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## Is There a Lingua France for the American Legal Academy?

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## Is There a Lingua Franca for the American Legal Academy?

Mary Anne Case

This chapter, more of a rant or a meditation than a conventional work of scholarship, presses hard the idea of translation between languages within the legal academy, asking, not only about a lingua franca, but also about a vernacular. It begins, as it will continue, with personal anecdote, not with data, and this in itself should help the reader to situate the author vis a vis some of the languages herein discussed.

I have been teaching for the last decade at the University of Chicago Law School, which has long had a deserved reputation, not only for welcoming conservative scholars and for favoring a somewhat macho scholarly style, but as a center of law and economics scholarship. When the University of Chicago recruited me in the late 1990s, I expressed concerns about the lack of diversity among the law school faculty.<sup>1</sup> My chief concern was not diversity of political persuasions: I was, after all, contemplating a move from the more conservative University of Virginia law faculty to a faculty in which, notwithstanding the prominence of conservatives, I would no longer occupy the left fringe but fall somewhere in the middle of a broader left-right spectrum. Nor was it demographic diversity, although I would have been delighted to see more women and people of color on the Chicago faculty. I did note with some regret a lack of temperamental or stylistic diversity, but I wondered whether this was easily curable given the small size of the Chicago faculty and the focus on a single conversation at the faculty's thrice weekly Roundtable lunches: Would someone who not only was uncomfortable bluntly

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<sup>1</sup> It is important to note that I am discussing my observations as of a point in time a dozen years ago, and that there has been substantial turnover on the University of Chicago's law faculty in the last decade, which has brought with it increased diversity along many of the axes I discuss.

criticizing or interrupting others, but might actually want to think something carefully through before speaking about it ever be able to get a word in edgewise? I doubted it.

What I told the hiring committee I was most worried about was a lack of methodological diversity. I did not mean by this a lack of subject matter diversity; rather what I was looking for, even in those subject areas dominated by law and economics discourse such as the first year private law topics of contracts and torts, was a broader diversity of ways of thinking and talking about law. “But Mary Anne,” they responded with some puzzlement, “aren’t we always eager to talk with you about the feminist topics you’re interested in, whether it’s sex segregation in public toilets, same-sex marriage, men in dresses, or parental leave?” I conceded their point, but tried to make them understand that it was not just a question of the subjects we discussed, but the language we used to discuss them. “Imagine,” I said, “someone who is willing to talk about the topic of my choice provided we do so in French.” French is a language I’ve studied, and I can readily understand almost anything said to me in French. If I were forced to speak it more often, my ability to speak it would improve, but it is not my native language and true fluency would likely still elude me. Similarly, I noted, my would-be colleagues at Chicago were indeed happy to talk with me about even the most far out of feminist topics provided they could do so in the language of law and economics or rational choice, which, like French, is a language I can understand perfectly well and can speak if required, but not the language in which I am most comfortable or in which I feel I can express myself best. Not only could it be laborious to translate my thoughts into this foreign language, there were some thoughts I could not find a translation for. Moreover, like French, the language of rational choice was one about which I

was deeply ambivalent about becoming much more fluent – I worried that, instead of becoming perfectly bilingual, I might lose the ability to express myself really well in any language.

In choosing French as the language I analogized to the language of law and economics and rational choice, I was making anecdotal use of my own actual knowledge of languages, but I also had in mind several other uses of French as a non-native language. First, I had in mind what literary critics have observed about Samuel Beckett,<sup>2</sup> a native speaker of English who wrote many of his works initially in French: When Beckett translated these works back into English, they were importantly different works. In French they tended by and large to be cleaner, simpler, less allusive and poetic. As Beckett himself said, he “couldn’t help writing poetry in” English whereas “in French it is easier to write without style.”<sup>3</sup> Part of the explanation may be that English is a language with many more words than French, but part of it is likely to be that Beckett could hear resonances to words in English in a way that he might not have been able to in French, because French was less deeply familiar to him. In describing Beckett’s French works as more spare, I don’t mean to be saying anything essential about English or French as languages. If I approached the divide between the British Isles and France from a different disciplinary perspective, focusing on the perceived differences between continental and analytic philosophy, I would note that continental philosophy is thought to function the way that Beckett’s English functions, whereas analytic philosophy, associated with English speakers and with Britain, more closely resembles Beckett’s French, being (or at least purporting to be) more stripped down, less allusive, clearer and sharper.

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<sup>2</sup> I used to be a literary critic, but I am not one any longer; in discussing Beckett I am reporting from a disciplinary perspective that is not my own.

<sup>3</sup> Samuel Beckett, quoted in Marjorie Perloff, *‘Une Voix pas la mienne’: French/English Beckett and the French/English Reader*, in *Poetic License: Essays on Modernist and Postmodernist Lyric* 161, 162 (1990).

My focus is not on the inherent properties of any particular language, but on the difference between using one's native language and an after acquired one, or between using the vernacular and using a lingua franca. Two other historical uses of French are relevant here. Most obviously, there is the use of law French in the law courts of England, a practice that has left its traces in terms of art still used by lawyers in the U.S. today. Although it had its roots in the Norman French of the Conquest, over the centuries law French ceased to be a living spoken language and became an amalgamation of antiquated French and English vocabulary which allowed those initiated in the mysteries of the law to communicate with one another in a jargon incomprehensible to lay people. Less obvious, but perhaps more directly analogous, is the tendency of the Russian aristocracy from the time of Peter the Great onward to prefer French to Russian as the language of polite society.

Let me suggest that for much of the American legal academy in the last generation, the language of law and economics and rational choice bears the same relationship to the language of legal doctrine (including what is left of law French) as French did to Russian for most Russian aristocrats. What I mean to suggest is, whether or not there is a lingua franca in the legal academy, there is a vernacular, the language of doctrine. Doctrine is the vernacular of American law along a variety of dimensions: It is not imported from another discipline, but indigenous. While some of its characteristic words and phrases originated elsewhere and some have penetrated to broader American society, it is spoken fluently only by lawyers. And it is a language all who are trained in law – practitioners and scholars at all levels of prestige - have been taught; indeed, it is one of the ways in which lawyers can recognize one of their own. Like

Russian for the aristocrats in Czarist Petersburg, however, the language of doctrine may be what ties today's American legal academics to their roots and binds them together, but it is not the language in which they generally choose to express their most elevated thoughts, even in the classroom. Rather, even in the first year required courses for which imparting the language of doctrine is seen as a priority, students are likely to hear as much about concepts and terminology derived from law and economics, such as the Coase theorem and negative externalities, as about those with roots in doctrine and law French, such as the parol evidence rule and estoppel.<sup>4</sup> To become truly fluent in doctrinal language so that they can communicate with all the peasants in the world of practice, our students are expected to take a bar review course, the equivalent for doctrine of a Berlitz cram course.

Like Count Tolstoy longing to revive Russian, there are some in the legal academy who may speak wistfully of dissolving the barriers between the academy and the profession. But, when it comes to communication within the legal academy through published scholarship and workshop presentations, doctrine tends to be despised. The surest way to damage another scholar's chances for hiring or promotion is to describe his or her work as merely doctrinal. Moreover, just as a wealthy member of the old nobility such as Tolstoy may have found it easier to embrace Russian than his poorer, less blue-blooded brethren, so the few legal scholars who still not only take a serious interest in doctrine but publish highly regarded works of doctrinal

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<sup>4</sup> The language of doctrine and that of rational choice can serve equally well to perform functions Elizabeth Mertz has identified as served by the language of instruction in law school classrooms, including "bracketing of emotion and morality in dealing with human conflict" and the instilling of the equivalent for lawyers of a medical student's "clinical attitude." See Elizabeth Mertz, *Teaching Lawyers the Language of Law: Legal and Anthropological Translations*, 34 J. Marshall L. Rev. 91, 100-03 (2000).

scholarship are disproportionately likely to be, not at lower ranked schools whose classroom focus is perforce on black letter law, but at elite schools, among them Chicago.

To say that doctrine is disfavored is not to say that only law and economics scholarship is available as a preferred alternative. Legal scholars who wish to avoid being merely doctrinal have a variety of theoretical and interdisciplinary languages available to them and, in addition to economists, U.S. law schools have been known to hire scholars without a law degree but with PhDs in disciplines including philosophy, psychology and sociology.<sup>5</sup>

If, however, there is a lingua franca in the American legal academy, that is to say a language that, while not the vernacular, is so widely understood that it is used as the common language for communication among otherwise disparate groups and individuals in the academy, I would argue that it has come to be the language of law and economics and rational choice.<sup>6</sup> My experience as a participant and observer of the law school hiring process strengthens my conviction in this regard. In the legal academy today, while only scholarship that moves beyond the core of doctrinal law has any chance of market success, work that moves too far in the direction of another discipline may give rise to questions about whether a law school, rather than

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<sup>5</sup> In this respect, the situation for legal scholarship at the turn of the millennium may have been somewhat more conducive to a diversity of approaches than that in political science, a discipline whose premiere journal, the *American Political Science Review* (APSR), was accused by critics who called themselves Perestroikans of accepting almost exclusively articles whose methodology was game theory or statistics, and of excluding “political history, international history, political sociology, interpretive methodology, constructiv[ism], area studies, critical theory and last but not least-post modernism.” See Susanne Hoebler Rudolph, *Perestroika and Its Other*, in *Perestroika, The Raucous Rebellion in Political Science*, ed. Kristen Renwick Monroe 14 (2005). In other respects, however, the dominance of rational choice methodology in political science appears to have paralleled its contemporaneous dominance in legal academia.

<sup>6</sup> My claim here is limited to the United States. While a detailed discussion of the dominant modes of legal scholarship in other countries is beyond the scope of this discussion or my competence, my sense is that, for example, the language of doctrine remains more respected in the UK, while Germany has seen the emergence of a sociolegal language with roots more in sociology than economics. Indeed, at least one German academic that I know of was told by reviewers that the use of law and economics methodology to analyze reformation of contracts was per se immoral.



some other department in the university, is its appropriate home. In my experience, candidates can take far more steps in the direction of economics than in the direction of any other discipline and still have a law faculty say, "Yes, we understand why you are here, we understand why we're listening to you, we can converse with you, we share a language and an enterprise with you, you can be one of us."<sup>7</sup> Among the reasons for this differential acceptance could be that, while rational choice has gained widespread acceptance as a language, insights from other disciplines have been more selectively incorporated and then have been so thoroughly integrated into the language of legal scholarship as to lose the distinct trace of their original disciplinary settings.

Thus, while the language of rational choice functions like French in Czarist Russia, insights from other disciplines may be incorporated the way law French terms such as "mortgage" and "laches" are in modern American law. Consider two possible illustrations of this latter phenomenon. The first, from the intersection of law and literature, is the concept of "deconstruction." J. Hillis Miller, with whom I studied deconstruction in the Yale English Department, applied it to traditional literary texts like the poetry of Yeats. When I enquired on my enrollment as a Harvard Law School student about a joint degree in law and literature so that I could apply this method to legal texts, I was told that, while the study of law could fruitfully be combined with any number of humanities disciplines from history to philosophy, literature was not one of them.<sup>8</sup> Since then, of course, deconstruction has come to be applied within the legal academy not only to conventional legal texts, but, more importantly, to "texts," that is to

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<sup>7</sup> See, e.g., J.M. Balkin, *Interdisciplinarity as Colonization*, 53 *Wash. & Lee L. Rev.* 949, 951 (1996) (suggesting that, while inderdisciplinarity has become "increasingly part of what ordinary legal scholarship is," forms of interdisciplinarity such as law and economics "are more successful, more mainstream, and have evoked wider acceptance, or at least respect, than other forms of interdisciplinary scholarship").

<sup>8</sup> I was graduated from law school in 1985. Although thousands of law review articles by now use the term 'deconstruction,' a HeinOnline search turns up fewer than a hundred that did so before 1985.

essentially anything one wants to analyze using the tools of deconstruction, with the result that the application of deconstruction is not today seen as at all foreign to the legal academy. Next, consider, from the intersection of law and philosophy, the concept of “pragmatism,” used not as a colloquial English synonym for practical reason, but as a term of art in the way philosophers from John Dewey to Richard Rorty used it. My Chicago colleague Richard Posner, toggling between the term of art and the ordinary language sense of the term, has endorsed pragmatism as useful, not only in legal scholarship, but in law more generally.<sup>9</sup> But, if philosophical pragmatism is not seen as foreign to the law, it may be because, before returning to the law from philosophy, it was integrated into philosophy by philosophers influenced by lawyers and legal theorists: At the time they were first defining philosophical pragmatism, William James and Charles Sanders Peirce were in dialogue with fellow member of the Metaphysical Club Oliver Wendell Holmes, Jr. and “many commentators have noted the apparent parallel between Holmes's presentation of the ‘prediction theory’ in ‘The Path of the Law’ (1896), and Peirce's statement of the pragmatic maxim.”<sup>10</sup>

As a lingua franca, the language of rational choice has come to function in the U.S. legal academy similarly to the way English has in the modern world more generally. At some periods in time, the lingua franca for scholarship was no one’s vernacular: although Latin may have started as the vernacular of Rome and spread with the Roman Empire as the language of colonizers, from the Middle Ages onward its advantage as a universal language was precisely that it was no longer anyone’s native language, putting all who used it to communicate on a

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<sup>9</sup> See, e.g., Richard Posner, *Law, Pragmatism, and Democracy* (2003).

<sup>10</sup> Susan Haack, *On Legal Pragmatism: Where Does “The Path of the Law” Lead Us?*, 50 *Am. J. Juris.* 71, 75 (2005).

comparatively equal footing.<sup>11</sup> Law French, similarly, was no one's native language. The disadvantage of such a lingua franca is that it tends to be more stilted, more artificial, than a language some use as a vernacular. But, just as English today, even though it is often spoken at international conferences at which no one is a native speaker, offers an advantage to those for whom it is a vernacular, so the use of rational choice as a lingua franca puts those accustomed to speaking, not with economists, but with anthropologists, sociologists or literary critics at a disadvantage. English has its dialects and variants – not only British, American and Australian English, but pidgin. Similarly, the dialect of rational choice spoken among political scientists and those concerned with institutional economics differs from that spoken by economists and those concerned with private law. And, just as some see American English as a debased or antiquated dialect of British English rather than a vibrant alternative capable of influencing as much as being influenced by the mother tongue, so economists and political scientists working with rational choice may see legal academics as primitive or behind the times in their language and methods. Not only have those within the legal academy outside of the business and private law fields first taken over by the language of rational choice, such as myself, had to learn that language to communicate with their colleagues, they have seen the language enter an increasing number of their own fields, including constitutional and family law, anti-discrimination law and feminist theory.

Apart from the challenge of developing fluency, how does the need to translate what one might want to say as a feminist theorist into the lingua franca of law and economics constrain what one is able to say? Let me give two examples from my own scholarly experience, the first

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<sup>11</sup> It still serves this function in the Roman Catholic Church today. Thus, Joseph Ratzinger, whose native language is German, who has spoken mostly Italian during his career as a Vatican bureaucrat, and who has a working knowledge of a half dozen other languages, held his first sermon as Pope Benedict XVI in Latin.

a cautionary tale of what is lost when all is translated into a single language, the second a more optimistic account of the synergy possible when multiple languages are used to address the same problem.

In recent years, feminist legal theorists interested in increasing public support for child-bearing and child-rearing have sought to frame their arguments in the dominant language of law and economics by arguing that children should be seen as a public good for which parents are entitled to compensation from the state and from the childless. Because some of those making this argument are not fluent in the language of law and economics, they do not quite understand what the term of art “public good” means; they tend to equate “public good” with “public value” and, notwithstanding having themselves introduced the language of economic rationality into the debate, are unable or unwilling to follow-through on the implications of using such language.<sup>12</sup>

As I have argued

starting down the road of claims for compensation grounded in economic rationality invites case-by-case examination and analysis of precisely to what extent which children will produce positive externalities worthy of compensation.... [T]o the extent [children] are a public good, the public is already paying a substantial percentage ... of the cost of raising them. Some children may not produce positive externalities in excess of this; indeed, some will produce net negative externalities. To what extent should state subsidies take this into account and how? \*\*\* If proponents insist on arguing for children on account of their positive economic externalities, does it not follow that we should strongly resist support for the reproductive choice of a parent with an expensive or

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<sup>12</sup> I discuss this problem at length in Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions about Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 Chi.-Kent L. Rev. 1753 (2001).

debilitating heritable disease? Like the Roman paterfamilias, can we as a society decide which child to take up and which to abandon as unprofitable?<sup>13</sup>

Because feminist demands for more public support for children and their parents are not, by and large, motivated by or limited to what economic rationality would dictate, framing arguments for such support in the language of rational choice is not, in my view, a fruitful way to advance the cause. Feminists would be better served by making, or at least supplementing, their arguments in a different and orthogonal language better suited to the conclusions they actually want to reach.

Not all attempts to bring together the language of law and economics and other languages for legal scholarship start from the premise that all must be translated into the dominant language. I was proud, for example, to be a participant in a symposium<sup>14</sup> reviewing together the reader *Crossroads, Directions, and a New Critical Race Theory*<sup>15</sup> and *Pervasive Prejudice?*, Ian Ayres's empirical law and economics study of discrimination in fields ranging from car sales to organ transplants.<sup>16</sup> Ian Ayres, it is important to note, is a left wing law and economics scholar. It would be wrong to suggest, therefore, that law and economics is an inherently conservative or right wing language any more than Latin or English are inherently conservative languages. The way in which a language may constrain what is said and what is thought is not a narrowly political one of bending to the left or right, but something deeper and more complicated.

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<sup>13</sup> *Id.* at 1775, 1785 n. 100.

<sup>14</sup> The symposium, organized by Clark Freshman, was published in Volume 55 of the Stanford Law Review in 2003.

<sup>15</sup> *Crossroads, Directions, and a New Critical Race Theory* (Francisco Valdes, Jerome McCristal Culp, and Angela P. Harris, eds., 2002).

<sup>16</sup> Ian Ayres, *Pervasive Prejudice? Unconventional Evidence of Race and Gender Discrimination* (2001).

One way I attempted to explore the constraint of a dominant language in my contribution to the symposium was by talking about the relationship between anecdote and data.<sup>17</sup> Reading *Crossroads* and *Pervasive Prejudice?* together caused me to reflect more deeply than I had previously on the often casually asserted proposition that “the plural of anecdote is not data.” Different proponents of this view mean different things by the contrast between data and anecdote. Some may have in mind the difference between a controlled study and happenstance observation, others that between a large and a small sample size, and still others that which can be quantified and that which cannot. I am personally becoming more convinced that to the extent the plural of anecdote is indeed not data (and under some definitions of both it may be), this only reinforces the need for both anecdote and data to make a case. Ayres himself repeatedly, both explicitly and implicitly, acknowledges the usefulness of anecdote as a supplement to the sort of data he gathers. For example, his own uncontrolled (anecdotal) experience being told by a nanny agency, “Tell me your prejudices. We’ll only send you pink polka dotted nannies if that’s what you want. If you’re not comfortable with an older or a younger girl, we’ll make sure that you only have to interview candidates that you like,” not only led him to file a complaint, but also suggested a new avenue for research.<sup>18</sup>

A methodological divide remains between those who are most likely to believe evidence when it can be reduced to numbers in a graph or chart and those who are most likely to believe the evidence of first person experience. What may be hardest of all to remember is that behind every dot on a graph and line in a chart is a flesh and blood individual and that the chart is the result of aggregating these individuals. Consider the number tattooed into the skin of a

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<sup>17</sup> See Mary Anne Case, *Developing a Taste for Not Being Discriminated Against*, 55 Stan. L. Rev. 2273, 2289-91 (2003).

<sup>18</sup> Ayres, *supra* at 403.

concentration camp survivor, say 71502. It is important to remember the number, that its bearer is one of many, not an aberration or exceptional; but it is also important that she is Judith Pincozovsky Jaegerman and important that she is a Jew.<sup>19</sup> It is difficult to hold name, number, and identity category in your head at head at once—the horror of particularity and that of aggregation is each in its own way overwhelming. To take a less freighted image, consider the trick of making a face out of the photos of several thousand faces—what you see in this mosaic is entirely a question of how finegrained is your examination of what is before you.

Unfortunately the choice of a scholarly language can also constrain if not dictate the choice of methodology. While the language of doctrine, with its roots in the common law, may leave room for both generality and particularity, anecdote and data, the language of rational choice favors abstraction, whether that of a model or of a data set. This is one of many reasons I resist accepting it as the dominant language of the legal academy.

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<sup>19</sup> See *Women in the Holocaust: Personal Reflections in Camps*, at <http://www.interlog.com/mighty/personal/jaeger.htm> (detailing an individual's personal reflections on her holocaust experience).

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