MISSING THE "PLAY OF INTELLIGENCE"

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Something is awry in current academic and judicial writing about law. In a recent article, Judge Harry Edwards complained that the writings of professors are no longer relevant to the problems faced by the profession. This complaint deserves to be taken especially seriously because Edwards is not only a judge on the D.C. Circuit but a former professor of labor law at the University of Michigan. On the other hand, the complaints run in the opposite direction as well. Professors complain that Supreme Court opinions are increasingly arid, formalistic, and lacking in intellectual value. Here, I am not speaking merely of interdisciplinary scholars who might be expected to find conventional judicial opinions uncongenial. Rather, this dissatisfaction with current judicial opinions seems equally widespread among old-fashioned doctrinal scholars—and not just those with ideological axes to grind. Perhaps these criticisms are overblown, but

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2. Judge Edwards also documents a perception by legal scholars themselves that their work is becoming removed from the intellectual needs of practitioners. See, e.g., id. at 50 (noting concerns of Richard Posner regarding decline in doctrinal scholarship); id. at 75-76 (noting George Priest's prediction of an increasing gap between law professors and the bar).

3. For better or worse, Supreme Court opinions are the most frequently read by academics.
there is enough truth in both sets of complaints for genuine concern. However, identifying the missing element in current legal discourse is not easy.

For me, this missing element is best captured by the phrase, "the play of intelligence." Although the meaning of this phrase will be discussed later in this Essay, a research mishap during the writing of the Essay provides a suggestive analogy. A Nexis search for "play" within two words before "intelligence" identified numerous sports stories to the effect that some athlete "played with intelligence." The import of this description was that the athlete's performance was not programmed. Instead, the athlete responded quickly and creatively to the twists and turns of the game, showing an imaginative sense of the possible future actions of the other players, and also showing a keen awareness of the overall strategic position of the game. These traits are not specifically athletic. They could be displayed just as clearly in a game of bridge or chess, by a lawyer during a trial, or by an appellate judge or legal scholar. Roughly speaking, it is these traits that seem lacking in so much of what appears in law reviews and West reporters.

The remainder of this Essay will explore these issues in greater depth. Part I considers the flaws in much of the Supreme Court's current work product. Part II somewhat more briefly considers the subject of legal scholarship. Finally, Part III will try to clarify the concept of the "play of intelligence" and will consider how we can begin to reclaim it.

4. See infra note 89 and accompanying text.
5. See infra text accompanying notes 88-90.
6. The focus of this Essay will be on diagnosis and possible cure rather than causation, but some brief comments on the latter topic are in order. First, weaknesses in the writing of academics and judges are linked: Weak academic writing provides less assistance to judges, and weak judicial writing is less likely to spark scholarly insights. Second, it is tempting to blame law clerks for the weaknesses of judicial writing, but this explanation does not account for the further weakening of legal writing in the last few years (nor does a similar theory absolve academics who do more of their own writing). Third, part of the explanation probably lies in the increase in ideological polarization, which distorts the selection process in both settings and also may lead to increasingly hostile and unproductive exchanges both on the bench and in the academy. See infra text accompanying note 102.
I. JUDICIAL OPINIONS

Morton Horwitz, the distinguished legal historian, wrote the Foreword to a recent annual review of the Supreme Court by the Harvard Law Review. He dutifully studied the Court’s output from the previous Term. As someone whose work has focused primarily on earlier eras of the judicial history, he was dismayed by what he found in the current advance sheets. “[T]he current Court’s jurisprudence,” he concluded, has “devolved into conceptualism and technicality.” Rather than vision, he found a “thick undergrowth of technicality”:

With three or four “prong” tests everywhere and for everything; with an almost medieval earnestness about classification and categorization; with a theological attachment to the determinate power of various “levels of scrutiny”; with amazingly fine distinctions that produce multiple opinions, designated in Parts, sub-parts, and sub-sub-parts, this is a Court whose Justices appear caught in the throes of various methodological obsessions.

A footnote wryly observes that “[a]fter devoting quite a bit of time just to reading the endless concurrences and dissents in any important case, one then is faced with the olympian task of trying to determine whether there is an actual majority behind any proposition.”

This criticism is a bit harsh but has a core of truth. Lest Horwitz’s comments be dismissed on the basis of his association with Critical Legal Studies, Robert Nagel, a perceptive conservative commentator, has put forth many of the same criticisms. Nagel aptly describes the Court’s style as a combination of the bureaucratic and the academic:

8. Id. at 98.
9. Id. at 98-99 (footnotes omitted).
10. Id. at 99 n.333.
11. See Robert F. Nagel, The Formulaic Constitution, 84 MICH. L. REV. 165, 177-79 (1985). In the nine years since this article appeared, the characteristics of Supreme Court opinions described by Nagel have become accentuated.
Although the Court's formulae are not as long or involved as many administrative rules and guidelines, some of the same characteristics are plainly evident. Both are complex, layered, and equivocal. Both employ words in a puzzlingly artificial way. . . . Typically both attempt to cover all contingencies. . . . In both an air of authority is established by illusory precision. . . .

The formulaic style is not, however, fully or only bureaucratic. It is also academic. The opinions look like law review articles. They have the same pattern of laborious footnoting and detailed argumentation. They have the same formalized organization—introductions, major divisions, subdivisions, conclusions. . . . One reason the formulaic style is little noticed by commentators is that it so resembles the voice of the academy.12

Based on conversations with scholars at my own and other law schools, a good many centrists also agree with this characterization. In speaking with other professors, and even with journalists, I have found a surprising consensus that the Supreme Court's opinions (especially those of the last five years) simply are not very interesting anymore. Bluntly, much of what the Court produces these days lacks the qualities of good legal writing.

Horwitz and Nagel focus on major constitutional cases, but in some ways, run-of-the-mill cases are more revealing of judicial quality. Consequently, I will use three routine statutory cases as illustrations. Each one of the following statutory cases presented a narrow, but interesting legal issue:

1. United States v. Thompson/Center Arms Co.13 (The firearms case). A federal law levied a tax on a manufacturer for each short-barreled rifle sold.14 A manufacturer sold pistols together with a kit that allowed them to be turned into short-barreled rifles.15 Was the manufacturer covered by the statute?16

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12. Id.
14. Id. at 2104.
15. Id. at 2105.
16. See id.
2. *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*17 (The banking case). Due to an error by the revisers, a minor provision regulating national banks was apparently repealed by accident during a recodification in 1918.18 Nevertheless, life went on as usual, with the industry and the regulators acting pretty much as if the statute were still in effect.19 In fact, in 1987 Congress passed a minor amendment to this statute.20 Finally, in 1992, in a case where the issue had not been raised by any of the parties, the D.C. Circuit astounded everyone by announcing that the statute had not been in effect for decades.21 Did the statute still survive?22

3. *Chapman v. United States*23 (The LSD case). Both a federal statute and a sentencing guideline imposed harsh mandatory penalties on someone who sold either drugs or a “mixture” containing drugs over a certain weight.24 In the case of LSD, the drug itself weighs almost nothing.25 The prosecutor argued that the weight of the blotting paper used to contain the drug should count.26 If so, the defendant’s sentence depended less on the amount of drug sold than on how the blotting paper had been cut.27 Should the weight of the paper have been the basis of sentencing?28

Admittedly, these cases are not blockbusters, but they raise intriguing (if narrow) issues. Nevertheless, the Court found nothing interesting to say about any of them. For example, here is a central paragraph in the Court’s explanation of its holding in the banking case:

17. 113 S. Ct. 2173 (1993).
18. Id. at 2177.
19. Id. at 2176.
20. Id.
22. See United States Nat’l Bank of Or., 113 S. Ct. at 2177.
24. Id. at 455-56.
25. See id. at 457.
26. See id. at 456.
27. Id. at 459.
28. See id. at 456.
The first thing to notice, we think, is the 1916 Act's structure. The Act begins by stating [t]hat the Act entitled "Federal Reserve Act," approved [1913], be, and is hereby amended as follows. 39 Stat. 752. It then contains what appear to be seven directory phrases not surrounded by quotation marks, each of which is followed by one or more paragraphs within opening and closing quotation marks. These are the seven phrases (the numbers and citations in brackets are ours) [this is followed by a full half-page verbatim quotation. Then the Court continues:]

The paragraph eventually codified as 12 U.S.C. § 92 is one of several inside the quotation marks that open after the third phrase, which "hereby amended" Rev. Stat. § 5202, and that close before the fourth, and the argument that the 1916 Act placed section 92 in Rev. Stat. § 5202 hinges on the assumption that the third phrase is a directory phrase like each of the others.29

The tone of this passage is unhappily reminiscent of a software manual or the inscrutable instructions accompanying an IRS tax form. The Court continued with this labored grammatical dissection of the statute at some length30 before triumphantly announcing that the case was so clear that neither legislative history nor the administrative construction of the statute could be considered.31

The other two cases produced equally dull opinions. The deciding votes in the firearms case were cast by Justices Scalia and Thomas, who said only that selling a rifle kit is different than producing a rifle,32 while the plurality made a muddled distinction between single-purpose and dual-purpose kits.33 In the LSD case, the Court's analysis basically came down to quoting two dictionary definitions of "mixture" and steadfastly refusing

30. See id. at 2183-86.
31. Id. at 2186 n.11.
33. Id. at 2107-10.
to think seriously about anything else.\textsuperscript{34}

Perhaps, one might surmise, there was nothing more interesting to say in these minor cases. In this respect, it is revealing to compare the rather stodgy Supreme Court opinion in the LSD case with Judge Posner's dissent in the court of appeals.\textsuperscript{35} Here is Posner's explanation of the flaws in the government's approach to sentencing:

\begin{quote}
[A] quart of orange juice containing one dose of LSD is not more, in any relevant sense, than a pint of juice containing the same one dose, and it would be loony to punish the purveyor of the quart more heavily than the purveyor of the pint. It would be like basing the punishment for selling cocaine on the combined weight of the cocaine and of the vehicle (plane, boat, automobile, or whatever) used to transport it or the syringe used to inject it or the pipe used to smoke it.\textsuperscript{36}
\end{quote}

Indeed, Posner commented, a person selling one dose of LSD in a glass of orange juice could obtain a heavier sentence than one who sold 180,000 doses in pure form.\textsuperscript{37} "Well," Posner asked a bit later, "what if anything can we judges do about this mess?"\textsuperscript{38} The answer, he said, depends on whether judges have authority "to enrich positive law with the moral values and practical concerns of civilized society."\textsuperscript{39} Posner's discussion has a vigor and intellectual excitement that is missing from the Supreme Court's opinions in all three cases.

Perhaps the oddest aspect of many of the Court's decisions is that the Justices seem to have lost sight of any purpose in what they are writing.\textsuperscript{40} Let me catalogue some of the problems in

\textsuperscript{36} Id. at 1332.
\textsuperscript{37} See id.
\textsuperscript{38} Id. at 1334.
\textsuperscript{39} Id. at 1335.
\textsuperscript{40} The Court seemingly views the issuance of opinions to be an end in itself, as if the text of the opinion had some autonomous value unrelated to its ability to communicate to an audience. At a deeper level, the intellectual flaw in the statutory-interpretation opinions is similar. The Court often treats statutes as free-standing texts, with little attention to their historical and social contexts or what their
the Court's work product.

The first problem is a tendency to prove laboriously the obvious. The Court sometimes seems incapable of stating the most basic legal proposition without a supporting bevy of citations. For example, it is not enough to begin analyzing a statutory issue by looking at the statutory language. The Court has to explicitly tell us that the statute is the place to start and then give a couple of citations to that effect. The Court decides a good many statutory cases and continually feels obligated to supply authority for this proposition, as if the Justices were afraid that the audience would otherwise disbelieve them.

Even worse than proving the obvious is the labored exploration of material that, in the end, turns out to lead nowhere. The Court regularly explores the legislative history in numbing depth, only to find it inconclusive or at least too weak to justify departing from the text. The average lawyer presumably would be willing to trust the Justices if they simply reported that they had checked the legislative history and found it wanting.

The Court's handling of the factual record is also often unproductive. The Court often begins an opinion with a lengthy review of the history leading up to the lawsuit, the procedural development of the case, and so forth. Often, much of this background lacks any legal relevance. After announcing a legal standard, the Court then devotes more pages applying that stan-

43. See, e.g., Growe v. Emison, 113 S. Ct. 1075, 1077-80 (1993) (detailing all of the plaintiffs' allegations, the parties' stipulations, interlocutory action taken by the legislature, committee and panel proceedings, and so on); Parke v. Raley, 113 S. Ct. 517, 519-21 (1992) (outlining in laborious detail the procedural history of the case, including hearings, plea bargains, and motions); Missouri v. Jenkins, 495 U.S. 33, 37-45 (1990) (devoting the first eight pages of a desegregation ruling to minutiae about the procedural development and factual background).
standard to the facts. If done in a cogent, crisp fashion, this analysis could provide guidance for lower courts in future cases, but often the Court feels obliged to explore the facts in tedious detail—so tedious that one wonders if the issue should not have been left to the lower courts or perhaps even the jury. For example, in a recent antitrust case, the Court spent many hundreds of words showing that a particular cigarette company was not guilty of price discrimination or predatory pricing during a certain time period. Apart from possibly usurping the fact-finding function of the jury, this discussion seems unlikely to add to the development of the law.

When the Court does attempt to guide lower courts, it generally uses multiprong tests that sometimes fail to provide much illumination. As Professor Horwitz says, the Court takes these tests very seriously indeed. For example, lower court judges may find themselves reproved for considering a fact under prong three of the test for regulating commercial speech, when the fact should have been considered under prong four. Sometimes these tests can provide future guidance, but often they have limited practical utility.

An apt example is provided by the public forum doctrine. This doctrine divides public property into traditional public forums, limited public forums, and nonpublic forums—providing a separate test for each one. There also seems to be at least one additional category for government-sponsored speech. I have criticized this test in previous scholarship, but my real complaint is in my role as an administrator. Questions arise about speech activities at the law school—students wearing offensive

45. *See supra* note 9 and accompanying text.
47. For the details of this doctrine, see, for example, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983), regarding restrictions on the use of a school system's in-house mail system and corresponding free speech protections.
48. *Id.* For another example, see Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 519 (1991) (using a difficult-to-apply test of "germaneness" for union dues).
T-shirts in the hall, posting placards in the foyer, attaching notices to bulletin boards, setting up tables in the hallways, engaging in fund-raising, or inviting speakers. Not infrequently, these activities are controversial and lead to requests for an administrative response. In responding to these very routine situations, I have to apply the public forum test, but often find it impossible to obtain relevant information, such as the exact history of previous uses of the same location or activity or written rules covering them. Surely, the Court could give more useful guidance to those of us who are trying to obey the law.\textsuperscript{50}

One reason that the Court's tests can be unhelpful is that they are often based on rather fine, if not insubstantial, distinctions. In the St. Paul cross-burning case,\textsuperscript{51} Justices Scalia and Stevens debated a far-fetched hypothetical: Would St. Paul's ordinance apply equally where an advocate of tolerance uses fighting words that insult a bigot on the basis of his intolerance, and the bigot then responds with fighting words insulting the concept of toleration? If not, Scalia argued, the ordinance discriminates in favor of the viewpoint of the tolerant.\textsuperscript{52} This analysis seems reminiscent of the Rule Against Perpetuities, where trusts were struck down not because of anything that might be reasonably likely to happen, but rather because of some hypothetical involving a ninety-year-old woman giving birth or some day marrying a person as yet unborn. To take a more mundane example, Justice Scalia also wrote a bankruptcy opinion in which the outcome of the case turned on whether a lien vested at the precise instant that a property interest was created, or a nanosecond later.\textsuperscript{53} In both cases, if he had stepped back and

\textsuperscript{50} Notice, I am not even complaining that the test gives the wrong answers; rather, it does not give me useful answers at all. In some of these situations, if the speaker is not protected by the First Amendment, I may have a legal duty to intervene under the civil rights laws in order to prevent a hostile working or educational environment. The Court has been equally unhelpful in defining that test as well. This absence of clear direction from the Court leaves me in something of a quandary as a conscientious administrator trying to obey the law.  


\textsuperscript{52} Id. at 2548.  

gotten some perspective on what he was doing, Justice Scalia might well have rested less heavily on such metaphysical distinctions.

This critique of the Court's work product should not be exaggerated. The Justices are hard-working, capable lawyers, facing very difficult problems that often arise in technical and unfamiliar fields. Opinions can be long because cases are complicated; courts can fracture because issues are recondite. Yet it seems fair to say that the overall written performance is uninspiring. Frequently, opinions today almost seem designed to wear the reader into submission as much as actually to persuade.

On one level, these problems merely involve matters of writing style. Nonetheless, they seem to reflect a failure by the Justices to think about their audience and their goals. Instead, the Justices seemingly grind out written products without any real consciousness of purpose. Even when, as in much of Justice Scalia's work, the product avoids dullness, it nevertheless fails to persuade. Rather, Scalia often preaches with brilliant flourishes to the converted, impressing his followers at the Federalist Society but doing little to persuade the neutral reader and often unnecessarily alienating potential allies on the Court.

Much of the problem seems to be a lack of perspective. If a Justice stopped to think about what he or she was doing and why, the result might be to rethink how the opinion was written. Unlike the hypothetical athlete who "plays with intelligence," the authors of many of these opinions seem to lack a sense of the flow of the game that they are playing. They also seem to forget that the point of the game is not elaborate dribbling but scoring baskets.

The Court's failure to write more persuasively is unfortunate for more than stylistic reasons. We expect the Court not only to solve legal problems, but to explain why important issues should be resolved one way rather than the other. Even in the relatively minor cases discussed earlier, the decision is important to not only the parties, but many others. How many casual sellers of LSD, one wonders, will face draconian mandatory sentences only because they used too large a piece of blotting paper?54 They
have a right—and we as a society have the right—to a persuasive explanation for this result. Similarly, with the question of whether short-barreled rifle kits should be freely sold or even what markets are open to national banks, we are entitled to a persuasive explanation. The kinds of bureaucratic documents produced all too often by the Court simply do not exhibit an adequate understanding of a significant societal decision. Consequently, these opinions also do little to contribute to our national dialogues over public policy.

II. LEGAL SCHOLARSHIP

It is not hard to frame a similar indictment of the state of current law review writing. For example, in an article in the Harvard Law Review a few years ago, Kenneth Lasson said:

It may be hard to say whether good writers are born or made, but it's painfully obvious that few of them are legal scholars. Law review prose is predominantly bleak and turgid. . . .

Similarly, length remains a hallmark of erudition. "[L]et your words be few," said Solomon himself, but the legal scholars continue to exalt quantity.

Providing documentation in support of this indictment is unnecessary; few readers of law reviews will disagree with the general import of Lasson's criticisms, though some may find his language too harsh.

Another worrisome concern relates less to stylistic weaknesses than to the intellectual aridity of much legal discussion, even on issues of pressing public concern. Worse yet, some indications exist that we are approaching the point where discussion of the issues may tend to dissolve into exchanges of ad hominem insults.

55. See supra notes 13-16 and accompanying text.
56. See supra notes 17-22 and accompanying text.
57. To take as an example an area in which I teach and write, although the Supreme Court has written many opinions in environmental law, in my view, this jurisprudence has had little real impact on environmental law.
Here, even more than in the discussion of the Supreme Court, I can do little more than provide some suggestive illustrations. Given the volume of writing by legal academics, it would be impossible to give an adequate number of examples. I will discuss only a small subset of the literature devoted to subjects of major social concern. I will focus my remarks on scholarship relating to affirmative action, with a passing look at one small aspect of the debate about pornography. Even within these two areas, there are certainly exceptions to my somewhat gloomy assessment of the scholarship, so my comments should be taken only as crude generalizations.

I spent a good deal of time in the last year reading legal scholarship about race in general and affirmative action in particular. It was a somewhat depressing experience. We seem to have worn deep grooves repeating the same basic arguments and counter arguments over and over.

The basic arguments on affirmative action are fairly easy to lay out. They can be found, for example, in the opinions in the *Bakke* case over fifteen years ago. The argument against affirmative action goes like this:

> Whether you call them affirmative action or reverse discrimination, racial preferences are wrong. They are morally wrong whichever group is favored. They are also dangerous, because they reinforce the legitimacy of racial thinking and racial stereotypes. Race is simply an irrelevant personal characteristic.

Here is the counterargument:

> Color-blindness sounds good in theory but ignores social reality. Given a history going back to slavery, and the prevalence, even today, of conscious and unconscious discrimination, affirmative action is a necessity. It also ensures that the full diversity of viewpoints in our multicultural society is represented.

My quarrel is not with these arguments, but with the fact that

59. This research was directed toward a forthcoming article, Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. (forthcoming 1994).

we have heard them so many times before and are apparently
doomed to hear them repeatedly in the future.

Besides being repetitive, the arguments tend to be quite styl-
ized. We tend not to notice this stylization just because we are
so accustomed to the almost ritualized formulae. One aspect of
these arguments that I find particularly striking, for example, is
that almost all of the affirmative action debate relates to African
Americans. Indeed, even members of racial minorities them-
selves tend to speak either of blacks or of "people of color"
collectively, as if all minority groups were fungible. This characteriza-
tion has never been true and is rapidly becoming completely
unrealistic.

Someone who read only law review articles in major law re-
views would be surprised to learn that Mexican Americans are
about to supplant African Americans as the largest minority
group.\footnote{Robert Pear, Population Growth Outstrips Earlier U.S. Census Estimates, N.Y.
TIMES, Dec. 4, 1992, at A1.} That reader would also be surprised to learn just how
different the situations of the two groups are in some respects.
For instance, cohesion is lower among Hispanics than blacks, as
is shown by the way people identify themselves on the census
and by their rates of intermarriage.\footnote{See Peter Skerry, Not Much Cooking: Why the Voting Rights Act Is Not Em-
powering Mexican Americans, BROOKINGS REV., Summer 1993, at 42, 43 (noting that
50.6% of all Mexican Americans surveyed in the 1980 census identified themselves
as racially "white").} Whites also respond quite
differently to the two groups, and are much more willing to
tolerate Mexican American neighbors, which in turn means that
there is much less residential segregation.\footnote{Id. (pointing to a study of 1980 census data which found that an influx of
Latinos into a residential area does not seem to precipitate an exodus of Anglos).} Accordingly, argu-
ments based on polarization or segregation may play out differ-
ently for Mexican Americans than for African Americans.

Some readers might also be surprised to know that there
actually have been some empirical studies about the scope and
effectiveness of affirmative action. These studies suggest that, on
the whole, the attention devoted by legal scholars to the issue is
somewhat disproportionate to its practical importance. Affirma-
tive action seems to have caused a modest increase in the num-

\begin{thebibliography}{9}
\item Robert Pear, Population Growth Outstrips Earlier U.S. Census Estimates, N.Y.
\item See Peter Skerry, Not Much Cooking: Why the Voting Rights Act Is Not Em-
powering Mexican Americans, BROOKINGS REV., Summer 1993, at 42, 43 (noting that
50.6\% of all Mexican Americans surveyed in the 1980 census identified themselves
as racially "white").
\item Id. (pointing to a study of 1980 census data which found that an influx of
Latinos into a residential area does not seem to precipitate an exodus of Anglos).
\end{thebibliography}
ber of blacks employed in certain industries (less than one percent annually) but it has had relatively little effect on long-term wages.\textsuperscript{64}

On yet another point, a bit of empiricism might bring some refreshing variety to our thought about racial issues. One of the major arguments for affirmative action is that it is needed to combat ongoing discrimination. Those on the left point to a rising tide of racism, making affirmative action increasingly urgent. Those on the right point to the illegality of intentional racial discrimination in our society, eliminating (in their view) any need for such strong medicine as affirmative action. There are strong grounds for doubting both views.

First, as to the "rising tide," public opinion polls quite consistently show a decrease in overtly racist statements by white respondents.\textsuperscript{65} Either whites are less racist, or they think that expressions of racism are less socially acceptable, even to other whites. Notably, similar trends appear when researchers try to gauge discriminatory conduct, rather than attitudes, through the use of "testers."\textsuperscript{66} Interestingly, even if the tide of racism is rising, affirmative action may be as much a cause as a cure. In a carefully researched study, two political scientists, Paul Sniderman and Thomas Piazza, recently concluded that opposition to affirmative action spilled over into generally negative attitudes toward blacks.\textsuperscript{67} To determine the direction of causation, Sniderman and Piazza randomly asked one group of whites about affirmative action before asking questions designed to reveal their appraisals of blacks. These respondents were significantly more negative toward blacks than were members of a

\textsuperscript{64} For a summary of the literature, see George Rutherglen, After Affirmative Action: Conditions and Consequences of Ending Preferences in Employment, 1992 U. ILL. L. REV. 339, 346-52.


\textsuperscript{66} John J. Donohue, III & Peter Siegleman, The Changing Nature of Employment Discrimination Litigation, 43 STAN. L. REV. 983, 1001-02 (1991). "Testers" are teams of black and white persons who, for example, attempt to buy houses in certain neighborhoods as part of a fair housing audit. \textit{Id.} at 1001.

\textsuperscript{67} SNIDERMAN & PIAZZA, supra note 65, at 103.
control group for whom the questions were asked in the opposite order.\textsuperscript{68} So, reasons exist to doubt the left's conventional wisdom on this point.

The right's conventional wisdom, however, fares little better. As Christopher Jencks points out, Chinese and Japanese Americans statistically have the educational traits, family backgrounds, and work attitudes that white employers value.\textsuperscript{69} Yet they are paid less than similarly situated whites.\textsuperscript{70} It is hard to envision any cause of this disparity other than bias. If these groups are handicapped in employment markets by bias, it is difficult to argue that African Americans suffer no such disability.\textsuperscript{71} On the level of attitudes, Sniderman and Piazza found a dismaying residuum of good, old-fashioned racism.\textsuperscript{72}

I am not claiming that this empirical data is unimpeachable, or that if true, it would be decisive (in either direction) about the desirability of affirmative action. Nevertheless, legal scholarship with a more empirical bent would have a greater potential for saying something new and valuable, rather than polishing a high gloss on old cliches. As it is, much of the scholarship discussing affirmative action seems, like the judicial opinions discussed earlier, to have lost sight of its purposes. It lacks the power to provide illumination or to persuade the uncommitted reader. Rather, like some of Justice Scalia's opinions, much of this scholarship seems mostly designed to preach to the converted.

The prospects for creative legal scholarship on race diminish further under the pressures that inhibit unconventional thinking. The effort to dissuade Randall Kennedy from publishing a critique of Critical Race Theory, for example, illustrates the pressure against free discussion of racial issues.\textsuperscript{73} Other exam-

\textsuperscript{68} Id. at 102-04.
\textsuperscript{69} CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY 39 (1992).
\textsuperscript{70} Id.
\textsuperscript{71} Id. at 39-40. Because black women with college degrees earn roughly the same salaries as white women, Jencks suggests that gender is more important than race in determining the wages of women workers. Id. at 40.
\textsuperscript{72} SNIDERMAN & PIAZZA, supra note 65, at 38-51.
ples include the shabby treatment directed toward Lani Guinier. Her innovative writings on voting rights displeased both conservatives and the civil rights establishment, leading President Clinton to withdraw her nomination as Assistant Attorney General for Civil Rights.\footnote{74. See Neal A. Lewis, 
Clinton Abandons His Nominee for Rights Post Amid Oppo-

tion, N.Y. TIMES, June 4, 1993, at A1.}

I wish these problems were limited to the area of race law. Considering how central racial issues are in our society, such a limitation would be depressing enough. Yet we have recently seen similar developments in another area—the debate over pornography—where debate has often been more ideological than substantive. One current controversy relates to Regina v. Butler,\footnote{75. 1 S.C.R. 452 (Can. 1992).} in which the Canadian Supreme Court recently reinter-

terpreted its obscenity statute to treat pornography as a violation of the civil rights of women. Catharine MacKinnon, who pio-

neered this analysis of pornography, applauded the decision as a breakthrough.\footnote{76. CATHARINE A. MACKINNON, ONLY WORDS (1993).} Critics, notably Nadine Strossen of the ACLU, gleefully reported that the Canadian authorities had applied the decision to suppress lesbian and gay materials, serious art works, and even the works of feminists such as MacKinnon's colleague Andrea Dworkin.\footnote{77. Nadine Strossen, A Feminist Critique of "The" Feminist Critique of Pornogra-

phy, 79 VA. L. REV. 1099, 1145-47 (1993).} In a less publicized rebuttal, sup-
porters have argued that these actions did not, for various rea-
sons, really involve the Butler decision.\footnote{78. Michele Landsberg, 
Supreme Court Porn Ruling is Ignored, TORONTO STAR, 
Dec. 14, 1993, at D1. One exception was apparently a successful prosecution in To-

ronto against a small gay and lesbian bookstore selling sadomasochistic materials. \textit{Id.}} Most of the discussion on both sides of this issue has been somewhat superficial. For example, neither side has discussed the strong resemblance between Butler and certain aspects of the governing Miller stan-
dard\footnote{79. See Miller v. California, 413 U.S. 15 (1973) (stating the Supreme Court's standard for obscenity).} in the United States.\footnote{80. Daniel O. Conkle, Harm, Morality, and Feminist Religion: Canada's New—But Not So New—Approach to Obscenity, 10 CONST. COMMENTARY 105 (1993).} Thus, as with race scholarship, the debate has been unduly abstract and ideological.
As with race scholarship, the prospects for future intellectual debate about pornography are unpromising. MacKinnon's characterization of her critics is, to say the least, uncharitable: "I do not allow myself to be used to orchestrate and legitimate a so-called 'debate within feminism' over whether pornography harms women. It is my analysis that that is the pimps' current strategy for legitimizing a slave trade in women." This rhetoric seems unconducive to fruitful discussion—as is some of the rhetoric of her critics. In a shrill attack on her most recent book, Carlin Romano begins by hypothesizing a decision on his part to rape MacKinnon, which becomes transmuted into a decision merely to write about this idea, for which he is then prosecuted. Under MacKinnon's theory, he says, writing about rape is indistinguishable from rape; his hypothetical is intended to make that idea seem absurd. MacKinnon was understandably outraged by Romano's fantasy of her as a crime victim. In response, she has called the review "a public rape," perhaps confirming his rendition of her substantive views, while her partner Jeffrey Masson spoke darkly of ruining Romano's career. This spectacle does not augur well for further public discourse on the pornography issue. To return to my earlier athletic metaphor, the players seem intent on brutalizing each other rather than engaging in what sportswriters call "playing with intelligence."

The evidence here suggests (but falls well short of proving) that the discourse on important issues of public policy too often has been intellectually thin and is now threatening to break down into ad hominem attacks. I have also offered nothing...

82. See MACKINNON, supra note 76.
83. See Carlin Romano, Between the Motion and the Act, 257 NATION 563 (1993).
84. See id.
86. See, e.g., Gary Peller, The Discourse of Constitutional Degradation, 81 GEO. L.J. 313, 331 (1992) (responding to Mark Tushnet's criticism of legal storytelling by asserting that "even within his own grid of meaning, Tushnet should be understood
approaching proof that most law review writing is dull and inert. For readers who have lingering doubts about my conclusions, all I can suggest is to spend a few hours perusing the recent issues of some leading reviews.

III. RENEWING THE PLAY OF INTELLIGENCE

Before discussing my diagnosis, let me briefly recapitulate the symptoms. The upshot is that both law review articles and judicial opinions are getting increasingly longer and more complex, yet seem to have less to say to much of their audiences. One increasingly has the sense that writers are absorbed in verbal manipulation rather than engaging genuine problems in the real world. As we have seen, debates among scholars seem to be getting uglier (and in fact, the level of civility on the Supreme Court is not what it could be either). If this Essay has failed to convince the reader of its full criticism on these points, I hope it at least demonstrates that cause exists for concern. The more difficult task, however, is articulating the cause of these symptoms.

In thinking about this question, I was initially reminded of Justice Holmes' admonition that we should "think things, not words." Part of the problem does seem to lie in that direction. In reviewing the Court's work, we saw a fixation on verbal formulas; likewise, race scholarship frequently seems to suffer from a similar fixation on stylized rhetoric. Yet Holmes' adage defines the problem a bit too narrowly—suggesting that we mostly need less abstraction and more concreteness. This deficiency actually is part of the problem; we could surely benefit from more empirical research and sensitivity to concrete factual situations. Yet, the problem goes beyond that.

The phrase that comes closest to identifying this missing element is the "play of intelligence," a term I first heard used by

87. Oliver Wendell Holmes, Jr., Law in Science and Science in Law, 12 HARV. L. REV. 443, 460 (1899).
my late colleague Irving Younger.  

Professor Younger defined this phrase in an article about effective legal writing:

Good legal writing comes from the head. You must see through and around your subject, measuring it by more than one measuring stick, turning it over, testing it, arriving at a just and clear-headed assessment of its position in the hierarchy of things.

The word that best expresses this requisite distance is “detachment,” understood as a certain amusement with the enterprise upon which you are engaged, a sense of humor about yourself and your works. If a lawyer has it, the lawyer’s writing will unfailingly communicate the play of intelligence (“play” here being as important as “intelligence”). It is the play of intelligence that brings legal writing to life, holding a reader’s attention and eliciting his assent.

To correct what might otherwise be a natural misconception, I do not read Younger to be saying that the writer should feel passionless or disinterested regarding a project. On the contrary, great lawyers care deeply about the success of their arguments. Also, writing is not always as enjoyable as he makes it sound—as with athletics or ballet, much painful exertion goes into what appears an effortless performance.

Despite these quibbles, this passage does help illuminate some of the common shortfalls in current legal discourse. A careful reading of the Supreme Court opinions discussed earlier does not suggest that their authors “[saw] through and around [their] subject . . . turning it over [and assessing] its position in the hierarchy of things.” Rather the Justices seem to have moved along the line of least resistance to crank out an opinion. Similarly, much scholarly writing fails to demonstrate the de-

88. Irving Younger used this phrase in the course of criticizing a law review article. For readers who may be unfamiliar with him, perhaps I should explain that Irving was not a conventional legal scholar, but rather thought of himself as a humanist, a scholarly attorney, and in his capacity as a trial lawyer, as an “artist in the courtroom.”


90. Younger, supra note 89, at 110.
tachment needed to question and thereby transcend the author's preconceptions. Rather, scholars too often seem content to embellish on a familiar creed. Moreover, humor is in notoriously short supply among both judges and legal scholars.

Notably, the passage quoted above was not written by a philosopher or literary theorist but by a working lawyer meditating on his craft. Notice that Younger is not speaking about writing in general but about legal writing. In doing so, he evokes the traditional concept of the lawyer as professional. In a recent book, Anthony Kronman provided a philosophical elaboration of this concept. He stresses two of the same elements of professionalism as Younger—namely, good judgment, in the sense of experienced practical reason, and detachment, in the sense that the lawyer's identification with the client's needs is tempered by the lawyer's obligations as a member of a learned profession. In addition, Kronman emphasizes another element that is implicit in Younger's formulation—imagination. Imagination is needed in legal writing for several reasons: to generate potential arguments for the client's position, to conjure up the likely counterarguments of an opponent, and to gauge the likely reaction of the audience to both sets of arguments.

For these purposes, legal writing is distinguished from other writing less by its subject matter than by its social context—the author's relationship to the other participants in this rhetorical situation. First, lawyers' writing is always conducted in the shadow of an opponent. Accordingly, the author must always fear that any omissions, misrepresentations, or analytical weaknesses will be exploited. Yet the opponent is not truly an enemy, because both the author and the opponent share allegiance to a set of legal institutions and professional norms such as civility. Second, legal writing is addressed to a particular kind of audi-
ence. Even where the client is the direct audience, the question usually concerns the position some outside decisionmaker might ultimately take on an issue. A tribunal is always present as the virtual if not actual audience. That tribunal does not come to the argument without preconceptions but is presumed to be open to argument from both sides. In short, we are positing a certain kind of disinterested and critical audience. This audience, whether virtual or actual, is reading with a purpose—not for enjoyment or personal enlightenment, but to make a specific decision or to analyze a particular problem. For this audience, and this kind of writing, the "play of intelligence" is crucial.

Some examples are appropriate lest this attribute be thought mythical. Both of my examples are lower court judges, in part to avoid making invidious comparisons among the Justices. The first example is Judge Learned Hand, the very paradigm of judicial craftsmanship. Despite the calm, self-assured tone of his opinions, Hand was plagued with agonizing doubts about the analysis in many cases. He paused frequently between paragraphs to obtain a critique from his law clerk, which he took very seriously. He also displayed a sense of humor in his memoranda to other judges and his dealings with his clerks, to whom he was apparently prone to sing Gilbert and Sullivan.

My other example is contemporary and perhaps more surprising. At the time of his appointment, it would have been reasonable to view Judge Posner as a prolific scholar but indelibly wedded to a narrow intellectual and political perspective. Indeed, I suspect that he retains that public image today. But since being on the bench, he has shown a remarkable degree of growth, both in his scholarship and in his judicial opinions. This allegedly conservative scholar, for example, has endorsed legal recognition of homosexual partnerships and constitutional pro-

95. In particular, I am fighting the strong temptation to use Justice Stevens as a positive example; the reader would be entitled to regard this view by a former law clerk as suspect.
97. Id.
98. Id. at 410.
tection for reproductive rights. As to his writing on the bench, consider the passage from the LSD case quoted earlier. More recently, Posner wrote an exceptionally liberal opinion in an entrapment case to which I suspect Justice Brennan would have been happy to sign his name. Presidents Reagan and Bush apparently found Posner too unconventional and unpredictable for a Supreme Court appointment, perhaps because they suspected he might be guilty of the play of intelligence.

As the last statement suggests, some degree of bias against playful intelligence may exist in the judicial selection process. Humor and imagination seem likely only to hurt one's case before the Senate Judiciary Committee in the unlikely event that those traits were not fatal earlier in the process. A less grimly inquisitorial process of confirmation might provide more creative intelligence on the bench. No profession, however, can afford to rely on sheer talent for good performance. We have to think about how we can raise the standard of performance without relying on extraordinary talent.

Improving judicial and scholarly writing requires a greater consciousness of the author's rhetorical situation. Good legal writing exhibits the play of intelligence because lawyers badly want to succeed and are keenly aware that the situation demands a certain kind of performance. Much of the current problem is that both judges and legal scholars have lost sight of the rhetorical context in which they operate. Their situation is not literally the same as the practicing lawyers, but there are some intriguing analogies.

Consider first the judge. A key weakness of current Supreme Court opinions seems to be that judges have sometimes lost track of whom they are addressing or what they are trying to accomplish. Of course, they have no literal clients, but they seek to advance a set of values and perspectives that might serve as the basis for identifying metaphorical clients. For a judge like Learned Hand, the client might be considered to be the Ameri-

100. See supra text accompanying note 36.
101. See United States v. Hollingsworth, 9 F.3d 593 (7th Cir. 1993).
102. Query whether these traits would be assets in the faculty selection process.
can legal system as an ongoing enterprise. The purpose, then, is to help the system work as well as possible according to its own norms and goals. I suspect, if they thought about it, a Kennedy or Souter would identify similar clients. For a Brennan or a Scalia, the client is an ideological position—it is only stretching things a little to say that Brennan's client was the ACLU or Scalia's the Federalist Society, not as specific organizations, but as embodiments of a viewpoint. In similar terms, Justices Kennedy and Souter's clients might be described as the collectivity of lower court judges.

The next step is to determine what a particular piece of writing is designed to do on behalf of the client. Often, the purpose is to guide other courts to advance the client's interests in their own decisions. In this respect, the important part of the opinion is that portion speaking to future cases—though as we have seen, judges sometimes fail to focus their energies there. Additionally, the opinion, if it is to elicit more than the most grudging obedience, must appeal to the values and goals of those judges as well as to the author's. Sometimes, the purpose is to persuade other Justices; this purpose is unlikely to be served by hyperbolic rhetoric or by verbal abuse of other members of the bench, though some Justices act on occasion as if they thought otherwise. Whatever the purpose, we ought to expect the same kind of professionalism from the judge that we expect from advocates such as the Solicitor General.

Although it may seem, if anything, less conventional to think of scholars as having clients, the same analysis is also helpful. I believe, and have argued elsewhere, that the scholar's client should be truth with a small "t," though I cheerfully admit my inability to define that term. More concretely, my view makes the scholar's client the community of scholars considered as a whole.

There are other conceptions of scholarship extant, and they are unlikely to disappear. Some scholars, like Professor MacKinnon, speak on behalf of abused women. Other scholars may represent the Federalist Society, or African Americans, or

some other group. Many of these clients are not unitary, and
their lawyers need to keep in mind that sharp disagreement
exists within these groups about their own values and interests.
Legal scholars should recognize that other lawyers seeking to
represent the same group legitimately may view a client's inter-
est differently than they do. If legal scholars do choose to think
of themselves as representing some of these metaphorical cli-
ents, they should, like other lawyers, openly identify their cli-
ents. Like other lawyers, they continue to be bound by duties of
honesty and civility in dealing with their opponents and with
their audiences. When they engage in legal writing in the sense
that I have defined it, even the most ideological scholars are
fully in need of the detachment, imagination, and sense of judg-
ment I have called the play of intelligence.

In the end, we can only expect the play of intelligence to flour-
ished if we practice it ourselves and encourage others to do so.
Those of us in the academy can cultivate it in our colleagues
through our responses to their work. Possibly we can even give
judges a small nudge in that direction. Perhaps more important-
ly, in the long run, we can try to cultivate it in our students.¹⁰⁴

Imagination, detachment, and humor are not easy things to
teach. But we can try.

¹⁰⁴. Professor Kronman suggests that, properly employed, the Socratic method can
serve "as an instrument for the development of moral imagination." KNORMAN, supra
note 91, at 113. Improperly employed, however, it can have the opposite effect, as
many law students have cause to regret.