Legal Writing as a Kind of Philosophy

Joel R. Cornwell
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Perhaps what is inexpressible (what I find mysterious and am not able to express) is the background against which whatever I could express has its meaning.

—Ludwig Wittgenstein

Literary theory can be said to come into being when the approach to literary texts is no longer based on non-linguistic, that is to say historical and aesthetic, considerations or, to put it somewhat less crudely, when the object of discussion is no longer the meaning or the value but the modalities of production and of reception of meaning and of value prior to their establishment—the implication being that this establishment is problematic enough to require an autonomous discipline of critical investigation to consider its possibility and its status.

—Paul de Man

I. INTRODUCTION

Post-structuralist theories of textual meaning have been integrated into legal education in various ways, notably through the influence of

† The title is a play on Richard Rorty’s essay on Derrida, Philosophy as a Kind of Writing: An Essay on Derrida, in Richard Rorty, Consequences of Pragmatism 90 (1982). Devotees of Rorty’s essay will note that I have also mimicked the form of his opening paragraphs (“Here is one way to look at . . . “). As deconstructionist critics are well aware, there can be no writing without iteration. See Jonathan Culler, On Deconstruction 110-34 (1994).

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Critical Legal Studies movement.³ Ironically, legal writing courses, the portion of the first-year curriculum ostensibly allotted to techniques of dissecting and manipulating language, have largely ignored the insights of analytical philosophy and literary deconstruction indirectly appropriated in other courses. The standard models remain algorithmic, reinforcing a conservative view of writing as an applied lexigraphic skill, essentially void of the substance taught in nonwriting courses. This conceptual disjunction between writing and thought engenders and feeds the attitude that legal writing courses are ancillary to the rest of the law school curriculum, which teaches students to “think like a lawyer,” as opposed to teaching mere techniques of transposing thoughts. Ironically, this attitude severely inhibits the mode of thinking to which it aspires. Only the realization that writing is thought empowers students to dismantle a legal text according to its own internal contradictions, and only prowess in dismantling provides the vision by which lawyers create arguments instead of ape them.

The first part of this Article examines why this stereotypical view of legal writing is perpetuated, identifying the reluctance to change as an instance of broader cultural and psychological prejudices delineated by Jacques Derrida and subsequent deconstructionist critics. Key to these is the notion of presence, which is analyzed in three manifestations, beginning with the most general (an illusion of the self within), proceeding to a more specific literary incarnation (an illusion of the meaning of a text), and ending with an aspect closely associated with legal education (an illusion of the answer behind Socratic questioning). Because the impossibility of a comprehensive account of language precludes any algorithmic formula for ethical decision-making, the IRAC model is undesirable, particularly if steps are not taken to demonstrate to the student that it is a model of conversational rhetoric as opposed to a model of logical calculus. Accordingly, the second part of this Article examines four approaches that aspire to such a demonstration. A third part of the Article briefly addresses the question of political agendas intruding into pedagogy and is essentially an attempt to allay fears that the aforementioned approaches necessarily entail some form of left wing

³. This is not to say that the integration has always been easy. See, e.g., Dean Carrington's assertion that “the nihilist who must profess that legal principle does not matter has an ethical duty to depart the law school . . . .” Paul D. Carrington, Of Law and the River, 34 J. LEGAL EDUC. 222, 227 (1984); cf. Of Nihilism and Academic Freedom, 35 J. LEGAL EDUC. 1 (1985) (containing exchanges of correspondence between interested parties concerning the Critical Legal Studies movement, to which Dean Carrington was understood to refer); Ted Finman, Critical Legal Studies, Professionalism, and Academic Freedom: Exploring the Tributaries of Carrington's River, 35 J. LEGAL EDUC. 180 (1985) (questioning particular assumptions of Carrington's thesis).
IDEAL WRITING

The Article concludes with a summation and exhortation to a more open view of writing.

II. LAW, LANGUAGE, AND PRESENCE

Here is one way to look at law: law is a systematic representation of concepts. Rules of law are a means of signifying logical connections within an interactive network of ideas, and these connectors are subject to the dictates of formal logic. Thus, the application of a given rule is testable against a broader consistency of actual and potential applications across a field of ideas represented by other rules. Ultimately, all rules are postulated from elemental premises that are scientifically verifiable, and so the study of law entails a scientific method. This is the proverbial seamless web, the ideational common law architecture undergirding the pedagogical formalism of Langdell. It is the theme varied by natural law thinkers such as Aquinas and Blackstone. It is the tacit—and essentially unconscious—presupposition of judges and lawyers, past and present, standing in the tradition of Anglo-American common law. It is the foundation of the classic mode of teaching legal reasoning and legal writing. Law is a rational calculus of rules applied to facts. Predictive reasoning is a matter of computing ideas (in the form of rules) against spatio-temporal variables (in the form of facts) adjusted for perceptual irregularities of judicial mechanics (in the form of policy). Argumentation is, accordingly, an exercise of emphasizing certain fact-based variables against the compelling force of rules (asserted as a matter of formulaic acumen) viewed in light of political consequences that reinforce both the empirically driven emphasis upon the necessary variables and the logical compulsion of the rule. Legal writing, in either an objective or argumentative mode, is thus an

4. See Michael Moore, The Semantics of Judging, 54 S. Cal. L. Rev. 151, 159 (1981) (quoting C. Langdell, A Selection of Cases on the Law of Contracts viii-ix (1871)): "Law, considered as a science, consists of certain principles or doctrines . . . . If these doctrines could be so classified and arranged that each should be found in its proper place, and no where else, they would cease to be formidable in number." See also Professor Levinson's gloss on a similar Langdellian passage, in Sanford Levinson, Law as Literature, 60 Tex. L. Rev. 373, 374 (1982).

5. See Summa Theologica, Q. 91, Art. 2 (defining natural law as the rational creature's participation in divine law, inclining the creature to its natural end) and Q. 91, Art. 3 (defining human law as a function of reason whereby particular determinations are derived from general indemonstrable principles of natural law).

6. See 1 William Blackstone, Commentaries *40: "[The Laws of Nature] are the eternal, immutable laws of good and evil, to which the creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions."
algorithmic exercise of skill separate from the substance represented by legal rules and their ideational premises. So law is a kind of science.

Here is another way to look at law: law is a linguistic act that represents nothing. Rules of law are tropes facilitating good feeling by misrepresenting nothing as a series of compelling inferences in a scientific mode. These tropes, properly brought to conscious awareness, are revealed as part of a complex mistake by which humans posit a level of understanding outside of language acts, a level in which meaning is merely represented by language, and language can be dissected to reveal the meanings that are, or ought to be, common to all human understandings. Law, then, is both a manifestation of power and a linguistic rationalization. This is law as viewed by Nietzsche\(^7\) and Jerome Frank.\(^8\) (If it is not precisely the view shared by other so-called Legal Realists of the 1920s and 1930s, it is the inevitable result that their opponents feared).\(^9\) This is law as viewed by adherents of Critical Legal Studies.\(^10\) This is, in the terms of literary deconstruction, law as nothing but text, law that cannot be read. Law is fiction turning inward to contradict its thematic elements and then to contradict its contradictions without end. Predictive reasoning resembles a form of literary criticism that casts a discerning eye to the influential bearing of texts on the entropic trajectories of judicial emotions. Argumentation is a matter of using tropes well. Legal writing is writing law. It can be nothing else because there is nothing for writing to represent, no substance for which skill is a mouthpiece. So law is a kind of writing.

Here is one way of looking at writing: writing is a way of describing that which exists independently of human design by translating perception into thought, thought into speech, and speech into representational symbols. So writing is a kind of technical exercise in graphics, and it is nonsense to assert that law is a kind of writing: writing merely represents law. Here is another way to look at writing: writing is the interplay of images that we call thinking, a processing of data into

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symbols that compel other symbols. Thought presupposes imagery because there is otherwise nothing to think. Writing is not a consequence of speech that is a consequence of thought, but rather writing is a precondition of thought and speech. So writing is thought in its purest possible form—writing does not represent law, but makes it.

Which way of looking at law and writing is the true one? Here is one way of understanding truth: truth is the correspondence of representations with actual states of affairs. According to this way of understanding, the operative question is one of verification: which way of looking at law and writing is the real way? So legal writing is a kind of calculus. Here is another way of understanding truth: truth is an emphatic designation that something is worthy of trust, or, as William James would have it, good in the way of belief. According to this second way of understanding, the operative question is not one of verification, but of utility: which way of looking at law and writing will facilitate our sense of goodness, getting us from where we are to where we want to be? So legal writing is a kind of philosophy.

What, then, is the meaning of a written text? Here is one way of defining meaning: the meaning of a word or phrase is its verification according to empirical fact or analytical truth. Here is another way of defining meaning: the meaning of a word or phrase is the sense that emerges from that which stands fast around it, giving it life in the form of context. Thus, the content of a word or phrase, or of a feeling

11. WILLIAM JAMES, PRAGMATISM 36 (1991); see also id. at 87-104 (Lecture Six: Pragmatism's Conception of Truth); RICHARD RORTY, INTRODUCTION TO CONSEQUENCES OF PRAGMATISM, xiii-xvii (1982). For a discussion of the similarities and differences between pragmatism and deconstruction, see JONATHAN CULLER, ON DECONSTRUCTION, 153-55 (1994). Culler sees deconstruction as differing in attitude. Pragmatism tends to embrace truth as consensus relative to a framework (deconstruction cannot restrict truth in this manner) and to exhibit complacency in its attitude toward reflexive inquiry. Pragmatists tend to avoid the problem of reflexivity by delimiting their epistemological options. Deconstructionists see value in the attempt to theorize about one's conceptual framework even though the attempt cannot engender a logical grounding of truth. Id. For an explanation of the deconstructionist method in terms of the "reflexivity" of language, see HILARY LAWSON, REFLEXIVITY 9-30 (1985).

12. For an example of the debate in analytic philosophy regarding the concept of truth as correspondence and truth as emphasis, see J. L. Austin, Truth (I.), 1950 ARISTOTELIAN SOC. SUP.; P. F. STRAWSON, Truth (II.), 1950 ARISTOTELIAN SOC. SUP. 129. For an insightful analysis of a jurisprudential manifestation of correspondence theory in constitutional interpretation, see Gary Peller, Neutral Principles in the 1950's, 21 U. MICH. J. LAW REFORM 561 (1988).

13. Ludwig Wittgenstein, who articulated the latter view with unrivaled intellectual prowess, had earlier experienced a "verificationist phase" between his initial correspondence theory of truth and his later account of "language games." For an excellent overview of Wittgenstein's major work, see RAY MONK, LUDWIG WITTGENSTEIN: THE DUTY OF GENIUS
engendered by words and phrases, is nothing more or less than other words, phrases, and feelings engendered by words and phrases. If one looks for meaning in the first way, one will find the meaning of a text, or one will find unverifiable nonsense. So meaning is a kind of fact. If one looks for meaning in the second way, one cannot confidently purport to find the meaning, but rather some meanings, and the ascription of nonsense must ever bear a tentative quality. For even chaos is a form of order to those with the eyes to see,\textsuperscript{14} and any perceived order bears within its strictures the inevitable destruction of its own hierarchy. So meaning is a kind of aspiration. To what is the aspiration directed? It is directed to other aspirations, in the form of words, phrases, and feelings—none of which is sharply distinguishable from the others. Hence, according to this view, law is a kind of writing, writing is a kind of philosophy, philosophy is a kind of aspiration, and aspiration is again a kind of writing.\textsuperscript{15} But why in the world would anyone choose to see matters in this second way? It has something to do with who people believe they are.

Long before anyone had heard of literary deconstruction or Critical Legal Studies, the philosopher Soren Kierkegaard answered this question by means of a parable attributed by Kierkegaard to Gotthold Lessing.\textsuperscript{16} Suppose, wrote Lessing, God were to appear and offer a choice of gifts concealed respectively within His right and left hands. In His right hand would be the gift of absolute truth. In His left hand would be the indeterminate and unrelenting striving after truth. You must choose, says the Almighty. Lessing responds, "Lord, since absolute truth is a concept appropriate to Your understanding alone, I choose the

\textsuperscript{(1990). For a discussion of the indeterminacy of meaning in contemporary deconstructionist theory, see CULLER, supra note 11, at 110-34.}

\textsuperscript{14. That the very concept of disorder implies a minimal form of order is a realization long cherished by metaphysicians. See, e.g., Paul G. Kuntz, Cosmos and Chaos: Weiss's Systematic Categorization of the Universe in THE PHILOSOPHY OF PAUL WEISS 117, 118-19 (Lewis Edwin Hahn ed., 1995).}

\textsuperscript{15. Writing in this sense (what interpreters of Derrida have called an arche-writing, LAWSON, supra note 11, at 102-06, or archi-writing or protowriting, CULLER, supra note 11, at 102) is of course the precondition of any linguistic act, including philosophy. See RORTY, supra note 11. Thus, the theme of this paper could more precisely be represented by the title "Legal Writing as a Kind of Writing." It is hoped the reader will understand the sacrifice of precision to aesthetics. For Derrida's first-hand rejection of the identification of writing with the graphic sign, see JACQUES DERRIDA, OF GRAMMATOLOGY 44-65 (Gayatri Chakravorty Spivak trans., 1976).}

\textsuperscript{16. SOREN KIERKEGAARD, CONCLUDING UNSCIENTIFIC POSTSCRIPT 97 (David F. Swenson & Walter Lowrie trans., 1971).}
The essential point for both Lessing and Kierkegaard has nothing to do with the actual existence of God but rather with the disposition of the human heart. It is ours to choose how we will conceptualize truth. At the metaphorical moment of choice, neither the right hand (truth as representation—meaning as fact—speech as translation of thought—writing as graphology) nor the left hand (truth as creativity—meaning as aspiration—writing as philosophy—philosophy as creativity, aspiration, and writing) is the correct choice because correct and incorrect have no meaningful reference until one has an operative concept of truth. The question is not which standpoint is true, but which is appropriate. The standpoint presupposed by the traditional law school curriculum and, more significantly, the forms of rhetoric driving the exercise of judicial power and defining the posture of legal writing courses, is manifestly appropriate—in so far as one senses the propriety of legal decision makers assuming to themselves a posture logically attributable to God. There can be no viable comprehensive theory of language because one cannot stand outside of language any more than one can stand outside of thought. Without a comprehensive theory of language, there can be no comprehensive theory of anything requiring thought. There can be no algorithms to provide answers to legal or ethical questions. There can only be conversation. Those who assert comprehensive systems (or presuppose them in a form such as IRAC) in fact take a God-like posture. In so far as one senses this posture is inappropriate, one must look to different forms of rhetoric and alternative modes of teaching writing.

Why do efforts aspiring to different modes, that is, teaching legal writing as a kind of philosophy instead of an algorithmic exercise of skill in the IRAC mode, meet with such resistance? In his essay on Derrida, *Philosophy as a Kind of Writing,* Richard Rorty interprets Derrida as posing the question, “Given that philosophy is a kind of writing, why does this suggestion meet with such resistance?” The short answer is that philosophers characteristically have viewed philosophy as something greater than writing—a kind of pure thought that writing merely represents. This notion of pure thought, prior to and distinct from a

17. Id. Kierkegaard quotes Lessing's German text without translation:


18. RORTY, supra note 11, at 94.

19. Id. See also CULLER, supra note 11, at 89–92 (referring to Rorty's essay in discussing Derrida's concept of presence).
linguistic structure that translates it, necessarily gives thought a privileged position over speech; less obviously, it gives speech a privileged position over writing. Thought first translates itself into word spoken to the self, which in turn is represented by graphic marks on paper. To say that philosophy is a kind of writing is to degrade philosophy from the realm of pure thought to the realm of autonomic typography, or, worse yet, to imply that thought is itself a kind of writing.\textsuperscript{20}

There are multiple illusions here. The first is that words are distinct from the thoughts they represent. This engenders the error Derrida calls logocentrism.\textsuperscript{21} The second illusion is that symbols are distinct from the words they represent. This engenders the error Derrida calls phonocentrism.\textsuperscript{22} Both errors feed, and are fed, by the illusion of presence—the notion that there is a meaning to human thought distinct from the context in which thought manifests itself.\textsuperscript{23} Although the illusion of presence is very useful, it is also dangerous. Without presupposing an unchallengeable ground of reference, language would be impossible. But if the presupposition is unexamined and a useful fiction is taken as reality, people will believe that they possess something like absolute truth when in fact all they possess are words. This insight is the vital contribution of deconstruction to the various academic disciplines that mold our ways of looking at the world, not the least of which is law, the discipline most proximately focused on directing human behavior. It is an insight ignored at perilous cost, yet it is vigorously resisted even in the elite echelons of legal education.\textsuperscript{24} Nowhere has resistance been greater than in legal writing curricula, a

\textsuperscript{20} The writing referred to is not that of lines on paper—for that is the misconceived prejudice of phonocentrism—but a necessary signification that is the precondition of language. See supra note 15. As Christopher Norris interprets Derrida, “Writing . . . is the ‘free play’ or element of undecidability within every system of communication . . . . Writing is the endless displacement of meaning which both governs language and places it forever beyond the reach of a stable, self-authenticating knowledge.” CHristopher Norris, Deconstruction: Theory and Practice 28-29 (1993). The impossibility of a comprehensive theory of language precludes assertions of absolute truth. This point is made with particular clarity by Hilary Lawson, who explains Derrida’s position in terms of the “reflexivity” of language. Lawson, supra note 11, at 9-30, 90-122.

\textsuperscript{21} See Derrida, supra note 15, at 43; Norris, supra note 20, at 28-31; Culler, supra note 11, at 92-93; Lawson, supra note 11, at 99-102.

\textsuperscript{22} See Derrida, supra note 15, at 11-12; Norris, supra note 20, at 28-31; Culler, supra note 11, at 98-103.

\textsuperscript{23} See Derrida, supra note 15, at 12-13; Culler, supra note 11, at 92-96, 103-09.

\textsuperscript{24} See, e.g., the attack on deconstructionist theories by Professor Austin. Arthur Austin, A Primer On Deconstruction’s “Rhapsody of Word-Plays,” 71 N.C. L. Rev. 201 (1992).
curious phenomenon given that these are the law school courses ostensibly focused on language. This resistance is in part due to political concerns both within the law schools and the larger society. But it is also, in large measure, a result of the longstanding fear and prejudice locked into formalist legal theory over the generations. This disdain of deconstructionist insights is, in turn, a reflection of a broader fear and loathing across disciplines. In order to understand the fear, it is necessary to understand the implications of a world view devoid of presence, and such an understanding must begin with the illusion of pure (nonlinguistic) thought generated by a pure (nonbiological) consciousness.

A. Presence as the Self Within

The illusion of presence—that there is an inherent true meaning to things—is generated and sustained by the illusion of an inherent true self who apprehends the meaning. Derrida's earliest philosophical enterprise was directed against this illusion in the epistemology of Edmund Husserl, the progenitor of contemporary phenomenology. The notion of a pure self, of course, was already well established by Rene Descartes in the seventeenth century when his Meditations on First Philosophy placed the problem of how we know things at the threshold of all subsequent philosophical enterprises. But Derrida's critique of Husserl's attempt to delineate a grammar of pure intention is only one manifestation of a modern philosophical enterprise aimed at discrediting the Cartesian duality of a consciousness whose capacity for underv

25. See infra note 48 and accompanying text.
26. See Section IV ("A Word on Political Agendas"), infra.
27. The formalist approach to legal theory and the correspondence theory of language are roughly reflected in the product-centered approach to composition, which emphasizes the written artifact as opposed to the process by which the artifact is produced. See J. Christopher Rideout & Jill J. Ramsfield, Legal Writing: A Revised View, 69 WASH. L. REV. 35, 48-56 (1994). A third approach, the social perspective, refines the process approach to "focus on the individual writer to acknowledge the social contexts within which writing . . . generates meanings that are shaped and constrained by those contexts." Id. at 57. Thus, one may identify at least some common sensibilities between social perspective theorists and deconstructionists. The resistance to both movements, accordingly, evinces a common etiology of fear.
thought forms the cognizance of both self and world. Accordingly, one can grasp this essential aspect of literary deconstruction by appealing to philosophers such as Daniel Dennett, who expose the illusory character of our common notion of consciousness as a kind of internal thought-giving spirit, even though Dennett's critical theory of consciousness is not per se identified with any contemporary deconstructionist canon.

Descartes believed that the locus of all perception and cognition—the mental command center, so to speak—was the pineal gland. Contemporary neurophysiological data presents a far more complex picture, suggesting that the brain processes information by a network of billions of interconnected neuronal impulses, the pattern of which is undiscernible by present scientific standards. In any event, there is no single biological mechanism engendering human awareness, drawing the boundaries of an emotive self, and making sense of the world. In opposition to the image of consciousness as a kind of documentary account of an isolated internal self-author, Dennett offers the metaphor of consciousness as "multiple drafts" circulating across a kind of neuronal internet of readers, the various drafts differing in their respective states of completion, and so subject to various levels of criticism and revision.

31. As Dennett explains:
There is no single definitive "stream of consciousness" because there is no central Headquarters, no Cartesian Theater where "it all comes together" for the perusal of a Central Meaner. Instead of such a single stream (however wide), there are multiple channels in which specialist circuits try, in parallel pandemoniums, to do their various things, creating Multiple Drafts as they go. Most of these fragmentary drafts of "narrative" play short-lived roles in the modulation of current activity but some get promoted to further functional roles, in swift succession, by the activity of a virtual machine in the brain. The seriality of this machine . . . is not a "hard-wired" design feature, but rather the upshot of a succession of coalitions of these specialists.

Id. at 253-54. This is not to say that Dennett perceives no "hard-wired" features of the brain. Indeed, the characteristic of our species, the creation of a self through words, is the function of "hard-wiring," as much as the spider's impulsion to spin webs, or the beaver's impulsion to build dams:

[T]he strangest and most wonderful constructions in the whole animal world are the amazing, intricate constructions made by the primate, Homo sapiens. Each normal individual of this species makes a self. Out of its brain it spins a web of words and deed, and, like the other creatures, it doesn't have to know what it's doing; it just does it . . . .

This "web of discourses" . . . is as much a biological product as any of the other constructions to be found in the animal world. Stripped of it, an individual human being is as incomplete as a bird without its feathers, a turtle without its shell.

Id. at 416.
So there is no pure self; rather, self is a kind of complex manifestation of linguistic tropisms, a center of narrative gravity that, like its conceptual counterpart in physics, is a useful fiction, indeed a necessary tool. But it is a fiction nonetheless, and there is nothing pure about it. A significant implication is that language is not a creation derived from pure thought because there is no pure self to think it. Signifiers are raw materials that influence us as we influence them. Dennett designates these raw materials *memes*, “mostly borne by language, but also by wordless ‘images’ and other data structures.”

Human consciousness—thinking—is not prior to language. There is no language of thought unconnected to the language inherited from culture. In this respect, Dennett's theory of consciousness, like Derrida's grammatology, contradicts Husserl's attempt to found phenomenology on a language of pure intent. Indeed, without a pure self, there can be no pure intent or, for that matter, no pure mental function of any kind. Intending, willing, believing, and similar designations are but artificial constructs language employs to order pandemoniums of emotive sensation. The designations do not represent definitive mental activities theoretically verifiable on some manner of thought film that could capture the impressions of a

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32. *Id.* at 254.

33. Derrida illustrates the difference between writing in the primordial sense, see *supra* notes 15 & 20, and writing in the graphic sense, while simultaneously illustrating the indeterminacy of signifiers by his term “differance.” Jacques Derrida, excerpt from *Difference* in *A DERRIDA READER*, *supra* note 29, at 61-79. Peggy Kamuf explains:

Unlike English, French has not developed two verbs from the Latin *deferre*, but has maintained the senses of both to differ and to defer in the same verb, *differer*. Also, unlike English, in French no noun formed from this verb carries the sense of deferral or deferment. Derrida's invented word (which has since been recognized by lexicographers and included in dictionaries) welds together difference and deferral and thus refers to a configuration of spatial and temporal difference together. As for the *ance*-ending, it calls up a middle voice between the active and passive voices. In this manner it can point to an operation that is not that of a subject on an object, that is, therefore, not an operation at all. Instead, there is a certain nontransitivity which, Derrida suggests, may well be “what philosophy, at its outset, distributed into an active and passive voice, thereby constituting itself by means of this repression” . . . . Because it cannot be differentiated in speech, the mark of their difference is only graphic; the *a* of differance marks the difference of writing within and before speech. *Id.* at 59. *Cf.* LAWSON, *supra* note 11, at 106: “Differance is that which enables language to take place by allowing this opposition between speech and writing [in the nongraphic sense of arche-writing] to occur.” Signifiers have meaning because they differ one from another; they are able to differ because speech (which is already writing) defers its meaning, never immediately capturing the thought that occasions it. *Cf.* NORRIS, *supra* note 20, at 48.
given moment. They are imprecise categorizations of multiple feelings remembered and recomposed as coherent units after the fact. There are no states of mind in the present because states of mind are the creation of narrative, and narrative is the reflective spinning of experience. In the moment, preceding reflection, there are only multiple streams of consciousness, parallel pandemoniums of sensory data. It is the illusion of a self coherent to itself in states of mind defined prior to reflective recomposition that Derrida derides as the metaphysic of presence.

Because there is no distinct line between the cerebral energy that I identify as me and the speech acts I identify as words, it is accurate to say that words do things with me as much as I do things with words. Hence, there is no possibility of developing a linguistic theory that is genuinely comprehensive and no way of modeling a determinate system that explains exactly what words mean when people utter them. Dennett delineates this insight essentially from a neurophysiological standpoint, but there are other ways of recognizing the necessary impurity of human intention and the consequent context dependence of the meanings of words. Freud, in his own fashion, undermined the "single definitive 'stream of consciousness'" theory by his explication of unconscious motives and rendered dubious any comprehensive linguistic theory by exposing the manifestation of unconscious wishes in ordinary speech. The philosopher J. L. Austin revealed the illusory character of an inner intentional self by carefully analyzing ordinary speech.

34. See DENNETT, supra note 30, at 101-70.
35. This is essentially the defining assertion of "post-structuralism." See CULLER, supra note 11, at 222-25.
36. Realizing that philosophers had erred in treating all speech as descriptive statements that are either true or false, Austin explained that utterances entailed illocutionary force, not merely describing things, but performing actions as well. J. L. AUSTIN, HOW TO DO THINGS WITH WORDS (1975). Thus, uttering the words "With this ring I thee wed," is an act essential to accomplishing the wedding. The words, "I name this ship the Queen Elizabeth," spoken aloud, actually do the naming. Id. at 4-11. To utter the words, "I warn you not to disturb me before breakfast," is in fact to issue the warning. Austin further explained that the success of these speech acts did not depend on the speaker's state of mind as such but rather on certain contextual conditions. Id. at 14-15. My words in the marriage ceremony will accomplish holy matrimony whether or not I intend it, assuming that proper social conventions are in place. A study of meanings, therefore, is properly focused upon the social contexts in which the words are used, not upon how accurately a person has registered her inner self through a representational act of speech. Indeed, the analysis of ordinary language reveals such an inner self as a fiction because the meanings of speech acts do not depend on this ghost. An explanation of Austin's basic theory and of Derrida's deconstructive reading of Austin is given by CULLER, supra note 11, at 110-33.
The illusion of presence is inextricably woven into the notion of the intentional self distinct from the language people use and the sensual world they encounter; they possess, so we think, a true intent somewhere, an intent that could be verified if only we had access to their minds. And so if one writes a book, the text is the representation of this theoretically verifiable intent—and this intent is the meaning of the text. So it is that we are led to think that the proper study of the book is the attempt to discern, however imperfectly, the author’s true intent as best we can reconstruct it from other less cryptic materials. When the ghost vanishes in the light of analysis, the idea of a single determinative meaning nevertheless lingers. So ingrained is presence, we simply do not know how to function without it.

When the narrative center of gravity is perceived not as a useful fiction but as a manifestation of self-generating pure thought from which true meaning is derived, additional logocentric epiphanies follow, appearing also as constant points of reference inherent in a universal order that is literally unspeakable, but the presence of which gives ontologic definition to everything. “The authority of presence,” writes Culler, “its power of valorization, structures all our thinking.” The metaphysic of presence underlies not only the Cartesian notion of a pure self present to itself in thought, and the notion that the meaning of an utterance is what is present to the thinking self at the moment of utterance, but numerous other grounding concepts:

Each of these concepts, all of which involve a notion of presence, has figured in philosophical attempts to describe what is fundamental and has been treated as a centering, grounding force or principle. In oppositions such as meaning/form, soul/body, intuition/expression, literal/metaphorical, nature/culture, intelligible/sensible, positive/negative, transcendental/empirical, serious/nonserious, the superior term belongs to the logos and is a higher presence; the inferior term marks a fall. Logocentrism thus assumes the priority of the first term and conceives the second in relation to it, as a complication, a negation, a manifestation, or a disruption of the first . . . .

Indeed, we generally assume that this is the procedure to follow in any “serious” analysis: to describe, for example, the simple, normal, standard case of deconstruction, illustrating its “essential” nature, and proceeding from there to discuss other cases that can then be defined as complications, derivations, and deterioriations. The difficulty of imaging and practicing different procedures is an indication of the ubiquity of logocentrism.  

37. Culler, supra note 11, at 94.
38. Id. at 93.
A different way of imaging whatever oppositional hierarchies are at work in a given situation is to concentrate not on that which is prior, foundational, or essential but rather upon that which is subsequent, derivative, and peripheral. This ostensibly perverse focusing, this different way of looking at things taken for granted, allows the possibility of breaking the oppositional hierarchies by uncovering their inherent contradictions and reversing the hierarchical conceptualization by discerning elements in the purportedly foundational term that are derivative of the purportedly derived term. Truth lies not in a calculus of manifestations reflecting an unspeakable presence holding the universe together but in the empowering ability to see things from different aspects. It is problematic that the reversed hierarchical oppositions are themselves new oppositional hierarchies subject to further deconstructive reading, and so foundational principles—linguistic centers of gravity, so to speak—appear tenuous to the point of undermining rational thought. Thus, the initial experience of deconstructive reading is often one bespeaking confusion, anxiety, and nihilism.

39. See, e.g., CULLER, supra note 11, at 164-75. After commenting on Freud's "most striking instance of deconstructive speculation" by which the death instinct reverses the oppositional hierarchy of life or death, rendering life the weak or inferior term by construing the death instinct as functional master of the pleasure principle, Culler delineates an interpretive deconstructive reversal of Freud's privileged positioning of the masculine over the feminine in psychoanalytic theory. Id. at 164. Culler cites approvingly an argument of Shoshona Felman, that Freud's emphatic assertion of penis envy ostensibly rendered female sexuality derivative, making the female an "incomplete" male, but the assertion is undermined by Freud's own psychoanalytic explication of bisexuality. Id. at 171 (citing Shoshona Felman, Rereading Femininity, 62 YALE FRENCH STUD. 19-44 (1981)). Because psychoanalytic theory regards the female as primordially bisexual by virtue of her two sex organs (vaginal and clitoral, the latter being a penile derivation), the female becomes the general model of sexuality with male sexuality comprising "a particular variant of woman, a proleptical actualization of her phallic stage." Id.

40. This initial effect resembles the awakening of consciousness to the unconscious experienced through psychoanalysis, and deconstructionist critics often invoke psychoanalytic concepts. See, e.g., Harold Bloom, The Breaking of Form, in HAROLD BLOOM ET AL., DECONSTRUCTION AND CRITICISM 14-15 (1992) (applying the ego psychology of Anna Freud to an analysis of poetic ratios); see also infra note 77. J. Hillis Miller expressly analogizes nihilism to the unconscious: "[N]ihilism,' as the name for the devaluation or reduction to nothingness of all values, is not the name nihilism has 'in itself.' It is the name given to it by metaphysics, as the term 'unconscious' is given by consciousness to that part of itself which it cannot face directly." J. Hillis Miller, The Critic as Host, in DECONSTRUCTION AND CRITICISM, 217, 228. Miller then attempts to deconstruct the hierarchical opposition of nihilism and metaphysics, placing nihilism in the privileged position:

Is there any way to break this law, to turn the system around? Would it be possible to approach metaphysics from the standpoint of "nihilism"? Could one make nihilism the host of which metaphysics is the alien guest, so giving new names to both? Nihilism would then not be nihilism but something else,
Such is the price of travelling in the culturally designated margins. It is possibly the price of wisdom.

B. Presence as the Meaning of a Text

Words, symbols, phrases, allusions, and tropes all refer to other words, symbols, phrases, allusions, and tropes. Language has no meaning apart from language. Language (and thought) cannot stand outside of itself in order to interpret its own devices. It is this necessarily reflexive character of language that prompts the oft-quoted deconstructionist maxims that there is nothing outside the text,41 that all reading is misreading,42 and that the impossibility of reading should never be taken lightly.43 Truth is context-dependent, and contexts do not stand still. They can always be enlarged by considering new facts—either additional facts or facts previously relegated to the margins. Contexts can also be enlarged by removing a particular speech act to a different level of abstraction. As Dennett observes, the human mind creates itself by imposing closure on multiple streams of perception; its tool of closure is language. Derrida may be viewed as adding the insight that language, being the tool of closure, cannot close itself. Thought cannot exist in a form free of signifiers, signifiers cannot exist in a form free of other signifiers, and the endless play of signifiers engenders endless possibilities of contextual movement and endless ways of looking at things. There can be no valid assertion of universal truth (but this is itself such an assertion, illustrating the reflexive trap of language, which must always refer back to itself in a manner that precludes any validation of universal assertions—and this statement also denies what it asserts, and so on).

something without a melodramatic aura, perhaps something so innocently sounding as “rhetoric,” or “philology,” or “the study of tropes,” or even “the trivium.” Metaphysics might then be redefined . . . as an inevitable rhetorical or tropological effect. It would not be a cause but a phantom generated within the house of language by the play of language. “Deconstruction” is one current name for this reversal.

Id. at 229. The reversal sought by Miller is again analogous to the therapeutic process by which a patient becomes accustomed to drawing upon unconscious psychodynamics; through an acquired habit of looking at the emotive self in a new way, consciousness becomes a weak derivative of a primal unconsciousness. Waking hours become a way of living out the stuff of dreams.

41. DERRIDA, supra note 15, at 158.
42. CULLER, supra note 11, at 175 (paraphrasing Harold Bloom).
How, then, does the critical reader seek meanings in a text? All meaning is created by moving signifiers into different contexts to mix with other signifiers in other levels of abstraction, a process often called "grafting." Critical reading becomes a kind of writing by which the critic attempts to unravel various strains of interposed thoughts, exposing their discontinuity within what previously appeared as a unified textual logic. It is the exposition of nonsense, not in the mode of an analytical philosopher's demonstration that certain constative statements are without empirical reference, but in the mode of a dialectical self-realization that there is no empirical ground to which any statement can refer, notwithstanding the inevitability of attempts to refer. All texts, if read closely enough, will self-destruct, undermining their internal logic with contradictions, the authors being undercut by their own rules of how to look at things. It is to expose the contradictions that the critic reads—to engender humility born of the impossibility of reading the meaning of a text and the impossibility of writing the meaning as well.

Of course, every deconstructive reading is subject to the same dialectic as that which it deconstructs: every eradication of an oppositional hierarchy spawns other oppositional hierarchies waiting to be exposed by close reading. Indeed, in so far as the deconstructionist attempts to expose the fantasmal character of oppositional hierarchies, many neutral texts might be viewed as deconstructive enterprises. In effect, by exposing the mind and body duality as illusory, Dennett deconstructs our common notion of consciousness, unifying the opposites through physiological accounts and models of artificial intelligence. In the end, the vision of a mental command center dispersing orders to the body is no longer viable, and it seems more appropriate to view the mind as a subsidiary of the body. But even as the reader exults in this new knowledge—for all knowledge involves a way of grasping perceptions in a manner that unifies that which is otherwise chaotic—the new portrait of consciousness is undermining itself. Dennett breaks the old Cartesian model by substituting a model of artificial intelligence, a biologically powered virtual machine for the proverbial ghost powering a biological machine. New oppositions emerge, for example, computer/person (for personhood now seems parasitical on the biological computer that is consciousness), artificial intelligence/natural intelligence (for the natural now derives from the artificial), hardware/software (for the "hard-wired" brain functions now seem to define the boundaries of self).

44. See CULLER, supra note 11, at 134-56.

45. The close reading required in a mode of deconstruction is necessarily aimed at undoing an author's proffered signification by discerning inevitable discrepancies within
the logic of the signification—the difference between what a text says and what a text does or, in Culler's phrase, the difference between what a text means and the way that it means. CULLER, supra note 11, at 238 (discussing Barbara Johnson's exemplary deconstructionist reading of *Billy Budd*). One might recall that the Legal Realists admonished readers of judicial opinions to concentrate on the result in measureable human terms, disregarding in large measure the rhetorical devices employed to obtain the result. See, e.g., Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 159 (1928) (reprinted in *AMERICAN LEGAL REALISM* 199 (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds., 1993)).

The never-ending spawning of new hierarchical oppositions by the close readings that deconstruct former oppositions can be seen as a defining characteristic of "aporia," a term of art designating the climate of logical impasse when a text's signification is undermined by self-contradiction. See NORRIS, supra note 20, at 49; CULLER, supra note 11, at 23 (quoting J. Hillis Miller, *Stevens' Rock and Criticism as Cure*, 30 GA. REV. 335-38 (1976)). For a skillful deconstructive reading of legal texts, see Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985) (demonstrating how problems of power and knowledge are mirrored in traditional "doctrinal dichotomies" of private/public, objective/subjective, and form/substance).

Notwithstanding such fine examples, first semester students are probably best introduced to the analysis of hierarchical oppositions through close readings of nonlegal texts, preferably in disparate, but familiar, literary genres. The habit of close reading, once established, is more naturally applied to the foreign genre of judicial opinions. Here, the professor enjoys a good deal of creative latitude. Consider, for example, the following deconstructive readings. The first reading concerns a text by Joyce Carol Oates in which the author effectively deconstructs boxing as Dennett deconstructs the Cartesian ghost, exposing and reversing foundational hierarchies of opposition:

No sport is more physical, more direct, than boxing. No sport appears more powerfully homoerotic: the confrontation in the ring—the disrobing—the sweaty heated combat that is part dance, courtship, coupling—the frequent urgent pursuit by one boxer of the other in the fight's natural and violent movement toward the "knockout": surely boxing derives much of its appeal from this mimicry of a species of erotic love in which one man overcomes the other in an exhibition of superior strength and will. The heralded celibacy of the fighter-in-training is very much a part of boxing lore: instead of focusing his energies and fantasies upon a woman the boxer focuses them upon an opponent. Where Woman has been, Opponent must be.

JOYCE CAROL OATES, *ON BOXING* 30 (1995). Common sense significations are undermined. The opposition of masculine/feminine is undone by the appeal to unconscious motivation, which also reverses such oppositions as violence/tenderness and opponent/friend. The most masculine sport is uncannily revealed as a derivative manifestation of feminine sexuality; the destructive act of fighting is revealed as a derivative manifestation of eros; and the opponent is a derivative manifestation of the lover. Femininity gives birth to machismo; love begets pummeling; and the opponent is only one's beloved seen from a different point of view. The reader feels edified, gaining through these uncanny revelations a sense of seeing the true sport of boxing for the first time, like the prisoner released from Plato's cave who sublimely comprehends that he has previously known only the shadows of things now seen in the light of day. The good feeling cannot last, however. Like the prisoner, we must return to the shadows with the slightest shift of context because the uncanny mis-
significations that have been the means to wisdom will become disfunctional. The logic of
the uncanny insight will not work in day to day life. How can one advise a boxer (or
anyone else) that if he wishes to realize his femininity he must repress it, and if he wishes
to express sexual love he must pummel the object of his desire? Ms. Oates cannot sensibly
graft her signification into a context only slightly different, as the following passage
illustrates:

Boxing is a purely masculine activity and it inhabits a purely masculine world.
Which is not to suggest that most men are defined by it: clearly, most men are
not. And though there are female boxers—a fact that seems to surprise, alarm,
amuse—women's role in the sport has always been extremely marginal . . . . At
boxing matches women's role is limited to that of card girl and occasional National
Anthem singer: stereotypical functions usually performed in stereotypically zestful
feminine ways—for women have no natural place in the spectacle otherwise . . . .
Boxing is for men, and is about men, and is men. A celebration of the lost religion
of masculinity all the more trenchant for its being lost.

In this world, strength of a certain kind—matched of course with intelligence and
tirelessly developed skills—determines masculinity. Just as a boxer is his body,
a man's masculinity is his use of his body. But it is also his triumph over
another's use of his body. The Opponent is always male, the Opponent is the rival
for one's own masculinity, most fully and combatively realized . . . . Hence
women's characteristic repugnance for boxing per se coupled with an intense
interest in and curiosity about men's fascination with it. Men fighting to
determine worth (i.e., masculinity) excludes women as completely as the female
experience of childbirth excludes men.

Id. at 70-73. There is aporia here because the text has become internally contradictory.
There is inconsistent signification with the preceding passage. No longer does boxing's
physical struggle bespeak a sublimation of feminine characteristics; indeed, concepts of
masculinity and femininity are opposed in classic hierarchical opposition as if the reversal
in the prior passage had never taken place. Boxing is masculine and aggressive, a
celebration of maleness that approaches the sacred. And so women have no "natural place"
in it. Indeed, they cannot take part in the essential experience of boxing any more than
a man can give birth to a child.

Elsewhere, Ms. Oates tells the reader that she developed her love of boxing through her
relation with her father. Thus, it would seem that the author unconsciously undoes her
conscious insight about boxing's feminine side (a kind of feminist insight) in order to
preserve her femininity in the form of her father's love (a kind of antifeminist sentiment).
The author must deny that as a woman she has any natural place in boxing so that she can
preserve her natural place in boxing as a woman. The text tries to do it all—saying and
doing contradictory things. One could argue that the signification is not inconsistent if one
acknowledges that the different senses of the words are indigenous to different contexts.
But this is just another way of making the deconstructionist's foundational point: there
can be no comprehensive theory of how language works because it is impossible to
categorize all the possible contexts that give rise to different senses of words. In fairness
to Ms. Oates, we note that her reference to women boxers was made before Christy Martin
and Dierdre Gogarty reversed an entrenched hierarchical opposition by becoming the de
facto main event on an otherwise boring Tyson and Bruno card, thus rendering men's
boxing a weak parasitical derivative of women's boxing if only for an evening. See Steve
Wulf, Belle of the Brawl, TIME, Apr. 1, 1996, at 83; Richard Hoffer, Gritty Woman, SPORTS
1996, at 18 (arguing that the spectacle of women being battered, even by other women, is
liable to increase violence by men against women).

In any event, one can read Ms. Oates' second passage as insightful only by giving up or suspending the concepts operative in the first passage, allowing masculinity and femininity to mean differently in the different parts of the text. Graft the meanings of passage one into passage two, and there is contradiction. Our empowering concepts, gained at great effort, cannot withstand shifting contexts—and contexts shift with any further description or level of abstraction. See CULLER, supra note 11, at 123-25 (discussing the senses in which context is boundless). What empowering insights might be gained from realizing the necessary context-dependency of signification? For one thing, the realization precludes any comprehensive theory of language that would account for definitive meanings of words. Because there can be no definitive meanings, there can be no algorithmic formulas to solve problems of ethics, the simplest of which contain complex linguistic signification.

A second deconstruction illustrates the reflexive indeterminacy of language by a more immediate contradiction of what the text says by what the text does:

We have familiar experience of the order, the constancy, the perpetual renovation of the material world which surrounds us. Frail and transitory as is every part of it, restless and migratory as are its elements, never-ceasing as are its changes, still it abides. It is bound together by a law of permanence, it is set up in unity; and, though it is ever dying, it is ever coming to life again. Dissolution does but give birth to new modes of organization, and one death is the parent of a thousand lives. Each hour, as it comes, is but a testimony, how fleeting, yet how secure, is the great whole. It is like an image on the waters, which is ever the same, though the waters ever flow. Change upon change—yet one change cries out to another, like the alternate Seraphim, in praise and in glory of their Maker. The sun sinks to rise again; the day is swallowed up in the gloom of night, to be born out of it, as fresh as if it had never been quenched. Spring passes into summer, and through summer and autumn into winter, only the more surely, by its own ultimate return, to triumph over that grave, toward which it resolutely hastened from its first hour. We mourn over the blossoms of May, because they are to wither; but we know, withal, that May is one day to have its revenge upon November, by the revolution of that solemn circle which never stops—which teaches us in our height of hope, ever to be sober, and in our depth of desolation, never to despair.


The powerful beauty of this passage lies, once again, in its uncanny breaking of entrenched hierarchical oppositions. Cardinal Newman reveals that chaos is not the absence of order, but its precondition; change is not the imperfection of permanence, but its essence; death is not the assassin of life, but its progenitor. In effect, we are told that the universe is not a jumble of random events upon which we impose imperfect order through our own metaphors but a meta-system of designed workings that generate indigenous metaphors which make the great scheme graspable even at close range. For a moment, one feels that truth is derivative not from ourselves but from the great plan outside ourselves. Then aporia sets in. The image deconstructs itself by its own sensuality. Cardinal Newman has given us a metaphor (the universe as the change of seasons) composed of other metaphors (the seasons as a benign cycle) composed of other metaphors (spring as living, winter as dying). Ironically, the intensive effect of the metaphors lies in their implicit denial of their metaphorical character: the psychological pictures are so vivid that the reader feels that she is not experiencing images but the
To the deconstructionist reader, all writing is iteration, a putting together of repeatable signs into different configurations, a moving of words into novel contexts, a grafting of language into various species of acts. The meaning to which a word aspires in one context will never quite fit the aspiration of another, and the cross-aspirations will always be apparent if one reads closely enough. Once the concept of grafting is properly understood, even stalwart Langdellian educators should have no ostensible problem with deconstructive readings of judicial opinions. The grafting of significations into different contexts in order to generate contradiction is at the heart of traditional law school pedagogy. We call it the Socratic method.

C. Presence as the Answer Behind the Socratic Question

Derrida’s critique of the western philosophic tradition uncovers the continuous suppression of writing by means of a mythical image of pure consciousness present to itself in pure thought. Writing, in this mythology, is the impure material corruption of pure thought—a parasitic, ambiguous, supplementary graphing of speech, which is the purer, though still imperfect, representation of thought. This is what Plato purported to establish by dramatically portraying the triumph of Socrates over Gorgias: dialectic is the precondition of rhetoric; logic is antecedent to poetry; and structure exists prior to language, endowing language with its sense. It is this Platonic portrayal that Derrida, following the course of Nietzsche and Heidegger, perceives as a lie. Socrates accomplishes the subordination of rhetoric to dialectic only by employing the rhetorical devices that he subordinates. Unable to justify the priority of thought over expression except by tautology, Socrates can only employ tropes to make the weaker argument appear the stronger. Dialectic (thought, logic, structure, speech) is nothing more than a rhetorical device employed to obscure its own origin in rhetoric (expression, poetry, language, writing). “It is here,” writes Christopher Norris, “that deconstruction finds its rock-bottom sense of the irreducibility of metaphor, the different at play within the very constitution of literal meaning. It finds, in short, that there is no ‘literal’ meaning.”46

46. Norris, supra note 20, at 66.
Just as the western philosophical tradition has artificially elevated speech over writing, precluding the characterization of philosophy as a kind of writing, so the western legal tradition has artificially elevated law over writing, presupposing some form of prior ideation. Law has been asserted as a mode of dialectical thought that is the precondition of legal speech, which in turn is the precondition of legal writing. Legal writing, then, is devalued as a parasitic corruption of law, as law is presumed to have a meaning that precedes and stands apart from the rhetorical forms in which law finds expression. The deconstructionist reading reveals that it is the other way around. Writing precedes law, as law, like other assertions of dialectical thought, is but a rhetorical device (more precisely, a short-hand designation for a cluster of devices) whose primary objective is to conceal its character as a device. In this way, sheer emotive force is given the illusion of a necessity inherent in a pre-existing structure of the universe. If law is acknowledged as a kind of writing, an entire edifice of presuppositions must fall. Law is no longer a discipline apart from other disciplines, a form of specialized knowledge reflecting a privileged position of thought. If law is a kind of writing, and writing is a kind of aspiration to meaning (i.e., philosophy), and philosophy is a kind of writing, there are no sharp distinctions between any of these activities. Indeed, if writing is the precondition of the others, legal writing is not properly characterized as an expression of philosophy; it is philosophy.

The characterization of legal writing as philosophy is not in itself threatening to the traditional Socratic mode of classroom teaching or, for that matter, to the IRAC ethos of graphology. But this is so only if philosophy is done as Plato did it. The grafting of rules of law into various hypothetical fact patterns is a comparatively tame enterprise if both student and professor maintain the fiction that there is a correct application in any given instance and that this application is discoverable if enough variables are properly accounted in a rational calculus, the form of which, like the form of an applied mathematical calculation, is dictated as a matter of logical necessity. Otherwise, the Socratic encounter appears to be nothing more than a game. If there is no right answer lurking, however obscurely, behind the multiple grafting, the resolution to the hypothetical problem becomes a matter of unrestrained psychological motivations—something more like a matter of personal opinion rather than a principled induction attained by an esoteric skill of "thinking like a lawyer." Law then becomes philosophy not in the mode of formal logic but in the mode of ethics. Legal decisions become moral decisions. Moral decisions, unlike logical calculations, are inherently controversial, and the persuasive force of moral arguments has no necessary correlation to logic, precedent, or anything else.
At this point, it would seem evident why there is so much resistance to the idea that legal writing is a kind of philosophy. The reversal of oppositional hierarchies, so that writing becomes the host rather than the parasite, undermines the heart of a corporate logocentrism into which many legal educators have invested as shareholders. If law is a trope, the Socratic method employed in the classroom is, after all, what most students perceive it to be—a game in which emotive force is given the illusion of logical inevitability. Substantive courses are subordinate manifestations of skills, methods, or writing courses, not the other way around. Consequently, those who teach writing courses are in the most privileged intellectual and pedagogical positions, dealing most directly with the purest form of law. The political order of the established law school would be undermined in a manner suggestive of a third-world revolution. Worse than this, legal educators of all ranks would be forced to squarely face the radical indeterminacy of law. Even now, more than half a century after the advent of the Legal Realist movement and a quarter century after Critical Legal Studies, this realization is simply too unsettling for many to face.

Of course, law school faculties have not consciously conspired to keep legal writing in its place so much as they have tacitly accepted the unconscious prejudices of their cultural enclave. The unconscious character of the prejudice explains, in part, the resistance to deconstructionist insights even among those who teach legal writing. All of us have partaken of a common indoctrination and gained membership to a subculture by shared experiences in a hierarchical structure that we have all bought into to some degree or another. A world that is explained even with bad reasons, as Camus pointed out, is nevertheless a familiar world. Moreover, like all invested hierarchies, law schools have a way of anticipating social unrest and taming it through attenuated incorporation. Thus, law schools have begun to establish tenure-eligible directorships of writing programs, on the one hand elevating the status of writing, but on the other hand establishing a privileged class who will develop incrementally an interest in preserving the status quo. Even the admirable proliferation of legal writing


texts in the marketplace is a mixed blessing, establishing a commercial norm for classroom teaching from which instructors deviate at an increased risk. Teaching legal writing as a kind of philosophy is hard; teaching IRAC in its various manifestations is easy. As texts make it easier to teach legal writing not as a kind of philosophy, those who have it easy can be expected to resist change.

III. TEACHING TROPES

A. Critical Ambiguity as the Ethical Duck-Rabbit

The deductive syllogism is the backbone of traditional legal rhetoric even when it is not expressly acknowledged. Translated into the IRAC formula, the major premise of the syllogism corresponds to the rule, and the minor premise corresponds to the application. The issue sets the operative terms of the premises, and the conclusion is compelled by the premises as a matter of logical necessity. Translated into Jerome Frank's model of how legal analysts view decisions, which is probably closer, graphically, to what most first-year law students envision, the correspondence would be thus: rule (major premise) x facts (minor premise) = result (conclusion). For example, in the classic case of *Interstate Commerce Commission v. Kroblin*¹¹, the issue was whether an interstate carrier violated a statute requiring interstate carriers to obtain an ICC certificate to transport manufactured goods, but not agricultural products. Mr. Kroblin did not obtain a permit to transport

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49. The risk is magnified for those instructors who have little job security. See Levine, *supra* note 48. Even for those who enjoy renewable contracts, the comparatively short duration of the employment contract encourages conformity.

50. The major legal writing texts devote varying degrees of sensitivity to ethical issues in the mode of policy, but each textual paradigm presupposes a form of algorithmic deduction to which policy provides an additional variable. In all texts, ethical sensibility is presented as a secondary function in abeyance to neutral coordinates as opposed to the primary function, which determines biased coordinates that present themselves to consciousness as neutral. See, e.g., CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 56-84 (2d ed. 1994); LINDA HOLDEMAN EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS AND ORGANIZATION 15-77 (1996); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING 15-25, 83-95 (2d ed. 1994); LAUREL CURRIE OATES ET AL., THE LEGAL WRITING HANDBOOK 52-64, 191-99 (1993); NANCY L. SCHULTZ ET AL., INTRODUCTION TO LEGAL WRITING AND ORAL ADVOCACY 41-63 (2d ed. 1995); DIANA V. PRATT, LEGAL WRITING: A SYSTEMATIC APPROACH 86-96 (2d ed. 1993); HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW 27-53, 176-94 (3d ed. 1995).

51. 113 F. Supp. 599 (N.D. Iowa 1953), aff'd, 212 F.2d 555 (8th Cir. 1954). The choice of this example is not fortuitous. For a comprehensive analysis of the logical disjunction of this syllogism, see Moore, *supra* note 4, at 156-58, 173-75.
his frozen eviscerated chickens. An IRAC-type syllogism would accordingly take the following form:

Issue: Does an interstate carrier violate a statutory requirement by failing to obtain an ICC permit before transporting frozen eviscerated chickens across state lines? Rule (major premise): Objects that are not manufactured products do not require ICC permits. Application (minor premise): Frozen eviscerated chickens are or are not manufactured products. Conclusion: Therefore, the carrier did or did not violate the statute. The problem is all in the minor premise, for this is where ambiguity lies. How does one explain to a student how to fill in the crucial blank of "are or are not"? The traditional model would suggest that the critical ambiguity will be determined by a court as a matter of analogical resemblance between frozen eviscerated chickens and items that in past cases have been deemed manufactured products or agricultural goods. Whichever items the chickens most closely resemble will determine the proximate classification. In other words, the concept of frozen eviscerated chickens is grafted into other recorded fact patterns—and other concepts are grafted into the present fact pattern—and an answer will be apparent, or at least discernible. The method appears self-evident and uncontroversial. But there is something wrong here.52

What appears to be a judgment of fact is a judgment of value. The formalist presupposition of IRAC is that the minor premise will invariably reduce to an observation statement verifiable by empiricist criteria. So the minor premise is simply an observation. If the minor premise is wrong, this is because the observation was flawed. From a post-structuralist perspective, minor premises are more than observations. Analogical resemblances are not a matter of logic but a shorthand designation for an emotive compulsion generated by pictures that spawn other pictures in a complex of parallel pandemoniums. The logical gaps are filled in by the judge's expectations.53 Thus, the final

52. As Moore states:
   It is evident that such a deductive process, while impeccable as a matter of logic, seems to ignore the basic problem for decision in the case: Are eviscerated chickens to be classified as manufactured products or not? The second premise of the syllogism assumes an answer to this difficult question. Thus the syllogism is of little use in understanding what it is a judge does, and should do, in deciding the case.
   Moore, supra note 4, at 171.
53. Moore states:
   The problem... is how a formalist may justify the insertion of [a] third premise [that all eviscerated chickens are not manufactured products]. It is not a statement of the facts of the case, but rather a general statement about all things that happen to be eviscerated chickens. It is not a legal rule, for there is no legal
judgment, ostensibly the result of a neutral cognition of external phenomena, says little about the object and much about the individual. If I judge a football to be more like a globe than like a hockey puck, the judgment does not convey essential information about any of the three objects, but it might well convey information about my own attitude toward sports or my perceptions of volume. Similarly, if I look at an inkblot on a Rorschach test, my perception of a butterfly or my mother or the Great Pumpkin or a lesion on President Clinton's nose will provide only negligible information about the inkblot. In other words, crucial ambiguity is not eradicated by the minor premise; it is translated into a useful fiction by an act of more or less unconscious creativity. The fiction is wrought with ethical implications because it will determine the compelling force of the syllogism, making that which is contingent appear necessary and that which is a matter of perspective seem like absolute truth. This duplicity of the model is what we have failed traditionally to teach.

It would seem that the minor premise of any elemental legal syllogism is itself predicated on tacit premises that are in turn based on other tacit premises and that this regression of premises must simply be stopped by an unconscious mechanism that solidifies the analogical judgment in a picture that is unassailable to common sense and so appears unassailable in its rhetorical assertion. Moreover, these various premises are not themselves logically compelled significations but complex impressions engendered by multitudinous factors, encompassing in a fraction of a second a lifetime of sensory data. Indeed, that which we designate as logic, from the deconstructionist perspective, is not a meta-system comprehensively dictating rules of thought (for such a system would have to be grounded outside of thought) but a complex of compelling metaphors. That which appears to be true by empirical observation is, upon closer examination, true because of the observer's predisposition to see things in a certain way. The critical analysis of any legal problem must accordingly focus in large measure upon the operative prejudices of the analyst. In this way, the study of law becomes an occasion of self-understanding as well as an exercise in discerning human motivation on a broader scale.

An effective classroom device to illustrate the point is Wittgenstein's duck-rabbit. Perceiving the ambiguity, a student's natural tendency

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authority that has established it as true. Nor may one look to logic, for there is no license in logic to create whatever premise one happens to need.

Id. at 172.

54. The duck-rabbit, which Wittgenstein utilized in his PHILOSOPHICAL INVESTIGATIONS (Part II) 194 (1964), is an ambiguous representation which looks to be either a duck or a
is to ask which animal is really portrayed in the drawing. The student might posit a mythical artist who possessed the meaning of the drawing, but this notion of real meaning becomes tenuous when it is noted that, logically, the artist could in fact have intended to portray a hippopotamus or the Golden Gate Bridge. In any event, the artist is not around, and the student, acting as judge, must employ the only available data and make a decision. After covering this ground, it is usually apparent to the student that the resolution of the critical ambiguity will depend on what she wishes to see. It is also apparent that, in justifying her decision to the world, she might be hesitant to articulate this subjective basis of the resolution. Instead of telling of her traumatic childhood experience with a duck, she would point to the various curvatures of the lines, concluding that there is more indication in the drawing itself that the image is that of a rabbit.

Virtually every objective memorandum problem in first-year legal writing courses is designed to present the student with some critically ambiguous fact or fact complex to be resolved in light of two lines of authority to which analogies must be drawn. After the lines have been drawn and the critically ambiguous factors identified, the duplicity of the IRAC algorithm can be exposed by casting the ambiguity as an ethical duck-rabbit. Given two plausible ways of characterizing the situation, the student, armed with the duck-rabbit device, is able to appreciate the essentially nonrational determinant of the outcome. The next step is to analyze why the outcome appears to be logically compelled, and this entails focusing on the power of words. Judges write words that connect in the reader's thought with other words, with the connections being of such speed and subtlety that they are unnoticed under ordinary circumstances. It is to these connections—the word pictures generated by other word pictures in lightning swift succession—that the student must direct her attention, thus mastering the ability to engender connective images that compel her desired outcome and to expose as illusory those that do not. In other words, the student masters the trope of metaphor.

B. The Category Mistake as Sword and Shield

All language is metaphorical because there is no way of thinking without some manner of imagery. The fact that we necessarily think in tropes is frustrating to those who seek referential precision, but it is empowering to those who seek to manipulate language for persuasion.

rabbit, depending on one's perspective. For an excellent adaptation of the duck-rabbit figure, see MONK, supra note 13, at 507. Another variation is contained in LAWSON, supra note 11, at 128.
“Category mistake” is a term borrowed not from the deconstructionist vocabulary but from the tradition of analytical philosophy. Gilbert Ryle introduced the term in an attack upon the same tradition of Cartesian dualism that Dennett has opposed, and here, analytical philosophers and literary deconstructionists find common ground. The category mistake entails an inappropriate linking of disparate concepts spawned by grammatical similarities in representation. In a deconstructionist vocabulary, the category mistake would translate as something like a particularly inappropriate graft of signification from one context to another. In more mundane terms, it is an exceedingly inaccurate picture generated by metaphor. It is the lawyer’s treasured trope.

A classic example of a category mistake successfully presenting its imagery as logical signification is the definitive issue presented by the court in Tauza v. Susquehanna Coal Co. The Susquehanna Coal Company was a corporation chartered by the State of Pennsylvania. A summons and complaint was served upon an officer of the corporation in the State of New York in a manner prescribed by New York statute. The corporation contended that the New York court was without jurisdiction, that is, that the corporation could not be sued in New York. Justice Cardozo’s opinion framed the issue in terms of the corporation’s locus: “We are to say . . . whether [the corporation’s] business is such that it is here. If in fact it is here, . . . not occasionally or casually, but with a fair measure of permanence and continuity . . . it is within the jurisdiction of our courts.” It sounds good if one does not think too much about what the court has said. Felix Cohen was one who thought about it. If a legislative body were considering the question of jurisdiction over foreign corporations, Cohen noted, it would probably make factual inquiries into how corporations choose their sovereigns, the extent to which relations between corporations and their states of charter exceed mere formality, the practical difficulties of plaintiffs being forced to sue corporations in foreign jurisdictions, and the hardship to corporations of defending actions in more than one state. Based upon this factual data, the legislature would formulate a rule in light of certain value judgments regarding priorities of competing interests. But the court took a different approach.

56. More precisely, it is a kind of metalepsis. See infra note 73.
57. 115 N.E. 915 (N.Y. 1917).
58. Id. at 917.
The Court of Appeals reached its decision without avowedly considering any of these matters. It does not appear that scientific evidence on any of these issues was offered to the court. Instead of addressing itself to such economic, sociological, political, or ethical questions as a competent legislature might have faced, the court addressed itself to the question, "Where is a corporation?" Was this corporation really in Pennsylvania or in New York, or could it be in two places at once?

Clearly the question of where a corporation is, when it incorporates in one state and has agents transacting corporate business in another state, is not a question that can be answered by empirical observation. Nor is it a question that demands for its solution any analysis of political considerations or social ideals. It is, in fact, a question identical in metaphysical status with the question which scholastic theologians are supposed to have argued at great length, "How many angels can stand on the point of a needle?"60

The critical reader of judicial opinions will never be at a loss for examples of category mistakes.61 Another classic instance can be seen in the common-law distinction between active and passive negligence.62 Any ascription of responsibility can be characterized as a proximate result either of doing something (putting my fist into contact with your nose) or of failing to do something (restraining my fist from contacting your nose). The characterization will depend on the adjudication one

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60. Id.
61. Cohen's Transcendental Nonsense provides additional examples of pedagogical value, notwithstanding their age: whether a labor union, being an unincorporated association, is a "person" and thus subject to tort liability, id. at 813 (citing United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922)); whether a commercial designation has sufficient economic value to be "property" and thus constitute a protected trade name, id. at 814-16 (citing American Agric. Chem. Co. v. Moore, 17 F.2d 196 (M.D. Ala. 1927)); whether a utility receives a fair return on the "fair value" of its property if value is not a function of actual or replacement cost, id. at 818 (citing Smyth v. Ames, 169 U.S. 466 (1898)); whether due process is met by legislation if the "rationality" requisite to the standard purportedly has nothing to do with history, psychiatry, or morality, id. at 819 (citing Muller v. Oregon, 208 U.S. 412 (1908)). For a discussion of Cohen's article in the context of a realist jurisprudence that anticipated deconstructive modes of analysis, see Gary Peller, The Metaphysics of American Law, 73 CAL. L. REV. 1151, 1226-40 (1985).
62. See generally J. R. Kemper, Annotation, Comment Note—Contribution or Indemnity Between Joint Tortfeasors on Basis of Relative Fault, 53 A.L.R.3d 184, 210-26 (1973). The distinction arose in reaction to the common law prohibition against contribution among joint tortfeasors. The label of "active" negligence thus served as a shorthand designation that, under the circumstances, it was fairer to require one of the tortfeasors to bear the entire cost (in the form of implied indemnification to the other tortfeasor) than to require the other tortfeasor to bear the entire cost (by not allowing indemnification). Comparative negligence has largely prompted an abandonment of the doctrine. See, e.g., Allison v. Shell Oil Co., 495 N.E.2d 497 (Ill. 1986).
seeks. Yet another infamous manifestation of metaphor run wild is the distinction made by numerous courts in wrongful life cases, in which the courts refuse to recognize a cause of action because one cannot measure the pain of a miserable life against not being born at all. In fact, there was a time when none of us was born. So we know quite well what the alternative would be, notwithstanding the fact that we logically could not have experienced nonexistence because nonexistence implies necessarily no we. The distinction between the two settings (existence and nonexistence) is meaningless, the we who would experience nonexistence being an illusion of grammatical form, a graft of subject into an unbefitting context in which its meaning is emptied but its image endures. And with words, it is image that counts. This is why the trope works.

It is by uncovering tropes through careful reading of the text of judicial opinions, that is, the deconstructive enterprise of undermining the text via its own logic, that students realize, however idiosyncratically, that legal writing is a kind of philosophy and not an algorithmic exercise of skill. The student is enabled to see—perhaps against her will—that the conclusions are compelled by no extraneous meta-force transcending human language but by images conjured in human minds through conversation.


Ultimately, the infant's complaint is that he would have been better off not to have been born. Man, who knows nothing of nothingness, cannot possibly know whether this is so . . . . To recognize a right not to be born is to enter an area in which no one could find his way.

64. A useful illustration of how grammatical structure can misrepresent phenomena by categorization lies in the opening sentences of Justice Blackmun's majority opinion in Roe v. Wade, 410 U.S. 113 (1973):

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and predilection. We seek earnestly to do this . . . .

Id. at 116 (emphasis added).
the fact, headnotes chosen for a good rhetorical closure of a decision already made. The operative issue too is revealed as a label guaranteeing the proper can of rules. It is the application that precedes everything because it is not the torque of principles already given but the illocutionary power of words, the creative spinning of signification webs into metaphorical complexes that compel closure within a desired frame. Algorithms can produce good spiders because spiders need not know what they are doing. And spiders can function well so long as they do not encounter a superior intelligence. The mastery of tropes makes not a spider but a poet.

C. The Judicial Opinion as Poetry

The parallel between reading law and reading literature is nothing new, and the similarity between the judicial opinion and the poem has been apparent to scholars such as James Boyd White, who applies a New Critical conceit of paradox as a unifying center of both genres. The litany of items in the first two paragraphs are designed to denote and connote subjectivity. We expect philosophies, experiences, exposures to the raw edges of existence, religious sentiments, values, etc., to be different. They are things upon which people will naturally disagree because they lack a scientific measure of verity. Constitutional measurement, on the other hand, is in a category of its own, apart from these items of which subjectivity is predicated. The implication is that how one measures the Constitution has nothing to do with philosophy, experiences, values, and the like. For an insightful analysis of this rhetorical ruse, see Joseph W. Singer, The Player and the Cards: Nihilism and Legal Theory, 94 YALE L.J. 1, 30-33 (1984).

65. The designation “New Criticism,” like any term denoting a school of literary criticism, is necessarily imprecise. Essentially an American phenomenon rooted in the decades between the two world wars, its tenets are exemplified in the critical works of T. S. Eliot, I. A. Richards, John Crowe Ransom, Allen Tate, Robert Penn Warren, Cleanth Brooks, and W. K. Wimsatt. Other figures associated with the movement include Yvor Winters, Kenneth Burke, R. P. Blackmur, F. R. Leavis, and William Empson. John R. Willingham, The New Criticism: Then and Now, in CONTEMPORARY LITERARY THEORY 24, 25 (G. Douglas Atkins and Laura Morrow ed., 1989). According to J. A. Cuddon, “The New Critics advocated ‘close reading’ and detailed textual analysis of poetry rather than an interest in the mind and personality of the poet, sources, the history of ideas and political and social implications.” J. A. CUDDON, THE PENGUIN DICTIONARY OF LITERARY TERMS AND LITERARY THEORY 582 (1991). While the New Critics emphasized the “impersonality” of poetry, their purpose was not to reduce poetry to empirical determinants, but rather to safeguard poetry from any form of scientific reductionism. As Gerald Graff explains, The goal of literature for the New Critics was that very transcendence of the subject-object model of rationalist epistemology which animates both existentialist criticism and the apocalyptic anti-rationalism of the New Sensibility. This goal underlay the New Critical view that literature “fuses” opposites which, to the eye of reason and logic, must remain contradictory, as well as the New Critical preference for the kind of poetry that asserts that the dancer cannot be separated from the dance.
Indeed, a student who brings to the study of law a knowledge of literary criticism in the mode of the New Critics’ emphasis on impersonality and classical detachment can appreciate the common aspiration of poets and judges, just as she will understand the excruciating difficulty of fulfilling it. As White explains:

In the language of poetic criticism, the principle of “contraries comprehended” can be found, for example, in the claim of Cleanth Brooks that the center of poetic experience is the paradox: a way of comprising into one thing elements that seem of necessity to belong apart. Others have made analogous claims for other tropes—irony, ambiguity, and metaphor—and the radical idea of all of them is the same, the uniting in one order of what seems, when regarded alone, to be impossibly contrastive differences: different voices, different languages, different points of view.

The idea of “comprehending contraries” is if anything even more plainly essential to the judicial opinion, for the very idea of the legal hearing and of legal argument (of which the judicial opinion is intended to be a resolution) is that it works by opposition. Each party tells his (or her) story from his point of view, and in doing so reconstructs the facts and redefines the law so as to give the story a particular meaning. The hearing places these meanings in contrast; it is a measure of the excellence of a judicial opinion how far it recognizes what is valid or valuable in each side and includes that within itself. (An opinion that simply adopted one side’s brief would not be worthy of the name.)

The conceptual relationship between the New Criticism and contemporary deconstruction is a matter of some contention, but an uncontroversial point of similarity is apparent if one focuses not on the principle or disposition against which the trope is analyzed (e.g., whether the internal tensions and juxtapositions constitute paradox or irony that define the text, as opposed to contradictions or aporias that dissolve

GRAFF, supra note 28, at 136. It is likely this perceived fusing of apparent contradictions that markedly separates the New Critics from contemporary deconstructionists. See infra note 68.

67. Id. at 115-16.
68. Although there is general agreement that the New Criticism in some significant sense prefigured contemporary deconstruction, critics such as CULLER, supra note 11, at 19-21, 218-25, tend to emphasize the New Criticism’s roots in the structuralism against which the deconstructionists reacted, while NORRIS, supra note 20, at 7-14, and GRAFF, supra note 28, at 133-38, focus upon the New Critics’ endeavor to salvage poetry from a scientific epistemological reductionism, thus emphasizing an anti-structuralist commonality between the two movements.
textual definition), but on the act of reading itself.\textsuperscript{69} As White observes, "to look at the way the poem or the opinion is made . . . is to conceive of oneself, whether teacher or student, as a maker of compositions too, as one who also remakes language and reconstitutes form."\textsuperscript{70} John Crowe Ransom and T. S. Eliot, who together inspired much of the New Criticism, were poets. Eliot, at least, believed that the best critics were those who functioned in the dual roles.\textsuperscript{71} Deconstructionist critics such as Harold Bloom, emphasizing the indeterminancy of literary forms, have equated criticism with poetry in a literal sense.\textsuperscript{72} From either perspective, criticism engenders a poetic consciousness, the study of tropes beckoning participation in the object of study, the quest for meaning vanishing into the experience of it. In this way, the legal writer, the critic of judicial opinions, becomes a judge by judging. Her critical essays in the form of objective memoranda mirror the form of the judicial opinion, and in this way her criticism itself becomes poetry.\textsuperscript{73}

\textsuperscript{69} In other words, the deconstructionist concept of internal contradiction bears a strong resemblance to the New Critical concept of irony. Irony is created by the tension between the denotative and connotative senses of language, and this tension can never entirely be translated by criticism—that is the point of expressing the matter in poetry and not prose. See Art Berman, \textit{From the New Criticism to Deconstruction} 53 (1988) (paraphrasing the critical theory of Cleanth Brooks). It is, then, through the immediate experience of poetry, not by logical abstraction, that contradictory facets of life can find some manner of resolution. \textit{Id.} at 57. Such poetry links the New Critical epistemology to Coleridge's theory of reconciliation of opposites. It is also reminiscent of the philosophy of F. H. Bradley, the subject of Eliot's doctoral dissertation at Harvard. See Hugh Kenner, \textit{Bradley in T. S. Eliot} 36 (Hugh Kenner ed., 1962). It would seem that the New Critics are contradistinguished from the deconstructionists not so much by cognizable hermeneutic theory as by a distinct attitude or disposition that permits the New Critical consciousness to transcend in a salutary fashion the logical contradictions inherent in life and language. \textit{Cf.} Norris, \textit{supra} note 20, at 13: "What the orthodox New Critics sought in the language of poetry was a structure somehow transcending human reason and ultimately pointing to a religious set of values."

\textsuperscript{70} White, \textit{supra} note 66, at 113.

\textsuperscript{71} Stephen Spender, T. S. Eliot 139 (1976). Willingham, \textit{supra} note 64, at 27-28, concludes that Ransom's poetry was for him primarily a means of developing his critical poetic theory, and this is why Ransom wrote little poetry after 1925, devoting himself almost exclusively to criticism. Willingham nevertheless is sensitive to the fine quality of Ransom's poems. \textit{Id.}

\textsuperscript{72} Harold Bloom, \textit{A Map of Misreading} 69 (1980).

\textsuperscript{73} As the critic/judge/poet develops her skills of reading and composing, she attains through her work a self-understanding that in turn enables her to attain a more individualized view of others—what might be termed compassion, but is more accurately the precondition of it. This is what Martha Nussbaum refers to as the "equalizing" effect of the literary consciousness. Martha C. Nussbaum, \textit{Poets as Judges: Judicial Rhetoric and the Literary Imagination}, 62 U. Chi. L. Rev. 1477, 1488 (1995). The necessary immersion in specific factual contexts counters the illusion of a scientific neutrality, providing the emotive equilibrium requisite to understanding:
The critical or poetic task is, first, to identify the technical devices by which the judicial author attains her desired effect. This will entail a close reading of the metaphors by which the portrayed scene on the judge's story is made to resemble the scenes recounted by other precedential stories, the metonymes that portray resemblance at a higher level of abstraction, the iteration of principles in support of the metonymes, the seductive inflection of crucial phrases, and all other

[The experience of novel-reading, immersing the reader in the particular, yields a strong commitment to regard each life as both qualitatively individual and separate from other lives . . . . This does not mean that even in contact with an individual one cannot find many ways of dehumanizing him or her in thought. It means, however, that when one does manage to apply the literary attitude of sympathetic imagining to the individual, the dehumanizing portrayal is unsustainable—at least for a time.]

Id. at 1488-89.

74. Metonymy (the substitution of an attribute for the thing itself) can be viewed as a particular kind of metaphor, imaging a particular thought in a manner that a focused part of the image dominates the reader's attention. Most metaphors are metonymic to some degree, and the two devices are often merged. The aforementioned characterization of active and passive negligence employs metonymy by substituting negligence (an attribute) for the negligent person and metaphorically predicing action (or inaction) of the attribute. The effect is to remove the reader's attention from the scenario in which the person acts to a precise moment, subtly rendering the active or passive distinction less nonsensical by removing people and circumstances from the scene. The moment has come to signify the person, negligence being the person's essence. The person is his negligence.

In similar fashion, the image of the corporation presented in Tauza v. Susquehanna Coal Co., 115 N.E. 915 (N.Y. 1917), can be analyzed as metalepsis, a form of metonymy in which the substituted attribute is conceptually removed from the particulars of the thing designated. The individuals who comprise the company are lost in the designation of corporation, a metaphorical creature that moves around, conducts business, and commits torts. See also Peller, supra note 61, at 1194-1219 (analyzing the metaphoric root system of the Lochner era's liberty of contract discourse, focusing on spatial and temporal representations of a basic public or private dichotomy.)

75. Consider the connotive power of the term "right." Its power stops an ethical conversation that is otherwise interminable. See Daniel C. Dennett, Darwin's Dangerous Idea 505-10 (1995). Dennett notes that an algorithmic formula for ethical decisions is impossible from either a utilitarian or Kantian standpoint. (The utilitarian cannot consider all possible consequences of her act, just as the Kantian cannot consider all possible imperatives.) An appeal to rights strikes the consonant emotive chord that ends debate. Id. at 495-500. The term can also be effective if employed negatively. In Goldberg v. Ruskin, 499 N.E.2d 406, 409 (Ill. 1986), the court characterizes the losing party as asserting a "right not to be born," impressing the reader with predication that asks for something beyond convention. The court could just as easily have characterized the plaintiff's assertion as a "right to compensation for excruciating suffering." In Bowers v. Hardwick, 478 U.S. 186, 191 (1986), the Court announced that victory for the petitioner would entail a "fundamental right to engage in homosexual sodomy." What a difference if the reader is instead induced by the picture of a "right to privacy" or a "right to intimate expression of love." By his employment of the powerful symbol, "right," Justice White has
tools of the poetic craft. The subsequent task is to analyze the work in light of these technical findings to determine how well the judge has told the story. The level and emphasis of factual detail, including what the reader is not told, delimits the point of view from which the reader will likely begin, which in turn delimits the other points of view that it is possible to reach within the ostensible confines of the text. There are good poems, bad poems, mediocre poems, masterpieces, and trash. One learns to be a strong poet only by critical dissection of all types.

Harold Bloom has commented at length on the etymological affinity between meaning and moaning. Indeed, the poetic experience bears the resemblance. "What is a poet?" asks Kierkegaard. "An unhappy man who in his heart harbors a deep anguish, but whose lips are so fashioned that the moans and cries which pass over them are transformed into ravishing music." It is the critic's task to render a close reading (in New Critical terms) or a misreading (in Deconstructionist terms) of the tropes to understand in a more technical mode not only what they accomplish but what they conceal. Tropes usually protect something of emotive fragility. Thus, the strong misreader of judicial

76. Harold Bloom, The Breaking of Form, in DECONSTRUCTION & CRITICISM 1 (1994). Noting that the form of a poem is itself a trope, Bloom observes of poems what is also true of judicial opinions: "All that a poem can be about, or what in a poem is other than trope, is the skill or faculty of invention or discovery, the heuristic gift." Id.


78. In his mapping of poetic technique, Harold Bloom has correlated specific psychological defenses with six elemental tropes. BLOOM, supra note 72, at 84. Irony, metonymy, and metaphor are tropes of limitation. Synechdoche, hyperbole, and metalepsis are tropes of representation. It is in the dialectical interplay of limitation and representation that poetic imagery is generated and meaning is preconditioned. The same dialectic is operative in judicial decision-making, and the artistic endeavor of making law can be correlated to the poetic enterprise, even in the mode of IRAC, if one is so inclined: ISSUE: Irony, as the conscious tension between what a poem says and what it does, is a manifestation of the Freudian defense of reaction-formation, the means by which the ego constrains the primal urges of the id. Id. at 71; see also SIGMUND FREUD, NEW INTRODUCTORY LECTURES ON PSYCHO-ANALYSIS 112-14 (James Strachey ed. and trans., 1989). Turning inward against itself in a rebellion resembling the struggle of primal urges to break through the ego's censors into consciousness, the trope or defense will likely transform itself into some form of synecdoche, as neurosis might manifest itself in a localized physical ailment. Synecdoche allows a part to substitute for the whole in order for the mind to deal with that which is otherwise engulfing. As the ego turns aggressive impulses inward to create a manageable target upon which his unconscious can take revenge, so the strong poem implodes its irony to localize and render manageable its impulsive terror. The dialectic of irony and synecdoche may be seen as the functional
equivalent of framing a legal issue. The judicial writer, aware of unique characteristics of the case at hand, must nevertheless find a legal category in which to stuff the whole of the matter regardless of fit. Some parts will fit and be emphasized; other parts will not fit and be minimized. The psychological means by which the writer determines which elements ought to fit somewhere and which elements are appropriately ignored is the interplay of these same tropes. It is only the vocabulary that connotes a scientific methodology.

RULE: If synecdoche is the trope by which the legal issue is framed, metonymy, a more refined type of synecdoche that substitutes a name or attribute for the whole, is the trope by which the appropriate rule is signified. “Influence as repetition is thus substituted for influence as genesis, or to adopt the linguistic trope, contiguity replaces resemblance, as the name or prime aspect of influence replaces its larger meanings.” BLOOM, supra note 72, at 72. The legal concept to which all was reduced is itself reduced to key numbers and headnotes. The corresponding psychological defenses of metonymy are regression, undoing, and isolation. Id.; see SIGMUND FREUD, INHIBITIONS, SYMPTOMS AND ANXIETY 46-49 (James Strachey ed. & Alix Strachey trans., 1989). In living, regression is experienced as a return to a less developed emotional state, usually in response to stress. In poetry, regression is experienced as “a return to earlier periods of supposed creativity when poetic experience seemed more an unmixed pleasure.” BLOOM, supra note 72, at 72. In judicial opinions, regression is experienced as the security of presence, the scientific dictates of the algorithm of stare decisis that protect both judge and populace from randomness and subjectivity. As metonymy undoes the fullness of language, it isolates human emotion from its proper context, rendering it peripheral to poetic image or meaningless to the legal decision. Against the limitation of metonymy and its defense of isolation stand the representation of hyperbole and its defense of repression. The emotive energy trivialized by metonymical reduction, like all passion, does not die, but rather flourishes in the secund unconscious. “[T]he high imageries of hyperbole,” writes Bloom, “conceal an unconsciously purposeful forgetting, or not becoming aware, of those internal impulses that tempt us towards gratifying objectionable instinctive demands.” Id. at 73. As metonymy shrinks symbols, hyperbole expands them. As metonymy narrows signification to fit select facts into narrow rules, hyperbole widens the breadth of language to encompass that which we would not believe could live there but for the sublime hyperbolic image that necessarily bespeaks a masterful insight. If a fact will not seem to fit into the rule, emotion expands the rule, hiding itself in the expansive language. These conflicting tropes are not mere devices of persuasion (though they may be taught as such). The conflict is the resolution as experienced by the judge, however the rapidity of the process obscures it from consciousness.

APPLICATION: The trope of metaphor “transfers the name of influence to a series of inapplicable objects,” id., and so corresponds to the stage in which we envision the judge applying the rule refined through metonymic devices. In other words, judicial metaphor is the psychological mechanism by which concepts (e.g., negligence, malice, open and notorious) become the background and effusing imagery that the judicial opinion creates through a choice of words. Sublimation was Freud’s term for the defense by which an impulse attained gratification by changing its object, an unconscious creation of metaphor by another name. See SIGMUND FREUD, LEONARDO DA VINCI AND A MEMORY OF HIS CHILDHOOD 26-31 (James Strachey ed. & Alan Tyson trans., 1989). Metaphors, of course, deconstruct themselves, and the trope that counters the self-destructive implosion—a psychic defense mechanism that defends a psychic defense mechanism—is metalepsis. Bloom defines metalepsis as “the trope of a trope, the metonymic substitution of a word for a word already figurative.” BLOOM, supra note 72, at 74. For Bloom, the poetic technique
opinions will encounter resistance because in destroying the ravishing music she recreates the anguished moaning without reprieve. Judicial tropes protect us from the uncanny realization that the Rule of Law compels nothing. It is only music drowning the voices of the losers.

D. The Statement of Facts as Psychoanalytic Narrative

Memory is never a passive mechanism. Recollection is just that: re-collecting images in order to make them come out in a way that the brain can use, and the very need to use the material bespeaks expectation. The brain expects something useful, and it gets it, always due in some measure to unconscious manipulation. The deconstructionist notion of the endless play of signifiers strongly resembles Freud's view of the dynamic interplay of unconscious forces in the human psyche, for both image an open-ended complex of nonrational connections feeding apparently rational human faculties. Indeed, psychoanalysis reveals the complexes, however incompletely, by means of linking signifiers through nonrational free association, a method employed by some deconstructionist critics in analyzing texts. The critic reads to uncover discrepancies between what a text says and what the text does, just as the psychoanalyst reads to uncover the same discrepancy in a patient.

is exemplified strongly in the "transumptive" mode of allusion" developed by Milton. Id. at 78, 126-43. For the reader of law, the judicial technique is exemplified by the figurative allusion of any concept or emotive influence to another concept or emotive influence that is so apparently disparate from the first that it could not sensibly be imagined but for the figuration built upon other figuration. For example, using a condom does not seem to be like writing an editorial critical of the President of the United States. The impossible disparateness of the two acts precludes any possible connection to any person who has not attended law school. But to any person who has attended law school, there is an unavoidable esoteric connection linking the two acts—the First Amendment protection of free speech articulated by Justice Douglas' plurality opinion in Griswold v. Connecticut, 381 U.S. 479 (1965). This perception is the proximate result of sensitizing law students to a string of metonymic substitutions: all modes of language for political speech, actions for modes of language, rights for actions, suns for rights, penumbras for suns, privacy for penumbras, and speech for privacy. The trope of metalesis is the rhetorical manifestation of the psychological defense mechanisms of introjection, the means by which the ego extends emotional boundaries to overcome an obstacle (e.g., becoming like my father in order to resolve my hatred of him), see Sigmund Freud, The Ego and the Id 24 (James Strachey ed. & Joan Riviere trans., 1989), and projection, the means by which the ego alleviates internal conflict by representing it as outside the self (e.g., viewing my spouse's alcoholism as the source of all my problems in order to deny my own dependence on prescription drugs). See Sigmund Freud, Beyond the Pleasure Principle 33 (James Strachey ed. and trans., 1989).

CONCLUSION: Answer the question of whether homosexual sodomy is encompassed within the aforementioned penumbra. You have just introjected or projected yourself into the picture of Bowers v. Hardwick.
In psychoanalytic word-play, the image taken by the hidden psychodynamic forces is taken as a piece of a cryptographic puzzle, the solution to the particular part being dependent on a broader picture gathered from many other particulars and fitted together by the therapist and patient. The literary genre of the judicial opinion provides a frame and outline of the puzzle in the form of a result to be justified. Reading in the light of this goal (there are many other lights providing many different perspectives by which to read), the student is able to perceive the significance of the signification of facts. Like the psychoanalyst, the legal analyst assumes that the mode in which the recollection is presented is never arbitrary. The close reading of items in the margins can provide understanding of the motivation for the decision while serving as an example of emotive persuasion because a marginal image that plays a critical role to the writer will play a critical role also to the reader (who is also a co-writer of the text), the unconscious character of the persuasion merely investing it with greater impetus. Thus, the IRAC-shackled reader who contests that neither he nor the judge has been swayed by anything in the margins undermines his assertion as he utters it.

In *Tedla v. Ellman,* Judge Lehman begins a story thus:

> While walking along a highway, Anna Tedla and her brother, John Bachek, were struck by a passing automobile, operated by the defendant Ellman. She was injured and Bachek was killed. Bachek was a deaf-mute. His occupation was collecting and selling junk. His sister, Mrs. Tedla, was engaged in the same occupation. They often picked up junk at the incinerator of the village of Islip. At the time of the accident they were walking along “Sunrise Highway” and wheeling baby carriages containing junk and wood which they had picked up at the incinerator. It was about six o’clock, or a little earlier, on a Sunday evening in December. Darkness had already set in. Bachek was carrying a lighted lantern, or, at least, there is testimony to that effect. The jury found that the accident was due solely to the negligence of the operator of the automobile. The defendants do not, upon this appeal, challenge the finding of negligence on the part of the operator. They maintain, however, that Mrs. Tedla and her brother were guilty of contributory negligence as a matter of law.

Show only this paragraph to first-year students and ask who is going to win the suit. Most of them will get it right. Ask them how they know. They will not be able to tell you with any confidence. Then point out that they have been manipulated by Judge Lehman’s telling of the story.

80. *Id.* at 988.
They have been manipulated to expect a particular party to win, which is another way of saying they want that party to win. They want the party to win because they have been convinced that it is the result demanded by the law even though the law has not been discussed. They have been so well manipulated that they cannot tell you how. The mechanism works essentially at an unconscious level. Ironically, it works unconsciously in the storyteller as well. Judge Lehman, in writing the law of this case, probably did not know that he was attempting to manipulate people by the way he told it. This is because he was also manipulating himself in the telling.

Judge Lehman’s rhetorical obstacle is a rule established almost twenty years earlier in Martin v. Herzog, in which the court held that violation of a highway statute (in that case, failing to have lights on a vehicle) constituted, as a matter of law, prima facie evidence of contributory negligence. In Tedla v. Ellman, plaintiffs clearly were in violation of a statutory provision requiring pedestrians to walk on the left of the highway, facing the oncoming traffic. Plaintiffs walked on the right of the highway with the flow of traffic behind them. Noting the testimony of a state police officer that traffic going west (on the left) was much lighter than traffic going east (on the right), Justice Lehman reasoned that walking against the flow of traffic (in compliance with the statute) would have put plaintiffs at “unusual risk.” The legislative purpose of the statute (public safety) would thus have been undermined by compliance in this particular case, and this would be a result that the legislature could not reasonably have intended. Therefore, the rule of Martin v. Herzog did not apply.

Armed with such impeccable logic, why did Judge Lehman waste time telling us that the deceased plaintiff was a deaf mute? Logically, this is of no relevance unless the accident might have resulted from his inability to hear. But this would undermine the court’s assertion that he would have been at “unusual risk” facing traffic. Facing traffic makes more sense, not less, if one cannot hear. Why are the plaintiffs designated by their proper names as opposed to their status (i.e., “plaintiffs”)? Why is it relevant that they were brother and sister, that they subsisted by collecting junk at the village incinerator, and that they had just been there and filled baby carriages with junk and wood? Why

81. 126 N.E. 814, 816 (N.Y. 1920).
82. 19 N.E.2d at 988.
83. Id. at 989.
84. Id. at 990-92.
are we told that Bachek “was carrying a lighted lantern” when there appears to have been some doubt about the matter?\textsuperscript{85}


It all happens in an instant. Multitudinous images are processed, and we are predisposed to a result before we even delineate a legal issue. The student is thus able to see, first, that there are no objective statements of facts any more than there are neutral legal analyses in judicial opinions. Judicial opinions are arguments aimed at convincing the reader that the judge has made the right decision, and statements of fact are written to this end, persuading by what is written and by what is not written.\textsuperscript{86} It is the extreme subtlety of persuasion that

\textsuperscript{85} Id. at 988.

\textsuperscript{86} Particularly useful illustrations are provided by cases in which judges writing separate opinions offer factual accounts differing from or augmenting the principal statement of facts in the majority opinion. \textit{E.g.}, \textit{In re Petition of Doe, 627 N.E.2d 648 (Ill. App. 1993), rev’d, 638 N.E.2d 181 (Ill. 1994), cert. denied, 115 S. Ct. 499 (1994)} (the “Baby Richard” case). The majority opinion of the appellate court tells a story of an absent natural father who has reason to think his child might have been placed for adoption by his girlfriend, but who does not care to consult a lawyer until over two months after the child is nurtured by adoptive parents. \textit{Id.} at 649-56. The dissent tells the story essentially from the point of view of the natural father, who is portrayed as a supportive father-to-be subsequently the victim of his girlfriend’s deception—a deception of which the adoptive parents and their attorney were aware. \textit{Id.} at 656-66.

On occasion, a judge may undermine his own factual account by a subsequent recitation in a case arising from the same series of actions but with the legal issue framed in a manner directing a different result. \textit{Cf} Walker v. City of Birmingham, 388 U.S. 307 (1967); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969). Petitioners in both cases were arrested for participating in civil rights demonstrations in Birmingham during the Easter weekend of 1963. Walker challenged the constitutionality of a temporary injunction against demonstrating without a permit required by city ordinance. 388 U.S. at 309. Shuttlesworth challenged the constitutionality of the city ordinance itself. 394 U.S. at 148. In the Walker opinion, the demonstration organizers are portrayed as disrespectful of law and order for failing to challenge the state court injunction (issued on the city’s ex parte motion) through established procedures whose practical effect would preclude the demonstrations:

\textit{We are asked to say that the Constitution compelled Alabama to allow the petitioners to violate this injunction, to organize and engage in these mass street parades and demonstrations, without any previous effort on their part to have the injunction dissolved or modified, or any attempt to secure a parade permit in accordance with its terms . . . . [W]e cannot accept the petitioners’ contentions in

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reveals the delicate artistry of the good judicial writer. If a student is taught to look for these subtle manipulative significations from the beginning, she will avoid the befuddlement of trying to discern a coherent system of concepts when none exists, and she will better employ those same manipulative techniques upon judges when it is her time. She will know how to read a case and write it at the same time.

After the hidden persuasive tropes are uncovered, there remains the question of why the judge unconsciously wished for things to come out in a certain way. Unconscious wishes are the stuff of speculation, but

the circumstances of this case.

388 U.S. at 315. The account of the marches is austere, weighted against the marchers for the Court's failure to place the ostensibly unlawful demonstrations within the context of a brute segregationist law machine:

That night a meeting took place at which one of the petitioners announced that "[i]njunction or no injunction we are going to march tomorrow." The next afternoon, Good Friday, a large crowd gathered in the vicinity of Sixteenth Street and Sixth Avenue North in Birmingham. A group of about 50 or 60 proceeded to parade along the sidewalk while a crowd of 1,000 to 1,500 onlookers stood by, "clapping, and hollering, and [w]hooping." Some of the crowd followed the marchers and spilled out into the street.

388 U.S. at 310-11. In the Shuttlesworth opinion, the same persons are portrayed as principled opponents of segregation, disobedient to a city ordinance whose practical effect would deny their First Amendment rights: "[O]ur decisions have made clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license." 394 U.S. at 151. Accordingly, the factual account of the same Good Friday march is expanded to the point of explicitly stating that certain events did not occur:

On the afternoon of April 12, Good Friday, 1963, 52 people, all Negroes, were led out of a Birmingham church by three Negro ministers, one of whom was the petitioner, Fred L. Shuttlesworth. They walked in orderly fashion, two abreast for the most part, for four blocks. The purpose of their march was to protest the alleged denial of civil rights to Negroes in the city of Birmingham. The marchers stayed on the sidewalks except at street intersections, and they did not interfere with other pedestrians. No automobiles were obstructed, nor were traffic signals disobeyed. . . . As the marchers moved along, a crowd of spectators fell in behind them at a distance. The spectators at some points spilled out into the street, but the street was not blocked and vehicles were not obstructed.

394 U.S. at 148-49. For an informative account of the background and political consequences of these cases, see David B. Oppenheimer, Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964, 29 U.S.F. L. REV. 645 (1995). The critical insight to be sought is the reason why Justice Stewart proximately identifies in the first case with the state authorities and in the second case with the demonstrators. If the framing of a legal issue (violation of an unjust ordinance as opposed to violation of an unjust injunction against violating the same unjust ordinance) can so influence a judge's emotive identification as to change the outcome of a decision, the portrayal of characters in a manner that facilitates the judge's emotive identification might also influence the rhetoric by which the issue is framed. Mastering one trope entails practicing the other to some degree.
the speculation of the legal critic is not to be despised as presumptuous; the true unconscious wish is not to be grasped because it is not an empirical fact so much as a useful fiction—like the narrative center of gravity or the rule of law. Moreover, there is no privileged position in being the one who wishes. Indeed, the judicial author, as analysand to the critical reader, would likely be in no better position than the reader to articulate his unconscious wishes even if the judge were present. The Freudian concept of transference can provide a useful approach to discerning the judge's emotive ground. In essence, the operative question is who, aside from the actual parties to the litigation, the judge is seeing in the narrative he has just given. Within any human interaction, we see reflections of other humans and other interactions. Invariably, we see reflections of ourselves as well. Perhaps Judge Lehman unconsciously identified Anna Tedla and her deceased brother with a specific person to whom he had been close; more likely, he identified some aspect of himself with the victims. The conclusion might initially seem trite because we cannot know of Judge Lehman's childhood and intimate life experiences, but one soon realizes that the pedagogical accomplishment has practically nothing to do with Judge Lehman's attitude.

The accomplishment is the uncovering of the reader's own attitudes, prejudices, and emotive identifications. The reading that is learned is a capacity to decipher one's own transference with respect to the narrative (which to some degree will always be one's own countertransference to the judge's transference-driven way of narrating) and, like any good psychoanalyst or analysand, addressing our previously cryptic impulses in the light of reason. Identifications are like poems. Some are good; some are bad. There is no legal or ethical metalanguage to tell us which is which. As with poems, we learn to be writers by being critics; we learn to be critics by being writers; and somehow we acquire the capacity for discerning good and bad. Identifications are

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87. Transference refers to a kind of psychological grafting of experiences:

What are transferences? They are new editions or facsimiles of the impulses and phantasies which are aroused and made conscious during the progress of the analysis; but they have this peculiarity, which is characteristic for their species, that they replace some earlier person by the person of the physician. To put it another way: a whole series of psychological experiences are revived, not as belonging to the past, but as applying to the person of the physician at the present moment.

Sigmund Freud, Fragment of an Analysis of a Case of Hysteria ("Dora"), in THE FREUD READER 172, 234 (Peter Gay ed., 1989). The phenomenon can of course become manifest outside of therapy in other relationships. It is the basis of what in the modern vernacular is called "acting out."
often fragmentary and conflicting. One might closely identify with John Bachek (relating his struggle and vulnerability to one's childhood) while experiencing a conflicting identification with parental authority that dictates precedent be followed, however painfully, for the greater good of social stability. The question of whether *Tedla v. Ellman* was rightly decided will force an answer to which identification was stronger for Judge Lehman and which is stronger for the student. The essential insight is that the result is not compelled by IRAC logic but by how we perceive ourselves—how we write the stories that tell us who we are.

IV. A WORD ON POLITICAL AGENDAS

Applying psychoanalytic principles in the search for a literary theory of meaning, Peter Brooks observes that the cognitive force of literary narrative, like that of psychoanalysis, is the result of dynamic interplay between the storyteller and the listener:

Does wisdom flow from the storyteller to the listener? Or is it the listener—the analyst—who provides "counsel"? The transferential model suggests that there is an irresolvable shuttling between these two positions: that the truth of narrative is situational, the work of truth reciprocal. Wisdom comes from conviction, however you construct it.\(^8\)

The problem with conviction is its capacity for contradiction by additional conviction, and if people cannot verify one or the other as the true conviction, the wisdom unleashed would appear to be nothing more than raw will to power. If our truth is essentially a matter of how we choose to see things, and nothing logically compels our choice of aspect, all that would seem to be gained by affirming the contextual nature of truth is narcissism. Some form of this argument invariably is raised against all who attempt to integrate into their teaching a post-structuralist perspective, whether as literary deconstruction or as Critical Legal Theory. It is especially a concern of political conservatives who associate post-structuralism with left wing political agendas. This attitude bespeaks misapprehension although it is a misapprehension so widely shared as to be self-fulfilling.

There are certain fundamentals that must be borne in mind: deconstructionist method does not deny the possibility of transcendent or ultimate truths, or even that we can know such truths; it denies, rather, that we can know what these truths are. In other words, because language cannot stand outside of language, thought cannot stand outside of thought, and so any truth that would transcend

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thought cannot be verified. Thus, any attempt to persuade ourselves or others about what is good to believe cannot be circumscribed by scientific principles. In Rorty's phrase, the only limits on our discourse are conversational. Whatever we can say to persuade another of the goodness of our position is legitimate except the assertion that our position is the absolute and unassailable truth of the matter.

Law, then, is not a science but a mode of conversational discourse. As such, it is always driven by a political agenda of the conversants, and the scientific study of law—in so far as such a designation is possible—will consist in the analysis of what courts do instead of what they say, attempting to discern ethical consistency in the results of cases. Such a study is aimed at clarifying not only the political agendas of judges but the agendas of those who engage in the study, endowing legal analysis with a character of self-analysis.

A post-structuralist study of law reveals political agendas while compelling no particular agenda. Deconstructionist readings of legal texts can thus support conservative positions as well as liberal unless the position is inseparable from an assertion that it is verifiable as a universal truth. In fact, it is just this assertion that tends to interfere in the actual course of political conversation, reinforcing the misapprehension among both conservatives and liberals that conservative positions cannot be defended upon conversational grounds. In any event, it will seldom be the goals or general principles that are the

89. For example, the separate opinions of Justices Scalia and Thomas in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2118-19 (1995) contain some pregnant ethical concerns regarding affirmative action:

In my view, government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction . . . .

To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

Id. at 2118 (Scalia, J., concurring in part and concurring in the judgment). "These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences . . . . In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice." Id. at 2119 (Thomas, J., concurring in part and concurring in the judgment). Is there no ground upon which these arguments can be defended other than a questionable hermeneutic of original intent? The conversation should be directed to the empirical evidence that might support the assertions, not to "what the Constitution says." One can converse with a constitution only by way of tensely strained metaphor. See supra notes 74 & 78.
subject of disagreement. The argument will usually be over the best way of attaining the goals in light of additional goals and principles that conflict in varying degrees. Such arguments are essential to the lives of societies as they are to those of individuals. Good conversation is never to be despised.

V. CONCLUSION

Post-structuralist notions of truth and meanings of texts have been integrated into substantive law courses in the form of Critical Legal Studies and related theories employing techniques of literary deconstruction. Ironically, legal writing courses—the courses expressly focused on understanding and using language—have been resistant to these techniques, preferring a formalist model presenting writing as an algorithmic skill whereby pre-existing rules are applied to fact patterns in a calculative maneuver designed to predict a result (in the mode of objective writing) or influence a result (in the mode of persuasive writing). The traditional model of IRAC thus reinforces the stereotype that legal writing is a technical exercise in graphic representation, a mere reflection of legal truths that precede linguistic manifestation. In deconstructionist terms, the IRAC model perpetuates the illusion of presence—a complex presupposition that there is a pure meaning to things apprehended by a pure self who is sustained by biochemical processes but not defined by them.

The IRAC algorithm is undesirable, first, because it obscures the ethical significance of legal decision-making, and, second, because it obscures the rhetorical devices that are the very skills touted by the model’s formalist adherents. The moral ambiguity entailed at various stages of the judicial decision can be illustrated effectively by focusing the student’s attention on the minor premise of the standard legal syllogism, emphasizing that the identification of critical terms and analogical relationships is not logically compelled but rather contingent upon already given complexes of expectation that drive the apprehensions of the judge. Thus, it can be seen that the law that the judge employs is not a representation of an extra-linguistic truth, but

90. Consider the goal identified by Professor Singer, supra note 64, at 70: “The goal of politics and law should be to organize social life in a way that will maximize the number and variety of social situations in which contact among people is experienced as mutually self-validating and loving rather than mutually isolating and threatening.” Although Professor Austin makes light of this passage, supra note 24, at 242-43, he does so in order to make a point about hypocrisy. It is very difficult not to agree with Professor Singer’s goal. The hard ethical conversation must account for the insight (ordinarily identified with political conservatives) that quite often the best way to maximize love and fulfillment is to leave people alone.
writing—a process of symbolic associations that necessarily lead to other symbolic associations that find repose in a particular kind of association engendering a feeling of goodness. Legal writing is accordingly revealed as the creation of legal truth. In sum, the student is enabled to perceive that law is a kind of writing that is a kind of philosophy, which is also a kind of writing.

The creation of legal truth, then, is seen as the effective use of tropes. Accordingly, the prudent analysis of judicial opinions is geared to identifying tropes and apprehending their effects. Such an analysis might employ concepts from analytical philosophy (e.g., category mistake, illocutionary force), poetry (e.g., metaphor, metonymy), deconstructionist literary criticism (e.g., graft, aporia), psychoanalysis (e.g., transference, narrative), or other disciplines providing a useful vocabulary. Pedagogical taxonomies are limited only by imagination, but the taxonomical approach to judicial rhetoric is crucial to the student's perception. Unless the tropes themselves are isolated and studied, the innate sense of presence will not be overcome, and the tropes will master the student, who will lean back in an uncritical haze, mistaking the rhetorical devices for representational terms in a neutral calculus. Such a student can learn to parrot tropes. But the price of being a parrot is the impossibility of being human. The neutrality of legal decision-making is a dangerous fiction, effectively employed in every generation by those who would avoid the anxiety of authentic human responsibility, pretending that in following the law they are not also making it. In the end, we must teach that algorithms are lies not only in order to create better rhetoricians, but in order better to create ourselves.