ratio of student theses, and a forever anonymous idiot of an editor's conscious decision to disregard *Harvard Law Review* international citation standards. Prestige was the last thing in my mind at the time, perhaps just a freshman year memory of Dean Agabin encouraging me to take the editorial exam during one conversation in the corridor. A teacher's wish weighs heavily in the Confucian ethos, and if the best wanted me to undertake the Herculean – perhaps Sisyphean – task of tackling the institution's many problems, so it would be.

I choose to write all this down not in an attempt to tarnish the JOURNAL's ninety-year reputation, but perhaps to perpetually remind my successors that writing is an art, a discipline, and a formidable challenge, not a venue to seek prestige. I harp on prestige because of the JOURNAL's inherent lack of accountability: a Chair receives this much-coveted prestige upon appointment, and it remains with him or her regardless of performance. Additionally, I wish to emphasize that managing the JOURNAL presents so many administrative challenges that have little to do with actual writing or editing, and neither do the solutions. Professor Eduardo Labitag even teases me for being my own circulation manager, and where indeed is the prestige in having to hand out copies of the JOURNAL yourself?

Perhaps I feel that the Volume 79 editorial board has done its share in rolling the boulder up the hill,²¹ and my deepest fear is that it will roll back down someday. If the written word's power lies in its immortality, then perhaps the writer fears meaningless obscurity. This is likely the lot of our trip up the slope should the stone later slip once again, and perhaps the consignment of our Herculean labors to the forgotten Sisyphean oblivion of a dusty shelf is something to fear indeed.

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²¹ This was done, incidentally, with quite a bit of assistance from the College and Law Center staff: our office's staff members Virgilet Encarnacion and Edwin Birong, Sally Casis and the Dean's Office Staff, Elise Ochoa and the Associate Dean's Office, our Accounting Officer Bella Desamito, our favorite librarian Evelyn Cuasto, Luz Sobrevinas and the Property Office, and Manny Abaya and the printing department's complement (who more than earned that bottle of Fundador).