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Three Lessons from Law and Literature

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It would be both redundant and erroneous to emphasize in this forum how important the literary disciplines have become for law over the past fifteen to twenty years. Redundant, because the aversion to stories that once characterized law schools and law professors has been replaced by frequent literary critical forays in classrooms and law reviews; erroneous, because, despite the near boilerplate nature of the professoriat's plundering of "postmodern theory," the literary sensibility in law has been insufficiently recognized.

We need to recall that far less allied disciplines have been revolutionized recently by an internally generated awareness of the *narrative* nature of what once seemed "scientific" enterprises. Anthropology has been destabilized and sociology eviscerated in large part because key players in those fields have perceived that *the story you tell is all there really is*. Psychology may well follow suit.

Nor have the sciences been immune from humanistic influence. We all know that Charles Darwin's accounts, like Leonardo da Vinci's drawings, combined the flash of insight of the artist with the "hard" realities of the natural or physical worlds. In our time DNA has emerged as a kind of hermeneutic code in the same way that Galileo Galilei's discoveries required first a complete shift in humankind's self-regarding mythologies. Medical students receive more classroom instruction in the complexities of human nature than do law students; novels and short stories often convey to them the sense of the whole person lacking in their "rigorous" courses, but undeniably essential to their careers as healers.

But law, proud law, dressed in a little brief authority,[1] stubbornly resists full recognition of its basically narrative nature. In some ways even law and literature techniques have missed the point. Much of the field's writing has been about "theory," and the debate has centered on time-honored and perennial questions of who or what controls textual

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1. I paraphrase Isabella in *Measure for Measure*. *See* WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act 2, sc. 2 ("but man, proud man, Drest in a little brief authority").

meaning. Although one of my lessons here relates to the absence of "plain meaning" in texts, in general the humanities have supplied more heat than light to lawyers who have adequately understood these things before Jacques Derrida or Martin Heidegger came on the scene. Sadly, the one thinker who most brilliantly inquired into the nexus of meaning, justice, and law continues to be badly misunderstood, and the same Derrida is somewhat to blame.[2] Friedrich Nietzsche is cited endlessly as a textual nihilist and disbeliever in justice. Eventually, our approach to him may restore a sense both of *his* meanings—and he believed in authorial meaning—and of the transcendence of certain texts that teach us about the just existence.[3] This will take time.

Meanwhile, Richard Posner wrote a long book, full of rich detail, the upshot of which is that the literary skills—except for stylistics, which he sees as quite relevant to lawyers—are not that important for the law.[4] As many have observed, we see his smiling face beaming out from the jacket cover of that "law and literature" book, contrasted with his macho grimace from the economics books that went before.[5] Stories, his visage tells us, are fun, and they may have their incidental place in understanding some legal problems. But "science" is closer to law, and certainly more serious. Let us not tamper with the economic tools that make us wealthy. Let us not be paid what literature professors are paid.

While much of the ensuing skepticism about his venture is warranted, Judge Posner's foray into law and literature inspires me because it indicates his understanding that the fairly rudimentary approach economists take to language is inappropriate to law. People engaged in complex transactions—and surely their lawyers—just do not use language in the transparent and simplistic manner that economic analysis often predicates. This Essay stresses the multidimensionality of language; it also emphasizes what Judge Posner has, of course, failed to grasp: Law and legal language are always bound up in ethical choices, a richness in our

2. Derrida provides drastic misreadings of Friedrich Nietzsche, internally justified by Derrida's distorting theory of reading, one that would surely have dismayed Nietzsche, always a careful exegete of others' writings. *See* JACQUES DERRIDA, SPURS: NIETZSCHE'S STYLES 105 (Barbara Harlow trans., Univ. of Chi. Press ed. 1979); *see also* Richard H. Weisberg, *De Man Missing Nietzsche: "Hinzugedichtet" Revisited*, *in* NIETZSCHE AS POSTMODERNIST 111, 111-24 (Clayton Koelb ed., 1990).

3. *See* Richard H. Weisberg, *Text Into Theory: A Literary Approach to the Constitution*, 20 GA. L. REV. 939, 962-76 (1986).

4. *See* RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988).

5. *Compare* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986); RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (1981) *with* POSNER, *supra* note 4.

field that his own brand of economics—if surely not his own intelligence—leaves untapped or absurdly allows to lie fallow.

The next step for law and literature proponents, faced with the inertia or hostility associated with so-called harder approaches—although as I have said, decay from within, as much as stress from without, can undermine the staunchest edifice—is to infuse literary sensitivity into the curriculum. Most law professors drop a bit of economic theory into their classroom approach. Why should they not also employ at least a dollop of literary technique? The following three "lessons" hope to inspire readers to make this move, and are therefore not designed solely for use in a class or seminar explicitly devoted to law and literature. All three draw somewhat on earlier writings, but the emphases will give even a first time reader a sense of the scope and ambition of the interdiscipline.

In what follows I resist a radical program of curricular reform. It would be too easy, but at present also too contentious, to prove that a full year of storytelling—courses in spoken and written communication, rhetoric, and style—followed by a full year of listening—courses in hermeneutics, sensitizing to "the other," and ethics—followed by a third year of applying these skills to specific legal subjects might better prepare the budding lawyer for practice than does our century-old Langdellian system. The imaginative readers of this Symposium can—and this marks the enduring "relevance" of what even an explorer named Christopher Columbus has contributed to our politically correct and changing planet—find ways to infuse what interests them into the already available law school curriculum; for each lesson deals with the most essential skills in our profession: the lawyer's capacity to hear others and to speak in ways that will combine a sensitivity to audience with the aim of doing the right thing.

I. LESSON NUMBER ONE: THINK ABOUT "CONSIDERATE COMMUNICATION" WHENEVER YOU NEED TO INFLUENCE YOUR LISTENER

The debate about Herman Melville's *Billy Budd Sailor*[6] has just about outlived its welcome. But I am encouraged to note that a recent article by Elizabeth Fajans and Mary R. Falk[7] asked, even at this late date, for greater attention to one underplayed aspect of the debate.[8]

6. HERMAN MELVILLE, BILLY BUDD SAILOR (Harrison Hayford & Merton M. Sealts, Jr. eds., University of Chicago Press 1962) (1924).

7. Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163 (1993).

8. *Id.* at 197 n.150.

When I first proposed the then eccentric notion that a story by a late nineteenth-century American novelist might have great relevance to late twentieth-century American law,[9] I emphasized the concept of "considerate communication" as the primary mode by which people in authority—including lawyers and judges—address interested audiences. Despite this focus, little of the ensuing vigorous debate about other assertions I made has touched on that central theory of communication. This first lesson means to demonstrate anew the vitality of considerate communication for current law.

Readers of *Billy Budd Sailor* will recall that Herman Melville takes time, early in the story, to recount the mutinous atmosphere that attended the period of the tale. Regarding "the Great Mutiny" in particular, Melville's narrator offers the following seminal account of the manner in which central information is conveyed to the public:

> Such an episode in the Island's grand naval story her naval historians naturally abridge, one of them (William James) candidly acknowledging that fain would he pass it over did not "impartiality forbid fastidiousness." And yet his mention is less a narration than a reference, having to do hardly at all with details. Nor are these readily to be found in the libraries. Like some other events in every age befalling states everywhere, including America, the Great Mutiny was of such character that national pride along with views of policy would fain shade it off into the historical background. Such events cannot be ignored, but there is a considerate way of historically treating them. If a well-constituted individual refrains from blazoning aught amiss or calamitous in his family, a nation in the like circumstance may without reproach be equally discreet.[10]

This paragraph is central to an understanding of the story because, as I have argued, the narration itself is imbued with "considerate communication," and the most lawyer-like of Melville's characters, Captain Vere, employs the device throughout the trial of Billy Budd for the killing of John Claggart. But I also pointed out that, as a theory of communication, the text superbly and even uniquely grasps modern sophisticated techniques of information control. All lawyers must understand these techniques to be successful, for they are used by most author-

9. Richard H. Weisberg, *How Judges Speak: Some Lessons on Adjudication in "Billy Budd Sailor," with an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1, 34-58 (1982). This analysis was expanded upon several years later in RICHARD H. WEISBERG, THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION (1984).

10. MELVILLE, *supra* note 6, at 55.

itative law-speakers. In addition, the individual lawyer may decide to employ the technique on behalf of clients and causes to which he or she is professionally committed.

What then is "considerate communication"? First, the passage makes clear that it is a mode of transfer of data from people with greater amounts of vital information—call them "authorities"—to people with less—call them "the audience." Even in the kinds of representative democracies with which we are all familiar, authorities think carefully about the amount and the kind of data they provide to the audience. "Without reproach," we may usually condone their abstemiousness. They have their jobs to do, for which a maximum of data is always advantageous; their audience has its job to do for which such data would often be not only extraneous but occasionally upsetting.

Hence the phrase "considerate communication." The authorities' decision to *sharply limit* their communications about, say, the Great Mutiny—or think of recent American analogues such as the assassination of President John F. Kennedy, or the Gulf War—is *considerate* both to their own interests and to those of the audience. The authorities see no good reason "to blazon aught amiss" when such verbal excessiveness would have no beneficial effect on the problem and only a negative effect on the audience. Let John Bull, or Middle America, enjoy their dinners in peace; let the authorities do what they are best at: resolving difficult matters of internal or foreign policy.

Then why not, as in many dictatorships, conceal the truth entirely? Why not utter lies? Here, as the passage reminds us, "impartiality" may "forbid" complete silence.[11] Authorities in democratic cultures may occasionally lie, but in general they and their various institutional spokespersons—press secretaries, the "respectable" media itself, and the like—wish to inform the public with at least some faithfulness to the data. Indeed, reelection would become difficult if a large gap emerged between official action and the facts authorities reveal. Watergate provides an example of an even more drastic resolution.

"And yet his mention is less a narration than a reference, having to do hardly at all with details."[12] It is unnecessary to play the despot and to indulge in the great lie. *Selective information* can be conveyed, truthful as far as it goes. This control furthers the considerate quality of the phenomenon: Authorities give away something to their constituents, and the latter feel good about being let in. The audience can pursue its af-

11. *See id.*
12. *Id.*

fairs, content that it is not being disregarded by its elected, or otherwise constituted, leaders.

Furthermore, some events are so crucial to the audience that either complete silence or falsehood would be calamitous to the authorities. Unless there is an "official reference"—we would call it spin control today—intelligent members of democratic communities tend to make their own inquiries. Alerted to something as threatening as the Great Mutiny—for such events always make themselves known somehow—but excluded *entirely* from the story, these industrious people both fact find and produce independent interpretations of the event. The authorities, willing to see such activity take place by small and noninfluential groups, do not wish to see it occurring in any central way.

Why not, as in the immediate aftermath of the JFK assassination, evoke a "reference," render it authoritative, and then let the organs of respectable information—*The New York Times*, CBS News—do most of the job of furthering the adopted position? Of course, there will be counterflow fact finders and interpreters, but these will be treated as exogenous or even eccentric. How many opponents of the "one assassin theory" were dismissed for decades as lunatics? Everybody, even in a democracy, has a vested interest in selective information control and the interpretive comfort to the majority that flows from it.

The necessity for and the tolerance of considerate communication are directly proportionate to the contentiousness of the subject matter of the utterance. Most transfers of information—say, about the weather, or the cost of a gallon of gas, or even the closing price of a stock on a given securities market—are intrinsically "considerate" if in fact given without any special thought. But Melville's narration indicates that, when it comes to controversial matters, people are moved less by unreflected statements of "truth" than by speech acts that are designed to placate some of the beliefs they already hold dear.

Lawyers are neither immune from nor incapable of using considerate communication. Yet few have any formal training in this subject. A baleful outgrowth of law and economics, to which I have already alluded, is indeed the misplaced impression it may give that language is transparent or unidimensional. Considerate communication is far more realistic, tracking as it does the multilayered nature of words, particularly words used by authorities to address various interested audiences.

When, for example, an appellate court has before it a matter likely to bring on a unanimous decision, considerate communication may be less necessary than when the court is sharply divided. Judge Cardozo's use of the empathetic phrase "a lad of 16" in the first sentence of his

controversial decision in *Hynes v. New York Central Railroad*,[13] or Chief Justice Rehnquist's use of an off-putting word like "transmuted" to describe the claim made unsuccessfully in *Paul v. Davis*,[14] denote the tricky situations in which judges—as much as other authorities—will use considerate communication. The "facts" sections of appellate opinions tend to be recounted selectively, in the manner of William James telling the British people about the Great Mutiny.

Similarly, when a practicing lawyer has a theory likely to ruffle some feathers, he or she will need to assess the *manner* in which that theory should be conveyed. The same is true for law professors, as anyone with a nonstandard interpretation of a sacred text can verify. When an individual is fighting for a deeply felt but unpopular cause, considerate communication will enhance the probability of success. *Indeed, the technique is probably a prerequisite for achieving the desired result.*

Audiences to disturbing or ground-breaking remarks, in fact, deserve considerateness, and an authority who spits out information and advice without caring for the audience's already situated beliefs is usually not heard and is always in a sense irresponsible. The remarkable disparity in effectiveness between Henry Kissinger, probably our most gifted political communicator, and Jimmy Carter, a fine but inept man, may provoke the understanding that simply having the right instincts hardly brings about the right results, even when you are nominally "in charge." When the dull Iran-gate lawyers squared off against the colorful military rhetoricians, there was a similarly counterintuitive result.[15] My third lesson returns in part to this observation about the way leaders communicate.

Words are tricky. Lawyers must deal with them every day. An ounce of considerate communication is worth a pound of microeconomics.

II. LESSON NUMBER TWO: BEFORE YOU GO OVERBOARD AND MAKE ALL YOUR SPEECH "CONSIDERATE," RECALL THE EXAMPLE OF "LAWTALK" IN VICHY, FRANCE

Herman Melville indicated that considerate communication is morally neutral or even pragmatically praiseworthy. "If a *well-constituted* individual in like circumstances," he has told us, "refrains from blazon-

13. 131 N.E. 898, 898 (N.Y. 1921); *see* RICHARD H. WEISBERG, POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE 17-20 (1992).

14. 424 U.S. 693, 698 (1976); *see* Weisberg, *supra* note 9, at 43-58.

15. *See* WEISBERG, *supra* note 13, at 218.

ing aught amiss,"[16] then surely we, too, should see the difference between total "honesty" and interpersonal effectiveness. But what if we find ourselves in the midst of circumstances that touch our deepest beliefs, and yet we are asked to speak as evenhanded lawyers about those circumstances? Are we to remain "considerate" when selective and courteous communication risks furthering a moral wrong? Shorn of the Nore historians' desire to inform without panicking,[17] and of Judge Cardozo's desire to do justice without distorting legal principles, should we practice considerate communication in the service of a corrupt end?

My second lesson is meant to answer this question resoundingly in the negative. Considerate communication exists either as a benign tool of understanding the way others are likely to react, or as an *aid to the lawyer to do what he or she thinks is right*. When Melville proceeded, in the full context of *Billy Budd Sailor*, to show that we must always be on guard to detect the underlying values of the communicator, he was also advising us to challenge and to improve our own ways of behaving so that considerate communication never deteriorates, as it does in Claggart and Captain Vere, to morally indefensible forms of covert or false speech.

To exemplify the distinction between Judge Cardozo and Captain Vere, I hop one more body of water and land in the world of Vichy law—to that period between 1940 and 1944 that the French have managed to cloak in secrecy, or in the myth of "universal resistance," until recent events have shown their considerate formulations to be lies.

In the part of France left autonomous by the conquering Germans in 1940, the French established a regime that quickly enacted, independently from German influence, a scheme of racial definition that in many ways exceeded the Nuremburg models.[18] Faced with the new legislation, hundreds of lawyers, magistrates, administrative judges, and bureaucrats were asked to implement, interpret, and rationalize the laws.[19] They saw before them texts that singled out groups, particularly Jews, for special persecution.[20] A mere few weeks before, these same lawyers would have dismissed such texts as violative of every principle of French constitutional law to which their training had exposed them. Now they saw before them the weird texts of racial exclusion, random imprisonment, career curtailment, loss of property, and by imaginative extension, expungement of life itself.

16. MELVILLE, *supra* note 6, at 55.
17. *See* Weisberg, *supra* note 9, at 35-36.
18. *See* WEISBERG, *supra* note 13, at 144.
19. *See id.* at 146-47.
20. *See id.* at 147.

Yet the constitutional premises of equal protection still existed in Vichy. Some lawyers in some contexts utilized the old verities and even protested against nonracial violations by the government. As we shall see, there were even isolated objections at the beginning to the anti-Semitic legislation, but *there was no enduring or organized protest by any lawyer or legal group against those racial laws*. For four long years the French legal community—again largely without German pressure—built its own system of increasingly complex racial definition and restriction.[21]

There was little inclination to question the need for, or the appropriateness under French legal traditions of, ostracizing Jews on the basis of race. As François Dominique-Gros very recently reported, the number of outright protests—he has studied the writings of law professors in particular—did not increase substantially even as the war wound to a close and allied victory appeared inevitable.[22] The Vichy-authored statutes,[23] which became so appealing to the Germans that they extended them to the Occupied Zone as well—were assimilated "considerately" into the French system.

One of the very few notable legal protests lodged on a high level of generalization was that of Professor Jacques Maury of the Toulouse Law School. Professor Maury, in the authoritative *Journal Officiel* covering the period just after promulgation of the Vichy denaturalization and racial laws of 1940, stated that making exceptions of individuals, purely on the basis of immutable traits,

> has been substituted for or (better) juxtaposed with a more gradual approach to necessary changes. The French people find themselves placed in three categories of non-identical stature. There is an increasing abandonment of our long-held rule

21. *See id.* at 150-51.

22. François Dominique-Gros, Le "Statut des Juifs" et les Manuels en Usage Dans les Facultés de Droit, 1940-44, at 7 (1992) (unpublished manuscript, on file with *Loyola of Los Angeles Law Review*). Of 39 legal manuals studied, Professor Dominique-Gros cites only two that fall into his category of expressing "clear hostility" to the racial laws. *Id.* at 8. Another handful contains "*commentaire assorti de réserves*" [selected expressions of doubt]. *Id.*

23. French internal documents made no pretense about the origins of the racial laws under which most Jews, in both zones(!), were persecuted: These laws were of Vichy derivation. Typically, the tragic case of a Paris court of appeals Judge Laemle involved a set of Vichy documents tracing his fate, all citing the French law of October 3, 1940, and no German ordinance, under the terms of which on December 17, 1940 he was "*mis à la retraite*" [fired]. Judge Laemle was eventually arrested and deported just for being Jewish under the French legal definitions. *See* Centre de Documentation Juive Contemporaine Doc. VI-140, at 1 (originally dated Apr. 12, 1942).

guaranteeing equality in their rights as well as in their responsibilities to all French people.[24]

Although Professor Maury did not specifically attack the newly promulgated Vichy racial law of October 3, 1940, his lengthy statement—elaborated over several articles—in one of the profession's most prominent publications surely stood as a challenge to the already tangible legislative policies dividing citizen from citizen—and citizen from "noncitizen"—on the basis of race. As was true of every such strong protest against Vichy law's violation of foundational French constitutional beliefs, Professor Maury's writings did not result in *any punishment to the speaker*, either by the French government or the Germans. No lawyer was ever sanctioned professionally, much less imprisoned or worse, for publishing such jugular attacks against the regime's laws. So, why, especially when it came to attacking Vichy's racism, as opposed to its other violations of French constitutional tradition, were there so few Professor Maurys?

The response to the legislation reveals a pervasive acceptance of the new racial scheme, less because of anti-Semitism than because lawyers are generally disinclined to challenge systems at their very heart. Instead, Vichy lawyers delighted in attacking lower level problems. For example, does an individual with two Jewish and two non-Jewish grandparents count as a Jew? The statute was ambiguous on this point and there were hundreds of cases disputing Jewish status in this way.[25] The question was endlessly debated. Too few chose to ask Professor Maury's question, even though it was as much a "legal" question as the ones that were asked: "Are these 'laws' legitimate?"

Indeed, the progression in Professor Maury's discourse over the next few years indicates that internal professional pressures led even a right-minded analyst such as himself to adapt to an apologetic way of speaking about racial definition.[26] The progression in legal discourse towards an interpretive "mainstream" that abided and utilized the racial

24. JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANCAISE, doc. 169 (Oct. 18, 1940) (translated from French by Author).

25. *See* Richard H. Weisberg, *Legal Rhetoric Under Stress: The Example of Vichy*, 12 CARDOZO L. REV. 1371 (1991).

26. An original protest does not suffice, although if rendered by the profession's leaders, it will set an impressive and perhaps definitive tone. The essential, however, is to *trace* the progression of discourse from an original protest to a more, or less, acceptable position. This is how professional discourse develops in precisely the kind of free-flowing environment that I claim was that of French law from 1940 to 1944. Professor Maury was quite outspoken at first. Let us see how his discourse softened over time.

laws can be preliminarily revealed by watching Professor Maury's subtle shift.[27]

When, just three months before D-Day, Professor Maury was asked to opine about the Jewishness of three young children of a mixed marriage in Toulouse, he had come far from his stance of jugular protest against the first fruits of Vichy legislation. Too much had happened during the almost four years since the regime launched its program. There was no longer any doubt of the racial laws' "Frenchness," no longer any talk of the unacceptability of distinguishing one person from another on the basis of immutable characteristics. The discourse had softened; "lawtalk" had accommodated. And the issues had sorted themselves out on a far lower level of generalization. French law, without much prodding from the Germans—except in the form of Nazi slaps on overzealous Vichy wrists—had gradually come into existence by just this process of rhetorical give and take, of professional discourse, of learning what is right and wrong by lawyers watching and heeding what other lawyers were saying and doing—and not through "basic ethics" or even "established French constitutional principles."[28] For the Jacques Maury of March, 1944, there persisted none of the original—one might say "foundational"—objections:

> The undersigned professor, Jacques Maury, professor of comparative law on the faculty of the University of Toulouse, offering on that faculty the course in private international law, director of the Institute of Comparative Law at the University, offer the following opinion on the racial quality [le caractère racial] of the Levy children.

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27. I have looked at this rhetorical phenomenon with regard to Joseph Haennig's learned article entitled *What Means of Proof Can the Jew of Mixed Blood Offer to Establish His Nonaffiliation with the Jewish Race?*, which was published in the 1943 authoritative French reporter, the *Gazette du Palais*. *See* WEISBERG, *supra* note 25, at 1371-76 & apps. 1-10; Richard H. Weisberg, *Cartesian Lawyers and the Unspeakable: The Case of Vichy France*, TIKKUN, Sept.-Oct. 1992, at 46; David Margolick, *At the Bar: The Action of a Lawyer in Occupied France Raises the Question: Is Nit-Picking Collaboration?*, N.Y. TIMES, May 17, 1991, at B18.

28. For a masterful analysis of how professional discourse develops and changes, see STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES 338-71 (1980). For Professor Fish, a professional discourse is never subject to overriding "rules" because only the way people talk and behave in a given community can establish what the "rules" of the group are at any given time. *See id.* at 342-43; *see also* Danièle Lochak, *La Doctrine sous Vichy, ou les Mèsaventures du Positivisme*, *in* LE STATUT DES JUIFS DE VICHY 121, 124 (Serge Klarsfield ed., 1990) (speaking of "banalisation" of racial laws partly in terms of academic lawyers' "measured, neutral, and detached tone"). Professor Lochak, to the best of my knowledge, does not cite Professor Maury's writings and concludes that no law professor raised a voice in protest, but this is an overstatement. *See id.* at 125.

> The following facts have been given to us: three children have been born of the marriage, celebrated on 23 November 1936 in Toulouse between Mr. LEVY, an Argentinian national of the Jewish race, and Miss MAGNE Simone, aryan and French by nationality, remaining French despite this marriage; the three are Gilbert, born 24 October, 1934 . . . Serge, born 15 November, 1935 . . . Michelle, born 28 January, 1940 . . . . These children were baptized; Gilbert on 15 August 1935, Serge on 15 May 1941, and Michelle on 18 June 1940. Their birth and baptismal certificates have been presented.
>
> On this state of the facts, we have been asked to opine on the race of the LEVY children.[29]

Professor Maury then cited the prevalent statute of June 2, 1941, which tracked the October 3rd law's ambiguous treatment of people with two Jewish and two non-Jewish grandparents, the case here, but added that such people would be considered Jewish if they "belonged to the Jewish race on 25 June 1940."[30] Are the Levy children to be considered Jewish under these facts and under this law?

STOP RIGHT NOW! Aren't you tempted to sink your teeth into this question, forgetting the hideous framework in which it arises? You are a *lawyer*, after all! You are paid to sort out the differences among these seemingly similarly situated children. And you are not *responsible* for the law itself, are you? Maybe you can help little Serge, whose baptism came almost eleven full months too late to satisfy the legal cutoff date of June 25, 1940. Maybe you can use considerate communication to help in this one case while not offending your audience by attacking the law as a whole—say by noting its ex post facto nature, its placing the burden on the child, or its inherent unconstitutionality and un-Frenchness. So Professor Maury crafts a response:

> The negative answer is clearly applicable to Gilbert, and to Michelle, both baptized before that date according to the Catholic rite. . . . Although some courts of first jurisdiction at the outset of the application of the law of [2 June] 1941 held that what was needed was a "real" commitment to Catholicism or Protestantism and that such a commitment could not be found

29. Jacques Maury, *Consultation sur l'aryanité des enfants LEVY*, Centre de Documentation Juive Contemporaine Doc. XVIIa-44, at 1 (originally dated Mar. 6, 1944) (translated from French by Author) (on file with *Loyola of Los Angeles Law Review*) [hereinafter Opinion of Maury].

30. *Id.*

> in a child of tender years[31] . . . the law has moved, apparently with good sense, to the opposite conclusion. Today the point is settled that baptism suffices to prove the nonaffiliation with the Jewish race ["la nonappartenance à la religion juive"], the decision of the Conseil d'Etat of 7 January 1944 . . . [preserving the job of a mixed-heritage functionary who produced a baptismal certificate from the reformed church]. Against such proof, no contrary presumption can prevail. . . .
>
> The issue is different, both factually and legally, when it comes to Serge, baptized on 15 May 1941.
>
> The law once held that only belonging to one of the religions recognized by the state before the law of 9 December 1905 could prove nonaffiliation to the Jewish religion, which would lead to declaring as Jewish all those with two grandparents of the Jewish race who could not demonstrate that they were Catholics or Protestants before 25 June 1940. But this approach has been justly criticized by almost all the commentators, and has also been rejected by both ordinary and administrative courts. Although the Cour de Cassation [France's highest civil court] has not to our knowledge ruled on the point, many courts including Appeals Courts have ruled that nonaffiliation with the Jewish religion can be proved by all other means [besides baptism alone]. This is incidentally the solution reached by German courts, whether on the basis of the occupation ordinances of 1940, 1941 or 1942 or the [indigenous German] law of 15 September 1935.[32]

Professor Maury then turned considerately to the difficult issue of Serge's adherence or nonadherence to Judaism, given the ambiguous timing and nature of the boy's religious acts. He first adopted a controversial stance:

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31. The cases on baptism, including the curiosity cited here by Professor Maury, were legion. German law considered baptismal records to be dispositive of non-Jewishness in the case of a mixed-heritage individual—even an infant, who perhaps did not have what the early Vichy courts wanted: a "full awareness of his religious choice." This language comes from a case that represented the predominant view in Vichy at the time, *Charles Robert Lang*, decided by a Brive tribunal that fined Lang for not registering as Jews his two infant children, both of whom had been baptized and had only two Jewish grandparents. *See* Semaine Jurdique (Juris-Classeur Périodique), July 12, 1942. Its reasoning was challenged vigorously by other courts; hence Maury's statement. The Nazis occasionally urged their Vichy *confreres* to declare non-Jewish a mixed-heritage individual who could produce such a baptismal certificate. *See* WEISBERG, *supra* note 13, at 274 n.24. The case law indicates that the French often declined to do so, thus implicating a broader scope of individuals than under Nazi law. *See id.*

32. Opinion of Maury, *supra* note 29, at 1-2 (citations omitted).

> Now in fact Serge LEVY has never belonged to the Jewish religion, and all the indications presented to us constitute, in this regard, sufficient factual presumptions. It would be inexplicable, by the way, to find one child out of three, or one son out of two raised in the Jewish religion while the other son, or the two other children, would be raised as Catholics. Such an arrangement would be completely untypical of the approach of spouses of differing religions.[33]

But here Professor Maury knew that his legal logic in 1944 contrasted with that of official Vichy, which held that different family members *might well* be treated differently by the racial laws.[34] Rather than challenge the prevalent orthodoxy, the professor extended his argument on the absurdity of finding Serge Jewish but his siblings Aryan by stressing the indifference of father Levy to his Judaism compared to the familial concern about Catholic ritual:

> It has been shown that Mr. LEVY, completely detached from the Jewish religion, did not participate at all in it. . . . [Serge's] baptism in 1941 might be suspect if it stood alone. It is in a way authenticated by the baptisms of his brother and sister, which show by their very existence that the family religion was Catholicism, although by the tardiness [of the baptisms] that perhaps the rites of that religion were not strictly adhered to. The actual practice of the Catholic religion by the two older children, their keeping to the catechism, confirms as well the reality of their religious life, which their parents surely chose for them. There was certainly no [formal] adherence by Serge to Catholicism before 25 June 1940. *From the facts, as they have been reported, we can deduce that Serge LEVY did not belong to the Jewish religion, and therefore he is not Jewish under the law of 2 June, 1941.*[35]

Professor Maury concluded by harmonizing his findings with German law, adding that: "In the Occupied Zone, unless there is a new ordinance that has not yet come to our knowledge, the LEVY children

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33. *Id.* at 2.

34. On April 11, 1941, for example, an internal Vichy memorandum noted a lawyer's wonderment that the regime's racial laws "will lead to different treatments under law of two brothers with identical father and mother . . . [,]" to which his superior responded in the memo's margins: "Yes!"—indicating the agency's firm view that different treatment *is* occasionally mandated. Centre de Documentation Juive Contemporaine Doc. CXIV-9a (originally dated Apr. 11, 1944) (translated from French by Author) (on file with *Loyola of Los Angeles Law Review*).

35. Opinion of Maury, *supra* note 29, at 3.

would not be Jewish. There is not the slightest reason to consider them such in the southern zone, since according to existing French law they are aryans."[36]

STOP AGAIN! Are you pleased with the professor? Did he not do some good in an awful situation? His words were polite, his appeal to the audience considered and proper, and the outcome he urged may save the boy. If he had directly attacked the statute, as he did in 1940, he could not have done this much. And, after all, no one listened in 1940. Of course the statute and the cases are grotesque. And it is true that the next child whose "Jewishness" is asserted may lose his life using the very logic against him that the professor created in favor of little Serge. What would we have Maury *do*?[37]

Jugular protest, although rare, did attend the promulgation of the October 3, 1940 racial statute. Foundational attacks on Vichy legislation were published and abided, and they would continue, in very small doses, throughout the four years of the regime. The political trials at Riom, launched by the regime against such III Republic leaders as Edouard Daladier and Leon Blum, inspired some prominent lawyers to pick up on Professor Maury's 1940 theme of the "un-Frenchness" of the regime's laws, although the Riom protest unfortunately did not specifically address the racial laws per se. But Professor Maury's own rhetorical shift, over the years, to a neutral tone accepting the racial premise as a given—where he once saw it as grotesque and aberrational—is typical of French professional discourse during the period. It is not so much that some protested, continued to protest, and then gave up or were somehow silenced; rather, the racial laws became a viable reality because the discourse of direct protest *never caught on*. As soon as several key lawyers accepted, authenticated, and in fact *created* the racial texts[38] by adapting them to their practice, the whole profession fell into line. The choice, as

36. *Id.* at 4.

37. My last sentence paraphrases Posner's rejoinder to me about Joseph Haennig. *See* POSNER, *supra* note 4, at 173 ("What would Weisberg have had Haennig *do*?").

38. Texts, legal or otherwise, have no implementable meaning apart from what those who use and control them decide. If a lawyer says he is constrained by a statute to act in ways that violate his ethics, he is interpreting the statute to bring about that violation. If enough lawyers ignore a statute or rewrite it through interpretation, it can be rendered harmless. *See* FISH, *supra* note 28, at 338-71. My differences with Professor Fish begin with Vichy. *See* WEISBERG, *supra* note 13, at 172-75. But they also end there. If lawyers in Vichy had been believers in Professor Fish, they might have perceived that they were free to make of the racial laws anything they wanted. In fact, that is what they "did" with the laws they *are* now fully responsible for. No written text forced them as a community to act the way they did. The problem is that no written text constrained them to act otherwise, either. My answer to Professor Fish is that we must work as a community to develop beliefs in texts that will induce us to refuse ever again to repeat Vichy's errors. To do this, we must retain the theoretical belief

the contrasting examples of Belgium, Denmark, and even Italy reveal, was entirely the French community's.

Considerately moving in the gradual way that professional rhetoric will, French lawyers and courts found racism tolerable. They easily learned to accommodate those few colleagues whose nausea in the face of what they were seeing placed them increasingly at the margins of polite legal discourse. But only they were to blame for what became marginal and what, sadly, became central.

The lesson for us involves the limits to considerate communication within our own moral world. While we must always have our audience in mind if we are to *accomplish* the aims that we value, we must never emulate the Vichy lawyer's practice of surrendering our deeply held beliefs by the very process of rationalizing, and hence rendering acceptable, everything we hate. Eventually, people will probe our speech and find within it either the strength of an ethical system or the Vichy-like weakness of professional accommodation to the bad.

III. LESSON NUMBER THREE: WHATEVER YOU *DO* SAY, DO NOT THINK ITS MEANING IS "PLAIN"

Suppose a French lawyer in 1941, at the height of the Vichy regime's power, decided to heed my second lesson and to publish an inconsiderate jugular attack on French racial laws. What more would have been accomplished than to make that lawyer feel better, or perhaps to show future analysts of the period that there were some good, in both senses, lawyers around at the time? Experience, coupled with Lesson One,[39] teach us that small and ineffectual minorities will be tolerated as long as they are self-limiting. But what if our hypothetical lawyer hoped to move his colleagues to feel and to act according to principle? What if the aim was nothing less than to change the behavior of the majority of the legal profession, to get them to ignore or to reverse the racial laws?

How would that salutary aim be achieved? Forgoing considerate communication, our ethical lawyer wants to speak directly to his audience about his absolute rejection of racism. Richard Posner, bullying my first writings about Vichy, has already stated that such an attack "would not have been published."[40] Like much of what Judge Posner originally

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that some texts, and they must be ones that we choose for their ethical excellence, do in fact immutably require us to resist the persecution of others on racial grounds.

39. *See supra* part I.

40. POSNER, *supra* note 4, at 173.

said about Vichy, this is simply wrong.[41] In any case, "getting published" is only half the battle; our lawyer wants to have his words attended to as well. Many of the lawyers that I have interviewed in France asserted that such words, spoken by a few leaders, *would have effectively avoided racial genocide in France*—if spoken early.[42] Will an audience now set in its beliefs also listen?

What does an audience do with a speech act that strikes mercilessly, "inconsiderately," at its own prejudices? To answer this, we must reckon with two situations. The first, which we have already offered earlier, is that the audience simply refuses to *heed* the communication. Like the heretical minority's view of the JFK assassination, our lawyer's moral attack on anti-Jewish laws will simply be ignored. He will be tolerated, but treated like a pariah. Without considerate communication, a speech act that tends to challenge its audience's deeply held beliefs will almost definitely not be heeded.

The second situation, however, posits a lawyer already held in such high esteem by the audience that his or her every utterance commands its attention.[43] If a professional leader decided to challenge the racial laws centrally—and this simply did not happen in France, although it did happen in Belgium, for example[44]—how would he or she be understood?

Put differently, what will an audience do when confronted with an authoritative communication that must be heeded, but which is blatantly offensive to the audience's deeply held beliefs? It might decide to change. But, more likely, it will *construe the message to mean something it can tolerate*. No matter how "plain" the authority believed its message to be, the audience would find a way to read it painlessly.

Suppose, for example, that a law school dean reduced a commencement message to these pithy phrases: "I never really wanted any of you to go into practice, whatever I may have said. My prayer to you today is to avoid taking the bar and to find something else to do with your lives."

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41. See the example of Jacques Maury, *supra* note 24. There were dozens of other prominently published protests against the regime's basic legal structure throughout the four years, although again almost none relating to the racial laws per se.

42. See, for example, the words of Philippe Serre, a French lawyer and one of the few members of the National Assembly in 1940 to refuse to grant full powers to the new Vichy regime: "[T]he Germans would not have insisted on a racial policy if the French had refused." Richard H. Weisberg, *France: From Vichy to Carpentras*, WALL ST. J. (Int'l ed.), Oct. 12, 1990, at 8.

43. A subtle response to this hypothetical would be that no such person would take such a position, having been weaned away from radically ethical postures by the very success that defines him or her. I will put aside for another time an answer to this cynical but strong counterfactual.

44. *See* WEISBERG, *supra* note 13, at 291 n.153.

Now we cannot completely ignore the dean, even as we are about to leave her jurisdiction. But what a message! It cannot be that the dean meant that after three stressful years we graduating "three Ls" should leave the law before actually entering into its mysteries. Aha! The dean meant what she was always trying to tell us more politely while we were in law school. We should become law *professors*! It is a much happier life. Oh, that dean of ours. What a proselytizer for the academic life. She's terrific!

Plain meanings can only be discovered by audiences receptive to them. The word "chicken," as Walter Benn Michaels reminds us, possesses no inherent clarity once a judge decides that it can mean at least two different things,[45] just as the word "rocks" in the William Wordsworth poem, *A Slumber Did My Spirit Seal*,[46] can suggest either ecstatic life or instant obliteration. Even the "plainest" word in our most authoritative secular text, the United States Constitution, is always open to interpretation. Anthony D'Amato has definitively indicated that such seemingly "unambiguous" phrases as the thirty-five-year-old minimum age requirement for presidents would be "compromised" if the appropriate dispute arose.[47]

When audiences want to hear *X*, they will find it in *Y*. Until they have been prepared for it, they will not find *Y* anywhere. "[T]he readiness is all," as the fifth act of *Hamlet* reminds us.[48] But it was also he who moved from the relativism of his act two—"[t]here is nothing either good or bad, but thinking makes it so,"[49]—to the mature understanding that we control our own fates and that we can act in the direction of what is right.

If the top authority in the field cannot instantly convince his audience to change, how is that "right" to be accomplished? Perhaps it can never be reached through language alone. But if language stands ready to assist, despite its absence of plainness, it must be used with a combination of forthrightness and audience awareness of which we have few examples in times of crisis.

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45. *See* Walter B. Michaels, *Against Formalism: Chickens and Rocks*, *in* INTERPRETING LAW AND LITERATURE 215, 217-18 (Sanford Levinson & Steven Mailloux eds., 1988) (citing Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960)).

46. WILLIAM WORDSWORTH, *A Slumber Did My Spirit Seal*, *in* THE COMPLETE POETICAL WORKS OF WORDSWORTH 113, 113 (Andrew J. George ed., 1932).

47. Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 NW. U. L. REV. 250 (1989).

48. WILLIAM SHAKESPEARE, HAMLET act 5, sc. 2.

49. *Id.* act 2, sc. 2.

The final lesson for us here is therefore more of a challenge: to retain one's sense of the ethically correct as one moves ahead in the field; to muster the beauty and the skill of considerate communication to make one's values feasible within the community; to recognize and decipher considerate communication when used by authoritative others; to decline considerateness when it becomes an end in itself and betrays the deepest part of oneself; but then to speak forthrightly while also finding a way to convince colleagues to change their ways, if those ways have become errant.

Fortunately, Americans have a tradition of such speech, which finds the path both to inspire and to criticize. I will close with a passage from Martin Luther King, Jr., in one of his least compromising and yet most considerate modes, the *Letter from Birmingham Jail*.[50] Imprisoned, Dr. King found a way to appeal to eight white "moderate" clergymen who had verbally attacked civil rights demonstrators in that crucial year of 1963. It is worth striving—ethically and linguistically—to emulate his model:

> Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority. Segregation, to use the terminology of the Jewish philosopher Martin Buber, substitutes an "I-it" relationship for an "I-thou" relationship and ends up relegating persons to the status of things. Hence segregation is not only politically, economically and sociologically unsound, it is morally wrong and sinful.[51]

50. MARTIN LUTHER KING, JR., *Letter from Birmingham Jail*, *in* WHY WE CAN'T WAIT 77 (1963); *see* Susan Tiefenbrun, *Semiotics and Martin Luther King's "Letter from Birmingham Jail,"* 4 CARDOZO STUD. L. & LITERATURE 255 (1992).

51. KING, JR., *supra* note 50, at 85.