

Foreword—and Forward!: Toward the Felicitous Relationship of Words and Ideas

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I.

It is my true privilege to introduce to you, its first audience, both *Blackacre*-the-volume—here, I get to say something about the words on the pages, each an invitation to its own transcription of meaning, its own capture of ideas—and *Blackacre*-the-project: something that a devoted band of just three students found the inspiration and the energy, *ex nihilo*, to create. But *Blackacre* both is and is not an example of creation “*ex nihilo*,” as I shall go on to suggest.

On the one hand, Ben and Matt and Meera have, with the benediction of our Dean and *Blackacre*'s generous initial sponsors, breathed into being a journal of a new and special sort, one that has not existed at this Law School ever before: a journal that is intended to serve as a forum for newly-made literature and for the exchange of ideas. On behalf of all of us who have had some relation to its making, I hereby welcome its birth.

But what is as exciting as the fact of its creation is the discovery that underlies the creation of the journal. Here, then, is what has turned out to be “on the other hand”—the part of the effort that is just the opposite of “*ex nihilo*,” as it were. For when Ben and Matt and Meera went out to learn whether there was interest within the Law School community in the existence of a journal such as this, they found within our midst poets and essayists and fiction writers already hard at work, hewing meaning and significance out of the rocky substance that language is when it has to be split apart and crafted, word by solitary word, into hand-made artifacts of the unnatural realm of ideas—artifacts that are intended to be far greater than the sum of their individual, and individualistic, parts.

These three students, who have created the architecture of the journal in the act of shaping its substance, made a wise decision when they uncovered these individual sites of activity. They decided to constitute *Blackacre* as a forum of expression for a community of contribu-

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tors that would not only consist of the most obvious candidates—that is, current students and faculty (As Claude Rains’s character says to Humphrey Bogart’s at the conclusion of *Casablanca*, “Round up the usual suspects!”). They decided, instead, to solicit the participation of the alumni body of the Law School and also our staff. In this way, they chose to send a message that no other textual artifact of our community’s existence does. It is that this new journal stands for the proposition that, in the essential realm of ideas and their expression, this law school is a broadly inclusive and inclusionary place. A senior member of our faculty, Professor Jack Getman, has long been involved in the campaign to inculcate this very idea. It is not surprising that the editor-creators of *Blackacre* have looked to him as a source of inspiration and that he has smiled on their ambitions by including some of his own fiction here.

In yet another way, our editors have meant for us to understand that *Blackacre* is intended as a friendly forum for ideas. Drawing on the interview format of an inspiring and illustrious progenitor, *The Paris Review*, they have sought out Dean Powers, as well as Professors Philip Bobbitt and Guy Wellborn, and have not only rendered into lively textual form their highly personal—and (to anthropomorphize the resultant utterances) personable—visits; they have depicted the settings for each of the interviews in the very manner of *The Review*.

The interviews manage, thusly, to accomplish a lot. Stylistically—and self-consciously—they trace out the way that all reenactments of literary form stand on the shoulders of the prior art: Our civilization re-creates itself in just this ceaseless way. But what is interesting about the editor’s choice to re-enact the manner in which George Plimpton, *The Review*’s founding and near-eternal editor, perfected his craft is that our editors have done so in such a light-handed and good-natured way.

Differently than Plimpton himself, who famously turned his own presence into an insistent announcement of just that, they set out to have it both ways, calling attention, as did he, to the fact that the interview is its very own literary form, while at the same time standing back so as to allow each of their subjects to have his own day. And that is what Dean Powers and Professors Bobbitt and Wellborn have fashioned, each to his own taste. Anyone who has made their individual acquaintances, and those who have not had that pleasure to date, can easily visit with each of them, and with the special relationships that each of them has to literature, to writing, and to the arts—now memorialized on the printed page.

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Only an interviewer who has the wisdom and good grace to know when and how to let his or her subject take charge can accomplish something as faithful to its subject as are each of the textual representations of these three pillars of our Law School community that appear here. By contrast, the skill that it takes to accomplish this feat seems, within the popular press, at least, to be either a dying or a rejected art. Just as I hope that *Blackacre*-the-project continues after this issue, I hope that the interview format, with its generosity toward the live/idiosyncratic subject, continues to be employed and that it continues to be used this well.

Similarly, I hope that the “Outlines” section continues on. It, in addition to the interviews, offers a special opportunity to learn about someone who is one of us but whose literary and cultural tastes we might not know. Here, we encounter the famously engaging Professor Johanson in a new and interesting way. (I should add that the editors generously invited me to create an “Outline” of myself in the manner of Professor Johanson’s. But I chose to abstain from the formidable pleasures of such an undertaking in order to attempt the synthesis of the journal’s methods, contents, and larger purposes—as I conceive them—that they have, instead, invited me to present here.)

II.

What I want now to add, as a feature of the congratulations I mean first and foremost to offer, is, perhaps, obvious, when one surveys the landscape of materials that make up this introductory issue of the journal as it stands. I begin by observing that the cornucopia of fiction and poetry that appears here does just exactly what it should. It presents literary effort as a living art. It offers the sense that literature grows as the grass grows—everywhere and underfoot. But like grass, to be luxuriant and to nurture the senses, it needs not merely to be planted but to be cared for, as well.

The selection of home-grown literature that we find in *Blackacre* (we will walk past the fact that its hip name is, for the purpose of my immediate metaphor, infelicitous) offers what contemporary literature does when it provides nurture for the sensibilities, both for those who create it and for those who choose to lie on a bed of literature and experience the field. Its diversity—including the ways that the various pieces respond to the boundaries of form—offer their own layer of testimony to the catholicity of contemporary life and taste. (See this attractive fact of our existence further exemplified in the way that Dean Powers, in his interview, describes his personal cornucopia of literary tastes, from classic Greek thought and biblical hermeneutics to a fa-

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mous “Pop Zen” novel, as well as lighter fare.) So, different bits of writing and of referenced readings point in the direction of a bounteous diversity of different tastes, signifying that the liberatory judgments of both writers and readers are the order of the day.

These sections remind us, too, how plastic language is and how accomplished is the English language at satisfying the shared desire of contemporary writers for linguistic plasticity—a factor related both to the polygenesis of English and to its historic receptivity to change. Together with the rest of the volume, the fiction and poetry entries suggest to us how fortunate we are to have as our expressive vehicle a language as nimble and responsive as English is.

I am apt to think that poetry serves as the ambassador of this fact more naturally than does any other genre of literature: Try out even this one journal’s samples amongst the various generic literary types—a kind of natural experiment—and see whether you agree. But, then, I wasn’t straying outside the literary terrain that the editors have chosen to occupy when I encountered that thought. If, instead, I leap the journal’s fence, I can take my question on the road and ask whether the lyrics of contemporary music, for example, not only count as an exciting literary form but whether they might be taken to override the case of contemporary poetry as the most happening place for the English language to keep on bursting alive.

This question causes me to laugh at my own indiscretion—a lawyer’s indiscretion, one can see from a mile away—for it attempts to embrace a possible relationship between literary forms by styling as the relevant question, “Which of two genres most fulsomely exploits the literary capacities of the English language?”—thus setting up what amounts to a contest between two claimants for a prize.

Such a construct—the figure and ground of a lawsuit between contestants over a singular win/lose result—is not the exclusive domain of those who are trained in the law. Literary theorists and popular essayists, no less than legal theorists—and novice legal academics, in spades!—often seek to certify the victorious nature of their analytic judgments by setting them within a similarly adversarial frame (By way of contrast, one notes that many of the most acclaimed legal theorists trumpet self-confidence in their ideas by failing to truck with, or even to point through citation toward any seriously competitive views.). Indeed, there may be nothing inherently legal about bilateral contests. Think of how many sports rely on the structure of competitive two-team contests as the way to determine merit in victory—not the only kind of merit that sports both exemplify and instill, but merit-tested, all

the same, through competition under the guidance of impartial and impartially administered rules in the determination of a single, ultimate prize. Maybe humans are hard-wired to prefer competitions. Or, maybe just some humans—those who become athletes and lawyers and top chefs (and soldiers?)—are.

But does a preference for competitive modes of existence imply that those who think like lawyers, even those who *train* to think like lawyers have doomed themselves to a life of the mind in which one *cannot escape* from thinking like a lawyer—that is, in adversarial terms? First-year law students often complain that modes of thought less narrow, focused, and analytic—perhaps more intuitive and less tethered to self-conscious modes of reasoning—seem frozen out by the driven nature of the pedagogic exercise and the intellectual processes it privileges. They worry, often out loud, that becoming a lawyer will demand that they check entire aspects of their humanity at the door. I myself had a teacher, an eminent member of the legal professoriate, who proclaimed, early in my own first year of law school, that this fear deserved to operate as a fact. His *ex cathedra* pronouncement was simple: By the time we became lawyers, he prophesied, we would never be able to read poetry again. None of us who heard that chilling news thought he was advertising to the demands on a lawyer's time. He might as well have been saying that to be a lawyer is to surrender the ability to live and to love. We took it that, by extension, maybe he was.

In this volume, both contributors from our distinguished staff of writing instructors, Professors LeClercq and Schiess, put the case for the narrowing-of-the-person in other, but equally savaging terms. They suggest that law students might find themselves exhibiting tendencies toward verbal artifice and—still worse—pomposity by internalizing the old, stiff, elitist language of the law, possibly from their professors themselves! Their comments remain far less chilling than those of my old professor, hurling his prophecy down at us from atop his self-certain mount. At the least, LeClercq and Schiess lampoon the possibility. They suggest and treat the issue as one that resides within the domain of choice: You, the law student can lick any tendency toward the silly, over-inflated use of lawyer lingo—just get with the program and nip that tendency in the bud!

This still leaves open the question that induces its own kind of terror in law students. Not the terror of becoming “a pompous ass”, as Dickens famously charged, referring to the law itself, turned back again on lawyers by our writing instructors here; not the specific horror that my own professor attempted to instill in us—he whom I now see as exhibiting just a touch of sadism in his casually threatening remark; but

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the fear that, to be a good law student and lawyer, one must—as repeated earlier—check some portion of one’s humanity at the door.

Some law students find solace and more—an implicit way of contesting against the sense that law school pedagogy is so hegemonic in its demands as to be totalizing—in the refreshments offered by competitive intramural sports. As my earlier pairing meant to imply, I find this move not just interesting but understandable, as law and sports seem, at the level of deep structure, so closely allied. This pause that refreshes is, on my hypothesis, barely a pause at all, though it is certainly competition in a different key and tone, given the relative sense of inconsequence with which these games—including the special sport of student-faculty games—are played. There is also—and here may be the crucial distinction between pedagogy and participatory sports—the overweening knowledge that to take up a sport for fun while in law school is to *choose* and to *control* an aspect of one’s life. And it is these very aspects of the self that seem under threat, a threat that is further consolidated by the insistent demands for intellectual rigor of the pedagogy itself.

What, then, is the relationship between the strictures of law study/law practice and the recreational pleasures of the mind, exemplified, in our pages, by a desire to read in the various literatures of what we might call, for want of a general term, the craft tradition—the literatures exemplified most particularly in this volume of *Blackacre* by poetry and fiction but which also include essays—such as the one that I am writing, one of the several non-fiction forms? Can reading in the craft literatures or engaging with the plastic arts—say, watching films—function to restore a sense of the whole, choosing person to those who have also chosen a lifetime engagement with the law? Can literature or film play the same role, that is, as participation in—or even watching and following—sports?

An answer floats through *Blackacre*, unannounced by the explicit presence of the question. And that answer includes a resounding “Yes!” It gets registered, by way of stout example, in the relish with which Professor Wellborn embraces film, and not just film as a medium but the films that he makes it clear he truly loves. His is the direct, revelatory kind of engagement with one of the arts of a person-who-happens-to-be-a-lawyer, not a relationship that appears to be, or is being claimed to be instrumental, involving the intentional tie to some aspect of the broader culture created and maintained *because* a person is a lawyer, or because the lawyer seeks to be a *better* lawyer than she believes herself to be or, equally instrumentally, because a lawyer re-

quires, as a choosing self: a quick escape from the confines of the professional day.

Other responses published in the volume take up the burden of my question by implicitly reformulating it, looking, then, past the relationship between a lawyer's necessary and, therefore, unquestioned engagement with legal writing and legal analysis that our writing instructors pursue and, instead, toward the engagement of each person *as* a person with the craft literatures—or with the art of crafting literature—as an activity—just like watching or playing sports—in itself. It is in this way—through the direct art of engagement—that Dean Powers engages in a kind of virtual advocacy for the wide pursuit of non-legal literacy by lawyers and by undergraduates, as well. He treats the undertaking as a kind of exploratory enterprise for the whole person—a pursuit that, like carpentry or the making of music or the study and practice of architecture, helps both to extend the spirit and unify the mind and body in the doing of a thing.

Intriguingly, Professor Bobbitt speaks luminously of his engagement in the process of planning “the architecture” of his books, which so intriguingly straddle the borders of law and the expository literatures of the craft tradition. He describes his efforts to *draw* the relationships among the parts, a process through which—like hewing individual words from the rock of language—he finds the best method for composing the order of the ideas that he has chosen to employ.

The process of selection and mobilization that Professor Bobbitt describes in his efforts to marry ideas to language is the same root project that engages—or, *should* engage—the attention of lawyers and judges who, after all, have committed themselves not only to living by their wits but to doing so in a manner that only words can convey. Closely related is a matter that Professor Stanley Johanson makes it a prominent point to raise in his plea to those who draft wills and trusts. Employ clear and straightforward language, he enjoins these drafters, so that the instruments that you shape for the benefit of your clients are ones that they can read and understand. Here is the same message being carried across the pages of this volume by our writing instructors. It is the same message that Professor Bobbitt's prose must embody when he sets out to convey a provocative thesis about the relationship between law and war, between history and the politics of governance to the considerable audience that his ambitions would tempt.

It is interesting—and more than a little curious—that law students and legal draftspersons need to be coaxed into recognizing what every writer in the craft tradition takes on as the burden of art: that whether

the writing be a single line of poetry or a sentence in a short story, a novel, or an essay, each word, each phrase is to be dispatched on the same mission. And that mission is to capture for his or her own purposes in making art the attention of every person in the widest, or truest audience that the writer has set out to find.

Professor Johanson means us to understand, though he does not invoke higher authority for the purpose, that the drafter of a will or a trust is attending to the requirements of good professionalism, not coveting the attentions of his or her desired audience, when the drafting is accomplished with the client's understanding in mind. I would like to suggest that the lawyer who has trained himself to be a careful expositor—one who has come to value the kinds of judgments that the selective deployment of purposive language involves—is likely to apprehend an ethical charge that implicates the use of language in the client's best interest, whatever the source of that charge, and be well-able to practice its precepts, if only the practice environment allows.

III.

If there is salience to the notion that lawyers owe their clients an obligation of perspicuous meaning, as Professor Johanson suggests, should a similar obligation obtain in the realm of legislative drafting, even if the ethics of audience cannot be hung on a signpost as obvious as the lawyer-client peg? None of the contributors to this first volume of *Blackacre* have reached that far. Whether conceived as a matter of political obligation or, perhaps, of democratic virtue, instead, I hope that the subject of language in the service of public meaning will receive our future journal's address.

A certain Supreme Court justice has, as a part of his effort to cleave legislative interpretation from legislative history, trained a narrow telescope of his own manufacture on the plain meaning of statutes as a function of what dictionaries have to say about words. I wonder whether the intellectual aggression with which he forays into the meaning of meaning and the ideology of judicial interpretation are conducted has caused others, with differently-motivated projects, to back away from this turf.

In the meanwhile, a profound irony attends the insistence on a rigidly-bounded jurisprudence of plain meaning at a time when the language of legislation has become increasingly arcane and obscure. But the irony of the situation casts its shadow over the subject of judicial interpretation in more than this obvious way, for the more that political determinations are cast into legal molds that cannot, and do not seem

intended to be readily understood, the more are courts, which tend to write in a far more socially penetrant way, treated as the objects of obsessive public scrutiny—scrutiny that the relative transparency of their roles and their language leaves them unfairly isolated to bear.

As students of comparative law well know, the burden of this circumstance is not shared by at least the lower courts within the civil law tradition. It is the appellate courts of the United States, with their self-imposed norms of public justification, that are constantly available to the kind of political scourings that have become an ongoing feature of their existence, most especially in these parlous times. It seems to me that the majoritarian outreach—both as intended and as accomplished—of the judicial effort to explain the binding rules of our constitutional democracy to ourselves leaves courts extraordinarily vulnerable to the polity's internal cast of critics. The more is this so, as I have offered, on account of the difficulty in attaching public accountability to the material actions of what legislative bodies do.

But my claim as to legislatures, courts, and language has gotten ahead of my simple invitation to future contributors to muse out loud about these themes. Why not assume, then, that I've been merely heating some water under a possible pot of debate?

IV.

There is no reason to assume that I *intend* for *Blackacre* to encourage, so much as to be open to the initiation of debate or, by other means, to foster the direct exchange of views. That is but one turn among many that further editions could take. In this final section, I want to mention some of the directions that our three editor-creators are hoping that their journal will maintain or reach out further to include. And then I will mention a closing thought or two of my own.

I decided to interview Ben, Matt and Meera in order to be certain that their views about the origins and the future of *Blackacre* found some way into print. My technique was decidedly less stylish than their own referential use of *The Paris Review*. My sole device was to ask them why the journal and where it should go from here. These ideas emerged:

First, as to origin: Our three editor-creators shared—and continue to share—the view that *Blackacre* and other forums for creative self-expression are necessary adjuncts of the law school experience. The beckoning presence of such forums—in this case, for those who want to write creatively or read creative writing or both—helps law students to recognize that the tutelary demands that the study of law imposes need

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not narrow their interests or their passions. Instead, students who wish to engage in these activities can now find themselves with an outlet—much as students do when they join a pick-up basketball game, or sign on for touch football, or appear in, or help to mount the Law School show. As one of the three went on to observe, “People need a creative outlet.” To which I added: In a community the size of ours, people need a *lot* of outlets, or, at least, a considerable variety of types.

What is more, we soon agreed, no one should have to, or even necessarily want to participate in just one mode of activity for three years. To which I add: The Greek ideals of moderation in all things and healthy minds in healthy bodies are well worth keeping in mind. Indeed, *eudemonia*, the Aristotelian ideal of happiness, or well-being, is taken to be the result of an active *and* rational life. I take this to mean that playing a participatory sport as well as spectating at some are to be encouraged, along with writing a short story or a novel (maybe not *right* before exams!) and going to see some films. Enthusiastic engagements in such enterprises are not the exclusive province of professors or deans. Our editor-creators intend for *Blackacre* to endorse the creative process for absolutely everyone who spends time in a law school, but most especially for their peers.

Next, they want to make it clear—and they want their journal to keep on making it clear—that learning to think and write like a lawyer need not “ruin” the way that you write. Conversely, the ability to write well and with attention to craft carries with it naught but positive implications for the study and the practice of law. Yet, in teaching the basics of competent legal analytics, there is a pervasive sense of personal displacement, rather than the integration of personal voice. As much as anything else about the first-year experience, this sense of the interdiction of voice causes a profound sensation of loss which students—including our editors—do not see sufficient reason to accept.

The question of what elements of the craft tradition could be integrated into the Law School’s writing program remains in need of address. What is hoped for, on the other hand, is clear: an additional tier or two for the program, offered after the first year, with participation made optional, so that sophisticated assignments that include elements of “creativity, voice, and style, along with attention to detail” can be worked through. Student journals like *Blackacre*, then, can be additive; but they should not be expected to pick up all the slack. Nor should they have to contend against the view that the writing program’s orthodoxies seems to invite (or at least, does nothing to discourage)—the view that unusual—rather than usual—writing skills are to be taken as normatively—and, therefore, as literally—out of bounds.

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There is, it seems to me—and I stand together with Ben and Matt and Meera on this point—a separate basis on which the community should want to endorse the teaching of legal writing, as well as the development of student writing skills, in a multiplicity of forms. Writing focuses the mind. It fuses abstract with practical skills; conceptual with linguistic skills; creative with analytic skills; it adds expressive fluency; and it undergirds literacy—a skill that every lawyer needs, regardless of how much or how well she writes. Certain practices that the internet has brought into the classroom do just the opposite of all of this. They are cognitively disintegrative. They serve to distract the user and those who bear unwitting witness to the use. They beckon with the seductive suggestion that a novice law student can absorb new ideas, if not new forms of knowledge, and can do so in intellectually rigorous ways while also sending and receiving messages extraneous to the pedagogical undertaking, watching a movie, or buying a pair of shoes.

Of course, it is beyond question that the life of judicial clerks and beginning lawyers, to name just two categories of intended endeavor, will effectively render the split-screen, task-divisive human consciousness unfit for the particular purpose at hand. Yet, the education that may well be more intellectually demanding than the careers for which it prepares is being challenged to incorporate this new way of being and the domain of choice that it entails. By comparison, old-fashioned, singularly-focused activities such as reading, writing, carpentry, drawing, and playing sports are all of a piece. Their affinity consists of the cognitive and higher-order integration that they require.

I cannot (yet) demonstrate, as a matter of hard science that disintegrative task engagement must prove damaging to the learning of law. Certainly, there are issues of degree. But I am sufficiently cavalier, or sufficiently Burkean, as to wager that the faculties of mind that have traditionally been demonstrated to do the work that legal study requires will turn in reliably superior performances, in the end.

On this admittedly astringent basis, then, I add a final cheer for *Blackacre* and I salute the singularity of purpose with which our three students fused their determination, energy, and enthusiasm to bring their and the Law School's new journal all the way home. Their project seems likely to be good for you, good for us, good for lawyers, and good for law.