

DIVING INTO THE CULTURE OF LAW: LESSONS FROM LITERARY MASTERS OF LAW

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ABSTRACT

Through the ages, respected leaders in law have implored the profession to develop and exercise advanced literary skills. It is a challenging goal in our ‘twitterised’ world, where law school curricula are necessarily overloaded with technical legal subjects. This paper briefly recounts some benefits of a literary approach to the study of law. It provides examples of related theoretical topics that can practically assist in legal study and practice. The appendix summarises the outcomes of a workshop developed and run by students at Victoria University Law School, entitled *Improving Legal Literacy Through Literature*. This paper aims to tempt law students to dive into, enjoy, and benefit from the literary culture of law.

I. INTRODUCTION

This paper recounts some established links between the effective study and practice of law and the benefits of a literary approach. These include deepened understanding and knowledge of the world, of literary techniques, of legal philosophy and of legal history. The benefits to the legal practitioner include greater potential for empathy, more effective use of language, and the ability to construct more sophisticated and powerful arguments. For law students, elevated awareness of literary techniques and willingness to seek meaning beyond the text can aid advanced capacity for conceptual thinking and critical analysis. Additionally, the mysterious art of effective rhetoric can be illuminated through study of its ancient yet accessible recipes. The recipes reveal ingredients that encompass skilled employment of literary techniques. Building awareness and recognition of the need for these pervasive, foundational literary skills is desirable, as few law students today have undertaken preceding studies in the arts. Practice can deliver confidence and proficiency in studying law.

A literary approach to the study of law also delivers to students a deeper appreciation of legal culture. Students can develop personal connections within it and find their own words to describe it. These deepened connections allow students to more easily settle into and become part of the culture of law. We can strive to do more than act as mere operational contributors.

II. CONTEMPORARY CALLS TO ACTION TO DEVELOP LITERARY SKILLS

Some contemporary masters of law lament the disconnection between the traditional literary approach to the study of law and a modern focus on technical rules. Posner speaks of the US experience and claims that there has been a decline in literary culture contributed to by the legal profession’s culture of ‘jargon and stilted expression’,¹ and competing forms of media.²

From an Australian perspective, the Hon Michael McHugh confesses ‘on the High Court and in other places I have often felt dispirited by the lack of eloquence in the submissions

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1 Richard A Posner, *Law and Literature* (Harvard University Press, 3rd ed, 2009) 448.

2 Ibid.

of present day counsel.³ McHugh thinks the following factors have contributed: the public's declining interest in court proceedings, brought about by the advent of television; the rise of celebrity; the abolition of the death penalty and its associated drama; and the fact that in more modern times, written submissions to the bench were required,⁴ and that in the past, '[j]udges tended to resent eloquence in argument'.⁵

Posner argues that in American law courses there is little recognition that lawyers and judges are 'rhetoricians'⁶ and that development of style and narrative in communications is important.⁷ The Hon Michael Kirby is more optimistic about Australian law schools' commitments to the teaching of rhetoric in the form of advocacy skills.⁸ He reminds us that foremost, the function of the advocate is to persuade,⁹ and that 'eloquent persuasion is essential'.¹⁰

The above commentary suggests that at the highest levels of legal practice today eloquence is valued as an element of persuasion. Effective advocacy should employ meaningful expression and appropriate style. The skills of eloquence and persuasion should be developed in law school.

Challenges arise in motivating students to commence skills development early enough. Practice of literary skill requires confidence. This paper reminds us that solutions toward motivation and confidence already exist in the works of law's literary masters. These 'masters' include Aristotle, Cicero, Quintilian, Cardozo, Posner and many others. Rather than perceiving attainment of literary skills as some future, lofty, aspirational and artful goal, law students simply need to recognise the benefits of the effort, and get started. Getting started also requires understanding that attainment of superior literary skills requires more than simply good research, good writing and good speaking at a level sufficient for passing law school subjects. The many components of the relevant literary techniques need to be exposed and explained. Encouragement is necessary to stimulate practice. To my delight, I found that many of the masters have already laboured to record this wisdom for our benefit. Modern accessible texts exist that encapsulate these gifts.¹¹ The words of the masters can fuel studious ambition.

To combat the law student confidence problem another great gift is provided by the masters. They recorded their frank confessions. Examples are provided in the following section. Similar to the experience of many law students, the masters experienced great challenges in comprehending legal texts and developing their particular styles. As law students recognise that their study struggles are common with those faced and conquered by their law heroes, confidence is built and perceived connections are enjoyed. We can try our best and accept that we may fail. We can try again, and in doing so find comfort in the candour of mentors from the past to guide and encourage our learning. We can avoid ignorantly gliding through our careers unaware that our inelegant articulation undermines the impressions we make upon others and constrains our opportunities. Our efforts are likely to be rewarded by escaping the otherwise unavoidable and aching regret that our potential talents were left unexplored and voiceless.

The workshop outlined in the appendix came about as a result of the above realisations. Contemporary masters of law lamented a decline in skills generally. Research uncovered methods and materials for learning and teaching. Research also uncovered that the works

3 Michael H McHugh, 'The Rise (and Fall?) of the Barrister Class', in Justin T Gleeson and Ruth CA Higgins (eds), *Rediscovering Rhetoric: Law, Language and the Practice of Persuasion* (Federation Press, 2008) 165, 190.

4 Ibid 189–190.

5 Ibid 190.

6 Posner, above n 1, 448.

7 Ibid.

8 Michael Kirby, 'Rhetoric in Law – A Case for Optimism?' in Gleeson and Higgins (eds), above n 3, 194, 195: Kirby believes evidence of this is an increase in mooted competitions and availability of works on the subject by eminent practitioners.

9 Ibid 194–5.

10 Ibid 194.

11 See, for example, Ruth CA Higgins, "'The empty eloquence of fools": Rhetoric in Classical Greece' in Gleeson and Higgins (eds), above n 3, 3; Justin T Gleeson, 'Cicero's *De Oratore*, *Pro Milone* and the *Philippics* – Character, Argument and Emotion' in Gleeson and Higgins (eds), above n 3, 45; Douglas Hassall, 'Quintilian and the Public Attainment of Justice', in Gleeson and Higgins (eds), above n 3, 87; Arthur R Emmett, 'Hermogenes of Tarsus: Rhetorical Bridge from the Ancient World to the Modern' in Gleeson and Higgins (eds), above n 3, 114.

and messages of the masters can serve as invitations for students to develop deeper, personal connections to their own perceptions of law. These invitations and connections can motivate and deliver study confidence. Ultimately, understanding and acceptance of the benefits of literary skills, coupled with perceived mentorship offered by the masters, tempts us to step inside the rewarding sphere of law’s literary culture.

II. ALL LAW STUDENTS MUST BURN THE MIDNIGHT OIL

Studying law can feel like swimming against an interminable tide of texts. How can the overwhelming wave of technical rules be converted to a swimmable current? I was drowning until I found practical techniques and deepened understanding to keep me afloat.

With the common-sense realisation that nobody is born erudite, I sought answers to the following questions: *How do the legal greats achieve mastery? How do they seamlessly weave the legal past with the present? How do they do they wrangle and sculpt complexity into comprehensible precision? Why do their arguments carry extinguishing and commanding power?* My search revealed that the most talented leaders in law asked the same questions and faced the same challenges.

In his early years of studying philosophy, the revered Learned Hand¹² found many texts ‘impenetrable’.¹³ His family recalled Hand’s description of his hard fought efforts to incrementally comprehend: ‘I sort of had the notion that if I read it over enough, the fog might clear a little’.¹⁴ Later in his life he confessed that when he was as a law student and was struggling to interpret the language of old cases, the same painstaking persistence was necessary: ‘I hadn’t any idea what the words meant. You read it over and over and over, until sort of by osmosis, it would come in.’¹⁵

According to The Hon JJ Spigelman, ‘Sir Owen Dixon possessed the most formidable legal mind in all of our history ... [with] clarity of expression which placed him in the first rank, not only of lawyers but of philosophers.’¹⁶ Similar to Hand, Dixon’s studies began in the classics.¹⁷ They included works of Cicero.¹⁸ Dixon read ‘beyond the curriculum’,¹⁹ and the classics taught him ‘to value precision in thought, clarity of expression, and logical sequence in the parts of a composition’.²⁰

Law students can gain confidence and encouragement from this evidence. The greatest legal talents faced the same challenges coming to grips with the languages of philosophy and law. The masters succeeded only by the absorption of the wisdom of their predecessors, with practice and persistence. This demonstrates that law students must toil to develop their own literary talents. We should heed the warning of the ancient Roman Quintilian:²¹

[L]et no man hope that he can acquire eloquence merely by the labour of others. He must burn the midnight oil, persevere to the end and grow pale with study; he must form his own powers, his own experience, his own methods; he must not require to hunt for his weapons, but must have them ready for immediate use, as though they were born with him and not derived from

12 Billings Learned Hand (1872–1961), was a Federal District Judge in New York then a Justice of the United States Court of Appeals for the Second Circuit. He served more than fifty years on the bench: Gerald Gunther, *Learned Hand: The Man and The Judge* (Oxford University Press, 2nd ed, 2011) xv.

13 Ibid 28.

14 Ibid quoting Louis Henkin, Interview with Learned Hand family members (Family Interviews, no date cited) in Louis Henkin, *Reminiscences of Learned Hand* (Columbia University, 1957) 38.

15 Gunther, above n 12, 36 quoting Louis Henkin, Interview with Learned Hand (Henkin Interview, 1957) in Henkin, above n 14, 25–7.

16 Philip Ayres, *Owen Dixon* (The Miegunyah Press, 2007) vii.

17 Ibid 11.

18 Ibid.

19 Ibid.

20 Ibid 13.

21 Hassall, above n 11, 88–90: Marcus Fabius Quintilianus was born in approximately 35 AD in Roman Spain, the author of *Institutio Oratoria*, ‘his magnificently thorough statement of the principles of forensic oratory and the legal skills which they embody.’

the instruction of others. The road may be pointed out, but our speed must be our own. Art has done enough in publishing the resources of eloquence, it is for us to know how to use them.²²

IV. CONTEMPORARY AFFIRMATIONS OF LAW'S LITERARY CULTURE

My quest toward legal literacy led me to Richard A Posner's *Law & Literature*.²³ Posner rescued me from subsiding confidence in my legal studies. I was pressured and my time was compressed under the weight of the interminable volume of legal texts and the exhausting onslaught of technical rules. Posner has taken the time, for our benefit, to explain the practical linkages between the art of literature, legal culture and the necessity of exercising literary skill. These skills foster ability to contextualise the technical legal rules. Posner's examples compelled me to access additional works. I reconnected with the human focus and the art in law through the poetic legal mastery of Cardozo²⁴ and the humanist legal-literary approach of James Boyd White.²⁵ Gleeson's and Higgins' *Rediscovering Rhetoric: Law, Language and the Practice of Persuasion*²⁶ revealed legal luminaries who contribute to the Australian literary culture of law and appreciate the works of past literary greats including Aristotle, Cicero and Quintilian.²⁷

V. WHY BRIDGE THE TECHNICAL–LITERARY GAP?

If law students are not aiming to become barristers or judges, and can pass their law school subjects, why should they strive to develop skills beyond those academic thresholds? One answer lies in appreciating the difficulties of studying law without concurrent development of literary skills. Appreciation of law's literary culture elevated the extraordinary talents of the masters. Law students can benefit from the same lessons by better understanding the relationships between legal history, philosophy, literature, literary techniques and skills development.

A. *The Burden of Studying Law without Context*

Internationally renowned professor of legal language and culture, Barbara Vilez, reminds us that we live and work in a globally collaborative legal world, and cross-cultural legal understanding is enhanced through literature:²⁸

[I]t is unquestionably important for law students to be given a way out of the atomised study of the law as an impermeable discipline and guided towards a more integrated understanding of law in society and of themselves as actors of law.²⁹

Vilez's words hit their mark, as if fired directly at me. I felt that within my study, a plethora of legal rules were blasting at me, as pellets from a shotgun. I sought a deeper contextual base for my learning. If I aim to stand inside the culture of law as a professional contributor, I must do more than attempt to catch legal significance as it flies past.

22 Quintilianus, *The Institutio Oratoria of Quintilian* (HE Butler trans, Heinemann, 1958) vol 3, 171 [trans of: *The Institutio Oratoria* Book VII, Ch X, 14–16] quoted in Hassall, above n 11, 100.

23 Posner, above n 1.

24 Benjamin Nathan Cardozo served as a 'member of the Court of Appeals of the State of New York (1917–1932) and as a member of the Supreme Court of the United States (1932–1938)': Hall, below n 62, v.

25 Posner, above n 1, 467–8: White is described by Posner as '[t]he strongest advocate of a literary education for lawyers'. White is L Hart Wright Collegiate Professor of Law Emeritus, University of Michigan Law School, MA English and graduate of law (Harvard), and a prolific author: Michigan Law School, *White, James Boyd* (16 April 2013) Michigan Law School Faculty Biographies <<http://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=jbwhite>>.

26 Higgins and Gleeson (eds), above n 3.

27 See, eg, above n 11. Another most literary former Australian High Court Justice is the Hon Ian Callinan: see, for example, I D F Callinan, 'Law and Literature' (2001) 21(3) *Australian Bar Review* 265.

28 Barbara Vilez, 'Law and Literature: A Conjunction Revisited' (2011) 5(1) *Law and Humanities* 209, 217.

29 Ibid.

To my astonishment I found that in 1765 Sir William Blackstone predicted my panic and repeated Justinian's similar prediction.³⁰ I presume that, based on his personal experience, Blackstone found it necessary to articulate that a disconnected learning of legal rules without history and context is likely to be a futile and unrewarding effort:

[The law student] should consider his course as a general map of the law ... For if, as Justinian has observed, the tender understanding of the student be loaded at the first with a multitude and variety of matter, it will either occasion him to desert his studies, or will carry him heavily through them, with much labour, delay, and despondence.³¹

The perplexing matrix of technical rules can be contextualised when links to society's progression, cultural standards and legal history are discovered. After all, law is the container of our society and the product of our history. Within this context, we can be enlightened to the purpose of, and necessity for, technical legal rules. Educated, alternative and perhaps original arguments can be formulated. As law students we can strive to do more than simply repeat standard responses by rote. The masters tempt us to be brave enough to reason. The vision of our integrated role as lawyers can become clearer within the evolution of law.

B. *But Not All Law Students Want to Be Barristers or Judges!*

It is a mistake to assume that only barristers and judges require and benefit from higher-level literary skills. If we work in law or we study law, we are asked to take on tasks and skills development that will contribute to advocacy for a client or advocacy toward law reform. Legal roles including those of solicitors, researchers and policy makers all require exercise of comprehension, explanation and persuasion. These functions involve conceptual thinking and critical analysis. Further, these skills are not unique to law jobs.

White explains that whether we are writing a letter to a client or delivering a closing address we must remember that '[t]he imagination of the lawyer is more than a capacity for pretending or for perceiving; it is also a power that organizes what is seen and claims a meaning for it.'³² It calls for imaginative expression and appropriate ordering of the information.³³ Law students practise these skills when writing law essays and when answering problem questions. The judiciary engages in it when writing judgments. If we recognise that our role is to serve the client and to serve the Court, we can better connect to our responsibility to properly develop these skills.

Posner asks us to extend our legal imaginations to the limitations upon judges and the considerations they face when writing judgments.³⁴ Beyond legal precedent and statutory rules, at times, judges must also consider issues of policy.³⁵ Posner asks that when we develop our arguments, we imagine ourselves in the position of the judge.³⁶ He acknowledges that effective rhetoric has capacity to feed judicial decision making.³⁷ Kirby appears to agree.³⁸ The art of literature teaches us to exercise our imaginations where we put ourselves in the position of the characters and develop empathy for them. In the role of lawyers, we can ask ourselves: *What does this judge, client or supervisor need to know now?* This need for imagination, consideration of our audience and ordering the right information using appropriate literary techniques is nothing new. Nor is it only relevant in the context of court. Gleeson explains that Cicero applied

30 William Blackstone, 'On the Study of the Law' in *Commentaries on the Laws of England* (Lexington, 2013) 18, 19.

31 Ibid.

32 James Boyd White, *The Legal Imagination* (University of Chicago Press, 1985) 209.

33 Ibid.

34 Richard A Posner, *How Judges Think* (Harvard University Press, 2008) 219.

35 Ibid.

36 Ibid.

37 Ibid.

38 Kirby, above n 8, 213: 'If there is a sharpening of the argument and a responsiveness to the rhetoric from the Bar table, then credit can often be taken by the advocates who press their arguments in strong and compelling terms, capturing the minds of judges who then proceed to reflect those arguments in their own writings.'

these same techniques to achieve ‘rational persuasion’³⁹ in his powerful rhetoric, which relied on logic, ethics and psychology.⁴⁰ These techniques included:

careful marshalling of the internal proofs, including selection of major premises(s) at a level of generality and construction of supporting arguments from probability and experience; explicit or implicit use of logical devices such as the dilemma; presentation of character and interweaving of emotion; carefully arranged and complemented by a suitable style; and targeted to the likely opinions of the particular audience at hand.⁴¹

It has never been a secret that effective persuasion benefits from the connections between literary technique, the wisdom of past rhetoricians, imaginative creativity and the selection and ordering of the right information targeted for the specific audience. These are not skills that should be regarded as reserved for the elite and to be honed only after graduation.

C. Commitment to Bridging the Literary-Technical Gap

The above masters’ comments motivated my journey to bridge law’s literary culture and technical divide for myself. The literary, contextualising frame will help me comprehend the myriad technical rules and set me on a path toward greater legal literacy. Ultimately, if judges pay more attention to the products of my craft, I can better represent my clients. My desire is to perform as a good example of law’s literary culture rather than remaining an awed observer performing merely operational functions. Being honest about my struggles and sharing my research with fellow students may not only relieve some degree of law student anxiety, it may also contribute to their better contextualised legal education.

VI. SOME PRACTICAL LITERARY SKILLS RELEVANT TO THE PRACTICE OF LAW

Moving from the conceptual to the practical, how can literary techniques, legal history and philosophy improve our legal performance and study of law?

In the previous sections, the masters identify elements of exalted oration. These include effective use of language to invoke empathy, logic, argument underpinned by relevant philosophy, demonstrated integrity and worldliness of the speaker, legal precision, and employment of appropriate style and technique.

Australian Professor Michael Meehan explains that the analytical disciplines of rhetoric and literary criticism provide improved understanding of language, how we think and why we do so, in relation to law.⁴² We should ensure we have control of legal language rather than allowing it to have control of us.⁴³ White explains that a goal of writers and law students should be to control language ‘by taking a position outside it’,⁴⁴ by using it to express more than it normally would express, and ‘at the same time recognizing what it leaves out’.⁴⁵ He explains that the use of literary techniques in literature external to law can demonstrate how this can be achieved.⁴⁶ Posner suggests that reading poetry can help train lawyers to better interpret difficult texts and to search for meaning beyond the words.⁴⁷ The literary imagination is ignited to encourage ‘careful and resourceful’⁴⁸ reading.

39 Gleeson, above n 11, 85.

40 Ibid.

41 Ibid.

42 Michael Meehan, ‘An Anatomy of Australian Law or “The Human Element in Legal Argument”’ in J Neville Turner and Pam Williams (eds), *The Happy Couple: Law & Literature* (Federation Press, 1994) 389.

43 Ibid.

44 White, above n 32, 71.

45 Ibid.

46 Ibid.

47 Posner, above n 1, 194.

48 Ibid.

The benefits of literature as they apply to the practice of law have been helpfully extrapolated within works of the masters, and by the law and literature movement⁴⁹ assisted by postmodernist literary theories and the discipline of linguistics. Posner has collected many of the beneficial theoretical aspects in *Law and Literature*.⁵⁰ Key theoretical and practical aspects include the following.

A. *The Benefit of Surrogate Experience Leading to Improved Critical Analysis*

Posner explains that literature is a source of historical knowledge that deepens our understanding of general philosophy, legal theory, legal process, differences between legal systems and interpretive methods.⁵¹ A key benefit of reading literature is acquisition of surrogate experience.⁵² Meehan's extrapolation of the value is deliciously tempting for aspiring advocates: 'Literature is drawn upon as a repository of wisdom, an authoritative source of enduring human truths.'⁵³ Surrogate experience and expanded emotional horizons should lead to deepened understanding.⁵⁴ Useful empathy⁵⁵ can arise to fuel insightful arguments.

Alter explained that our 'most complicated faculties of perception'⁵⁶ are engaged through reading literature and it feeds 'our nuanced knowledge of language, people, social institutions, politics, history [and] morality.'⁵⁷ By deepening our knowledge, by becoming more discerning regarding the subtlety in arguments, and by identifying key relevant issues, we train our habits of critical analysis. This is necessary for legal thinking and legal practice. It helps to ensure our arguments are substantiated. It assists in anticipating opposing arguments. Literature, legal history and legal philosophy are potent sources fuelling richer understanding of society and the circumstances of other human beings.

B. *Identifying and Developing Literary Technique*

Alter and Posner agree that some of the benefits of reading classical literature includes developing skills such as improving 'ability to grasp analogies, parallelisms, antitheses, significant repetitions, ellipses [sic], ironies, double meanings, even cryptograms.'⁵⁸ Aristotle,⁵⁹ Cicero,⁶⁰ Quintilian⁶¹ and Cardozo⁶² also crafted catalogues of literary styles and techniques.

By building our own arsenals of literary styles and techniques we can better identify them, remember them and be encouraged to deploy them. Additionally, a purposeful hunt for style and technique can motivate our reading. It is likely they signal some important point or perspective that the author has made an effort to express. The study of literary technique will inform our practice. Cardozo implored us to remember that argument is an art and not a science, and that skilful articulation through employment of appropriate technique can raise a minor point to greater consideration.⁶³

49 Other topics commonly covered in 'law and literature' texts include analysis of the legal regulation of literature, legal constraints on free expression, theories of interpretation and the evolution of technology impacting literature: Kieran Dolan, *A Critical Introduction to Law and Literature* (Cambridge University Press, 2007) 10–11.

50 Posner, above n 1.

51 Ibid 546–48.

52 Ibid 481–2.

53 Michael Meehan, 'The Good the Bad and the Ugly: Judicial Literacy and Australian Cultural Cringe' (1990) 12 *Adelaide Law Review* 431, 436.

54 Posner, above n 1, 486–7.

55 Ibid.

56 Robert Alter, *The Pleasures of Reading in an Ideological Age* (WW Norton, 1996) 228 quoted in Posner, above n 1, 485–6.

57 Posner, above n 1, 486 quoting Alter, above n 56, 228.

58 Posner, above n 1, 485–6 quoting Alter, above n 56, 228.

59 See Higgins, above n 11, 24–5.

60 See Gleeson, above n 11, 56–9.

61 Hassall, above n 11, 102 citing Marcus Fabius Quintilianus, *The Institutio Oratoria of Quintilian* (HE Butler trans, Heinemann, 1958) vol 3, 301–45 [trans of: *The Institutio Oratoria* Book VIII, Ch V–VI].

62 Margaret E Hall (ed), *Selected Writings of Benjamin Nathan Cardozo* (Fallon Publications, 1947) 342–9.

63 Ibid 355–6.

Proof of the power of literary technique is found within our own comprehensions of law brought to life by the imaginations and skilful articulations of the masters. Holmes conjured a succinct and now ubiquitous idea of law in his aphorism ‘The life of the law has not been logic: it has been experience.’⁶⁴

C. Connections Between Conceptual Thinking, Philosophy and Literature

As literature describes and imagines societies, it can reflect and inform opposing philosophies, describe and introduce philosophical concepts, and enlighten us to new possibilities in the development of philosophical arguments. There are many illuminating examples in Posner’s *Law & Literature*.⁶⁵

Another benefit of reading literature lies in ‘directing one’s attention to a plane or dimension of reality that is normally difficult or impossible to focus upon, namely the ethical and linguistic plane’.⁶⁶ By reading texts that incorporate unfamiliar concepts and ideas, we train our minds to think conceptually. When reading literature or when reading law, we need to look beyond the text for meaning. We need to be able to identify and manipulate concepts and become critically alert to content inherent or missing in the text.

For law students, challenges of conceptual thinking arise when reading legal judgments containing unfamiliar legal doctrines and terminology. They also arise prominently for readers new to philosophical subjects. Ironically, it is the pain and practice of striving to understand philosophical concepts, and some post-modernist literary ideas, that can deliver us to heightened skills of conceptual thinking.

As an example, significant legal arguments are often a result of clashes in philosophies.⁶⁷ Our legal constructs and concepts are most often the progeny of our accepted liberal philosophy.⁶⁸ The lawyer’s world and the lawyer’s brain are necessarily and densely populated with such concepts. Legal decisions and arguments are often based on the categorisation of facts against legal concepts.⁶⁹ Higgins provides historical context for the employment of the literary techniques of metaphor and analogy to manipulate conceptual ideas in argument and legal reasoning.⁷⁰ The method was rejected by Socrates, as he believed it was deceptive.⁷¹ Aristotle embraced it.⁷² Metaphor and analogy are now thoroughly engrained within our legal system. They give life to legal concepts and ‘legal fictions’.⁷³ The categorisation of the corporation as a legal person is one example.⁷⁴ Law students cannot escape their obligation to become highly proficient in conceptual thinking.

Additionally, our recognition of technical legal rules as progeny of legal philosophies and particular legal concepts helps us to realise that there may be alternative modes of thought, categorisation and argument.⁷⁵ Armed with this knowledge we can formulate relevant arguments based upon a solid and educated foundation.

64 Oliver Wendell Holmes, *The Common Law* (Lexington, 2013) 1.

65 Posner, above n 1.

66 James Boyd White, ‘Law and Literature: No Manifesto’ in *From Expectation to Experience: Essays on Law and Legal Education* (University of Michigan Press, 2000) 52, 71 quoted in Posner, above n 1, 469.

67 See generally Christian Biet and Lissa Lincoln, ‘Introduction: Law and Literature’ (2011) 5(1) *Law and Humanities* vii.

68 Marett Leiboff and Mark Thomas, *Legal Theories: Contexts and Practices* (Thomson Reuters, 2009) 1–3.

69 See generally, *ibid*; Margaret Davies, *Asking the Law Question* (Thomson Lawbook, 3rd ed, 2008) 26.

70 Higgins, above n 11, 26.

71 *Ibid*.

72 *Ibid*.

73 *Ibid*.

74 *Ibid* 27.

75 Leiboff and Thomas, above n 68, 2.

D. *Appreciating Language Ambiguity Assisted by Post-Modernist Theories & Linguistics*

As law students and lawyers we must appreciate that language is a ‘boobytrapped code full of potential for vagueness, imprecision, ambiguity, and other sources of misunderstanding.’⁷⁶ Postmodernist theory proposes that readers and listeners make their own choices about meanings.⁷⁷ The theory attributed to Barthes, summarised as ‘Death of the Author’⁷⁸ proposes that meaning is *not* dictated by the author. ‘Meaning’ is often constructed by more than simply words: ‘[m]eaning is a mixture of conscious intention and subconscious wish, of expectation and imagination, of varying and often incompatible perceptions of context, and this on the part of both writer and reader.’⁷⁹ This is a valuable lesson for law students. It motivates avoidance of ambiguity in expression and the necessity to confirm understandings perceived as a result of communications.

To further motivate law students toward precision, and prepare them for challenges communicating with clients and others, we can learn from Solan.⁸⁰ As a lawyer and linguist, he applies linguistic theory to law. He explains that as English speakers we have an inherent ability to interpret and utilise the grammatical constructs of the language.⁸¹ The meanings of words are learnt. One word can have different meanings based on context or can be interpreted differently based on our own personal experience or knowledge of the world.⁸² These are complications of using every day English without the possible additional obstacles of legal intricacy and context.

Law students benefit from appreciation of the real risks of language ambiguity. The lessons from post-modernism and linguistics are motivation toward the practice of precision. The lessons link the necessity of literary skill with the day-to-day study and practice of law.

E. *The Problem of Evidence: Justifying all of the Lessons of Literary Skills Development*

The presentation of evidence may be seen as one of the ultimate challenges in the employment of language. White explains that it is impossible to fully describe any event.⁸³ The lawyer must decide what will and will not be said.⁸⁴ If our goal is to persuade and evidence is the basis of that persuasion, we must strive to be aware of all of the inherent risks in language and all of the literary tools that may contribute to our persuasive success. For example, Schneck describes oral evidence as a ‘legitimate and appropriate representation of truth or reality.’⁸⁵ This makes sense when melded with the lessons of post-modernism and linguistics. If what we perceive as fact is merely our own interpretation of someone else’s narrative, which is subject to boundless influence,⁸⁶ we can begin to fully appreciate the responsibility of lawyers and barristers in collecting and articulating evidence. We can arrive at the realisation that ‘truth’ is merely a literal construction. This should illuminate the real challenges of language to law students.

76 Lawrence M Solan, *The Language of Judges* (University of Chicago Press, 1993) 16.

77 Leiboff and Thomas, above n 68, 390–2.

78 Ibid citing Roland Barthes, *The Death of the Author* (Collins, 1968).

79 James Boyd White, ‘The Ethics of Meaning’ in Turner and Williams (eds), above n 42, 269.

80 Don Forchelli Professor of Law, Brooklyn Law School, BA, PhD, JD (Harvard), prolific author of books and papers on the subject of language and law: Brooklyn Law School, *Lawrence M Solan* (10 April 2013) <https://www.brooklaw.edu/cvs/lawrence_solan.pdf>.

81 Solan, above n 76, 21.

82 Ibid.

83 White, above n 32, 3.

84 Ibid.

85 Peter Schneck, *Rhetoric and Evidence: Legal Conflict and Literary Representation in U.S. American Culture* (EBSCO Publishing, 2011) 1. Chapter 1, ‘Law, Literature, and the Predicament of Representation’ of Schneck’s book is fascinating reading for those interested in the boggling relationships between law, literature, rhetoric and reality.

86 Christine Higgins, ‘Tales of Gothic Horror’ in Turner and Williams (eds), above n 42, 168, citing Roland Barthes, *S/Z* (R Miller trans, Cape, 1975) 38 [trans of: *S/Z* (1970)], Roland Barthes, *Image – Music – Text* (Stephen Heath trans, Collins, 1977) 159.

It should motivate undertaking of study toward to the development of literary skills. It also highlights the benefits of our adversarial legal system in allowing challenges to evidence to be made as part of the legal process.

I interpret the wisdom of the Hon Nicholas Hasluck as linking all of the above critical lessons for law students. Hasluck explains that lawyers need not ‘view adversarial reasoning as the antithesis of imaginative or speculative thought.’⁸⁷ He claims that our adversarial system relies upon advocates, subject to the rules of evidence, telling the personal stories of their clients well,⁸⁸ and the telling can be informed by the lessons of literature.⁸⁹ On deep consideration of this modern master’s lesson, we can see that his approach to the law requires exercise of the literary imagination, conceptual thinking, critical analysis, avoidance of ambiguity, literary technique (such as the art of narrative) and effective advocacy all employed within the context and bounds of technical legal rules.

F. *Courage and Practice*

One of the greatest lessons the masters teach us is that only by practice can we improve our literary skills. If we aim to be good or great lawyers, writers and speakers, we must be brave enough to take some calculated creative risks. Hassall urges us to be encouraged by Quintilian’s affirmation of the advantages of applying literary skill:

[B]y the employment of skilful ornament, the orator commends himself at the same time, and whereas his other accomplishments appeal to the considered judgement of the learned, the gift appeals to the world at large, and the speaker who possesses it fights not merely with effective, but with flashing weapons.⁹⁰

It seems illogical to commence development of literary style and technique only after law school. If we are to make mistakes, law school is the place to make them. We need to take responsibility for our own learning. We should also encourage our law schools to guide us and recognise our efforts toward development of greater legal literacy and literary skills based on the proven wisdom of the masters.

VII. CONCLUSION – WE MUST DIVE INTO THE LITERARY CULTURE OF LAW

Properly considered learning derived from the collected lessons of the masters – from legal history, the law and literature movement, and the related legal, post-modernist and linguistics theories – have great potential to enhance legal literacy and literary skills. Key practical benefits appear to include expanded knowledge of the world, enhancement of comprehension skills, plus higher level development of conceptual thinking and critical analysis. Thoughtful design of text and oratory helps avoid ambiguity. Employment of appropriate style and technique aids precision, expression and persuasion. All are critical to effective lawyering.

The lessons and commentary of the masters provide motivation for law students to strive to improve literary skills. By making the connections between legal history, philosophy, technical legal rules and literature it is possible to enjoy a deeper understanding of the literary culture of law. The masters immerse themselves in this culture, benefiting from the teachings of their predecessors. They carry this wisdom with them, they learn to employ it naturally, and it appears to become part of their legal psyche and personality. The masters lead by example to help ensure the literary culture of law continues to benefit the profession. They encourage us to take pride in the craft of our work. Appreciating the wisdom of the masters, and finding

87 Nicholas Hasluck, ‘The Liaison Between Law and Literature’ (2006) 33 *University of Western Australia Law Review* 1, 1–2.

88 *Ibid* 1.

89 *Ibid* 2.

90 Quintilian, Book VIII, Ch II, 1–3 cited in H E Butler, *The Institutio Oratoria of Quintilian* (H E Butler trans, Heinemann, 1958) vol 3, 211–13 quoted in Hassall, above n 3, 101.

our own connection to the literary culture of law, is a personal journey. As Villez urges us to comprehend, our proper role as lawyers is as an integrated actor within legal culture.⁹¹

We must dive into the literary culture of law. Great gifts have been provided by many who laboured to record their valuable wisdom for our benefit. By beginning to absorb those lessons I can visualise myself eventually buoyed by the shared insights of the erudite masters. I hope to motivate other law students to do the same.

91 See above nn 28 and text accompanying nn 28–9.

VIII. APPENDIX – ‘IMPROVING LEGAL LITERACY THROUGH LITERATURE’: PILOT WORKSHOP OUTCOMES

A. *The Journey and its Benefits*

The awareness, confidence and skills development that I continue to experience in my journey into law’s literary culture is so profound that I am compelled to share it with my fellow students.

The *Improving Legal Literacy Through Literature* workshop and guidebook was developed as follows. I studied some works of literary masters of law, linguists and theorists. I developed brief snapshots of what I considered to be the relevant theoretical topics that could be the basis for enhancement of legal literacy and literary skills. I coupled those topics with literary examples. I designed exercises to demonstrate the relevant skills. Reflections were suggested to ensure learning was acknowledged. These workbook-appropriate exercises were then transformed, adjusted and complemented to better fit workshop style participation.

With the encouragement of the Dean of Victoria Law School, Professor Andrew Clarke, intensive workshops of three days duration were scheduled. The materials were further developed to include concurrent and enjoyable activities so that busy law student brains could remain engaged. Overall goals of the workshop were to openly acknowledge the challenges in studying law, to introduce literary theories, to exercise and raise awareness of necessary literary skills, to provide a catalyst for further self-study – and, most importantly, to encourage confidence in studying law.

In running the workshop, I aimed to exercise what I believe to be core attitudes demonstrated within law’s literary culture. I perceive them as respect, integrity and appropriate deference. We employed these attitudes and behaviours in our study of the masters and in our interactions with each other. The dynamic within the group was collegial, pleasant and focused on learning.

Posters of the literary masters were displayed on the workshop walls. Developing students’ personal knowledge of the masters as real people, and not simply as mysterious oracles of the past, helped create connections between the voices of law’s literary culture and the students’ learning. Fancifully, we imagined that the portraits of the masters were smiling down at us, encouraging and applauding us for respecting and absorbing what they took the time to record. We were enjoying the literary culture of law, learning by following their examples.

The feedback appears to substantiate benefits for students within participatory style, small workshops. The benefits do appear to meet the goals of the workshop outlined above. Significantly, students have indicated interest in participating in a network group to continue to share our learning, to discuss study challenges applicable to literary skills, and to share and celebrate our efforts toward becoming literary lawyers. We now have a basis for our ‘Future Literary Lawyers’ network. We dream of real-life literary masters of law and literature sharing with us at future reunions.

The greatest reward for me has been students approaching me in the subsequent semester explaining how their skills and confidence have improved as a result of the workshop.

B. *The Feedback*

Nine students participated in all exercises over the three day pilot workshop. While not an evaluation performed with academic rigour, the law students provided the following feedback. In terms of scoring, I asked the students to nominate whether the workshop provided:

Score	Evaluation
1	No Value
2	Little Value
3	Some Value
4	Moderate Value
5	Substantial Value

The following areas of benefit toward particular skills development were rated, with the total scores as follows (highest score possible was 45):

Score	Skills Development Evaluation Topic
39	Vocabulary
40	Comprehension
44	Conceptual Thinking
43	Critical Analysis
44	Introduction to Understanding of Legal Theory
40	Recognising Humanity in Law and Legal Practice
45	Creativity and Inspiration
41	General Confidence in Studying Law

The core evaluation question was: ‘From what subject area/topic did you feel you learnt the most and why?’ One law student provided the following response.

Robert Bujnowski:

It was great getting familiar with some of the literature ‘giants’ in law. Many of these I had not come across before, and can now appreciate their contribution to the culture. I also know where I can turn to broaden my understanding and become a better writer/orator. I enjoyed expanding my understanding of the meaning and origins of ideas such as ‘rhetoric’, ‘natural law’, and ‘positivism’. It was great to get an outline of the various literary techniques, and then ‘hunting’ for them in quotes from law related literature. I was unfamiliar with many of these. I liked deconstructing the difficult piece of writing and then discussing the different approaches to arrive at its meaning. This has broadened the way I read case law. I also found it useful identifying the various styles of judgments (as per Cardozo).

