NOTE

"Criticising the Jndges": Some Preliminary Reflections on Style

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Taking as his point of departure the not infrequent allusions in legal commentary to the importance of "literary qualities" in judicial writing, the author attempts to illustrate an approach to the stylistic criticism of judgments. At the outset, he suggests that the intimate relationship of form to content makes style a significant element in meaning, and argues that legal commentators' observations on style are too often rather superficial, impressionistic, or question-begging. He then applies a fairly detailed linguistic and literary analysis to three very brief samples of judicial prose, and considers how aspects of style contribute to the effects the passages have. He suggests that stylistic criticism should recognize that whether a writer's style is "good" or "bad" depends on what effects the writer is trying to create, and that before making evaluative statements about style one has to be able to identify and describe the elements of style and their influence on "meaning".

Partant des fréquentes allusions faites dans les commentaires juridiques quant à l'importance des « qualités littéraires » dans l'écriture juridique, l'auteur tente d'illustrer une approche de la critique stylistique de jugements. Dans un premier temps, il soutient que le lien intrinsèque entre la forme et le fond fait du style un élément important de la signification, et prétend que les observations stylistiques des commentateurs sont trop souvent superficielles ou impressionnistes, ou qu'elles prennent pour acquis des questions non résolues. Il effectue ensuite une analyse littéraire et linguistique détaillée de trois brefs exemples de prose judiciaire, et cherche à déterminer l'apport du style à l'effet créé par ces passages. Il prétend que la critique stylistique devrait reconnaître que la qualité plus ou moins bonne du style d'un auteur dépend de l'effet que l'auteur veut donner à ce qu'il écrit, et qu'avant d'émettre des affirmations qualitatives sur le style, il faut être à même d'identifier et de décrire les éléments de style et leur influence sur la signification d'un texte.

I. Introduction

I take the first part of my title from an article by Robert Martin, published in the McGill Law Journal in 1982.[1] Martin advocates a critical approach to judicial opimons and identifies three factors that should be considered in judging judgments: logical consistency, literary quality, and responsiveness to social issues.

I aın concerned here with the second of these — "literary quality" — and, when I mention Martin, I should be taken to be referring only to the brief section of his article where he introduces this issue. Indeed, he says enough only to indicate that the literary qualities of judgments are important and to provoke a response — perhaps like mine here.

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[1] R. Martin, "Criticising the Judges" (1982) 28 McGill L.J. 1.

The first question that might arise is whether literary quality, or style, is really very important. After all, what should concern us is what judges do — that is, their actual decisions — or at most *what* they say, not *how* they say it. One response to this is, simply, that how we say something *is* what we say. Thus, for example, William O'Barr points to "the inseparability of form and content" and says emphatically, "FORM COMMUNICATES".[2] All the reader has before him is the text, and it may be convincingly argued that a paraphrase is inevitably an inadequate representation of what the writer said.[3]

If form does indeed communicate, a sensitivity to matters of style can be illuminating in at least two important ways.

First, it permits the reader (or hearer) to recognize intentional rhetorical strategies used by the writer to create the effects that are part of a text's meaning. The ability to read a rhetorical structure (as opposed to simply a logical one) critically is particularly valuable in law, which S.I. Hayakawa includes among the "hortatory" professions.[4] Thus, even judges, in so far as they are writing "opinions", are attempting to persuade — persuasion is inevitably involved with stylistic choice. Even when a writer or speaker is not thoughtfully and deliberately choosing each word, he may adopt a rhetorical strategy by shifting, in certain circumstances, almost automatically into a particular style of discourse. For example, there are probably times when lawyers unreflectively "talk like lawyers". The auditor who can read the meaning of the style is likely to be well placed to apprehend what it is that he is being asked to accept. As Berel Lang has observed:

> Style is not everything in the text, but there is nothing that is not touched by it — and this means that unless we read for style consciously, with awareness

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[2]W.M. O'Barr, *Linguistic Evidence: Language, Power, and Strategy in the Courtroom* (New York: Academic Press, 1982) at 2 and 1.

[3]For the classic statement of this is relation to poetry, see C. Brooks, *The Well Wrought Urn: Studies in the Structure of Poetry* (New York: Reynal & Hitchcock, 1947) c. 11 entitled "The Heresy of Paraphrase". For similar observations in relation to philosophy, see L.B. Brown, "Philosophy, Rhetoric, and Style" (1980) 63 Monist 425; and B. Lang, "Towards a Poetics of Philosophical Discourse" (1980) 63 Monist 445. In the latter article, Lang discusses two ways in which form may determine content. The first would be by "corroborating" or reinforcing other features — notably, "theme". Thus, one selects stylistic devices to say what one wants to say more effectively. The second way is more radical, involving "determination" in the strict sense, of meaning by form. That is, *supra* at 457, "content cannot even be formulated independently of the stylistic features."

[4]S.I. Hayakawa, "Semantics, Law, and 'Priestly-Minded Men'" (1958) 9 W. Res. L. Rev. 176 at 179. See also M.E. Gold, "The Mask of Objectivity: Politics and Rhetoric in the Supreme Court of Canada" (1985) 7 Sup. Ct L. Rev. 455 at 455; he makes the point that the "centrality of argumentation", especially in judicial opinions, invites rhetorical analyses.

> of its role in shaping the process of reading, we shall be reading style anyway, but as nature — our *own* nature.[5]

The other use of a critical awareness of style is that it can provide an insight into the quality of the writer's or speaker's *thought.* One often hears statements such as "X had a good idea, but he couldn't explain it" or "X didn't express himself clearly, but this is what he meant, or what he was thinking". Such statements assume that thought and expression are discrete processes. There are those, however, who argue that language is not merely the vehicle by which we give expression to our thoughts; it is the mode in which we think. "How", the saying goes, "do I know what I think until I see what I say?" The implication of this view is that vagueness, confusion, awkwardness and staleness of expression correspond to similar qualities of mind. This seems to be much of the burden of George Orwell's article "Politics and the English Language", as, for example, when he says of the writer who (inadvertently) uses worn-out or mixed metaphors that he "is not seeing a mental image of the objects he is naming; in other words he is not really thinking."[6] James Lindgren has recently reiterated this view: "This, then, is the saddest consequence of bad writing — it hides, distorts, and ultimately prevents thought."[7] If such a view is correct, then how we say something is very significant indeed, and, for example, clarity of expression can be seen as an essential element in clarity of thought.

Perhaps not everyone would agree that the relationship between expression and thought is as intimate as Orwell and Lindgren suggest. Nevertheless, one frequently hears lawyers expressing concern — for whatever reason — about the style of legal writing and appealing for its improvement. Thus, Martin looks (generally in vain) for "precision, clarity, elegance of expression" in judgments;[8] J.O. Wilson tells judges that their writing should be "lucid, concise and pungent";[9] and Roman Komar devotes twenty pages of his recent book to giving judges advice on how to improve their writing.[10] Again, although legal commentators do not always explain why style is important — for clarity of thought, for clarity of communication, for efficiency, for euphony, for persuasive effect — there seems to be a consensus about the desirability of "good" writing in legal contexts.

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[5]Lang, *supra,* note 3 at 460-61.

[6]In G. Orwell, *Shooting an Elephant and Other Essays* (New York: Harcourt, Brace & World, 1950) 77 at 86.

[7]J. Lindgren, "Style Matters: A Review Essay on Legal Writing" (1982) 92 Yale L.J. 161 at 187.

[8]*Supra,* note 1 at 7.

[9]J.O. Wilson, *A Book for Judges* (Ottawa: Supply & Services Canada, 1980) at 84.

[10]R.N. Komar, *Reasons for Judgment: A Handbook for Judges and Other Judicial Officers* (Toronto: Butterworths, 1980).

A significant difficulty facing legal literary critics is that they have not always succeeded in working out their standards of judgment very precisely. Indeed, Martin observes that "[t]here are no accepted criteria of legal literary criticism",[11] a point he apparently takes from W. Twining: "A striking feature of legal literature in the western world is that there appears to be a total absence of any coherent theory or set of standards for legal literary criticism."[12]

The point can be illustrated briefly by sampling Komar's approach. He begins his discussion by listing several examples of bad judicial writing, but he does not explain what is wrong with them. Instead, he relies on *res ipsa loquitur* and a general statement about "syntax". Later, he advises judges to use British spelling ("gaol") in preference to American ("jail"), but does not explain why. What theory of language supports retaining the British form? Is the archaic flavour of "gaol" more appropriate to solemn legal discourse than the trendy and vulgar "jail"? Another piece of advice is that judges should keep a thesaurus nearby. While extending one's vocabulary is a commendable aim, the practice of "looking up synonyms" carries with it the danger that the writer will use words he has not really assimilated. One does not develop vocabulary by memorizing synonyms, but by reading, seeing words in contexts, and grasping their connotations. Komar's own vocabulary — at least his critical vocabulary — is in places rather uncertain. What he is discussing, one might assume, is "rhetoric"; however, when he uses this word, he uses it in an inexact colloquial sense: "Rhetoric may be excusable in a lawyer, but a judge should be able to express views that transcend the hostilities of the parties."[13]

One discerns in these examples a number of tendencies that are not uncommon in lawyers' comments on writing. Among these is a kind of critical inarticulateness: "I know that something is wrong with this; here, look at it; see what I mean?"[14] Another tendency is to adhere to rules ("use British spelling") which may be quite arbitrary. Yet another is the notion

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[11]*Supra*, note 1 at 6.

[12]W. Twining, "The Concept of a National Legal Literature" in W. Twining & J. Uglow, eds, *Legal Literature in Small Jurisdictions* (London: Commonwealth Secretariat, 1981) 7 at 10.

[13]Komar, *supra*, note 10 at 40. Gold, *supra*, note 4 at 457, for example, notes that this "popular" sense of rhetoric "long has been abandoned in the field of rhetorical theory and criticism".

[14]See, for example, Martin's comment on the passages discussed below, and the catalogue of examples of "fine" writing appended to G.J. Miller, "On Legal Style" (1955) 43 Ky L.J. 235. Even Lindgren, who displays a detailed consciousness of "style matters", is occasionally rather imprecise — for example, when he says, *supra*, note 7 at 162: "This sentence is all bumps." For an argument that describing the style of a text requires familiarity with a specific, accurate and coherent account of language, see M.A.K. Halliday, "Descriptive Linguistics in Literary Studies" in D.C. Freeman, ed., *Linguistics and Literary Style* (New York: Holt, Rinehart & Winston, 1970) 57.

that writing can be made more impressive by ornamentation ("consult your thesaurus so that you can spruce up your composition with some unusual diction"). The obverse of this tendency is a suspicion of "rhetoric", sometimes thought of as "flowery language"; hence, perhaps, Komar's use of the term as a pejorative.

A criticism such as Komar's is not particularly helpful. To be sure, it often includes bits of good advice or draws our attention to unhappy constructions. But its successes tend to be haphazard and insufficiently rationalized. More seriously, it often regards style as something that is pasted on to content — hence, the reliance on disparate "rules" or "tips for good writing". This fails to give adequate recognition to rhetorical choice as an intellectual activity, as opposed to merely a technical one.[15]

II. Illustrating an Approach to Style

Perhaps what is required of the critic is, as Twining says, "a set of qualitative standards respecting scholarship and style, which he is prepared to articulate and defend".[16] If one cannot articulate such a set of standards[17] — and I am not sure that "style" is amenable to such prescriptions — one should at least be able to illustrate a critical approach which demonstrates the kinds of factors which must be considered in stylistic analysis. This, in a provisional way, I hope to do by more or less detailed reference to three pieces of judicial writing, two of them by judges whose style Martin deplores and one by a judge whose style he admires.

The two examples of "bad" judicial writing are the brief extracts cited by Martin from Laskin J. and Rand J., both of whom, Martin says, "write abysmally".[18] These examples, and this observation, give rise to several questions. One of these is: "Is this really bad writing?" Another: "If so, why — or how?" Further: "Are both passages bad in the same way?" Perhaps most troubling is the question: "How do we reconcile the abysmal writing of these two judges with their eminence — some might say their greatness?" If Martin is right, are they not monuments to the fact that style is really not very important? I do not propose to venture answers to these last two queries; rather, I want to concentrate on the qualities of the writing.

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[15]I should except from these general comments Gold's study, *supra*, note 4, which is a relatively sophisticated treatment of the effect of form on meaning.

[16]*Supra*, note 12 at 10.

[17]For some discussion of critical standards in the legal context, see W.E. Nelson, "Standards of Criticism" (1982) 60 Tex. L. Rev. 447; and G.E. White, "The Text, Interpretation and Critical Standards" (1982) 60 Tex. L. Rev. 569.

[18]*Supra*, note 1 at 7.

As a preliminary observation, I would note that we need not take Martin at his word. Although he does not in his brief comments on "literary quality" pretend to elaborate a critical theory, he says enough to raise doubts about his own judgment. For one thing, he opines that "an excessive attachment to formalism explains many of the literary clinkers dropped by the Supreme Court of Canada."[19] This is tantalizing, but perhaps too facile. The term "formalism" in this context requires, I think, some definition — particularly when the only two examples that Martin cites are from the writings of judges who are arguably less "formalistic" than most.[20] Further, Martin's scholarship sometimes seems less meticulous than it might have been. He says: "In 1960 J.G. Wetter referred to Canadian judicial writing as 'an exercise in legal barbarism.'"[21] He takes this observation from Komar, who seems to have got it slightly wrong from Wetter.[22] Wetter uses the case of *Nova Mink Ltd* v. *Trans-Canada Airlines*,[23] in the Nova Scotia Supreme Court, as an example of Canadian legal writing, and says: "The case as a whole is an exercice [*sic*] in legal barbarism ... ."[24] It is not clear that Wetter meant to apply the epithet to the entire corpus of Canadian judicial composition rather than simply to the style of *that* judgment.[25] And finally, Martin does not explain why the two passages cited are bad writing; he merely asserts that they are, and quotes them.

A second preliminary observation is that I will be looking at the cited passages in isolation and thus effectively ignoring their contexts. An examination of the complete judgments in which they occur might alter our

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[19]*Ibid.* at 6 n. 14.

[20]Perhaps Martin has in mind the kind of problem identified by K.N. Llewellyn in "On the Good, the True, the Beautiful, in Law" (1941-42) 9 U. Chi. L. Rev. 224 at 241: "But what produces confusion, persistent and inevitable, is to *act* in terms of the felt reason of the situation — i.e., in the early style — but to *talk* in terms of the formal style." This is an intriguing critical observation, but Martin's point remains obscure. Gold, *supra*, note 4 at 486ff., discusses cogently some of the rhetorical effects of "formalism".

[21]*Supra*, note 1 at 7.

[22]Komar, *supra*, note 10 at 29, writes that according to Wetter the tradition of Canadian judicial writing "has degenerated in recent times to 'an exercise in legal barbarism'". Komar is referring to J.G. Wetter, *The Styles of Appellate Judicial Opinions: A Case Study in Comparative Law* (Leyden: A.W. Sythoff, 1960).

[23](1951), [1951] 2 D.L.R. 241, 26 M.P.R. 389 (N.S.S.C.).

[24]Wetter, *supra*, note 22 at 313.

[25]Although he does say that judicial styles in a given jurisdiction "possess remarkable uniformity". Such an observation would have to be subjected to careful scrutiny. As my discussions of the Laskin and Rand passages below indicate, judicial styles can differ markedly from judge to judge.

assessment of the passages.[26] Moreover, any assertion that they are representative of the judges' writing would require a fairly comprehensive sampling of each judge's entire output. But if we are to begin this critical enterprise, we must begin modestly, with brief units of composition. If we cannot identify and articulate the rhetorical qualities of sentences, then we have little hope of coherently judging larger compositions. If we cannot describe these qualities with some precision, we will be left pointing to extracts and attaching such vague, impressionistic, and often subjective, descriptors as "elegant" and "abysmal" to them.

A. The Laskin Passage

I shall turn first to the quotation from Laskin J.'s judgment in *R.* v. *Burnshine*,[27] partly because it is susceptible to a rather more "mechanical" or simply "grammatical" criticism than the Rand passage and partly because there is probably less at stake in criticizing it.

> The process of construction must be related to prescriptions and standards under the *Canadian Bill of Rights* which, apart from the statute, might or might not be seen as relevant matters, and, even if seen as relevant, would lack the definition that they have as statutory directives.[28]

It would be nice to be able to begin an analysis of this sentence by referring to some undoubted critical criterion — for example, "comprehensibility".[29] Indeed, many critics of legal writing simply accept the premise that "clarity" or "simplicity" is *the* standard to apply.[30] I suspect that much of Martin's concern about the sentence is that it is difficult to follow, not because the "ideas" are complex, but because the expression is rather contorted.

However, we know that a writer may not intend to be readily comprehended or understood: witness some kinds of poetry. In such circumstances, "good" or "effective" writing is presumably that which achieves the obscurity or ambiguity the writer intends. One might want to believe that legal writing should never be thus designedly opaque, but this is by no means certain. Recall that "form communicates". Language signifies in different ways: words "mean" referentially, by standing for things, concepts, and so

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[26]In this regard, the complaint of, for example, Llewellyn, about even the stylistic distortion caused by removing a phrase or sentence from its context is well taken. See *supra*, note 20 at 229.

[27](1974), [1975] 1 S.C.R. 693, 44 D.L.R. (3d) 584 [hereinafter cited to S.C.R.].

[28]*Ibid.* at 713-14.

[29]See Nelson, *supra*, note 17 at 478-82.

[30]See, *e.g.*, R.C. Wydick, "Plain English for Lawyers" (1978) 66 Calif. L. Rev. 727; and D. Mellinkoff, *Legal Writing: Sense and Nonsense* (New York: Charles Scribner's Sons, 1982) at 140-44.

on; but they also "mean" by virtue of their formal features. Richard Jacobson gives some examples of this in the legal context.[31] The Latin sentence *qui facit per alium facit per se* is meaningful not only because it states a proposition, but because it is Latin, because it contains parallel structures and because it is rhythmic. Stating the proposition in this form gives it a ceremonial force that may be crucial to how legal discourse "means". Similarly, a long — some might say repetitious, redundant or complicated — list like "all manner of action or actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, trespasses, damages, judgments, executions, claims and demands whatsoever" signifies, apart from the referents of the individual words, exhaustiveness. The form manifests the meaning iconically.[32] Thus, although in one view a list like the foregoing manifests the characteristics of legal discourse that make it difficult to comprehend, from another perspective it conveys important messages about the law — for example, that it is precise and thorough. More cynically, one might say that an important quality of legal discourse is obscurity, for this helps to sustain the "mystery" which reinforces the authority of the law.

Apart from the question whether legal discourse should be comprehensible, there is another difficulty with invoking that criterion. Comprehension — and therefore comprehensibility — are subjective to the reader, and thus we still may not have the objective standard we are looking for. What is clear to one person may not be to another.[33]

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[31]R. Jacobson, "Law, Ritual, Absence: Towards a Semiology of Law" (1977) 9 U. Hartford Stud. in Literature 164.

[32]In some semiotic classifications, an icon is a sign that bears a natural resemblance to the thing it signifies — in contrast to a "symbol", whose relationship to the thing signified is arbitrary. See, *e.g.*, J. Lyons, *Semantics*, vol. 1 (Cambridge: Cambridge University Press, 1977) at 99ff. Thus, a long list, in its extent and multiplicity, formally resembles or represents comprehensiveness.

[33]Thus, for example, in the foreword to G.L. Gall, *The Canadian Legal System*, 2d ed. (Toronto: Carswell, 1983) at v, the Honourable Samuel Freedman writes: "Every page is written in clear, simple, translucent prose." Here is a passage from the book, *supra* at 5-6:

> Even if a novice, in embarking upon an examination of the legal process in Canada, subscribes to the basic notion that the law is systematic in nature, functioning as a continual process in the context of many interacting societal processes, this, in itself, does not render a totally accurate appreciation of the legal process in Canada. Aside from an understanding of the various roles of the persons in the legal system, of the institutions which form the basic structural components of that system, and of the various judicial attitudes which, through convention, essentially make the whole process operational, there is, however, one basic component, the absence of which will not allow a thorough understanding of the nature of the legal process. The roles of the persons who man the legal system, the various institutions within the system and the judicial attitudes which, through convention, make oper-

Having noted these difficulties, I shall nevertheless discuss the sentence in terms of its comprehensibility. For one thing, we can explore the question whether a piece of writing is intelligible without deciding whether it was intended to be. For another, although comprehension may be subjective, we can at least attempt to isolate features of writing that make it more or less clear. Further, focusing in the first place on comprehensibility or clarity — which might be regarded as primary or basic goals in communication — will permit us to consider competing rhetorical objectives.

O'Barr identifies as two characteristics of legal discourse which make it hard to understand "complex syntactic forms" and "abstruse vocabulary".[34] The observation is hardly original: indeed, it represents a conventional criticism of legal expression. But it directs our attention to two critical foci: syntax and diction — how sentences are put together, and the kinds of words that are used.

In terms of syntax the most noticeable characteristic of the Laskin sentence is that it is rather heavily "embedded". It consists, basically, of one independent clause (or "carrier sentence") and a long subordinate clause (or "insertion"). In grammarians' terms, this is, broadly, a "right-branching" construction: the main clause precedes the dependent clause.[35] O'Barr observes that "[m]ost English sentences ... tend to be right-branching" and that these are easiest for English speakers to process.[36] Problems arise, however, where — as here — there are further insertions besides the "primary" subordinate clause, especially where such insertions separate parts of their carrier clauses. As P.K. Saha remarks, such "syntactic nesting" creates difficulties "because nesting forces the brain to keep track of the initial part of the construction until the nested item has been absorbed and the balance of the construction is revealed."[37]

> ational that system, will all be discussed in subsequent chapters, but before those discussions, it is essential for the new student of law to appreciate this additional entity within the process. It refers to the judicial philosophy or jurisprudence which, depending upon the particular school of thought adopted by an individual, undoubtedly affects the way in which a judge judges, a prosecutor prosecutes, a lawyer defends or advocates, and the way in which every citizen views the law and the legal system.

I would have said that the convoluted syntax, repetition, inexact diction and indirection of this writing make it anything but "clear" and "simple". It might be said that Mr Justice Freedman's and my divergent assessments of this style demonstrate that "clarity" depends upon the reader. I would, however, be prepared to give detailed reasons why my position is "objectively" valid.

[34]*Supra*, note 2 at 27.

[35]See P.K. Saha, "A Modern View of Language" (1972) 23 Case W. Res. L. Rev. 318 at 348ff.

[36]*Supra*, note 2 at 27.

[37]*Supra*, note 35 at 351.

Let us look first at the main clause here: "The process of construction must be related to prescriptions and standards under the *Canadian Bill of Rights* ... ." One could analyze this clause into a number of underlying kernel sentences which, through insertion and coordination[38] (*e.g.* "prescriptions *and* standards"), go to make up this particular "surface structure".[39] I want to examine only the insertion "of construction", a prepositional phrase functioning as an adjective modifying "process". Analytically, it involves the incorporation of another statement ("The process is of construction") into the carrier clause. So, we might ask two questions: "Is the insertion necessary?" and "Is this the best way of making it?" To answer the second query first, we might look at the alternatives: (1) "The process, which is one of construction", the insertion of a relative clause, is more cumbersome than what we have; (2) "The construction process", involving a further transformation of the prepositional phrase into an adjective, is more concise, but might be objected to on the grounds that using a noun as an adjective is awkward, and there is no appropriate adjectival form of the word "construction". Thus, "of construction" is probably the best insertion here. But we have the further question whether it is necessary — and here, semantic considerations come into play. We can say that "construction" *is* a process and therefore stating that it is a process is redundant; the subject of the main clause should be "construction" and not "process". This is, of course, assuming that efficiency of expression is desirable. Redundancy — especially where it involves Latin derivatives and such nominalized verbs as "construction" — can create an impression of complexity and weight, which may be the "iconic" impression that judicial discourse should give.

However, any awkwardness in the embeddings in the main clause is rather insignificant compared with what we find in the "primary subordinate

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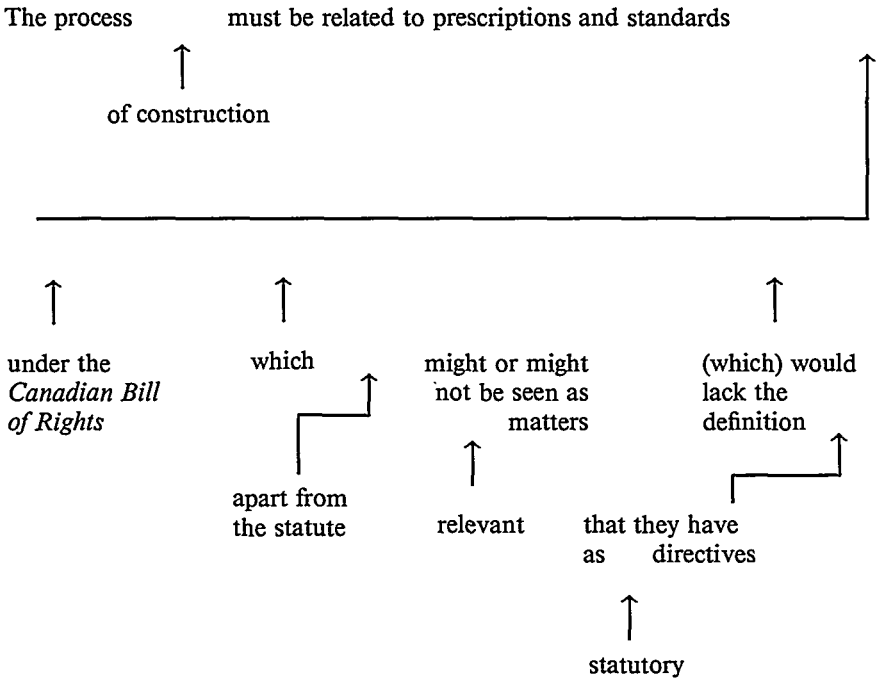
[38]See J.B. Williams, *Style and Grammar: A Writer's Handbook of Transformations* (New York: Dodd, Mead, 1973) at 101-45.

[39]See, *e.g.*, D. Bolinger, *Aspects of Language*, 2d ed. (New York: Harcourt Brace Jovanovich, 1975) at 161-66. In what follows, I shall be using some of the terminology ("surface structure", "underlying structure", "transformation") of the school of syntactic analysis called, generally, transformational grammar. For my purposes, transformational analysis is useful for the account it gives of the derivation of the elements in a given sentence. Thus, to take a simple example, consider the sentence ("surface structure"): "The old man died." Transformational grammar would tell us that this is derived from: "The man, who was old, died" and ultimately from "The man died. The man was old." "The old man died", on this analysis, contains two assertions, one of which ("The man was old") becomes "embedded" in the other, as an adjective, by means of "insertion" and "deletion". Students of style have noted the usefulness of transformational grammar to stylistics, because it offers a systematic way of presenting the options available to a speaker/writer for saying "the same thing" (see, *e.g.*, Williams, *ibid.*). Thus, each of the forms above is an alternative way of conveying the same "information", although they probably have different effects and therefore different "meanings".

clause". The insertions (or most of them) in the sentence as a whole might be represented schematically as follows:



The diagram indicates the complexity of the construction here. At the same time, it should be said that this is not an unusually syntactically complex sentence.[40] Perhaps the focus of our inquiry should be whether it is *unnecessarily* complex.

Again, in invoking the criterion "necessarily complex", I am leaving unanswered the question, "necessary for what?" As Elizabeth Traugott and Mary Louise Pratt point out, syntactic embedding is indicative of "relative psychological complexity".[41] One question, then, is whether the syntactic complexity of the Laskin sentence reflects genuinely complex concepts. It has been suggested that certain "scientific" disciplines (like law) demand

[40]Compare, for example, the sentence quoted by Saha, *supra*, note 35 at 351.

[41]E.C. Traugott & M.L. Pratt, *Linguistics for Students of Literature* (New York: Harcourt Brace Jovanovich, 1980) at 174.

an "intellectualization" of what has been called "the standard language".[42] Features of this "intellectualized" language include "a tightly knit and integrated structure of sentences and compound sentences with an elaborate hierarchy of superordination and subordination expressing different relations of causality, finality, parallelism, and the like".[43] That is, complex subject-matter demands complex syntax to express subtle relationships, qualifications, and so on. On the other hand, as I have already suggested, the necessity may be limited only to the desire to create the *impression* of psychological complexity. This may be a less compelling rationale for difficult syntax.

With these observations in mind, we can ask what difficulties the syntax gives rise to. First, there is some ambiguity, at least on a preliminary reading, of the reference of the word "which". If we adopt the "rule" that a relative pronoun refers to the noun immediately preceding it, the referent should be "the *Canadian Bill of Rights*", but semantic features tell us that this epithet is merely part of a prepositional phrase inserted between the actual referents ("prescriptions and standards") and the pronoun. "Matters" and "they", for example, indicate that the antecedent must be plural. But before we get to these semantic indicators, we encounter another insertion, "apart from the statute". It might be said that this insertion itself contains a noun phrase — "the statute" — which should alert us to the actual referents. "The statute" is the *Bill*: one does not normally speak of something "apart from" itself. At the same time, the referent of "the statute" is not transparently clear: "the *Bill*" would have been unambiguous. Perhaps Laskin J. had a rhetorical reason for saying "the statute": he might have wanted to emphasize that the *Bill* is no more than a statute, or to allude ironically to the diminished status that Supreme Court decisions had given the *Bill*.

I have digressed somewhat from "syntax", but the digression illustrates two points. First, the complexity of sentence structure as a factor in comprehensibility is inseparable from other elements in communication. Second, in seeking "simplicity" or "clarity", we might have to forego other resources of language: "*Bill*" might be clearer than "statute", but it lacks some of the latter's connotative force.

Another difficulty with the insertions in the Laskin passage is that it is not always easy to see which are coordinate. This is particularly true of "which ... might not be seen as relevant matters" and "[which] would lack

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[42]B. Havránek, "The Functional Differentiation of the Standard Language" in P.L. Garvin, ed., *A Prague School Reader on Esthetics, Literary Structure, and Style* (Washington: Georgetown University Press, 1964) 3 at 6-8.

[43]*Ibid.* at 7-8.

the definition they have as statutory directives". The intervening subordinate insertions — especially "even if seen as relevant" — separate the two coordinate constructions so that their relationship is obscured.

The sentence, then, might be said to suffer from excessive embedding — or, more accurately, awkward embedding. It should be noted that any developed use of language involves the ability to make transformations by, for example, various kinds of insertions, so that this process can scarcely be deprecated in itself. But it may be carried out more or less adroitly.

The complexity resulting from the embedding here is aggravated by another syntactic feature: passive constructions, a favourite of lawyers. Thus, in this passage, we have "must be related to" and "might or might not be seen as". Presumably motivated by lawyers' concern to appear impersonal and objective, particularly by avoiding "I" and "we", the use of the passive carries with it certain disadvantages. One of these is that it makes writing less vigorous. (Again, perhaps ponderousness is a desirable quality in legal expression, reinforcing the impression of gravity.) It makes writing less vigorous partly because it is passive — there is no doer doing something — and partly because it is generally more complicated than the active voice. Take the clause: "The process must be related to prescriptions and standards." Transformational grammarians would tell us that the underlying structure of such a clause is something like "Someone must relate the process to prescriptions and standards", and that the surface structure is the product of, first, a passive transformation ("The process must be related to prescriptions and standards by someone") and, second, the deletion of "by someone".[44] I do not mean to say that "deeper" structure is automatically to be equated with "simpler" or, perhaps, "more efficient" structure: clearly, this is not true of the generation of an adjective from a relative clause. However, in the case of the passive construction, I would say that the complexity is generally greater. Here, not only does it involve the addition of two morphemes ("be" and the past tense of "relate", *i.e.* "ed"), but the deletion of "by someone" requires the reader to fill the gap. This need not pose significant problems — probably it does not here — but think of the assertion (which one sometimes meets in legal discourse), "It is thought that ... ". Again, assuming that an adaptation of Ockham's razor — "Do not multiply grammatical complexities beyond what is necessary"[45] — is a

[44]Saha, *supra*, note 35 at 348-49.

[45]See Lyons, *supra*, note 32 at 112, who describes "Ockham's razor" as "the principle of ontological parsimony or economy, according to which 'Entities should not be multiplied beyond necessity'."

generally reliable principle, we should be careful that we have a valid rhetorical reason for using the passive voice.[46]

This illustrates what is involved in criticizing a text — even a single sentence — as a syntactic structure. Before labelling it "good", "bad", or "abysmal", one has to be able to describe the structure and its effects, even its "meaning".

The other matter O'Barr mentions is vocabulary. I have already commented on Laskin J.'s use of "the statute" to refer to the *Bill of Rights*, and some of the rhetorical implications of this. But more might be said about his diction here.

At the outset, we may remark that the sentence contains little of what Komar would recognize as "rhetoric": there is, for example, no deliberately figurative language.[47] Moreover, if the passage is "abstruse" it is not because Laskin J. uses technical jargon.

One thing we can say about the diction is that it is heavily "latinate":[48] "process", "construction", "related", "prescriptions", "statute", "relevant", "definition", "statutory", "directives". I am far from suggesting that English speakers should use nothing but "Anglo-Saxon" words.[49] However, Latin (and Greek) derivatives often create an impression different from their generally simpler "English" equivalents.[50] "Maternal parent" may denote the

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[46]Williams, *supra*, note 38 at 88-89, suggests that rhetorical considerations in the use of the passive involve the relative importance of the doer of the action as opposed to the "recipient" of the action: the passive gives emphasis to the latter. Thus, in the Laskin example, the question is whether it is significant who is doing the seeing: the courts, or "anybody". In my example, "It is thought that ... ", who is doing the thinking is clearly important: "I" or "recognized experts" or "the general public"? See also Wydick, *supra*, note 30 at 746-47; and Gold, *supra*, note 4 at 498-99.

[47]The place of figurative language in legal discourse is perhaps still in doubt in some people's minds. There may be those who share Locke's view that it is "the figurative power of language" that renders it "nebulous and obfuscating": see P. de Man, "The Epistemology of Metaphor" (1978) 5 Critical Inquiry 13 at 15. De Man goes on to point out, *supra* at 30, that language is inevitably figurative and that, for example, "[a]ll philosophy is condemned, to the extent that it is dependent upon figuration, to be literary ... ." The same, it would seem, is true of law. See also D. Davidson, "What Metaphors Mean" (1978) 5 Critical Inquiry 31 at 33: "Metaphor is a legitimate device not only in literature but in science, philosophy, and the law ... ."

[48]I use this term in a rather loose, impressionistic way, to denote words ultimately derived from Latin and "sounding" like Latin. Clearly, Latin words and derivatives have come into English at various stages of the development of the language, and via various routes — notably through French after the Norman Conquest. They have become more or less "naturalized". See T. Pyles, *The Origins and Development of the English Language*, 2d ed. (New York: Harcourt Brace Jovanovich, 1971) at 313ff.

[49]For an example of a paragraph containing "not a single word of foreign origin", see *ibid.* at 340-41.

[50]See Orwell, *supra*, note 6 at 84-85.

same person as "mother", but its connotation is quite different. It is fair to say that in general such diction suggests objectivity (or, perhaps, "science"), abstraction, and intellectual sophistication. But the impression may be no more than "stylistic", in the superficial sense. The "abstraction" may correlate to fuzziness, the "objectivity" to pretentiousness and the "sophistication" to the parroting of big words.

On the other hand, the Latin or Greek derivative is often the best or most "natural" word. Again, one should make a thoughtful choice of vocabulary, asking questions such as: "What are the alternatives? What effect am I creating by choosing one rather than the other? Am I being sincere? Do I want to be sincere?" Applying this approach, one would have some difficulty faulting Laskin J. For example, "construction" is a common enough word in this kind of legal context; "interpretation" is similarly a Latin derivative; "reading" — perhaps the nearest "English" equivalent — is not quite accurate. Similarly, synonyms for "directives" are words like "imperatives" or "mandatory instructions"; "guidelines" is too weak; "orders" is too strong. Getting around the problem might involve re-structuring: "what the *Bill* tells us to do". This is clearly less imposing than "statutory directives", and probably less pretentious, but one might wonder whether it is significantly clearer or more efficient.

One further point about diction: where it is least vague or ambiguous,[51] reading is usually easiest. In Laskin J.'s sentence, the verb "relate" is not as precise as it might be. "Relate" suggests the making of some kind of connection, but it does not specify the nature of the connection. Perhaps Laskin J. deliberately chose a non-committal word, or one might read into the use of "relate" a rather cynical allusion to the way interpreters of the law often treat statutes. It is even possible that Laskin J. simply did not work hard enough at coming up with a more exact formulation.

There is thus much to criticize even in this brief sample of writing. I am not sure that what we have seen justifies the epithet "abysmal", but a number of features of the sentence, particularly in combination, make it difficult to read. The question now is whether I can come up with a paraphrase that is — at least in terms of the criterion I have been emphasizing, "comprehensibility" — "better".

At the outset, I shall exclude two possibilities — not because they are untenable, but simply because I want to impose some ground rules. One of these possibilities is to cut out the whole sentence as a redundant assertion of the obvious. "Of course", one might say, "courts have to do what the

[51]It should be noted that ambiguity is a characteristic of language. See Traugott & Pratt, *supra*, note 41 at 9-10; and M.S. Moore, "The Semantics of Judging" (1981) 54 S. Cal. L. Rev. 151 at 181ff. and 193ff.

Bill of Rights tells them. And of course the presence of the rules of construction in the *Bill* makes them less avoidable." I shall eschew such radical solutions. The other possibility, since a major problem with the sentence is over-embedding, would be to cut it into a number of shorter sentences. Whatever advantages this kind of simplification has, it also has obvious drawbacks.[52]

Working, then, from the premise that the sentence has a right to exist as a single sentence, containing most of the information in the original, I would suggest the following paraphrase:

> Courts must construe laws according to *Bill of Rights* criteria, which, apart from the *Bill*, might or might not be thought relevant, but in any case would lack the certainty they have as statutory rules.

Without commenting exhaustively on the rhetoric of this new version, I would like to note some of the changes that make it "better". In the first place, it is shorter: thirty-five words compared with forty-seven. The difficulties of the embedded prepositional phrase and the passive voice in the main clause have been eliminated by changing "construction" back into the verb from which it derives. The ambiguity of reference of the primary subordinate clause has been avoided by placing "which" beside the noun to which it refers and replacing "statute" with "*Bill*". Some repetition has been removed ("relevant", "seen", "as"), and I have tried to find simpler words to replace Latin derivatives ("laws" for "statutes"; "rules" for "directives").[53] The result is, I believe, a briefer, simpler, clearer statement, albeit rather pedestrian — perhaps even more pedestrian than the original.

My larger point — that is, aside from what I say about Laskin J.'s sentence itself — is that useful criticism of legal or other expression requires detailed engagement with the text, and some definition or elucidation of the criteria of judgment.

B. The Rand Passage

Martin's second example of bad judicial writing comes from the pen of Rand J. in *Saumur* v. *City of Quebec*:

> Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order. It is in the circumscription of these liberties by the creation of civil rights in persons

[52]Including "choppiness" and awkwardness of transition. But see my discussion of the Denning passage, *infra*, note 67 and accompanying text.

[53]But note the differences in semantic scope of the words in each of these pairs.

> who may be injured by their exercise, and by the sanctions of public law, that the positive law operates. What we realise is the residue inside that periphery.[54]

I said earlier that much is at stake in a criticism of this passage. That is because Rand J. is saying something fundamental about the legal order here and his words have been frequently quoted, and found to be inspirational. Thus, Walter Tarnopolsky, apparently including *Saumur* among Rand J.'s "classic judgments", asserts that "the case is more important because of some of the statements about freedom of religion, which have subsequently affected our thinking of [*sic*] that fundamental freedom, than it is for what was held" and quotes part of the above passage.[55] The decision is not so important as what was *said* about freedom of religion. Mr Justice Thomas Berger, citing the same text, speaks of Rand J.'s "series of judgments that constitute a compelling intellectual affirmation of the place of fundamental freedoms in the Canadian federal system ... ."[56] And S.I. Bushnell calls Rand J.'s opinions in *Saumur* and *Switzman* v. *Elbling*,[57] "definitely the clearest exposition of an implied Bill of Rights of all the judgments rendered in the Supreme Court ... ".[58]

How can we reconcile a "classic judgment", "compelling intellectual affirmation" and "definitely the clearest exposition" with "abysmal" writing? Again, we must begin by looking at the passage.

What is perhaps the most striking about this excerpt is that it appears to be quite deliberately "rhetorical". While the rhetorical features of the Laskin sentence are very likely the product of habit, the Rand passage more clearly evinces positive selection of language to create an effect. Again, this is on its face appropriate since Rand J. is making a statement about fundamental values. The question is whether the rhetoric succeeds or, perhaps more accurately, in what ways it succeeds.

Let us look at some of the techniques Rand J. uses and their effects.

One device he uses to make what he says impressive is what Glanville Williams has called "the hypostasis of values".[59] That is, he takes what is probably an expression of opinion and formulates it as a matter of fact in

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[54](1953), [1953] 2 S.C.R. 299 at 329, [1953] 4 D.L.R. 641 [hereinafter *Saumur*].

[55]W.S. Tarnopolsky, "The Supreme Court and Civil Liberties" (1976) 14 Alta L. Rev. 58 at 79-80.

[56]T.R. Berger, "The Supreme Court and Fundamental Freedoms: The Renunciation of the Legacy of Mr Justice Rand" (1980) 1 Sup. Ct L. Rev. 460 at 461.

[57](1957), [1957] S.C.R. 285, 7 D.L.R. (2d) 337.

[58]S.I. Bushnell, "Freedom of Expression — The First Step" (1977) 15 Alta L. Rev. 93 at 115. But, in a footnote, *supra* at 121 n. 133, Bushnell refers to the particular passage I am considering in terms that suggest its meaning is not completely transparent.

[59]G.L. Williams, "Language and the Law — V" (1946) 62 L.Q. Rev. 387 at 390.

a "referential" statement.[60] Thus, "freedom of speech, religion and the inviolability of the person *are* original freedoms"; "[they] *are* the necessary attributes ... ". Even if such assertions are not unprovable (and it is not clear to me how they might be demonstrated), they are certainly unproven. In what sense of "original", for example, is the person "inviolable"? I should have thought that it was equally likely that the "inviolability of the person" was created by law as by something inherent in the human condition. Rand J.'s assertions are more likely expressions of allegiance to a particular view of things than they are verifiable representations of fact. Williams observes that the formulation of "value statements" as assertions of fact can mislead the hearer or reader. This is especially true where a value like "freedom" is the subject of discourse and the auditor very likely shares, or wants to share, the speaker's opinion — for example, that "freedom" is inherent in human nature. Of this device we can say that it is rhetorically effective, but it conceals (in this instance) complex philosophical issues.

Similarly, Rand J. uses a number of syntactic devices to reinforce the weightiness of his statements. One of these is the expression "strictly speaking", with which the passage begins. This is a kind of "metadiscourse" — that is, discourse about discourse.[61] It is the author himself assessing his assertions: what he says is "strict" or perhaps "precise". But, as we have already seen, at least part of what Rand J. says will reflect strict assertion is not entirely precise: what he says about freedom of speech, *etc.*, is not "strictly" accurate. Another way of characterizing "strictly speaking" is to call it a "performative" — that is, an utterance in which the speaker does what he says, simultaneously with his making the statement.[62] In effect, Rand J. is saying, "I am speaking strictly when I say ... ". That is, he is saying something about the nature of his discursive act: presumably he speaks strictly as he says he is speaking strictly. But the same objections can again be raised. His assertion can, however, be regarded as "performative" in another sense. As a judge, he is an authoritative declarer of the law: when he makes a statement like this, he may be taken to be saying, "I declare the legal position to be that ... ".[63] But, again, the "truth" of his position arises not from objective reality, but from his status, which allows him to express authoritative opinions.

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[60]*Ibid.*

[61]See Lindgren, *supra*, note 7 at 176-78.

[62]See J.L. Austin, *How To Do Things With Words* (Cambridge, Mass.: Harvard University Press, 1962) at 4-7. A clear example of a performative utterance is: "I now pronounce you man and wife." What the speaker says he is doing, he accomplishes by the words he utters. In applying the term to Rand J.'s expression, I am using it in a slightly extended sense. But see Bolinger, *supra*, note 39 at 166-68.

[63]See G. Kalinowski, "Sur les langages respectifs du législateur, du juge et de la loi" (1974) 19 Arch. phil. dr. 63.

Other syntactic devices that Rand J. uses to add effect to what he is saying also attract comment. Thus, "freedom of speech, religion and the inviolability of the person" exploits the rhetorical potential of parallelism and the triad — but not perfectly. The structure invites the reader to prefix "freedom of" to each of the substantives which follow; however, this clearly does not work for "freedom of ... the inviolability ... ". There is a slight disintegration of syntactic and semantic coherence here. What Rand J. might have said was: "freedom of speech and religion, and the inviolability ... " or, "freedom of speech, freedom of religion, and the inviolability ... ".

The second sentence in the passage is made more ponderous in at least two ways. One is the indirect "It is ... that" construction. This slows down the sentence, makes it more solemn. At the same time, it perhaps unnecessarily lengthens the sentence by adding a clause, and aggravates the impression of ambiguity by introducing the indefinite "It". Similarly, the forms "the circumscription of" and "the creation of" are (as we have seen already in the Laskin sentence) more turgid than the corresponding "circumscribing" or "circumscribes" and "creating" or "creates". This is largely because they are not only nominalizations, but also passive constructions: "circumscription by the creation" (compare, "the creation circumscribes"); "creation" by whom or what? In fact, one might say that the subject of the verb "operates" and of the verbs underlying "circumscription" and "creation" is "the positive law". Thus: "The positive law circumscribes these liberties by creating civil rights ... and the sanctions of public law." A further advantage of this construction is that it makes clear that "sanctions" is parallel with "rights" and not with "creation". The disadvantages of the revision are that it is less portentous (if this is a virtue!) and that a difference in emphasis changes the meaning of the statement somewhat.

Again, we can see that an inquiry into "style" tends to be paradoxical. Rand J.'s syntactic choices create certain effects; at the same time, they may involve a sacrifice of, say, coherence.

An examination of Rand J.'s diction here gives rise to similar observations. I have already mentioned the word "strictly", which creates a positive disposition in the reader to attend to the writer's words: it is rhetorically effective. At the same time, I have questioned whether it is accurate, or even "sincere". Are the reader's expectations, that precise distinctions will follow, fulfilled?

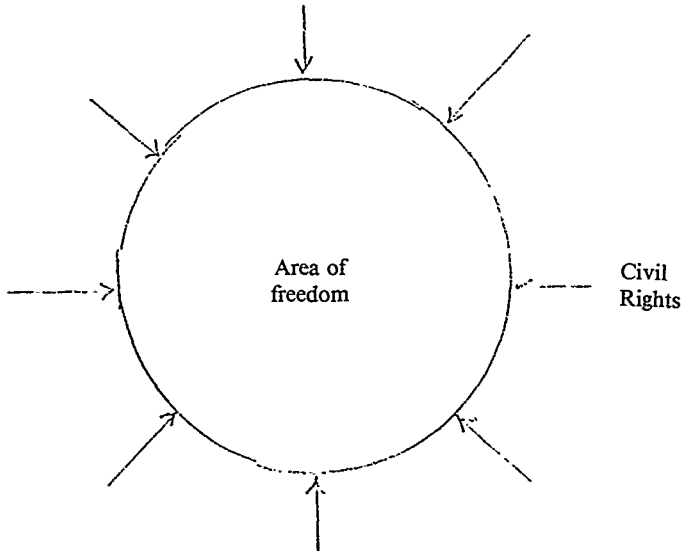
Another characteristic of the diction here is its "absolute" quality. Words like "inviolability", "original", "necessary", and "primary" connote certainty and ultimacy. They are impressive words. But questions occur about

their substance. I have commented on the ambiguity in the word "original": is an original freedom one that man has in a state of nature, or before the Fall, or as an inherent trait? Or does Rand J. simply mean that a person is free to do what is not prohibited and in that sense freedom is prior to restraint? Similarly, although Rand J. asserts that they are, it is not self-evident that these freedoms are "the primary conditions of [human beings'] community life". Rand J. may here be using strong adjectives as a substitute for reasoning.

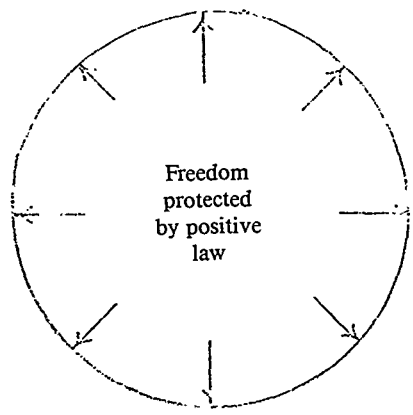
Two further comments are relevant. One involves the word "modes": is this quite appropriate? I should not have thought that freedom was a mode of self-expression; it seems more like a "condition". "Religion" and "speech" — like writing and painting, for example — may be "modes" of self-expression, but I should not have thought that the freedom to do these things was. The other point involves the prepositional phrase "within a legal order". While the words "legal" and "order" contribute to the general solemnity of the passage, the force of the phrase as a whole escapes me. Logically, its inclusion may suggest that there might be community life without a legal order: I doubt that this is tenable. Whether it is or not, however, I am not sure why the "freedoms" should be "primary conditions of community life" particularly "within a legal order". Are they less primary where there is no legal order? Does "legal order" refer to positive law? If so, what is the relation of "within a legal order" to the distinction between "civil rights" and "original freedoms" in the passage as a whole? The phrase is at least ambiguous and probably redundant.

Some of Rand J.'s imagery is also worth noticing — for example, the word "arise" in the first sentence. As an image of a physical process, and thus in this context as a metaphor, the word has lost much of its effect. On reading it we probably do not envisage a physical arising. Nevertheless, the word is interesting because it does suggest something that happens spontaneously or naturally. This suggestion is reinforced by the quasi-passive structure of the clause. It might have been more accurate to characterize "the positive law" here as a "doer", rather than as a kind of inert substratum. "The positive law creates civil rights." One might have thought that, in view of what seems to be Rand J.'s general point, it would be more appropriate to characterize the "original freedoms" as arising naturally and the "civil rights" as artificial constructs.

More important, however, is what strikes me as the central image in the passage, the picture of original freedoms as falling within an area whose circumference ("periphery") is defined by positive law:



The image is effective. As Rand J.'s own words reveal, however, it is an oversimplification. He emphasizes that "the creation of civil rights in persons who may be injured by their [the freedoms'] exercise" *circumscribes* the freedoms. So it does, from one point of view. But from the point of view of the person who might be injured, "civil rights" extend or at least guarantee his freedom. For him, the picture is more like this:



Civil rights created by positive law define the circumference within which the person's freedoms may not be transgressed. From this point of view, far

from being in some way antithetical, "freedoms" and "civil rights" are congruent.

One of the advantages of an image is that, by inviting the reader to visualize what is being said, it makes this more concrete. Here, thinking about Rand J.'s image allows us to see what he is saying, and also to question it.

Before leaving this image, I want to mention two other words associated with it. One is "residue" which is interesting for two reasons. The word connotes something rather indeterminate and unspecified, "left over", and perhaps less important than what is selected or specified. This connotation would be inconsistent with the absolute value Rand J. attaches to the "original freedoms" earlier in the passage. The effect is again to aggravate the ambiguity of the passage. Further, that the residue is "inside" the periphery strikes me as somewhat paradoxical. I think of a circle, for example, as being a specific shape or area defined in some larger field, and of the "undefined" or residual as being *outside* the defined area. The paradox again reinforces the ambiguity, which is perhaps inevitable in the relation between "civil rights" and "original freedoms".[64] The other word is "realize". I must admit that I do not know what "realize" means here. It probably does not mean "to grasp or understand clearly": even if it made sense semantically this use of "realize" usually takes a "that" clause as its object. The words may mean "give reality to", so that the freedom that has reality for us, or the only freedom to which we can give reality, is what is inside the periphery. But this is problematical: the import of Rand J.'s earlier statements is that the "original freedoms" are not human constructs, although I suppose that we may give them reality by exercising them. Another possibility is that the word is being used metaphorically, with the literal sense, "to convert into cash" or perhaps "to obtain as a profit".

Thus, a close reading of the *Saumur* passage details our impression that it is highly "rhetorical". At the same time, our analysis exposes considerable uncertainty of meaning. Whether Rand J.'s writing is "abysmal" is a question that has two answers. On the one hand, we should perhaps be impressed with a style that is inspirational in spite of that fact that, analytically, it conveys only an elusive meaning. We might find literary merit in the passage on the basis that it is richly suggestive: but this implies that the reader's response is essentially impressionistic, or even emotional. We

[64]Casey J. in *Chabot* v. *Commissaires d'écoles de Lamorandière* (1957), [1957] B.R. 707 at 720, (*sub nom. Chabot* v. *School Commissioners of Lamorandiere*) 12 D.L.R. (2d) 796, appears to have seen Rand J. as emphasizing that fundamental liberties must be limited. This seems to be at variance with most readers' reactions to the passage.

are reassured to hear "freedom" coupled with words like "original", "necessary", "primary", and even "realize". But I would question whether such writing should be described as "clear" or "intellectually compelling". Applying to this passage criteria which emphasize logical and semantic coherence exposes several shortcomings. We might, I suppose, rationalize these by saying that Rand J.'s style captures brilliantly the ambiguity of his subject; but I rather doubt that he would have approved the characterization.[65]

As I have already suggested, such observations give rise to broader questions than "What are the rhetorical features of this passage?" For one thing, if Rand J.'s language is in fact unclear, does this point to a lack of clarity in the thought that underlies the expression? Again, if my criticisms are valid, how can we characterize the responses of those who have found the passage, or parts of it, impressive? What criteria have they applied in coming to their assessments? What, for example, does Berger J. mean when he calls Rand J.'s affirmation of civil liberties "intellectual"? On my analysis of this passage at least, "affective" would be more appropriate. This observation need not be negative, for one might ask: "Is there not room for an affective element in judicial writing? Do we not want judges who can move with their eloquence as well as demonstrate with their logic?"

Again, I am not prepared to answer these questions — except to note that they may involve a false dichotomy. The relationship between logic and rhetoric may be more intimate than my referring to them as in some way alternative suggests.

C. An Example from Lord Denning

Having examined two samples of judicial writing whose style Martin condemns, I want now to look at an example which he would, presumably, approve. Among the judges whose opinions Martin says evince "grace and felicity" are Lord Mansfield, Lord Atkin, Lord Reid, and Lord Denning.[66] Although Martin cites no specific examples, I hope that I do not do him

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[65]The reader might want to compare Rand J.'s statement of a similar position delivered in another setting, the Oliver Wendell Holmes Lecture at Harvard Law School on 26 February 1960:

> The contrary view, moreover, ignores the nature of a "civil right", that it is the creation of positive law, to be distinguished from those freedoms that remain within the residue of unregulated conduct, fundamental, even "natural" freedoms because they are not, so far, circumscribed by law.

Published as I.C. Rand, "Some Aspects of Canadian Constitutionalism" (1960) 38 Can. Bar Rev. 135 at 154. This is a rather less rhetorically-striking statement than the *Saumur* passage; at the same time it is arguably "clearer".

[66]*Supra*, note 1 at 7. One might query whether the writing of these judges is "graceful" or "felicitous" in the same way.

injustice in selecting an excerpt which most students of the law would recognize from its style as having been written by Lord Denning:

> Old Peter Beswick was a coal merchant in Eccles, Lancashire. He had no business premises. All he had was a lorry, scales and weights. He used to take the lorry to the yard of the National Coal Board, where he bagged coal and took it round to his customers in the neighbourhood. His nephew, John Joseph Beswick, helped him in the business.
>
> In March, 1962, old Peter Beswick and his wife were both over 70. He had had his leg amputated and was not in good health. The nephew was anxious to get hold of the business before the old man died.[67]

The obvious point to be made about this is that it is quite unlike the other two passages, and (I would venture) quite unlike the legal discourse to which we are accustomed.[68] I mentioned earlier that the distinctive discourse of lawyers can be seen as an "intellectualization" of ordinary language. This "intellectualization" includes "terms of art", but goes beyond this, so that even when lawyers are not using technical vocabulary their language is often typified by complex syntax and difficult diction: the Laskin passage exemplifies these traits. To the ordinary speaker, such discourse may seem strange, impenetrable, intimidating. But to those who have learned the language of the law, it has become normal or "automatized".[69] "Automatization" has been described as

> such a use of the devices of the language, in isolation or in combination with each other, as is usual for a certain expressive purpose, that is, such a use that the expression itself does not attract any attention ... .[70]

That is, the primary effect of automatized language is communication of an underlying content; it does not make the form of expression the focus of interest. It may be said, therefore, that although discourse like that in the Laskin passage may seem unusual to members of other functional linguistic groups, for lawyers it is a normal mode of communication. (I leave aside the possibility that even lawyers do not know what such discourse

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[67]*Beswick* v. *Beswick* (1966), [1966] Ch. 538 at 549, [1966] 3 All E.R. 1 (C.A.). Again, to claim that a brief passage, more or less randomly selected, is "typical" of a writer's style is potentially hazardous. A person expresses himself in different ways at different times and in different contexts, and to identify with conviction what is typical would require, as I have already suggested, a rather extensive survey. This passage from Lord Denning is at least representative of what makes some of his writing particularly memorable.

[68]See, *e.g.*, Wydick, *supra*, note 30 at 741: "For several hundred years, English speaking lawyers have been addicted to long, complicated sentences."

[69]See Havránek, *supra*, note 42 at 9.

[70]*Ibid.*

means, but accept it for its form alone: it sounds like the kind of thing a judge should say.)

If the automatized discourse of the law is represented by the Laskin passage, what is the effect of the introduction of Lord Denning's style into the judicial context? One effect is to draw attention to the form of expression itself. This process has been described as "foregrounding",

> the use of the devices of the language in such a way that this use itself attracts attention and is perceived as uncommon, as deprived of automatization, as deautomatized ... .[71]

This foregrounding may assume various forms. It may involve importation into legal discourse of a strikingly incongruous form of expression.[72] It may involve figurative expression, especially where the figuration is exaggerated or awkward, as in the following passage: "Charter-based decisions have *hacked* away at the *shackles stifling* our sense of individual autonomy. Over the long term this may ... [cause] a healthy skepticism of power to *sprout* in the Canadian personality."[73] It may involve the introduction of an alien and perhaps disquieting term into a familiar context, as when Lord Diplock uses "synallagmatic contract" in the common law.[74] Or, it may involve an uncharacteristically simple expression — such as Lord Diplock's term "'if' contracts" for unilateral contracts.[75]

Thus, we may say of Lord Denning's style that, in so far as it violates our expectations of legal discourse, it involves foregrounding: it draws attention to itself. There is a paradox here, for many people would say that Lord Denning is simply using "ordinary language". How can such everyday speech be foregrounded? Is it not more generally automatized than the intellectualized legal discourse it replaces?

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[71]*Ibid.* at 10.

[72]See, *e.g.*, the conclusion of A.C. Hutchinson, "From Cultural Construction to Historical Deconstruction" (1984) 94 Yale L.J. 209.

[73]J.E. Magnet, "The Charter: A Year as a Catalyst" *The [Toronto] Globe and Mail* (18 April 1983) 7 [emphasis added]. Note that this appears in an article written by a lawyer for a popular audience. For a discussion of what constitutes effective use of metaphor, see W.C. Booth, "Metaphor as Rhetoric: The Problem of Evaluation" (1978) 5 Critical Inquiry 49.

[74]*United Dominions Trust (Commercial) Ltd* v. *Eagle Aircraft Services Ltd* (1967), [1968] 1 W.L.R. 74 at 82, [1968] 1 All E.R. 104 (C.A.) [hereinafter *United Dominions Trust* cited to W.L.R.]. Lord Diplock complains, *ibid.*, that his introduction of "this qualifying adjective" in *Hong Kong Fir Shipping Co.* v. *Kawasaki Kisen Kaisha Ltd* (1961), [1962] 2 Q.B. 26, [1962] 1 All E.R. 474, "was widely thought to be a typical example of gratuitous philological exhibitionism". One could say that the epithet "gratuitous philological exhibitionism" represents iconically what it means referentially, and is itself an example of foregrounding.

[75]*United Dominions Trust, ibid.*

There are two answers to this. The first is simply that foregrounding is context-dependent. The occurrence of, say, a colloquial expression in the context of a learned scientific article would clearly draw the reader's attention to the unusual (for that context) expression.

The second answer is that Lord Denning's style is not simply "ordinary"; it is what might be called "emphatic ordinary". The first three sentences, for example, are for almost any kind of written discourse, unusually simple — even "naive". A more normal or ordinary form of expression would be something like the following: "Old Peter Beswick was a coal merchant in Eccles who had no business premises, only a lorry, scales and weights." The repetition of subject ("Beswick", "he", "He") and even of verb ("had") is extraordinary. As Traugott and Pratt observe: "Examples of passages where little recursiveness is used and where there is very little difference between deep and surface structures are hard to find except in stories for small children";[76] "nonuse of an optional transformation may foreground and make special the scene being presented."[77] In other words, the perception of ordinary adult users of language is that, in certain circumstances, a failure to deviate from simple structures is inappropriate. When such failure occurs, it is either because the writer has not mastered ordinary discourse, or because he is trying to create a special effect.

One could not credibly maintain that Lord Denning has not mastered syntax much beyond the simple sentence. The simplicity here is almost certainly part of a deliberate rhetorical strategy. But I would question whether words like "elegance" and "grace" are apt to describe this style — assuming that Martin meant to include passages like this in his general praise of Lord Denning and others. That such writing may not be "elegant" does not, however, mean that it is not effective, or even "subtle".

This leads to another paradox. If Lord Denning's style is "simple" and "direct", how can it be "subtle"? I would suggest that it may be deceptively simple. That is, the creation of the impression of directness or naïveté is, as a rhetorical technique, arguably more sophisticated than the creation of the impression of intellectual complexity. The former wins the reader's sympathy by appearing to hide nothing; the latter is more likely to persuade only by appearing intimidating.

Having entered the reader's confidence by saying, in effect, "I will speak plainly to you", Lord Denning exploits other devices to win over his audience. Most of the appeal is emotional, not intellectual. Thus, Peter Beswick is routinely called "old Peter Beswick", which makes us both visualize him

[76]Traugott & Pratt, *supra*, note 41 at 168.
[77]*Ibid.* at 170.

and pity him for his age: he becomes familiar to us. When "old" is used to describe him in a context that suggests the nephew's point of view, the epithet takes on a pejorative colouring: we tend to dislike the person who would view Peter as "old" in that way. John Joseph Beswick (note the formality of the tripartite name) becomes "the nephew" — depersonalized, unlike Peter; he is rendered unrelated to Peter by the use of the definite article instead of the pronoun ("his") which we might expect; he wanted to "get hold of" the business. Peter is made more personal and familiar to us by the evocation of his life and circumstances: "he had no business premises"; "all he had ... "; he bagged the coal (himself, using his "scales and weights"); he "took it round" (not "delivered it"); his customers were "in the neighbourhood". And, finally, he had had his leg amputated.

A mistake that is often made is to think that to be rhetorically effective, language must be either "purple" or "florid". But these are the easiest rhetorical devices to see through. Simplicity is not, as is often thought, unrhetorical; it is merely a different kind of rhetoric. Lord Denning's "simplicity" and "directness" here are not entirely candid. For example, the excessively simple syntax accomplishes at least two things — aside from drawing attention to itself as unpretentious. First, it allows Lord Denning to emphasize the details of old Peter Beswick's life: one sentence tells us what he did not have; another tells the few, poor things he did have. Second, the excessive simplicity of discourse causes us to attribute this simplicity to Peter himself: the childish syntax evokes an uneducated, uncalculating character, easily victimized.

I am inclined to agree with Martin that Lord Denning's writing is more accomplished than that of either Laskin J. or Rand J. — but not for the reasons Martin seems to imply. It is not because Lord Denning's style is "simpler", or more "direct", or even clearer, that it is superior to the others; rather, it is because he is in greater control of his rhetoric. Laskin J.'s rhetoric — at least in the sample passage — is almost entirely automatized and undevised. Rand J.'s rhetorical strategy seems deliberate, but it gets out of hand to the extent that what he is saying becomes incomprehensible. Lord Denning, on the other hand, seems to know precisely what he wants to say and how he will say it.

III. Conclusion

Pratt has observed an "overwhelming tendency to view style as an exclusively or predominantly literary phenomenon and to equate style outside literature with mere grammaticality and conventional appropriateness."[78] She argues that this perception is based not so much on the intrinsic

[78]M.L. Pratt, *Toward a Speech Act Theory of Literary Discourse* (Bloomington: Indiana University Press, 1977) at 15.

nature of "ordinary" as opposed to "poetic" language as on the fact that the former has been studied by structural linguists, while the latter has been studied by estheticians. Each group has found in the object of its study what its presuppositions have limited it to finding. Thus,

> "Ordinary language" looks utilitarian, prosaic, mechanical, practical, and automatized to poeticians not because it is, but because structural linguistics is utilitarian, prosaic, and mechanical in the sense that it only undertakes to describe those aspects of language that can be accounted for in terms of dummy constructions, grammaticality, *rôles de service* and the "action of a mechanism."[79]

While I would not qualify legal commentators as structural linguists, I would suggest that their apprehension of legal language tends to be determined by their preconceptions about what they can or should find there. Thus, their emphasis on grammaticality (often in a very superficial, prescriptive way) and on language as an instrument for conveying "content".

What my examination of three brief examples of judicial writing will, I hope, indicate is that legal discourse, like any other kind of discourse, is susceptible of "stylistic" analysis of a rather complex kind. By thinking in terms of grammaticality and instrumentality, lawyers may blind themselves to the ways in which the language they constantly use affects them, or signifies. Every verbal structure reflects a rhetorical choice (if only as a matter of rhetorical habit); every rhetorical choice conveys meaning in a somewhat different way from the other options. A consciousness of the rhetorical qualities of discourse adds a crucial dimension to our understanding of that discourse.

One further comment: if lawyers are to become critics of legal literature they should probably begin not by seeking to prescribe what legal writing should be like, but rather to describe how it works.

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[79] *Ibid.*