

GOOD LEGAL THOUGHT: WHAT WORDSWORTH CAN TEACH LANGDELL ABOUT FORMS, FRAMES, CHOICES, AND AIMS

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* ©2016 Harold Anthony Lloyd, Associate Professor, Wake Forest University School of Law. This article draws from and expands upon portions of earlier articles including *Plane Meaning and Thought: Real-World Semantics and Fictions of Originalism*, 24 S. CAL. INTERDISC. L.J. 657 (2015) (which more broadly explores framing, metaphor, planes of thought, and the inconsistencies of originalism with how meaning actually works in the real world); *Exercising Common Sense, Exorcising Langdell: The Inseparability of Legal Theory, Practice and the Humanities*, 49 WAKE FOREST L. REV. 1213 (2014); and, “Original” Means Old, “Original” Means New: An “Original” Look at What “Originalists” Do, 67 NAT’L LAW. GUILD REV. 135–55 (2010).

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I. WORDSWORTH AND LANGDELL

Nuns fret not at their Convent's narrow room;
 And Hermits are contented with their Cells;
 And Students with their pensive Citadels:
 Maids at the Wheel, the Weaver at his Loom,
 Sit blithe and happy; Bees that soar for bloom,
 High as the highest Peak of Furness Fells,
 Will murmur by the hour in Foxglove bells:
 In truth, the prison, unto which we doom
 Ourselves, no prison is: and hence to me,
 In sundry moods, 'twas pastime to be bound
 Within the Sonnet's scanty plot of ground:
 Pleased if some Souls (for such there needs must be)
 Who have felt the weight of too much liberty,
 Should find short solace there, as I have found.

—Wordsworth¹

Wordsworth's sonnet on form should intrigue lawyers and students of the law. Though the weaver must accept the forms his loom permits, choice remains in what and how he weaves. Lawyers primarily trained in Christopher Columbus Langdell's case method can easily miss this flexibility bound up with form. Facts can often seem merely given in redacted appellate cases, and case strategies and choices leading to the redacted opinions themselves are often largely lost. However, just as a weaver's work never simply magically appears, neither do the facts of a case nor even the case itself. Instead, as the discussion below demonstrates, facts and cases are the products of framing and other choices human beings have made.

Second, Wordsworth's verse applies equally well to students who complain that form (such as the IRAC form discussed below) stifles creativity.² Form eliminates neither choice nor genius as the entire sonnet itself demonstrates. Instead, freedom requires form. To take any action, we

1. WILLIAM WORDSWORTH, *SELECTED POETRY* 137 (Stephen Gill & Duncan Wu eds., Oxford 1997).

2. See Gerald Lebovits, *Cracking the Code to Writing Legal Arguments: From IRAC to CRARC to Combinations in Between*, 82 N.Y. ST. B. ASS'N J. 64, 64 (2010) (noting student complaints of stifled creativity).

are of course constrained by whatever defines that action. How can Wordsworth's weaver, for example, weave loom products without a loom? Similarly, how can we have good thought apart from compliance with the rules³ and any forms that define it?

That said, we must not think that rules and form eliminate choice. Not only do rules and form need choice, they actually create choice. The sonnet form and its rules created endless possible sonnet choices for Wordsworth that would not have existed apart from the form and rules. The rules and forms of good thought also create choice. Prime examples of such choice are the opposing briefs in a case.

In this article, I shall therefore explore such freedom within the context of good legal form. More specifically, I shall explore how we frame legal thought at multiple levels, and the flexibility we have in such framing. In so doing, this article will examine resulting basic forms of legal thought. As we shall see, far from a Langdellian "science" with any kind of certain results, legal thought involves choice at every basic level.

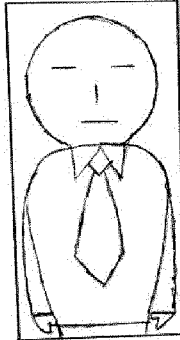
II. BEGINNING WITH "RIAC"

To begin exploration of what is hopefully a complete thought (to the extent a thought can ever be complete⁴), we can focus on the following drawing:⁵

3. See *infra* note 28 (on the nature of rules).

4. I use "complete" here to mean that a thought has all its basic parts. I recognize that no thought is ever complete in the sense that it cannot be further developed through application to unforeseen circumstances or otherwise.

5. Harold Anthony Lloyd, *Plane Meaning and Thought: Real-World Semantics and Fictions of Originalism*, 24 S. CAL. INTERDISC. L. J. 657, 664 (2015). Wittgenstein's Duck-Rabbit is a famous example that serves equally well. See Harold Anthony Lloyd, "Original" Means Old, "Original" Means New: An "Original" Look at What "Originalists" Do, 67 NAT'L LAW. GUILD REV. 135, 140 (2010) ("Framing is not an end in itself but a means to an end, a means to determine the solution to the problem the challenge presents.").



It is difficult (if not impossible) to think about this drawing in any full fashion without addressing the levels of thought set forth below.

A. The Reference

1. The “Drawing”

To begin thinking about the drawing above, first we must be clear about which lines concern us. Are we referring to all of the lines and other marks of that drawing, or are we only referring to some of them? Clarifying this first level of thought clarifies the thought’s reference or referent (i.e., that to which it refers).⁶ If I refer to all of the lines and other marks in the drawing above while you are either referring to (i) only a few of them, (ii) all of them plus something else such as the paper on which they are drawn, or (iii) something else entirely such as the color of the lines, we are from the outset talking across ourselves and are mistaken if we think we are discussing the same thing. The same occurs if opposing lawyers are in fact not talking about the same thing. Actually, the problem is worse: lawyers in such case spend their clients’ money to talk across each other. Though this point may seem an easy one in the abstract, unnoticed reference problems easily plague everyday practice.

2. The “Watch”

For example, siblings Kim and Cindy both want their late neighbor’s watch. Kim and Cindy both obtain counsel. Their counsel asks them what they want. Both sisters say the same thing as they point to a photograph: “I

6. The central question of reference theory is “[i]n virtue of what does a linguistic expression designate one or more things in the world?” THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 674 (Robert Audi ed., 2nd ed. 1999).

want my late neighbor's silver watch that she is wearing here in this old photograph. She promised it to me and I won't take anything less." Naturally, both sisters' counsel find these instructions quite clear. They not only have clear verbal instructions, they also have a photograph of the watch and client fingers pointing to it. How can there be any doubt about the nature of the dispute? They thus litigate and bill the matter for six years until Kim finally wins the watch in a final appellate court opinion, which some clever law professor redacts and puts in a casebook. Immediately upon winning her case, Kim horrifies her counsel by ripping off the silver watchband, tossing it in the trash, and keeping only the silver mechanical part of the watch. When told about this, Cindy shakes her head and says, "But all I ever wanted was that silver band. I never liked the dial of the watch itself." Both women then learn too late how not only language, but a photograph and pointing as well, had seemed to fail everyone concerned.

But who and what really failed here? There is an important lesson for lawyers here because the *who* were the attorneys and the *what* was the attorneys' failure to figure out their respective clients' real references. By not grasping their clients' real desires, the lawyers litigated an illusory dispute over the entire watch. Of course, Kim and Cindy may have also been imprecise in their initial communications. However, the lawyers have a duty to represent clients competently and to communicate well with them; these duties should include helping clients identify the real referents in play.⁷

As this example demonstrates, performing this function can be easier said than done. As we see here, not only can words fail but even pointing to things (or pictures of things) can fail.⁸ What, then, can we do? Are situations like this hopeless? Of course not. Lawyers must do more than just listen carefully to their clients and look where their fingers may seem to point. Lawyers must also ask the right questions and not stop until they have identified what is really in play. Here the lawyers should have begun such a process by asking something like: "What exactly do you like about that watch?" Such a simple question could have led quickly to each client's real desires and then to a quick settlement. Of course, simply parsing Kim's

7. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N, 2016); *Id.* at r. 1.4(a). As Comment 5 to Rule 1.1 notes: "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem . . ." *Id.* at r. 1.1 cmt. 5.

8. As Wittgenstein notes, for example, when one wishes to name a person by pointing at the person, the viewer might take that definition as one of "a colour, of a race, or even of a point of the compass. That is to say: an ostensive definition can be variously interpreted in *every* case." LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 13–14 (G.E.M. Anscombe trans., MacMillan 1968).

final appellate opinion (much less redacted portions of the opinion) is unlikely to teach us any of this.

3. The “Easement”

Additionally, even when lawyers understand their clients’ interests well, lawyers do not always question obvious reference frames when they should. For example, Philip and Elizabeth have inherited adjacent tracts of land from their great-aunt Ida. They believe that they are entitled to no more or less than their individual inheritances, whatever those may be. However, Philip would like an access easement over the north-eastern corner of Elizabeth’s land. He takes a copy of their great-aunt’s original hundred-year-old survey to Elizabeth, draws out the easement in pencil, and offers her a good price. Elizabeth is in a bad mood that day and refuses to grant the easement. Philip hires a lawyer to help him buy an access easement elsewhere. Such counsel quickly finds another workable easement at a reasonable price.

Though Philip is impressed with his lawyer’s “good” work, he should in fact be angered at a case of possible malpractice. Had Phillip’s counsel suggested a new and better survey (or at least an updated survey), the better information would have shown that Philip actually owned the corner in question. Had such new information corrected their reference frame, no additional easement would have been needed. Of course, one can suspect why Philip’s counsel may not have requested a new survey. If facts just magically are what they are in the redacted appellate cases he had studied in law school, why would we expect Philip’s counsel not to think that his survey “fact” could be any different?

4. No Natural References

Viewed yet another way, both the watch and easement examples also expose an ever-waiting trap for lawyers: assuming natural or given references apart from the values and desires that we bring to experience. The “given” facts of redacted appellate cases of course hardly help address this problem.

Taking the watch example again, any assumed “natural” reference of “watch” (i.e., the whole watch) was only in the lawyers’ heads. When their clients pointed in the direction of “the watch,” both lawyers assumed a natural reference of the whole watch. As we saw, however, the clients really wanted different parts of the watch.

The easement dispute demonstrates this trap in perhaps a deeper and more subtle way. In practice, there are different acceptable survey techniques and standards.⁹ Good attorneys know that they can explore these different techniques and standards in search of the best ones for their clients. Good attorneys also know that surveying standards evolve¹⁰ and can thus be challenged and supplemented if good, or at least reasonable, grounds exist for doing so. Good real estate attorneys thus understand that natural and immutable survey standards simply do not exist, and they assist their clients accordingly.

5. The Nature and Flexibility of Framing

All of these examples also underscore the role and flexibility of framing in thought. In order to refer to a specific part of an experience or the world, we must separate that part from the rest of experience or the world. In other words, we must put an accurate “fence” or “frame” around that part of the experience or the world. In drawing these referential framing lines, the good attorney investigates and understands his client’s interests well and otherwise performs adequate inquiry as to the referential frame itself. Again, despite the “given facts” in a redacted Langdellian appellate opinion, the good attorney also knows that there are no natural or given frames for carving out a particular reference.¹¹

When framing such reference, one must also take care to recognize the limits such framing will place on remaining thought. For example, in a murder trial, one way to frame the drawing above would be: “This is a picture of (i) a person dozing, (ii) a person meditating, (iii) a person praying, (iv) a plastic mannequin, or (v) a corpse in an open coffin.” If we agree these are the only possibilities, we have thus limited the potential issues¹² raised by the reference. (Section II.B. explores issues raised by

9. See generally *Land Survey Techniques*, SURVEYORS.COM, <http://www.surveyors.com/land-surveyors/land-survey-techniques/> (last visited Nov. 21, 2016) (listing land survey techniques such as triangulation, trilateration, traverse, leveling, and radiation).

10. See *id.* (examining change in land survey techniques over time due to equipment and technology).

11. As Hilary Putnam puts it, “to ask how things are ‘in themselves’ is, in effect, to ask how the world is to be described in the world’s own language, and there is no such thing as the world’s own language, there are only the languages that we language users invent for our various purposes.” HILARY PUTNAM, PRAGMATISM: AN OPEN QUESTION 29 (1995). As I have discussed elsewhere, understanding this lack of natural or given frames for reference also highlights the role of metaphor in reference and in other levels of thought. Lloyd, *supra* note 5, at 683.

12. The definition of *issue* includes “[a] point or matter of discussion, debate, or dispute.” THE AMERICAN HERITAGE COLLEGE DICTIONARY 736 (4th ed. 2002). *Issue* differs from *reference*: we can agree on the reference yet disagree on the issue or issues. For example, we can both agree that we are

references in more detail.) Under this framing, we can only ask whether this is a drawing of a sleeping person, a person in meditation, a person in prayer, a plastic mannequin, or a corpse in an open coffin. However we answer this question, it cannot be a drawing of anything else such as a drawing of a marble statue in a shipping crate or a vampire sleeping in its coffin.

As this example shows, arguments are won, lost, or at least impaired at this referential level because accepted frames limit the analysis that follows. If one wished to use the drawing as evidence in a case involving the theft of a marble statue, one must of course resist a reference frame that excludes such a possibility. If the drawing is the only evidence of the marble statue in question, the case might well be determined by how we frame this one reference.

6. Highlighting and Concealing

Additionally, the incompleteness of categories used in framing reference can set issue traps. In evaluating such categories, one must take care to remember two primary functions of categories: “highlighting certain properties” and “downplaying . . . , [or] hiding still others.”¹³ For example, the following statements refer to the same person and act:

My wife talked to another person on the phone last night.

My wife talked to another man on the phone last night.

My wife spent part of last night talking to another man.

My wife talked to a famous singer last night.¹⁴

Though all of these statements can be true, they highlight, downplay, and hide different things and thus potentially tee up radically different issues and analyses to follow.

referring to the same lines and marks in the drawing above while one of us may frame the issue as “whether we have a sleeping male or dead male” while another may frame the issue as “whether we have a sleeping male or a mannequin.”

13. See GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 163 (1980) (showing that emphasizing one point necessarily de-emphasizes another). Concepts by their very nature require this. Since concepts are not literally the things conceptualized, there cannot be a perfect one-to-one match. See *id.* at 13 (exploring the ways metaphors can be used to organize facts for emphasis or de-emphasis).

14. This example is based on a similar scenario given by Lakoff and Johnson. *Id.* at 163.

For example, the “famous singer” frame may allow the speaker to drive the conversation in the direction of the speaker’s own status. The “another man . . . last night” frame (especially without reference to the phone fact) might, on the other hand, allow a divorce-seeking husband to pursue that agenda with greater ease. Thus, good lawyers cannot simply accept reference frames (or other frames) as *true* without considering what such frames highlight, downplay, and hide and whether that which is highlighted, downplayed, and hidden is consistent with their clients’ interests.

B. The Issue(s)

1. Framing In and Framing Out

After we have agreed upon our reference, if we wish to discuss it further, we need to agree upon the issues it presents.¹⁵ This also requires framing because we need to fence in those issues that are “suitable” to explore and fence out those that are not.

For example, imagine again that we have referentially framed the above drawing so that it can only be a picture of (i) a person dozing, (ii) a person meditating, (iii) a person praying, (iv) a plastic mannequin, or (v) a corpse in an open coffin. With this reference frame clarified, we can next frame the issues either broadly or narrowly. Broadly, we might frame the issue as which of the five possibilities above is true? Do we have (i) a person dozing, (ii) a person meditating, (iii) a person praying, (iv) a plastic mannequin, or (v) a corpse in an open coffin? However, we might also issue frame more narrowly. For example, we might ask whether the reference could really be a plastic mannequin when there is evidence that the drawing was made before plastic was in general use.

However we frame the issues, we must be vigilant about what we are framing in and framing out. For example, if we have a murder trial and have agreed on the above five reference possibilities, the prosecutor might make his victory impossible by not raising and pursuing the issue of whether the drawing is of a corpse in a coffin. On the other hand, defense counsel might doom his client by failing to raise and pursue the issue of

15. Again, the definition of “issue” includes “[a] point or matter of discussion, debate, or dispute.” THE AMERICAN HERITAGE COLLEGE DICTIONARY, *supra* note 12. By moving from the level of pure reference to explore the reference further, we are setting up the reference for further discussion. Again, issue is distinct from reference: we can agree on the reference but disagree on the issue or issues. Again, for example, we can both agree that we are referring to the same lines and marks while one of us sees the issue as framed above or as “whether we have a sleeping person or dead person” or as “whether we have a sleeping person or a mannequin.”

whether the drawing is of (i) a person dozing, (ii) a person meditating, (iii) a person praying, or (iv) a plastic mannequin. If there is at least reasonable evidence of any of these four possibilities, defense counsel should of course explore such issues to establish reasonable doubt.

2. Framing and Connotation

In addition to what we expressly frame in and out of our issues, we must also be vigilant about the connotations we may be fencing in or out. If, for example, a pharmaceutical company seeks approval of a new drug, it would present a facially-weaker case if it framed its issue in terms of the acceptability of “[a] 10% mortality in the first month” than it would if it framed its issue in terms of the acceptability of a “one-month survival rate [that] is 90%.”¹⁶ Similarly, it is much more forceful to ask whether adding chemical *Y* to the environment triples the risk of a certain disease than to ask whether adding the chemical results in a disease rate of 3/100 million persons instead of a rate of 1/100 million.¹⁷ As noted above, we must also be vigilant about what our categories highlight, downplay, and conceal.

C. The Analysis

1. Framing the Options

If one has no further interest in the matter, one can of course end with reference and issue framing. However, if one wishes to explore the issues, one must turn to analysis.

Returning to the drawing above, the parties might have agreed that the only issue is whether the drawing represents a plastic mannequin. If so, they would have also framed the overall course analysis as follows: proceed affirmatively, negatively, or indeterminately as to whether they have a plastic mannequin. For example, the affirmative approach might reason that we must have a drawing of a plastic mannequin because the features are too symmetrical for a real person. The negative approach might reason that it is not a mannequin because mannequins are used to model clothes in an appealing fashion and a mannequin that appears to be sleeping cannot do that. The indeterminative approach might reason that the drawing could equally be a mannequin of any material, or a sleeping person, or maybe

16. See DANIEL KAHNEMAN, THINKING FAST AND SLOW 367 (1st ed. 2011) (providing these frame examples).

17. See generally *id.* (using examples of framing to show shifts in emphasis).

even a dead body. But we just cannot know the answer without more evidence.¹⁸

2. Looking Ahead

The reader will note that each of these approaches depends upon certain descriptive or normative rules. Are people generally not as symmetrical as mannequins? Are mannequins that appear to be sleeping or dead really not suitable for modeling clothes? What do we mean by “mannequin,” “sleeping person,” and “dead body”? Looking ahead for a moment, the analytical role of logic and legal rules suggests a need to expand the analysis level to include the notion of rules, something we shall do in Section III below when we expand “RIAC” to “RIRAC.”¹⁹

D. The Conclusion

1. Rhetoric and Force

If we wish to resolve analysis, we must also have a conclusion.²⁰ Where we have multiple plausible conclusions (as we do above with the plausible affirmative, negative, and indeterminative analyses of whether we have a plastic mannequin), we can reach a conclusion either by use of rhetoric, force, or both.²¹ Though force can involve the unpleasant, it can also simply involve the unobjectionable use of power as when a teacher uses status power to dictate a plastic mannequin for purposes of the class hypothetical. Of course, the “given facts” of a redacted appellate case likely give little insight into the role of rhetoric or force in deciding the mannequin “facts” here.

18. Of course, whichever analytical direction one takes, one must also be careful to avoid mistakes of reasoning. Such mistakes include deductive and inductive fallacies as well as omitting or misunderstanding relevant facts and law when performing the analysis. *See, e.g.*, RICHARD A. LANHAM, *A HANDLIST OF RHETORICAL TERMS 77–78* (2d ed. 1991) (listing formal and informal fallacies). An exploration of such errors is beyond the scope of this article.

19. RICHARD K. NEUMANN, JR. & KRISTEN KONRAD TISCIONE, *LEGAL REASONING AND LEGAL WRITING 30–33* (2013) (addressing the “[i]nterdependence [a]mong [f]acts, [i]ssues, and [r]ules”).

20. CHRISTINE COUGHLIN, JOAN ROCKLIN, & SANDY PATRICK, *A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS 169* (2013).

21. *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW 48, 166* (2000) (outlining the use of rhetoric); LAKOFF & JOHNSON, *supra* note 13, at 157 (“[W]hether in national politics or in everyday interaction, people in power get to impose their metaphors.”).

2. Containers and Hedges

Whatever our conclusion and however we reach it, we tend to see conclusions and their categories as “containers [of things] with an interior, an exterior, and a boundary.”²² For example, if we conclude that we have a drawing of a plastic mannequin, we will tend to think that we have filed the drawing “inside” that category of things.

As physical containers, conclusions and their categories therefore raise issues of both fit and strength. How good is the fit and how strong is the container? Will it really hold, and if so, for how long? If we are doing a predictive analysis, such as an objective memorandum, we need to answer these questions and we do so by hedging.²³ Our linguistic hedges include adverbs like “likely” fit, “possible” fit, “unlikely” fit, and so on.²⁴ In such objective analyses, one cannot predict with absolute certainty how a court will rule on any issue, and a competent attorney should never attempt to do so.²⁵ However, in persuasive analysis such as persuasive arguments and briefs, firmer conclusions can be, and generally are, appropriate as a part of an advocate’s role.²⁶

E. “RIAC” Recap

In their most basic form, complete thoughts will thus include references, issues, analyses, and conclusions. In other words, basic forms of complete thoughts will include a RIAC (reference, issue, analysis, conclusion) form, which can be further refined as noted in the sections that follow.²⁷

22. GEORGY LAKOFF & MARK JOHNSON, *PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT* 20 (1999).

23. *Id.*

24. *Id.*; see also LAKOFF & JOHNSON, *supra* note 13, at 123–24 (describing and giving examples of hedging of metaphors); COUGHLIN, ROCKIN & PATRICK, *supra* note 20, at 169–70.

25. In legal writing, such probability statements can include such words or phrases as: *will probably*, *will likely*, *will probably not*, *will likely not*, and *might* among others. COUGHLIN, ROCKIN & PATRICK, *supra* note 20, at 170.

26. I would avoid, however, telling a court that it “must” do anything since it is the role of judges and not the parties to issue orders.

27. See *infra* Part III (explaining how to construct RIRAC form).

III. FROM “RIAC” TO “RIRAC”

A. From “A” to “RA”

Though RIAC serves the purposes noted above, one can refine and expand it to a form that more fully reflects complete legal thought. Since legal analysis generally involves the application of a legal rule or rules,²⁸ the single “A” in “RIAC” can be usefully refined and expanded to “RA,” with the “A” standing for “Application” and the “R” standing for “Rule.” RIAC can thus be usefully expanded to RIRAC (Reference(s), Issue(s), Rule(s), Application(s), and Conclusion(s)).

For example, imagine a homicide framed as a “murder case” where the “facts” show beyond a reasonable doubt that the “defendant purposefully and without justification or excuse caused the death of another person.”²⁹ Here, the reference would be the purposeful killing without justification or excuse of another person. The issue would be: “Is the defendant guilty of murder?”³⁰ To address this issue, the prosecutor of course must find some applicable rule addressing murder. If the applicable rule provides that “[a]ny person who, without justification or excuse, purposefully causes the death of another person, is guilty of murder,”³¹ a murder conclusion seems a straightforward matter of simple deduction.

B. Symbiosis

This example also shows the symbiotic relationship of framing references, issues, and rules. One must frame each of these with the others in mind or risk failure. Where a rule requires lack of justification or excuse, the “facts” referred to must include these “facts.” However, this requires care in framing because “justification” is a legal term of art reached only

28. A detailed investigation of the nature of legal rules is beyond the scope of this article. For purposes of this article, I shall agree with others that such rules should satisfy at least three criteria: (1) “be—simply stated—concise enough for the reader to grasp easily”; (2) “be readily applied” without circular or ambiguous terms; and (3) be “consistent with the cases and law in the jurisdiction.” Paul Figley, *Teaching Rule Synthesis with Real Cases*, 61 J. LEGAL EDUC. 245, 247 (2011). See also Harold Anthony Lloyd, *Let’s Skill All the Lawyers: Shakespearean Lessons on the Nature of Law*, 11 VERA LEX 33, 64 (2010) (discussing the semiotic decalogue). Also for purposes of this article, I shall consider “rule” to include standards as well. See WILSON HUH, THE FIVE TYPES OF LEGAL ARGUMENT 51 (3d ed. 2014) (“The application of a rule depends solely on the existence of specific facts The application of a standard involves the consideration of one or more facts in light of one or more underlying values . . .”).

29. HUH, *supra* note 28, at 194.

30. *Id.*

31. *Id.*

after application of a rule as to what that means.³² One thus needs to choose more “neutral” terms to avoid simply begging the question in the analysis.³³ Understanding the need to differentiate between reference, rule, and analysis helps give us the clear head we need to avoid such confusion. Rather than beg the question, separating reference, rule, and analysis leads us to ask what facts prior to the rule application would be considered “unjustified.” If we learn, for example, that the defendant committed the homicide for no other reason than the mere adventure of the deed, we could apply our rule to those facts without circularity.

To take another example, when considering whether police officers unconstitutionally arrested same-sex adults engaging in private consensual sex, we must have legal rules to resolve the matter.³⁴ However, we cannot fully separate the framing of these rules from the framing of the issue or issues. Is the issue here whether those arrested have “a fundamental right to engage in homosexual sodomy”³⁵ involving all the historically-loaded baggage that term entails,³⁶ or is the issue whether those arrested have a basic constitutional right to be free of governmental intrusions into their private, consensual expression of affection?³⁷ Again, either frame of the issue must involve the framing of a corresponding rule or rules, and these in turn require frames for the necessary facts.

C. “RIRAC” and Communication

As Wordsworth’s loom can weave many different final products from the same materials, so can lawyers, judges, and clients weave their different “products” given the available framing and other choices discussed above. Therefore, a lawyer cannot always assume that others will follow her train of thought if she simply sets out the applicable law; the facts she has gleaned; the facts of any applicable judicial opinion (which facts she believes the reader on his own should see are similar or dissimilar); the holding of the judicial opinion; and the “obvious” result that should follow from all this.

Fortunately, RIRAC can help the lawyer avoid this common communication error. Focusing on the first “R,” or Reference(s), can help her to remember to communicate *all* the relevant facts as she has framed

32. NEUMANN, JR. & TISCIONE, *supra* note 19, at 32.

33. *See id.* at 31 (discussing and giving examples of what is and is not a fact).

34. *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

35. *Id.* at 191.

36. *Id.* at 192.

37. *Lawrence*, 539 U.S. at 564.

them. Focusing on the “I,” or Issue(s), the second “R,” or the Rule(s), and the “A,” or Application(s), can help her remember to set out in full the issues and the applicable rules as she has framed them, and her actual applications of those rules. Focusing on the “C,” or Conclusion(s), can help her remember not only to include a clear conclusion but to include any appropriate hedging as well.³⁸

D. “RIRAC” and “IRAC”

As a lawyer or student of the law, my default formulation of legal thought would thus be RIRAC because it sweeps up reference, issue, rule, application, and conclusion levels of thought. That said, if we are clear on our references, we can further shorten RIRAC to IRAC in appropriate situations. We can often do this in law school settings where our hypotheticals have clear references. However, again, we need to be vigilant in remembering that reference requires framing, too, and is a critical part of legal meaning and thought.

IV. SOME CAVEATS AND MISPLACED OBJECTIONS

Of course, RIRAC and IRAC (and their variations) do not in themselves assure good results.³⁹ Good results also require knowledge, skill, and facile framing at each level of thought.⁴⁰ Thus, those who question IRAC, for example, as purporting to be a “yellow brick road” that one only need follow “from start to finish”⁴¹ are misguided. The form claims no such powers in itself.⁴² As we have seen, RIRAC and thus IRAC require significant framing and other choices. Furthermore, a good RIRAC, and thus a good IRAC, must of course have good style including rhythm, tone, and flow if they are to keep the reader’s attention and persuade or

38. See, e.g., COUGHLIN, ROCKIN & PATRICK, *supra* note 20, at 169–71 (exploring strategies to help attorneys focus on the pertinent legal issue).

39. Brett Rappaport, *Using Elements of Rhythm, Flow, and Tone to Create a More Effective and Persuasive Acoustic Experience in Legal Writing*, 16 J. LEGAL WRITING INST. 65, 67 (2010).

40. *Cf. id.* at 82 (explaining that it takes skill to incorporate musical elements into persuasive writing).

41. *Id.* at 65, 67 (quoting REBECCA ADAMS, *WRITING NON-FICTION IN INSTEAD OF FULL STOPS: A GUIDE TO WRITING AND PUBLISHING NON-FICTION* (1996)).

42. See, e.g., Christina L. Kunz & Deborah A. Schmedemann, *Our Perspective on IRAC*, LEGAL STUD. RES. PAPER SERIES (William Mitchell Coll. Of Law), Nov. 1995, at 12 (“IRAC can be taught so that students understand not only why it is useful as a thinking and writing tool, but also that proper use of it requires judgment and creativity.”).

convince.⁴³ Nothing in the RIRAC or IRAC form automatically provides such style. This must come from the thinker himself.

As this need for style suggests, RIRAC and IRAC forms (and their variations) do not improperly stifle creativity as students may sometimes feel.⁴⁴ In addition to style, the selection, framing, and formation of categories noted above necessarily involve creativity. Furthermore, once one has mastered basic forms of thought, one can move to variations of RIRAC or IRAC, which might serve particular situations better so long as they still address all necessary levels of thought.⁴⁵ One cannot, however, successfully improve or embellish a core of good thought that does not exist.⁴⁶ Finally, when using basic forms of thought, we should also use all helpful linguistic and liberal arts skills; doing this also involves creativity.⁴⁷

V. MORPHING “RIRAC” INTO “CRAC” AND “CREAC”

Continuing with our formal analysis, RIRAC can be further modified to address concerns and expectations of daily law practice.

Judges, lawyers, and clients want to start with conclusions.⁴⁸ Unlike readers of Conan Doyle or Christie, judges, lawyers, and clients do not mind “spoilers,” or having the ending first. They want to know up front

43. See generally Rappaport, *supra* note 39 (illuminating persuasive power of tone and rhythm).

44. See Lebovits, *supra* note 2 (noting student complaints of stifled creativity).

45. In addition to CREAC, ICREAC, and IREAC discussed below, RIRAC and IRAC can generate countless other forms. See Tracy Turner, *Finding Consensus in Legal Writing Discourse Regarding Organizational Structure: A Review and Analysis of the Use of IRAC and its Progenies*, 9 LEGAL COMM. & RHETORIC: JALWD 356, 357–58 (2012) (discussing organizational structure in legal writing through four core principles: rule-centered analysis, separation of discrete issues, synthesis of the law, and unity).

46. As Bret Rappaport notes:

[T]o learn how lawyers view the world, deconstruct disputes, and from that deconstructed base, spot issues and construct arguments that help their client prevail . . . Without the fundamental understanding of the logic and reason of the law, students would flounder, for the real world of law is made up of such things.

Bret Rappaport, *Tapping the Human Adaptive Origins of Storytelling by Requiring Legal Writing Students to Read a Novel in Order to Appreciate How Character, Setting, Plot, Theme and Tone (CSPTT) Are as Important as IRAC*, 25 T.M. COOLEY 267, 299 (2008).

47. See Harold Anthony Lloyd, *Exercising Common Sense, Exorcising Langdell: The Inseparability of Legal Theory, Practice and the Humanities*, 49 WAKE FOREST L. REV. 1213, 1234–35 (2014) (highlighting the importance of liberal arts and metaphor). See also, e.g., Rappaport, *supra* note 46, at 299 (“Literature and its elements, character, setting, plot, theme, and tone, have a rightful and valued place in a student’s second or third year.”). I would also say that literature and other liberal arts should have a place in the first year. See *id.* at n.151 (acknowledging that others support “using literature in the first-year legal-writing class.”).

48. COUGHLIN, ROCKIN & PATRICK, *supra* note 20.

“who dunnit” so they can explore the reasoning that lies behind.⁴⁹ Judges and lawyers want the answers first because time is precious; clients want the answer first because that is generally their primary concern, rather than the reasoning that lies behind.⁵⁰

These audience demands therefore often require that RIRAC be modified to begin with a conclusion. Since conclusions involve issues resolved and, since issues resolved involve references, one can subsume the “RI” into a conclusory “C,” so long as the references and issues remain clear. (To assure such clarity, one should always keep the corresponding RIRAC in mind.) RIRAC can thus be transformed into “CRAC” (Conclusion-Rule-Application-Conclusion).

Unless clear on their face, rules need sufficient explanations that clarify and support the analysis and conclusion the lawyer provides.⁵¹ Although clients are most concerned with conclusions, some clients will want to follow the analysis in varying degrees of detail. Thus, it is important to provide clients with at least the opportunity to read clear explanations where rules are not clear on their face.⁵² Furthermore, if things go wrong, a good lawyer must be able to explain her reasoning and point out that this reasoning was also initially available to the client.⁵³ Additionally, in the classroom, a professor can better understand student errors and deficiencies if students explain their thinking.⁵⁴ It can therefore be useful to modify CRAC further to add a rule explanation provision so CRAC thus becomes CREAC, with the “E” standing for “explanation.”⁵⁵

49. *See id.* (illustrating that knowing where an argument is going gives facts and analysis greater meaning.).

50. *See id.* (explaining that readers focus on the conclusion).

51. *Cf. Turner, supra* note 45, at 356 (remarking that the applicable law is occasionally unclear, so an effective explanation of the rule is necessary).

52. *Id.*

53. *Id.*

54. *Id.*

55. Again, in addition to ICREAC and IREAC discussed below, RIRAC and IRAC can generate countless other forms. *See id.* at 357–58 (setting forth table of multiple forms); *see generally* Lebovits, *supra* note 2, at 50 (displaying table of multiple forms).

VI. FROM “RIRAC” AND “CREAC” TO THE PROFESSORIAL “ICREAC”
AND “IREAC”

[Y]ou [i.e., the law student in 1930] will notice that any *wide* synthesis of the subject-matter of a case class is left to you. Piece-wise, we help. As to any whole, our wiser members still leave you largely to yourselves.

—Karl Llewellyn⁵⁶

To learn legal analysis, students must solve problems themselves. Nonetheless, law professors have an obligation to provide detailed and structured overviews of law and its practice. Students pay in both money and time to be in law school, and have a right to a meaningful amount of material delivered in a logical and digestible form. “Piece-wise” instruction that “largely [leaves students] to [themselves]”⁵⁷ makes no more sense than a lawyer largely leaving clients to themselves. (I think providing only “[p]iece-wise” Langdellian guidance⁵⁸ can raise ethical questions for teachers no less than practitioners—especially if teachers are members of the bar—but that is a topic for another day.)⁵⁹

In providing instruction that is not “[p]iece-wise,” the forms discussed above can provide student “clients” with the same benefits that they provide legal clients. When addressing any matters, instructors should be confident that students comprehend the basic RIRAC form of thought for all the reasons discussed above. Once confident that students understand the need for framing reference in a shared way that permits further discussion of any matter, class instruction can shift to other forms as the instructor deems appropriate—though one further modification is useful for the classroom.

While legal clients focus on conclusions and thus often appreciate the CREAC form, student “clients” must learn to spot issues as well. For this reason, an instructor using CREAC in class discussions of problems can find that an ICREAC model (i.e., adding “Issue(s)” to CREAC) works better in class discussions. For example, imagine a discussion of the

56. K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 95 (7th prtg. 1978).

57. *Id.*

58. For my thoughts on the great damage Langdell and his followers have done to legal education, see generally Lloyd, *supra* note 47.

59. Exploring that topic might begin with Model Rule 8.4(c) which provides that “[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty . . . or misrepresentation . . .” MODEL RULES OF PROF’L CONDUCT r 8.4(c) (AM. BAR ASS’N 2016). If law schools hold out “[p]iece-wise” Langdellian *guidance* as truly preparing students for the practice of law (especially if this guidance is given by faculty who have never practiced law themselves), does this create ethical issues under the rule? At the very least, this sounds like a conversation we ought to have.

doctrine of consideration in a restrictive covenant context. The instructor might begin with a series of “issue” questions such as: “is a penny promised but never delivered sufficient consideration for a covenant not to compete?”; “is promised continued employment sufficient consideration for such a covenant?”; “is a change of title without more sufficient consideration for such a covenant?”; “is an increase in an employee’s duties sufficient consideration?”; or “is a decrease?”

Educationally, these issue questions serve multiple purposes. First, they raise issues students may indeed face in actual practice. Second, they may hopefully arouse the students’ interest in the discussion topic. For example, the awkward thought of increasing employee duties as possible consideration would hopefully cause at least some students to pause. After raising such issues, the instructor can next either give answers before further exploration (thus using ICREAC), or the instructor can move straight to further exploration (thus using IREAC). In either scenario, students can then follow the formal progression from “R” to “E,” and then to the various applications resulting in “C.”

Whether to use ICREAC or IREAC is always a situational judgment call. Over the course of teaching, one approach will work better in some cases and not in others. One big advantage of ICREAC is that it avoids the game of “hiding the ball” with issues. As a student, I found that “game” particularly annoying not only as a waste of precious time, but I also wondered whether wasting such time was necessary because the teacher could not fill the allotted class time with substance. I imagine these reactions are not unique to me.

Additionally, ICREAC may prove very effective because students may reject, be puzzled by, or even be intrigued with an instructor’s initial conclusion, thereby provoking more interest than an IREAC would have provoked. However, IREAC may in fact pique more interest and generate a livelier discussion in other situations. The instructor will thus need to make a judgment call, and often there may be no right answer between the two approaches.

But, the burden of the ICREAC or IREAC is not the teacher’s alone. At every level, students can be required to play roles in ICREACs and IREACs. Continuing with the restrictive covenant example, instructors might begin by asking students what sorts of consideration issues might arise with restrictive covenants. After students or the instructor (or both) have raised issues, the instructor can then ask the students about conclusions. Similarly, instructors can engage students on any other parts of the ICREAC or IREAC.

Students must also learn to do their own IRACs and CREACs and other assigned analyses in order to learn how good lawyers think and reason. In my commercial leasing class, for example, I find it very helpful to assign weekly problems, which students must address in IRAC form. Initially, a few students may complain about this but, by the end of the course, I generally hear that this was one of the most useful parts of the class. This makes sense since, again, good thinking needs to be in the form of good thought. However, though these assigned IRACs are useful, they do not remove the need for the professor's ICREACs and IREACs providing the benefits discussed above.

In sum, instructors no less than students, need to be clear and precise when they talk in class about references, issues, applicable rules, pertinent steps of rule application, and conclusions with their appropriate hedges. The study of legal reasoning and analysis applies in every class, and teachers' thoughts also need to be well structured. Using ICREAC and IREAC can help assure that this is done.

VII. CONCLUSION

Langdellian "science" and its "formalism" ignore ways that form permits, and even creates, freedom of choice. For example, as Wordsworth notes, though the weaver is restricted by what his form of loom can weave, the weaver nonetheless has vast choice in what and how he weaves with the loom.⁶⁰ Furthermore, the loom creates weaving possibilities that do not exist without it.

Such freedom alongside form is often lost on lawyers, judges, and teachers trained primarily in Langdellian redacted appellate cases, in which facts and other framed matters often wrongly appear as simply given. Similarly, in the context of their redacted appellate cases, many current students may only see constraint in IRAC (Issue-Rule-Application-Conclusion) and other thought forms, rather than the fastidious freedoms such forms both provide and create.

Overlooking such freedoms is not only misleading, it also misses the need to study how such freedoms are and should be exercised. When facts are simply presented as "given," and strategic and other choices go unrecorded and unnoticed in redacted appellate opinions, thorough analysis of these overlooked subjects cannot occur. This is extremely troubling since such overlooked subjects are at the very heart of the lawyer's craft.

60. WORDSWORTH, *supra* note 1.

Fortunately, RIRAC and its related forms allow us to engage in much more meaningful, challenging, and relevant work than simply parsing (or having students parse) redacted appellate cases. Such forms remind us of, and instruct us in, at least five basic levels of thought: references, issues, rules, application of rules, and conclusions. A good grasp of each of these basic levels of thought (and the resulting basic forms of thought) greatly refines reasoning, communication, and persuasion. Such a good grasp also underscores the vast flexibility we have in framing thought. Far from stifling creativity in legal thought, these forms promote good creative thought.

An understanding of reference assures that parties are talking about the same matter (the reference). It also increases the likelihood of gathering all relevant facts and using frames most consistent with a client's real interest. An understanding of issues leads to using more consistent frames and, further, brings necessary focus to what was important in the reference. Additionally, an understanding of how to frame and apply rules increases the likelihood of representing a client well. Lastly, an understanding of how to frame and hedge conclusions does the same.

Approaching all these levels of thought with RIRAC form in mind also helps assure both that no necessary steps are omitted either in thinking or in communicating such thought. Use of the professorial ICREAC and IREAC helps perform similar functions in the classroom. Additionally, IRAC and CREAC may prove desirable substitutes in the situations discussed. Even then, however, there is much safety in that “pensive citadel,” in keeping RIRAC in the back of one’s mind. Legal writing professors are the pioneers in this regard. It is long past time for others to join.

APPENDIX

A Brief Overview of Some Basic Forms of Thought

Basic Forms of Thought:

RIAC (Reference, Issue, Analysis, Conclusion)

RIRAC (Reference, Issue, Rule, Application, Conclusion)

Some Variations on RIRAC

IRAC (Issue, Rule, Application, Conclusion)

CRAC (Conclusion, Rule, Application, Conclusion)

CREAC (Conclusion, Rule, Explanation, Application, Conclusion)

Professorial ICREAC (Issue, Conclusion, Rule, Explanation, Application, Conclusion)

Professorial IREAC (Issue, Rule, Explanation, Application, Conclusion)