Deconstructing Los Angeles or a Secret Fax from Magritte Regarding Postliterate Legal Reasoning: A Critique of Legal Education

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Not only is it clear that most law students become impatient at some point during their three years of formal education, but it is clear also that how students learn the law is more the cause of their impatience than what they learn. Moreover, others besides law students may be entitled to challenge the style of education that manufactures a lawyer-culture. If one assumes for the sake of argument that the intellectual processes of lawyers, and consequently their values, differ from those of their society, this fact does not explain the difference between legal thinking and regular thinking, or explain why there should not be harmony between the two.

The genre of a law review article is an ironic choice for an argument against text-bound reasoning. This Article asks readers to imagine the shapes and colors of legal issues; it examines how people communicate and develop ideas through moving, metamorphosing images, especially computer graphics, and why methodology affects the eventual product of thought. Like dance, legal issues are described better through action than through words. Therefore, this Article challenges the principles of verbal reasoning upon which our legal system is based.

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1. In the process of legal education, typically intellectual and verbal law professors often ignore "the emotional and connotative level of communication." HERBERT L. PACKER & THOMAS EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 30 (1972). This approach causes their students to "suffer a severe loss in self-respect and possibly even an identity crisis." Id. According to Packer and Ehrlich, the rationale for this result is that the Socratic method is "meant to acclimate the students to 'legal reasoning' or 'thinking like a lawyer.'" Id.
The split between the thought processes of lawyers and others in society has made lawyers less influential than in the homogenous past and has made the legal remedies evolved from the battle less functional. Many people perceive the work of lawyers as a powerful, prohibitively destructive force. Lawyers are “like nuclear warheads. They have theirs so you need yours—but once you use them they fuck everything up. They’re only good in their silos.”

One of popular culture’s conventional topics is that lawyers hold different values than the average person. It seems that law students lose their innate (or at

2. See infra notes 25–36 and accompanying text. Anthropologist Lionel Tiger specifies the difference in lawyers’ hyperliteracy:

I am occasionally inclined to make the exaggerated observation that the only sizable group in North American life which reads and writes a great deal and carefully is lawyers, who demand up to $300 an hour for subjecting themselves to this. In fact, one common complaint against lawyers is for their “legalese,” their jargonic insistence on using language truly as a technology, with few if any referents to known normal language. Hence it is baffling and soulless to those who confront it.


3. JERRY STERNER, OTHER PEOPLE’S MONEY 58 (1989). One lawyer described “[t]he true corporate lawyer” as “a neutron bomb kind of lawyer: the neutron bomb that kept the buildings, the factories, and the bridges intact, and only killed the people in them.” ELLIOTT ABRAMS, UNDUE PROCESS 98 (1993). The lawyer thus described was Lawrence Walsh, formerly of Davis, Polk & Wardwell, who became the special prosecutor in the Iran-Contra investigation which convicted Abrams. Id. Even some legal scholars do not view lawyers’ work as an essential part of societal functioning but simply the articulation of a hierarchy of power. Law “is called into being by the primary social world in order to serve that world’s need. Law is auxiliary—an excrescence on social life, even if sometimes a useful excrescence.” Robert W. Gordon, Critical Legal Histories, 36 STAN. L. REV. 57, 60 (1984). “[T]he practice of law primarily consists of the hermetic reproduction of that which already exists.” Thomas C. Heller, Structuralism and Critique, 36 STAN. L. REV. 127, 187 (1984); see also Mid-Year Meeting of American Bar Association, 52 U.S.L.W. 2471 (Feb. 28, 1984) (quoting Chief Justice Warren E. Burger’s remarks at the Feb. 13–14 meeting, in which Burger criticized our legal system as too costly, painful, destructive, and inefficient); David Margolick, Burger Says Lawyers Make Legal Help Too Costly, N.Y. TIMES, Feb. 13, 1984, at A13.

4. Lawyers look for evidence to prove a client’s claim. The process of finding evidence does not necessarily aim at finding “The Truth” in a conventional sense. The popular view of the work lawyers do is negative. Often the defense of a guilty client is seen as fraud or manipulation. See, e.g., Santa Barbara (NBC television broadcast, Jan. 16, 1991) (depicting chaos as a jury acquits Dash of (date) rape; months later he will realize he was guilty and apologize to the victim); JOHN MORTIMER, RUMPOLE AND THE BLIND TASTING, in RUMPOLE’S LAST CASE 9, 23 (1987) (“With Probert’s knowledge of the law and my irresistible way with a jury, we might, I felt, become a team which could have got the Macbeths off regicide.”). It is a jury’s ancient and inalienable privilege to acquit the guilty. Furthermore, the caution that lawyers advise often is viewed as cowardice. See, e.g., Murphy Brown (CBS television broadcasts, Nov. 14, 1988 to present) (depicting Brown constantly reminding the corporate lawyer not to let his tail
least pre-law school) common sense and morality and do not regain it after mastering legal technicalities.\(^5\) The perception of differing values is a consequence of the accepted style of law school education. The goal of this article is to discover how the accepted style of law school education\(^6\) shapes mental traits distinctive in postmodern America and to discover whether it is possible to impart intellectual competence without promoting the kind of intellectual differences that have reduced lawyers to the butt of a thousand jokes.\(^7\)

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5. As one law professor notes, the traditional classroom fosters adversariness, argumentativeness, and zealotry, along with the view that lawyers are only the means through which clients accomplish their ends.

6. One commentator describes law-school education thus: a “moral relativism tending toward nihilism, a pragmatism tending toward an amoral instrumentalism, a realism tending toward cynicism, an individualism tending toward atomism, and a faith in reason and democratic processes tending toward mere credulity and idolatry.” Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*, 41 J. LEGAL EDUC. 3, 7, 8 (1991); see also Owen M. Fiss, *The Challenge Ahead*, 1 YALE J.L. & HUMAN. viii (1988). Fiss attacks the proponents of the theory of analysis called Law and Economics, who value mathematics and “place a premium upon purely behavioral or empirical studies, which generally presuppose the existence of some measurable goal and a form of activity that is fully observable and which, like rocks rolling down a hill, remains undisturbed by observation.” Id. at xi. Fiss calls the interdisciplinary studies, such as law and the humanities, “an attempt to free contemporary law from its own barrenness.” Id.

7. Typically, critics indicate dissatisfaction with the time lawyers spend (and bill). “Lawyers are like cab drivers stuck in traffic. They don’t do anything—but their meter is always ticking.” STERNER, supra note 3, at 21. For an insider’s similar evaluation, see J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987). According to Balkin, lawyers “spend most of their time trying to understand what other lawyers have said in legal texts.” Id. at 744. Law teachers theorize, and (in theory) practitioners use these theories to advise or argue cases for their clients. Id.; see also Catharine A. MacKinnon, *From Practice to Theory, or What Is a White Woman Any-
Lawyers have been criticized for ages. In the early Renaissance, Petrarch’s followers complained that “the lawyers were unhistorical and that they had no interest in the arts.” In contemporary America, the proper complaint is that law schools’ exclusive use of texts to teach law does not adequately prepare students to solve tax, economics, or international trade problems that develop from personal relationships. Further, even if one accepts a narrow role for the lawyer, not as negotiator and advisor but solely as litigator, lawyers who present verbal arguments are less persuasive than those who add visual presentations; this fact is not taught in law school.

9. One scholar claims that “[I]t had long since been clear to the rising generation of young academics that the Langdellian claims that all law could be found in the books and that law was a series of logically interwoven objective principles were, at most, useful myths.” ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 134 (1983). Except for enclaves of clinical educators, the pioneering work of interactive video lessons, and pirate copies of Palsgraf, the Movie, legal education begins and ends with a text, the statutes and appellate cases. “Law schools pay virtually no attention to client service or ghettoize instruction having to do with clients and client counseling in clinical courses.” Austin Sarat, Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education, 41 J. LEGAL EDUC. 43, 43 (1991).

The tales of Rumpole, the fictional English criminal lawyer, dramatize the break between the academy and practicing lawyers. Rumpole dislikes cases that turn on “a nice point of law”; he says, “Getting on for half a century knocking around the Courts has given me a profound distaste for the law. Give me a bloodstain or two, a bit of disputed typewriting or a couple of hairs on a cardigan, and I am happy as the day is long.” MORTIMER, supra note 4, at 22. Langdell’s view that all law could be found in the books belied the common practice in a time when most lawyers clerked rather than attending law school. See THOMAS L. CHADBOURNE, THE AUTOBIOGRAPHY OF THOMAS L. CHADBOURNE 28–29 (Charles C. Goetsch & Margaret L. Shivers eds., 1985) (describing the nature of the relationship that introduced young lawyers to the practice and how that relationship carried over to the close relations between the corporate lawyer and his clients during the 1920s).

10. But see MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1984) (“In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”).
11. See Phil Patton, Up from Flatland, N.Y. TIMES, Jan. 19, 1992, § 6 (Magazine), at 28, 31 (“In a courtroom chart prepared by Bruce Cutler and Susan Kellman, lawyers for John Gotti, X marked the spot where Government witnesses and their own criminal past intersected”; Gotti was acquitted in that trial.) Here, it is assumed that the visual representation gets attention and clarifies an important point to the trier of fact. In a case concerning a breach of express and implied warranties in the manufacture of metal components for a mooring system, a chart converted the complexity of the steel manufacturing process to a simple flow chart showing two pathways for the manufacture of steel: the defective method and the proper method. Lucker Mfg. v. Milwaukee Steel Foundry, No. CIV.A.91-2258, 1991 WL 225006, 1991 U.S. Dist. LEXIS
One of the fundamentals of legal education is to teach students a special way to think. Legal education developed from the study of classical science, which concerns "static phenomena rather than the vital forces and flows that produce the shapes we see from instant to instant." Thus, lawyers, in the classical scientific tradition, describe the world as if it


12. Legal reasoning, however, does not require three years of training. "Since the necessary analytical techniques have been learned by the first year, or shortly thereafter, and since the Socratic method is an immensely wasteful way to impart information, some teachers are not sure that they teach anything at all in the last two years." PACKER & EHRLICH, supra note 1, at 32.

13. According to Robert Stevens, "Langdell never wavered in his view that law was a science and that the center of legal education was the library . . . ." STEVENS, supra note 9, at 53.

14. JAMES GLEICK, CHAOS: MAKING A NEW SCIENCE 197 (1987). Gleick used the word static in the quotation in the ordinary, nontechnical sense to describe the method by which traditional physics describes motion. On the other hand, in Newtonian physics, statics is the study of objects at rest, while dynamics is the study of moving objects. In the traditional science, the study of motion breaks flow into a series of steps; motion itself is not understood as a flow. There is a beginning point and an end point, but what happens in between is unknown. According to the theory of dynamics, this unknown is irrelevant. Thus, the Newtonian study of dynamics in effect is static, in that the analysis requires that the continuous flow of motion be stopped at a series of connecting points. The course of the movement is transmuted into set intervals where a moment in time is defined only by an equation unrelated to its path or course. The continuous flow must be stopped at a series of connecting points. According to Laplacian theory, one can write the equations of dynamics as if they were equations of static equilibrium provided that one accounts for all of the inertial forces. Id., at 14. Thus, motion is not the fluid force of water down a drain, nor O.J. Simpson at the airport, but the jerky movements of the minute hand on an antique school clock or a baby's first steps. The action is stopped so that it can be analyzed, enlarged, observed and ordered step by step starting with point "1" and traveling through segments from subpart "(a) in general," to, for example, "subpart 1.401(k)-1(a)(5)(iv)" (provisions of the Treasury Regulations regarding nonqualified cash provisions in qualified pension plans). Flow, the constant movement, the unknown, becomes an orderly progression. Thus, a phenomenon that is complex and changing becomes linear and certain. With education, one disregards the object in motion. One learns instead to see the motion frozen, the snapshot or still that it has become. Hence, although the object is not at rest in the Newtonian sense, it is static in a less technical sense.

15. Traditional science analyzes systems in terms of their constituent parts, that is, continuously seeking to break down objects to the elusive smallest particle—the atom to the neutron to the neutrino. It eschews the study of the universe we see and touch, that is, life on a human scale.
were at rest. Arnheim argues that "[t]his selective apprehension overshadows our awareness that percepts are prominently dynamic."\textsuperscript{16}

Lawyers learn to ignore what the world sees—ongoing, changing relationships, the flow—and to focus on a system of ordered objects, as if business relationships and families were physical objects which could be described by the traits that law deems relevant and that lawyers learn to manipulate like game pieces.\textsuperscript{17} In fact, it is called playing by the rules.\textsuperscript{18}

In the spring of 1992, not only the rules but the legal system itself came under literal attack. A jury found that the eighty-one-second videotape showing the Los Angeles police deliver

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  \item \textsuperscript{16} See RUDOLF ARNHEIM, Perceptual Dynamics in Musical Expression, in NEW ESSAYS ON THE PSYCHOLOGY OF ART 214 (1986) (explaining the classical view that objects are either at rest or in motion).
  \item \textsuperscript{17} Id.
  \item \textsuperscript{18} Flow connotes "shape plus change, motion plus form." GLEICK, supra note 14, at 195. Flow is used in a Platonic sense to reflect a reality transcending a given moment. Id. Flows "produce the shapes we see from instant to instant." Id. at 197. Flow also is connected to the universal forms found in thousands of things such as a leaf, a flame, a liquid within a liquid, or a solid growing crystal. Id. at 196.
  \item \textsuperscript{19} For ease of handling, one thinks of the world as consisting of "things," which are defined by their physical properties, i.e., their shape, size, color, texture, etc." ARNHEIM, supra note 16, at 214. But cf. GEORGE RODRIGUE, Leaving My Bad Self Behind (painting 1991) (using color to describe the psychic attributes of a deceased pet; the red dog is the evil side of the ghost dog), in BLUE DOG series (1988–92); Clancy DuBos, Hot Dog! Cajun Artist's Whimsical Blue Dog Among Louisiana's Hottest Exports, GAMBIT, Aug. 6, 1991, at 15–16 (discussing the philosophical content of the Blue Dog series).
  \item Law students visit a world where objects possess specific traits, e.g., corporate traits versus partnership traits. See, e.g., Larson v. Commissioner, 66 T.C. 159 (1976) (distinguishing an association from a limited partnership for tax purposes); BORIS I. BITKER & JAMES S. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS ¶ 2.01[4] (5th ed. 1987) (describing how to "[u]nscramble[e] the eggs on a change of classification"). The complex problem of applying statutory or historical traits to real-life business activity is illustrated in the area of corporate taxation. See id. ¶ 16 (discussing corporate tax attributes).
  \item The object is to win the game. Regular people do not understand the purpose of the game. See Patricia J. Williams, The Rules of the Game, VOICE, May 12, 1992, at 32. One commentator suggests "that a poststructuralist account of the law treat any existing set of legal practices as a succession of theoretically arbitrary signs. . . . The core of the training and work of lawyers is to learn these practices [ways of being] and how to manipulate them." Heller, supra note 3, at 187.
  \item There are "rules and metarules." John M. Rogers & Robert E. Molzon, Some Lessons About the Law from Self-Referential Problems in Mathematics, 90 MICH. L. REV. 992, 1008 (1992). "[L]aw is often in ultimate practical terms what the lawyer thinks the legal system will allow or require. Just like geometric theorems that only occasionally may be verified by mapping onto spatial reality, legal truth may only occasionally be pinned down by a court decision." Id. at 999.
\end{itemize}
fifty-six baton blows to Rodney King was not sufficient evidence to convict the four officers who carried on the assault. In the course of the trial, the defense attorneys played the tape "over and over, freezing the frames" so that the rhythm and

22. The amateur videotape made by George Haliday, whose apartment terrace overlooked the highway, A Current Affair (NBC television broadcast, Apr. 20, 1993), and was shown on television stations around the world, A Jarring Verdict. An Angry Spasm, TIME, May 11, 1992, at 10, 10.

23. The charges against the officers included assault with a deadly weapon, using excessive force as a police officer, filing a false report, and becoming an accessory after the fact. Three of the four officers were acquitted. The jury was unable to agree on the conviction or acquittal of the remaining officer. See generally Seth Mydans, Los Angeles Policemen Acquitted in Taped Beating, N.Y. TIMES, Apr. 30, 1992, at A1, D22. Many believe that the change of venue from Los Angeles, an economically and ethnically mixed urban area, to Simi Valley, a virtually all white (only two percent of the population is black), middle-class suburban area, determined the verdict. See, e.g., Assessing the Verdict and Its Legal Fallout, NAT'L L.J., May 11, 1992, at 15 (printing an interview with Johnnie L. Cochran, Jr., named as the L.A. Trial Lawyers Association 1990 Attorney of the Year for his success in litigating police abuse cases).

The verdict was followed by days of rioting in Los Angeles in which much of South Central Los Angeles burned. The police lost control of the city and the National Guard was called to restore order. The violence was covered live on television. A gang assaulted a truck driver as TV cameras from a helicopter recorded an attacker smashing the driver's skull with a brick. Neighborhood residents rescued the truck driver. There were no police anywhere near the scene. See generally Tom Mathews, The Siege of L.A., NEWSWEEK, May 11, 1992, at 30; Nightly News (NBC television broadcast, May 29, 1992).

A year later, a federal jury in Los Angeles convicted the officer responsible for most of the blows and the police sergeant in charge of the arrest of violating Rodney King's civil rights. The other two officers again were acquitted. Seth Mydans, 2 of 4 Officers Found Guilty in Los Angeles Beatings, Tension Eases as Residents Hail the Verdict, N.Y. TIMES, Apr. 18, 1993, at A1. In the second trial, the government's evidence included the testimony of Rodney King and other eyewitnesses. Seth Mydans, Points of Evidence, Not Emotion, Prosecution Wins 2 Convictions with More Than Videotape, N.Y. TIMES, Apr. 18, 1993, at A19. The defense was almost identical to the first trial. Defense in Beating Trial Breaks Little New Ground, N.Y. TIMES, Mar. 19, 1993, at A8.

24. One writer described "[t]he frames of the videotape [being] played individually, like... transcendently isolated moments rather than as part of a motion called history, having a tempo or chronology that meant anything." Williams, supra note 20, at 32. Newspaper columnist Anna Quindlen is among the commentators who have attributed the verdict to racism:


Jurors found the still images ambiguous and the defense attorneys argued that "there were alternative explanations for King's wounds and broken bones." Lou Cannon & Leef Smith, Jurors: Tape Not Whole Story, THE TIMES-PICAYUNE (New Orleans), May 1, 1992, at A1; see also Lee A. Daniels, Some Identified as Jurors Aren't
meaning were lost in the ambiguity of unrelated still images which the defense lawyers argued could have looked like an attempt by King to attack or flee.

Page by page, the defense lawyers created a narrative distinct from the pictoral memory of the eyewitnesses and shifted the power to interpret the meaning of the event from the witness to the viewer. The frozen bits of video are analogous to a postmodern painting by David Salle in that the style of the evidence became deliberately ambiguous in its unrelated bits and images. In Salle's work, the meaning of the picture is in the viewer's response rather than the artist's intent.25 Like the examination of potential moves on a checker board, the viewer's eye need not move from left to right, nor from top to bottom.26 No single interpretation is correct. The information appears stripped of illusion. Hence, interpreting the event appears as a puzzle to be solved with logic, and without emotion. The fragments of frozen action become individual images that can be shuffled27 and read like a Tarot deck.28

Changing the King video to a series of stills was a typically lawyer-like thing to do. In addition, the analysis was literary in the way that postmodern art has become literary.29 In the confines of the legal system, within the courthouse in Simi Valley, the change of form altered the perception of the event significantly. It was as if Mozart's The Magic Flute were

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26. DAVID SALLE, DUAL ASPECT PICTURE (painting 1986) (allowing separate images to be read in any direction: left-right, up-down, diagonally). Similarly, in his poem snap shots, Jack Collom creates word groups which can be read down or across and stanzas that invite random order. See JACK COLLOM, SNAP SHOTS, in 8-BALL 18 (1992).

27. See PHILIP GARRISON, AUGURY 133 (1991) (comparing the narrative to a deck of cards).


29. The stills are literary in the sense that they create boundaries within which one analyzes the language of the visual art. According to Derrida, postmodern art is aligned with the visual expression that developed into the alphabet and the meta-art of painting, which is inspired by other painting. This literary-visual format cannot speak for itself but requires the audience to view other sources to create meaning. DUNNING, supra note 25, at 119 (citing JACQUES DERRIDA, OF GRAMMATOLOGY 293 (Gayatri C. Spivak trans., 1976)).
played note by note with analysis between each note. Outside the context of the rest of the piece, each note becomes meaningless noise. The rhythm and context of the musical event and not merely its content of notes obviously are critical to the comprehension of the piece by the audience. By fragmenting action into a series of still photographs, lawyers changed a real event in life to a legal event in a courtroom. The difference in perception between the world at large and the jury in the Rodney King case illustrates the difference between legal thinking and regular thinking.

The public rejection of the trial outcome differs only in degree from the public disapproval of other legal results. It seems that the legal system "has strayed far from human intuition about the world." The reason for this break between the public and the legal system is rooted in the way we learn the law.

The principal mental habit which identifies lawyers is a peculiar analytical technique based on asking rude questions. We call this "thinking like a lawyer." Lawyerly thinking begins with questions, as perhaps other modes of thought do, but the questions function differently for lawyers. In general, regular people use questions to elicit information. In contrast, the lawyer uses questions to isolate issues which can be solved by legal principles. Lawyer-questioners pursue an admission.

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30. GLEICK, supra note 14, at 6 (paraphrasing an original reference to theoretical physics).
31. Anthropologist Lionel Tiger argues that school-induced notions of justice are not consistent with human nature:

Justice must not only be seen to be done, but people will try to see it being done, even when they are not involved. It is satisfying in some way we might be tempted to call primordial. With more information and a wiser eye, we can see it as in continuity with the past. Yet in how many law schools are courses given about the relationship between equity and emotion? Are lawyers trained to understand the phylogeny of probity? Are they provided any appropriate information about the possible role of justice in early formative hominid societies?

TIGER, supra note 2, at 47.
32. Ree Adler, who was named outstanding young lawyer by the New York State Bar Association in 1992, explained her propensity for lawyering: "When I was little, my parents called me a pest, and that's a wonderful trait for a lawyer." David Margolick, At the Bar, N.Y. TIMES, Jan. 31, 1992, at B10. Adler was sixty-three when she won the award and was working at the time for the New York Neighborhood Legal Services in Buffalo; she graduated from law school in 1983. Id.
33. See PACKER & EHRLICH, supra note 1, at 30.
34. Law students learn to separate complex problems into a series of simple questions or units and then to solve each unit by applying relevant principles of law. What is relevant depends upon the question. As a lawyer giving advice, trying a case,
Lawyers channel inquiry to support a remedy. Lawyers see the world as what can be written down in documents. In contrast, regular people see more. They are more open to interpreting events and engaging in transactions that do not fit into the system that the law ordains. Technology, especially television and computers, has changed the culture from a literate culture to one which is particularly skeptical of words. This change separated text-bound legal thinking from the common perceptions of the world.

Let me first explain how I use the term "literate." "Literate" describes an alphabet-based culture in which print dominates. Reasoning in a literate culture relies on the use of abstract systems of classification based on ideal forms. In contrast to literate reasoning, "preliterate" reasoning, or arguing on appeal, one learns to limit facts. The success of any of these efforts may be clear on paper. But the law does not directly consider whether a victory will alleviate the client's problem. Law, in the social science tradition, does not merely identify issues to solve, but "create[s] issues that must be solved." Cf. Roger Rosenblatt, How to End the Abortion War, N.Y. TIMES, Jan. 19, 1992, § 6 (Magazine), at 26, 42 (arguing that "American society ... has shifted intellectually from a humanistic to a social science culture; that is, from a culture used to dealing with contrarieties to one that demands definite, provable answers"). See generally Charles W. Collier, The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship, 41 DUKE L.J. 191, 193-94 (1991) (distinguishing humanistic intellectual authority of original texts and the institutional (primarily nonintellectual) authority of court opinions).

Lawyers do not ask questions at trial to discover information: "Certainly no lawyer should ask a critical question unless he is reasonably sure of the answer." FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION 23 (1948).

The words of a client's complaint (story) are searched for some legal significance. The process of creating legal documents is one of discarding pieces of our clients' problems. We learn to find the issues for which courts provide a remedy. We learn to cite authority for everything we say and hence show that nothing is really new or unique. Unique might mean there is as yet no remedy from the court. See generally Collier, supra note 34, at 200 (stating that Langdell's declaration that one finds law in books caused the limiting rather than expanding of inquiry); id. at 193 n.8 (discussing lawyers' tendency to push the theoretical limits of the law). But see LAWYERING SKILLS, supra note 4, at 23-24 (recognizing creativity as an element of problem solving).

In the West, the self is an ideal form and individuals are variations of the ideal self. The concept of the individual "embraces the Enlightenment's assumption of a universal, stable, and to a large extent, pre-social, individual identity." Adeno Addis, Individualism, Communitarianism, and the Rights of Ethnic Minorities, 67 NOTRE DAME L. REV. 615, 633 (1991). "[The] individual inscribes every other individual." Id. at 675. Literate culture tends "to complete and hence freeze political and social stories" (Addis calls this cultural tendency modernist rather than literate). Id. "The abstract individual and the abstract community are invoked to write a unitary and final story . . . ." Id. (emphasis added).
which is characteristic of oral cultures,\textsuperscript{38} emphasizes concrete relationships.\textsuperscript{39} Finally, the term “postliterate”\textsuperscript{40} denotes the shift in postmodern America\textsuperscript{41} away from communication via words and texts, the hallmarks of literate culture,\textsuperscript{42} to

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\item \textsuperscript{38} Accounts of oral cultures indicate that the learning in these groups is experiential or kinetic and not simply based on words. Kinetic learning is distinctive from literate and visual learning in that it does not include a snapshot or stagnant representation. Kinetic, experiential, patterned movement represents the change of things over time, the rituals of extended families which develop a separate cultural identity in their young. \textit{See, e.g.,} TONY HILLERMAN, \textit{TALKING GOD} 34–36 (1989) (describing a Native American healing dance); LES DANSES RONDES, (Marie del Norte Theriot & Catherine B. Blanchet eds., 1955) (collection of folk dances reflecting part of the socialization process in Cajun Louisiana); \textit{see also} BARRY J. ANCELET, \textit{CAJUN MUSIC: ITS ORIGINS AND DEVELOPMENTS} 16 (1989) (“Everyone dances, even grandmère and grandpère . . . . There may be only a couple of fiddles to play for the crowd, there may be only four candles for light, . . . and only exceptionally a few bottles of tafia diluted with water for refreshment; no matter, everyone dances.” (quoting C.C. Robin’s travel account)).

\item \textsuperscript{39} An individual’s identity is as a part of a group. One is someone’s cousin, another’s parent. Roles shift for the individual, however, and the group relies on and functions through the totality of the players. Perception is personal and individual because of one’s geographic and psychic location, physical condition, and life experience. “The perception of any object, either tangible or abstract, is ultimately made a thousand times more complicated whenever it is viewed within the circle of \textit{an entire People as a whole}.” HYEMEYOHSTS STORM, \textit{SEVEN ARROWS} 4 (1972). People are destined “to Touch, Experience and Learn.” \textit{Id} at 7; \textit{see also infra} text accompanying notes 110–12.

\item \textsuperscript{40} I use the term “postliterate” to describe an individual who is well educated but not in a pre-1970s liberal arts way. A pre-1970s education included classical literature, philosophy, foreign languages, and at least one course in music and art appreciation.

\item \textsuperscript{41} The postmodern era is characterized by a rejection of a single correct view or even of an objective fact. The era’s hallmark is diversity; its science is chaos. \textit{See generally} GIANNI VATTIMO, \textit{THE END OF MODERNITY} (Jon R. Snyder trans., 1991). The postmodern man or woman believes not in progress but in cycles, and is obsessed with hermeneutics. A postmodern comment on this definition is: “That’s one way of saying it.”

\item \textsuperscript{42} A culture entails an “apparatus,” which includes as its elements technology, ideology, and institutional practices. Alphabetic culture’s technology is print, its ideology is originality and analysis, and its institutional practices demand the essay or treatise style of writing. \textit{See GREGORY L. ULMER, TELETHEORY} 4–5 (1991). In contrast, contemporary technology is a new kind of oral culture that Ulmer calls “orality.” Orality entails different technologies. It need not, however, entail different ideologies. Ulmer explains as follows:

\begin{quote}
Enforcement of the standards of the treatise and even of the essay in academic discourse as the best and highest expression of reason may no longer be taken seriously as “objective” fact, according to the argument of the apparatus, but as the projection of these forms onto writing itself, extending the conventions developed for the specialized needs of schooling to function as the norms of thought itself.
\end{quote}

\textit{Id} at 5. The purpose of postliterate education is to develop patterns of inventive thinking that will compensate for our society’s heavy emphasis on alphabets-based analysis and will help bring about a cognitively balanced culture.
communication via plastic visual media.\footnote{See \textit{Blue Man Group}, \textit{Tubes} (1991) (satirizing art and science, including Magritte’s painting and fractal clusters, through a virtually nonverbal stage production); GLEICK, \textit{supra} note 14, at 114–15, 197 (describing fractal pictures that could be generated by simple computer programs). The patterns produced in fractal pictures, made possible by computers, redirected the nature of scientific inquiry and the communication of scientific ideas. \textit{Id.} at 6.}

This shift, however, is not simply a return to preliterate reasoning. Computers, for example, project concrete objects, but the style of reasoning encouraged by computer learning is not equivalent to that of a preliterate culture. \textit{Seeing} an image of a flower on the screen, or seeing the blueprint for a rose’s DNA, is an experience largely devoid of sensory input.\footnote{Sound, touch, smell, and taste are not affected. In contrast, when one “sees” in real life, senses other than sight are involved. \textit{See} RUDOLF ARNHEIM, \textit{Film as Art} 31–32 (1958). Most significantly, the pull of gravity no longer orients one’s vision. For example, when one witnesses an event, no matter where one looks, one knows whether one is walking, running, standing still, or prone. \textit{Id.} at 24–25.} The image is abstract.\footnote{The picture of the rose is abstract in the sense that the rose purposely is viewed cut off from the bush, removed from the ground, separated from its life force. There is no emotional relationship between the viewer and the flower. The image is not unique. It can be replicated infinitely or it can be changed easily and completely. \textit{See} ANTOINE DE SAINT-EXUPÉRY, \textit{Le Petit Prince} (Katherine Woods trans., 1943) (telling the story of a stormy, G-rated romance between a boy and his unique flower, with drawings by the author).} Postliterate thinking combines concrete and abstract forms of reasoning in a way that creates its own interpretation of common events. For example, computer graphics programs allow things to move around easily, in ways that the literal mind would sense as turned upside down. These manufactured images suggest the flow of systems with two nonlinear characteristics. First, everything moves in chaotic patterns. Second, and as a consequence of the first, the context of any given thing is always changing. Yet changes always are revocable.

Hence, the terms “computer literate” and “literate” do not merely describe two skills, such as the abilities to spell and to add, required of educated individuals, but rather they describe a change in the process of reasoning. Postliterate thinking is expressed primarily through nonverbal means. The essence of postliterate reasoning is watching football on TV without the sound while listening to classical music. Because the physical separation of the football field from the concert hall does not affect the viewer/listener, the two events occur simultaneously in the same room. To the viewer, the separation of the football field and the concert hall does not exist in space at the point of
the experience. Hence, the physical underpinning for the convention of experiencing each event as a separate phenomenon is displaced electronically. The music and the movement of the players, conventionally classified as art and sport, fuse to become as unified a composition as ballet. This same notion of fusing separate phenomena is expressed in the photo-realist painting of a street scene in which both the reflection of the street in the plate glass, and the store behind the glass, are shown at once. The painting is "realistic" except that the focus is not humanly possible. The index system characteristic of print media does not acknowledge the notions inspired by technology, such as the ability of a computer image to focus simultaneously on both the front and back of an object and the ability of the camera lens to see more than its human model. Postliterate thinking develops from Magritte's painting of a pipe with the caption, "This is not a pipe."

46. The universal, assimilated norm seems as quaint and archaic as a cup of regular coffee in a Seattle coffee shop. The center of art does not exist; neither the Paris of the 1920s nor the New York of the 1950s. Centers exist simultaneously everywhere from Tokyo to Mamou and interrelate and change because "groups are contingent. . . . [Their very meaning can be rearranged and recast . . . .]" Addis, supra note 37, at 650. In the postliterate society, variations of perspective are as easy to accommodate as the computer-generated children's story. Each slightly different printout is both an original and a copy. Furthermore, these variations are not inferior to the universal ideal form. No priestly caste holds the power to create or to preserve learning or art.

47. DUNNING, supra note 25, at 208 ("The eye must focus on one image at the expense of the other."). For example, the subway rider at the window alternatively can focus on her reflection in the glass and be unable to see through the glass, or she can focus on the tunnel walls and be unable to see her reflection. The camera, unlike the subway rider, can focus on both scenes at once. See DON EDDY, NEW SHOES FOR H (painting 1973-74); EUGENE ATGET, MAGASIN AVENUE DES Gobelins (photograph 1925).

48. Chaos scientists developed ways to use graphic images to "capture a fantastic and delicate structure underlying complexity" and described the new elements of motion such as fractals, bifurcations, intermittencies, periodicities, folded-towel diffeomorphisms, and smooth-noodle maps. GLEICK, supra note 14, at 4-5. This way of seeing things was painted by Magritte earlier in the century. See RENE MAGRITTE, DANGEROUS RELATIONSHIPS (painting 1936) (showing simultaneously the front and back views of a woman partly hidden by a mirror).

49. Computer research for lawyers uses literate methods of libraries and indices which perpetuate the limitations of print-based reasoning. Thus, even the high-tech lawyer's paradigm is limited by text to verbal expression of events and relations.

50. RENE MAGRITTE, LA TRAHISON DES IMAGES (painting 1928-29);cf. Balkin, supra note 7, at 749 (1987) (comparing words to signs). Magritte questioned the conventions of reality which he felt were based on ignoring the paradoxes one encounters in everyday life. His work caught "the confusions and oversimplifications which are so deeply rooted in our habits of language that they are not even noticed." SUZI GABLIK, MAGRITTE 126 (1970). As Wittgenstein taught, language as a constructed model "does not necessarily tally with reality." Id. Magritte's painting "show[s] that representation is a complex process which involves more than mere mirroring or the imitation of
Ceci n'est pas une pipe.

Los Angeles County Museum of Art
RENÉ MAGRITTE, LA TRAHISON DES IMAGES (CECI N'EST PAS UNE PIPE)
Purchased with funds provided by the Mr. and Mrs. William Preston Harrison Collection
Postliterate thinkers question both physical and metaphysical reality, yet they reason without words.51

American culture is dominated by visual, semantic images. The national collective memory includes watching Jack Ruby step towards Lee Harvey Oswald, Ronald Reagan wave before the shot, the Challenger explode, Los Angeles catch fire. Live television broadcasts made the viewers participants in these events. In less dramatic moments, when television organizes information in visual charts, graphs, and maps, the most familiar of these, the weather map, moves. The postliterate generation thinks in terms of movement representing changes across space and time.

Static legal thinking starkly contrasts with postliterate thinking. Law students are like the last kid to learn about Santa Claus; they still solve problems by reasoning through idealized forms.52 They learn to separate the rights and objects." Id. at 137.

Other visual artists have depicted the ambiguity of language visually. See, e.g., BRUCE NAUMAN, VIOLINS/VIOLENCE (drawing 1985) (depicting three violins captioned "violence"); Gail D. Cox, Rioting Derails the Legal System in L.A., NAT'L L.J., May 1, 1992, at 6 (relating that amid the shattered glass of a courthouse, one remaining panel was spray painted "No Justice, No Peace"); see also Roger Green, Diddley Bows Expand Vibrantly, GAMBIT, Feb. 4, 1992, at 26 (reviewing John T. Scott's 1992 kinetic sculpture Poydras Street Dancing: Uptown Second Line, which combines African myth, the shape of the one-stringed Louisiana/Mississippi instrument called a diddley bow, the spirit of jazz music, and Mardi Gras dancing, and stating that the sculpture evokes spatial and psychic ambiguity in a downtown New Orleans office building).

51. See generally RUDOLF ARNHEIM, A Plea for Visual Thinking, in NEW ESSAYS ON THE PSYCHOLOGY OF ART, supra note 16, at 135–52. According to Arnheim, "Productive thinking operates by means of the things to which language refers—referents that in themselves are not verbal, but perceptual." Id. at 138. For example, a young child shown two identical beakers of water will think that when the liquid in one vessel is poured into a third, taller and narrower vessel, the third vessel has more water. An older child will realize that the volume of water is the same. Id. at 137 (discussing an experiment designed by psychologist Jean Piaget). The thought process of the older child does not need words. Words, however, can help codify the results. Id. at 139.

52. John Dewey wrote,

Any philosophy that in its quest for certainty ignores the reality of the uncertain in the ongoing processes of nature denies the conditions out of which it arises. The attempt to include all that is doubtful within the fixed grasp of that which is theoretically certain is committed to insincerity and evasion, and in consequence will have the stigmata of internal contradiction. Every such philosophy is marked at some point by a division of its subject-matter into the truly real and the merely apparent, a subject and an object, a physical and a mental, an ideal and an actual, that have nothing to do with one another, save in some mode which is so mysterious as to create an insoluble problem.

Action is the means by which a problematic situation is resolved.
liabilities of the parties in a relationship and to classify the transaction in abstract, nonrelational ways. Students learn to focus on a time and a place, to form opinions based on facts presumed to be (and thus continuing to be) true rather than based upon ongoing conditions. They learn to manage long-term relationships, for example a partnership, with a written agreement. Generally, the agreement will be enforced according to the conditions prevalent at the time of its formation, as if the day could be pulled out of time and analyzed like a biopsy. Law students acquire a skill that works if the world stops; time merely separates relevant from irrelevant events. A contractual relationship is not modified by ongoing conditions. Time in a contract or in a legal opinion is not dynamic.


53. Keats seems to share the assumption, essential to law, that still figures or printed words can express meaningful, dynamic relations. Keats wrote:

Bold Lover, never, never canst thou kiss,
Though winning near the goal—yet, do not grieve;
She cannot fade, though thou hast not thy bliss,
For ever wilt thou love, and she be fair!

JOHN KEATS, Ode to a Grecian Urn (commenting on how the figures on the urn are frozen in time forever), reprinted in SELECTED POEMS AND LETTERS 207, 208 (Riverside ed., Houghton Mifflin 1959) (1820)

54. See, e.g., U.C.C. § 2-302 (1977) (providing that unconscionable contracts are not enforceable). The Uniform Commercial Code does not include bargains turned bad in the scope of "unconscionable," only those which were bad when made.

55. See LAWYERING SKILLS, supra note 4, at 30 ("[A]lthough hypotheticals do provide factual diversity, each hypothetical asks the students to accept a given set of facts as a closed universe of facts.").

56. See Big Horn Coal Co. v. Commonwealth Edison Co., 852 F.2d 1259 (10th Cir. 1988) (holding that the defendant, who allegedly reduced coal purchases to satisfy environmental regulations, breached a contract where defendant never had any environmental problems, only operational problems, and invoked the force majeure clause as a pretext to avoid a large oversupply of coal); Eastern Air Lines v. Gulf Oil Corp., 415 F. Supp. 429, 440 (S.D. Fla. 1975) (finding that the fact that a contract no longer is profitable for an oil supplier, because the price had risen from $5 per barrel to $11 per barrel, is not commercial impracticability sufficient to modify the contract); Feld v. Henry S. Levy & Sons, 335 N.E.2d 320, 323 (N.Y. 1975) (holding that the seller had a good faith contractual obligation to produce a product for the buyer, even if the venture no longer was profitable for the seller, unless the product was a significant part of the seller's enterprise).

57. In contrast to American contract law, the Japanese Civil Code excuses performance when it has become impossible. Dan Rosen, The Kuan of Law in Japan, 18 N. KY. L. REV. 367, 393 (1991). For example, if prices change drastically because of triple-digit inflation, the Japanese courts have altered contractual obligations—reasoning that such outcomes are too unlikely to be foreseen by anyone. Id.
However, the world outside the courtroom moves. Text-bound reasoning is frustrating to the partners, who remain in a relationship for longer than the day on which the agreement was effected. If the conditions that formed the basis of the contract negotiations once were true, but no longer are true, then the result that once was fair, or at least bargained for, no longer is fair. For example, when a party to a suddenly burdensome long-term contract faces living with past assumptions or ending the contract, the law can

58. Continuing mercantile relationships cause frustrations similar to the frustration stemming from the world's continuity of motion. See Henry Gabriel, The Seller's Election of Remedies Under the Uniform Commercial Code: An Expectation Theory, 23 WAKE FOREST L. REV. 429, 446-47 (1988). Gabriel notes that the drafters of the Code assumed that parties to a contract respond to breaches in predictable ways. "The assumption of a contract as an 'end' implicitly underlies several commentators' approach to the question of election of damages." Id. at 452. Gabriel concludes that "[t]he law, absent pressing social policies to the alternative, should reflect the actual expectations and reasonable actions of the people for whom it governs. An expectation theory of contract achieves this goal." Id. at 454. Although the drafters of the Uniform Commercial Code attempted to excise the formalistic tenets of the common law of contracts in order to "mirror actual business practices[,] . . . one finds that the common law of contracts underlies the very essence of its rules." Id. at 429. Often the legal remedy is not in accord with the expectations of the parties. Contracts are construed according to material facts in existence at the time of the contract, not modified by future events. Here, one must assume for the sake of argument that the contract was fair in an ethical sense when made, or at least fair enough to prevent rescission. See RESTATEMENT(SECOND) OF CONTRACTS § 205 (1981) (imposing an obligation of good faith and fair dealing in contract performance and contract enforcement); U.C.C. § 1-203 (1977) (same). One may use "the doctrines of misrepresentation and unconscionability as proxies for deception and unfairness." Eleanor H. Norton, Bargaining and the Ethic of Process, 64 N.Y.U. L. REV. 493, 502 (1989) (comparing standards of conduct in negotiation with court proceedings). Professor Norton describes the proposition that lawyers negotiate "honestly and in good faith . . . and that they refrain from doing anything unconscionably unfair" as inherently radical. Id. at 514 (citing Alvin B. Rubin, A Causerie on Lawyers: Ethics in Negotiation, 35 LA. L. REV. 577, 593 (1975), as a supporter of that proposition); see Dennis M. Patterson, A Fable from the Seventh Circuit: Frank Easterbrook on Good Faith, 76 IOWA L. REV. 503, 508-09 (1991) (citing Nate's Shoes No. 2 v. First Bank, 808 F.2d 1351 (7th Cir. 1990)) (discussing a lender's liability for bad faith termination of a letter of credit where the bank told the debtor to "go back to its own neighborhood to obtain financing").


60. Courts have not been persuaded by this argument. See Glopak Corp. v. United States, 851 F.2d 334, 338 (Fed. Cir. 1988) (stating that a court's authority to deny enforcement of a contract is "not intended to permit courts to redistribute risks allocated by differences in bargaining power" (quoting Fraas Surgical Mfg. Co. v. United States, 571 F.2d 34, 40 (Cl. Cl. 1978))); see generally JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS §§ 13-17 (3d ed. 1987) (discussing assumption of the risk and technological impossibility). For a general discussion of how even the best-drafted contracts can go awry, see Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 AM. SOC. REV. 55 (1963), reprinted in READINGS IN THE ECONOMICS OF CONTRACT LAW 4 (Victor P. Goldberg ed., 1989).
assign fault skillfully but cannot restore the relationship. 61

Thus, the difference between lawyerly thinking and the thinking of other educated people is not merely the absence of peasant wisdom—which presumably affects both groups—but the difference between a snapshot and a motion picture. Because the education of lawyers, based on a still photo, differs markedly from that of other professions, based instead on a changing viewpoint, 62 it is not surprising that legal arguments have become less persuasive, 63 and that our legal system has become irrelevant to the society that lawyers presumably serve. 64


62. Lawyers today are a product of rigorous academic training, as opposed to the mixture of academic and experiential methodology of pre-1970 clerkships. STEVENS, supra note 9, at 240-42 (quoting ALFRED Z. REED, PRESENT DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA 215 (1928)).

63. See David Margolick, Lawyers: Villains for an Election Year, N.Y. TIMES, Feb. 7, 1992, at B1 ("Lawyer-bashing, which the [ABA] once believed to be the preserve of yahoos, malcontents and zealots, has now reached the country club, to which many of the A.B.A. types themselves belong."). Charles Beckham, president of the Texas Young Lawyers' Association, worried that "lawyers are about to become the 'Willie Horton' of the 1992 Presidential campaign." Id.

64. For example, legal remedies often are irrelevant to victims of abuse because lawyers fail to obtain the physical protection their clients seek and to others because legal resolution is too slow to offer practical assistance. See, e.g., Malcolm W. Browne, Godzilla Meets the FBI, N.Y. TIMES, May 24, 1992, § 4, at 2 (reporting a dispute over the ownership of a dinosaur skeleton named "Sue" which was discovered on Sioux tribal land. "Of course, 65 million years ago, Sue's disputes were resolved far more rapidly."). Id. Thus, bodyguards and underground networks of safe houses provide a more meaningful solution than resort to law. See, e.g., Peter Applebome, Child Abuse 'Rescuer' Is Now the Accused, N.Y. TIMES, Apr. 27, 1992, at A1 (reporting the trial of a woman who ran an underground network in which children were hidden to prevent courts from awarding custody or visitation to abusive parents); Russell Baker, Observer: Going to the Dogs, N.Y. TIMES, Mar. 28, 1992, at L23 (discussing the abandonment at an Idaho dog track of an 82-year-old man in a wheelchair who could not remember his name); Don Terry, Failed by Law, Women Seek Bodyguards' Help, N.Y. TIMES, Apr. 3, 1992, at A10 (reporting on battered women not protected by the legal system). But see Shunn v. State, 742 P.2d 775 (Wyo. 1987) (holding that the marital exception to a rape statute was unconstitutional and overruling the common law); People v. Liberta, 474 N.E.2d 567 (N.Y. 1984) (same), cert. denied, 471 U.S. 1020 (1985).

The interest in alternative dispute resolution grows from an intense public mistrust of formal legal institutions, the courts, to resolve commercial and personal disputes. Norton, supra note 58, at 496 n.12. The alternatives to formal adjudication raise the fundamental question concerning whether "courts have a versatility appropriate for resolving disputes of all kinds." Id. For example, the Agent Orange litigation involved over a million plaintiffs and illustrates the difficulty that all-purpose courts have in
Tax law is an extreme model of a subject with such discordant subtopics that textbook learning becomes a special challenge. The teaching of tax law exemplifies my claim that a textbook's discrete presentations of learning do not impart comprehension of an overall concept. Instead, a tax textbook's linear style of presentation perpetuates a multiplicity of fragmented concepts. It sets out neither the prevalent theme, nor even a set of themes, and fails to do so consistently from the introduction of a new concept to the disclosure of the final element in a principle of law. Then the incomplete understanding, by dividing and limiting the problems that lawyers think of solving, leads to overspecialization and prevents development of an overall tax policy. By separating technical knowledge from practical issues, the presentation of tax law constrains the ways in which lawyers serve their clients.

Tax law education shows how abstract the legal education process has become. In general, to learn through a text, one must isolate concepts and make a linear progression from settling complex disputes. See Memorandum and Pretrial Order No. 72, In re Agent Orange Product Liability Litigation, MDL No. 381 (E.D.N.Y. Dec. 1983). Additionally, formal adjudication takes too long and costs too much. Norton, supra note 58, at 496. Even the most respected tax professors question what they teach. "The subject [tax] has just become virtually unteachable. Obviously, we teach something, but we basically teach a vocabulary, and get people...so they can learn it on their own." Christopher H. Hanna, Interview with James S. Eustice, Gerald L. Wallace Professor of Law, New York University School of Law, 11 A.B.A. SEC. TAX NEWSL. 38, 42 (1992) (quoting Eustice).

Consider, by analogy, how divorce lawyers tend to sever clients' emotions from the litigation. The program that divorce lawyers present to their clients places marriage in the realm of property. Clients, however, typically see property issues as inseparable from a broader context of emotion and blame: "Clients...come to the divorce process expecting that their emotions will matter and that lawyers will care; they come away disappointed." Sarat, supra note 9, at 50. There is no consensus regarding the roles of the lawyer as litigator and as advisor among members of the practicing bar. This fact is illustrated by the recent American Bar Association debate concerning Rule 5.7 of the Model Rules of Professional Conduct, adopted by a narrow margin in 1991 at its annual meeting and repealed a year later in August 1992. The controversial rule restricted law firms' ability to control entities, such as consulting companies, which provide services defined under the rule as ancillary to legal services. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 5.7 (1991). The standards of Tax Practice Committee concluded that Rule 5.7 overlaps activities conventionally regarded as legitimate legal services, especially by attorneys functioning as advisors. Meeting of Standards of Tax Practice Committee (May 15, 1992) (minutes of the meeting on file with the University of Michigan Journal of Law Reform).

Lawyering Skills, supra note 4, at 5–6 (stating that specific skills and values are interrelated and "cannot be neatly compartmentalized").
A onward. Only at the end of the progression can one use the concepts, that is, if one can still remember A. In order to understand a single tax concept, the student must examine first the statute, then the interpretative comments, then the regulations that the statute engendered, and finally the cases. Even then, how the fragments of taxation fit together into the Internal Revenue Code (the Code) may remain unclear to many students, and also to many tax lawyers.

This serialization forces ideas apart into arrays of specialties. Yet this act of specification, this snapshot perspective that appears ordained by the compartmentalization of tax law's basic elements in the Code, actually descends from the flat surfaces of pages in a book. The compartmentalization postpones, and thus hampers, an attempt to unite tax concepts into a cohesive body of law. The fragments amount to a mere series of photographs, "a series of fragmented apostrophes," or digressions in study, "rather than a cohesive central text." The progression of incremental learning ends with a collage rather than an understanding of a primary concept. To push the analogy further, one might liken the study of taxation to the representation of objects in ancient Greco-Roman painting, where objects exist in

68. In particular, a tax student is told that the incomprehensible words of the Code eventually will have a meaning if they are applied to problems constructed to illustrate how the statute works (or perhaps to make the statute work). The gap between applying the tax principle in a narrow factual situation and understanding it as a principle is difficult to bridge. See generally James J. Freeland et al., Fundamentals of Federal Income Taxation 1-4 (7th ed. 1991).

69. Some argue that Congress may have written the Code to remain unclear. See Tax Reform: A Little List, Economist, June 14, 1986, at 25 (claiming that tax exemptions are cunningly built into the "arcane pedantries" of the tax bill); David E. Rosenbaum, When the Tax Rules Don't Quite Fit, N.Y. Times, June 9, 1986, at A18 (reporting that a tax bill's "Delphic prose" contains 175 special exemptions). "A [legislative] staff member who worked on the transition rules said he did not know why they were written in such an obscure way except that 'it's always been done that way.'"

70. See Dunning, supra note 25, at 225.

71. Id.

72. Id.
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separate spaces on the canvas.\textsuperscript{73} Like such a painting, each element of the tax statute is "granted its own separate perspective."\textsuperscript{74} The "postmodernist/post-Cartesian" or "pluralist viewer"\textsuperscript{75} of a painting fails to find a dominant theme, just as does the lawyer who learns taxation through the linear method. No central Renaissance perspective unifies the picture or the subject of taxation.\textsuperscript{76} "Our thinking, our art, our science, and our world view are all eclectic."\textsuperscript{77}

A novice and an expert often perceive the same thing differently.\textsuperscript{78} An expert art critic sees levels of white in the painting; similarly, a tax specialist reads layers of meaning lacquered atop the pure statement of the statute. The complexity of our tax law limits its understanding to the aesthete in the same way that the meaning of a work of art may be explained better by the critic than by the artist.\textsuperscript{79}

\textsuperscript{73} Id. at 2. "Though they may have been related in content, the painted objects and figures were not structurally or spatially related to each other or to the background because they were not drawn as if they were all seen from the same location." Id.

\textsuperscript{74} Id. at 2.

\textsuperscript{75} See id. at 213.

\textsuperscript{76} The result of the omission of a "unified space" was a fragmented image "unlike the unified image that Renaissance perspective would yield." Id. at 2–3. The law is out of touch with what nonlawyers call reality. Hence, the problem with law is not that a legal text contains a paradox, but that legal concepts are limited to ideas that can be expressed in writing. "Deconstruction thus reveals the antinomibl character of legal thought, a characterization which is at first disturbing, but in the end is the best description of our actual experience in using legal concepts." Balkin, supra note 7, at 786.

\textsuperscript{77} DUNNING, supra note 25, at 213.

\textsuperscript{78} The meaning of the postmodern painting is "not determined by the artist because no 'single interpretation can be devised.'" Id. at 229 (quoting Kristin Olive, David Salle's Deconstructive Strategy, 60 ARTS MAG. 82, 83 (1985)). Similarly, court opinions interpreting the Constitution have "supplanted" the original text. Collier, supra note 34, at 217. Furthermore, in visual art, in most creative writing, and in law, the author assumes that the expression will communicate on its own. With exceptions such as Woody Allen and Spaulding Grey, most authors do not interpret their own work. See generally Emily Fowler Hartigan, The Power of Language Beyond Words: Law as Invitation, 26 HARV. C.R.-C.L. L. REV. 67 (1991) (explaining the need for the reader's response to what is written). Allen and Grey are able to control the meaning of their films because they write and act (and, additionally, Allen directs). See, e.g., HUSBANDS AND WIVES (Tristar 1992); SWIMMING TO CAMBODIA (Lorimar 1987).

\textsuperscript{79} For example, Congress "signs" the Code, but often does not even read tax bills. The real authors are task forces drawn from various groups, usually including members of the House and Senate Committee staff. James B. Lewis, Viewpoint: The Nature and Role of Tax Legislative History, 68 TAXES 442, 444 (1990); Bradford L. Ferguson et al., Reexamining the Nature and Role of Tax Legislative History in Light of the Changing Realities of the Process, 67 TAXES 804, 820 (1989). Tax legislation is drafted by task forces representing various governmental interests, including staff members from the
The expert, with the eye of the connoisseur, 80 sees that the words of the text are shadowed by a historical context. 81 Thus, finding the plain meaning of the statute from the words alone is impossible. A common tax proverb advises, "One should read the Code only if the Committee Report is unclear." 82 The tax law is never written on a clean slate.

However, expert interpretation may have dangerous results in tax. 83 For example, the Treasury Regulations may try to transcend the words of the Code when interpreting its meaning. The drafters of the regulations treat the Code's words ceremonially, and therefore the words lose their literal meaning because like the phrase "good morning," "everyone [familiar with the words] knows perfectly well what their intended meaning is." 84 It seems that only the educated are

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House, the Senate, Joint Committees, the Treasury, and the IRS. The same group prepares the committee report. Congress, however, does not necessarily read the report even if it is available before voting. Ferguson et al., supra, at 811-12. According to Lewis, members receive their information from staff members who answer their questions orally or occasionally in writing. Lewis, supra, at 444. Thus, the doctrines of legislative intent are difficult to apply straight-faced to the Code.

80. Cf. WASSILY KANDINSKY, CONCERNING THE SPIRITUAL IN ART 49 (M.T.H. Sadler trans., Dover Publications 1977) (1912) (arguing that "[o]ur materialistic age has produced . . . a 'connoisseur' . . . who is not content to put himself opposite a picture and let it say its own message . . . [and who] does not probe the outer expression to arrive at the inner meaning").

81. See United States v. Burke, 112 S. Ct. 1867 (1992) (holding that a settlement award for a racial discrimination claim was not excluded from income because it was not damages in the historic sense of the term).

82. The authority of legislative history was debated in the Supreme Court recently when Justice Souter defended its use as the only way to determine meaning against Justice Scalia's accusation that reliance on legislative history was the "St. Jude [patron saint of lost causes] of the hagiology of statutory construction." United States v. Thompson/Center Arms Co., 112 S. Ct. 2102, 2109 n.8 (1992); see also Ferguson et al., supra note 79, at 804; Edward J. Imwinkelried, Evidence Pedagogy in the Age of Statutes, 41 J. LEGAL EDUC. 227, 231 (1991) ("Although the most frequently used type of extrinsic legislative history material is a committee report, neither the legislature as a whole nor even the committee members themselves vote on the report." (footnotes omitted)).

83. See, e.g., Phillips Petroleum Co. v. Commissioner, 97 Tax Ct. Rep. & Mem. Dec. (Macmillan) ¶ 97.3, at 15 (1991) (overturning a 69-year-old tax regulation). Phillips Petroleum claimed that the income derived from the sale of liquified natural gas to gas and electric companies in Tokyo was mixed source income within the meaning of § 863(b)(2) of the Code because the gas was personal property produced within and sold without the United States. Id. at 18. The IRS claimed that the gas was U.S. source income as defined by Treasury Regulation § 1.863-1(b)(1). Id. Because the two provisions conflicted on this issue, the court determined that the wording of the statute preempted the regulations and found for Phillips Petroleum. Id. at 20.

84. Judith Martin, The Latest Word on Polite Phrases, THE TIMES-PICAYUNE (New Orleans), Apr. 28, 1991, at D8 ("[T]here is hardly anyone more tedious than the person whose response to 'good morning' is to argue that it's raining.").
the Code's intended audience, not unlike the audience of a painting in Gallery 31 of the Museum of Modern Art. The authors of the Blue Book also function as its critics.

The functions of the commentator, in the case of tax, and the critic, in the case of art, are strikingly similar. The tax student is like the museum-goer who observes that the seemingly blank canvas actually is painted white. Hence, the museum-goer assumes that the museum object is art, but relies upon the critic to explain the object's meaning. At

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85. See infra note 88 and accompanying text.
86. The Blue Book, published by the staff of the Joint Committee on Taxation after the enactment of a tax law, contains an explanation of the law based on the committee report. "Absent any definitive legislative history that is more revealing, the court believes it is proper nevertheless, in the absence of any comparable contrary assertion, to give substantial weight to this Explanation." Ferguson et al., supra note 79, at 820 (quoting Bank of Clearwater v. United States, 85-1 U.S. Tax Cas. (CCH) ¶ 13,606 (Ct. Cl.)). According to Ferguson, the Blue Book authors occasionally tend to put their own gloss on the intent of the legislation. Id. Since the critics in this case include some of the authors of the words of the Code, one may wish to defer to such interpretations as opposed to Congressional intent. But whether Congress knew enough to form an intent concerning the meaning of the statute it passed is not an issue because, as a constitutional and political concept, Congress clearly had the power to enact tax legislation. See Earl M. Maltz, Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy, 71 B.U. L. REV. 767, 769 (1991) (noting how the doctrine of legislative supremacy in the traditionalist, neotraditionalist, and modernist model of statutory interpretation variously affects the judiciary). Maltz states that "[a]ny plausible theory of statutory interpretation must address the concept of legislative supremacy." Id. at 769; cf. Church of Scientology v. IRS, 792 F.2d 153, 170-71 (D.C. Cir. 1986) (Silberman, J., concurring) (discussing deference to regulatory interpretation of tax statutes), aff'd, 484 U.S. 9 (1987).

Some courts have had no trouble finding the plain meaning of a tax statute. See, e.g., Estate of Perry v. Commissioner, 927 F.2d 209, 212-13 (5th Cir. 1991) (rejecting the Commissioner's theory "based on policy and on logic (seldom if ever a consideration in federal tax statutes)" that the payment of premiums on an insurance policy was a "transfer" of the policy by the decedent); Gridr v. Cavazos, 911 F.2d 1158, 1163 (5th Cir. 1990) (applying recovery of tax refunds that had been intercepted towards payment of their defaulted student loans based on the plain meaning of the statute and the treasury's own regulations). In Gridr, the Fifth Circuit failed to find ambiguity in the word delinquent—a word "universally understood by lawyer and layman alike when used in reference to a debt." Id. The court disagreed with Jones v. Cavazos, 889 F.2d 1043, 1048-49 (11th Cir. 1989), which interpreted "delinquent" in a Treasury Regulation according to the legislative history of the regulation: "In the face of such unambiguous language, how can a court justify usurping the legislative function that was delegated to the Secretary of the Treasury by supplying words . . . to modify 'delinquent'?" Gridr, 911 F.2d at 1163.

87. Art is anything that is recognized as art. See Rita Reif, Ask Not 'Is It Art?' Ask 'Did An Artist Make It?', N.Y. TIMES, Feb. 23, 1992, at H37; see also SALVADOR DALI, LOBSTER TELEPHONE (1936) (telephone made by Dali); MARCEL DUCHAMP, READY MADES (painting 1914) (depicting telephones, urinals, automobiles, fluorescent lights, and vacuum cleaners).
first, one thinks that the sophisticated viewer could clearly distinguish a work of art from a white fence. But, upon reflection, one questions whether perhaps the fence, too, is art, and whether a painting used as a barrier is a fence.88

Academic writers have applied deconstructionist ideas of visual art to literary texts. Because deconstructionists search for meaning in the words of others, the choice of a particular work is less important than the interpretation given to the meaning found in it.90 The lawyer-like task

88. According to Dunning, postmodern painting challenges both the language and the illusion of painting. “For [postmodernist painters], the painting, like the spoken word, can function as both signifier and signified.” DUNNING, supra note 25, at 228. Dunning discusses the literary quality of painting and “the relationships among the reality of the canvas, the sign, and the reality of the sign.” Id. Jasper Johns's flag painting is “a perfect reproduction of a flag.” Id. However, the flag itself is a reproduction (if there can be a reproduction when there is no original); there exists no “original” flag, though each reproduction maybe [sic] treated as if it were an original. Such a conspicuous image makes it difficult to read the painting as nothing but a painting in the sense that a modernist would expect. Is Johns's flag a painting, or another reproduction, or a reproduction of a reproduction? What, then, is a reproduction of Johns’s painting? The flag is also a visual metonomy for the United States; it is America. If the flag is such a metonomy, then is John’s painting also a metonomy? The questions that Johns asks are related to painting as both illusion and language.

Id. at 228–29 (footnote omitted).

Ambiguity engages the viewer in the process of art. For example, in the electronic music composed by Max Neuhouse, street sounds incorporate the music, and the music joins the noise of the street. John Rockwell, Beneath the Feet, Art Soothes in Times Sq., N.Y. TIMES, Nov. 10, 1987, at B1. Ambiguity in a statute likewise engages the reader in the process of interpretation. As with the artist, the legislature loses authority to the interpreter, in this case, the courts. Once Congressional intent is merged with the document, the power of the author is past. Cf. Karla W. Simon, Congress and Taxes: A Separation of Powers Analysis, 45 U. MIAMI L. REV. 1005, 1008 (1991) (arguing that politics, not courts, should remedy problems with Congress's tax legislation).

89. See infra note 92 and accompanying text.

90. Balkin, supra note 7, at 744. Deconstructionist lawyers argue that there is a hierarchical relationship between what is privileged and what is excluded in legal thought. Balkin gives an example of deconstruction as “A is the rule and B is the exception; A is the general case and B is the special case . . . . Indeed, my labeling of these ideas as A and B involves a hierarchical move because the letter A precedes B in the alphabet.” Id. at 747. The practice of deconstruction shows that the priority of A against B is an illusion, for A and B have a mutually dependent relationship. Id.

Text creates a need for a hierarchical structure. Thus, although the particular order within that structure is sometimes interchangeable, the fact that it is hierarchical does not change. That is, whether the narrative style is a chronological account or a flashback, one always reads a page from top to bottom, one page (or word) before another. An example of nonhierarchical visual structure is the cartoon animation cell which consists of transparent layered images rather than pictures arranged sequentially. In the former, the order in which the pictures are arranged does not matter because
involves teasing out textual paradoxes\(^9\) without seeming to laugh. The debate in literature and in law is how much license an individual reader may take in her interpretation of the text.\(^2\) "[A]nything can mean anything."\(^3\) Or, put another way, "[d]econ-structionism is an interpretive technique that follows from the view that language itself contains infinite possibilities of meaning."\(^4\) In contrast, the

_Weirdos from another planet!_ by William S. Burroughs is not a novel but rather a poetic constructivist essay which involves playing with textual paradoxes without seeming to laugh. The debate in literature and in law is how much license an individual reader may take in her interpretation of the text. "[A]nything can mean anything." Or, put another way, "[d]econ-structionism is an interpretive technique that follows from the view that language itself contains infinite possibilities of meaning." In contrast, the

In written language systems, "syntax deals only with what we might call the linear aspect of construction: that is, the ways in which words are put together in a chain to form phrases and sentences, what in film we call the syntagmatic category." JAMES MONACO, HOW TO READ A FILM 142 (rev. ed. 1981). However, in film and television, syntax also includes a spatial component that is developed in both time and space. Id. In contrast, in language systems one cannot type a new word in the same space as the original without obliterating the original, and, although two people can speak at once, most people will not be able to follow either conversation. Id. Balkin pinpoints a frustrating aspect of the deconstruction technique: deconstruction "can displace a hierarchy momentarily, it can shed light on otherwise hidden dependences of concepts, but it cannot propose new hierarchies of thought or substitute new foundations." Balkin, supra note 7, at 786.

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91. Balkin, supra note 7, at 786.
92. But see Williams v. Bridgestone/Firestone, Inc., 954 F.2d 1070, 1075 (5th Cir. 1992) (Duhé, J., dissenting) ("Unlike the deconstructionists at the forefront of modern literary [and legal] criticism, the courts [should] still recognize the possibility of an unambiguous text." (alterations in original) (quoting Ideal Mut. Ins. Co. v. Last Days Evangelical Ass'n, 783 F.2d 1234, 1238 (5th Cir. 1986))).

In Irion v. Prudential Ins. Co. of Am., 964 F.2d 463 (5th Cir. 1992), the plaintiff sued her insurance company for not buying a $440 "full cranial prosthesis" to cover her total baldness. Id. at 464 n.2. The court rejected the plaintiff's terminology, noting that "[w]hile we do not mean to diminish Ms. Irion's claim, for simplicity and clarity, we will refer to Ms. Irion's hairpiece as a wig." Id. The court similarly rejected another characterization urged by the plaintiff. She argued that the insurer was obligated to buy the wig because her lost hair was a limb, and the policy covered purchases of artificial limbs. Id. at 464. A medical dictionary and Webster's dictionary convinced the court that the plaintiff was wrong. Id. at 464-65.

94. Kenneth S. Abraham, Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair, in INTERPRETING LAW AND LITERATURE 115, 117 n.23 (Sanford Levinson & Steven Mailloux eds., 1988). Abraham's argument has a scientific basis in studies of redundancy. Redundancy used as a device to limit the meaning of words is at the same time a source of multiple meanings. "[O]rdinary language contains greater than fifty percent redundancy in the form of sounds or letters that are not strictly necessary to conveying a message." GLEICK, supra note 14, at 256. The need for redundancy in ordinary language is caused by the imprecise meaning of words and the extent to which the speaker and the audience share the same "knowledge of their language and the world." Id. A computer programmed to generate two- and three-letter combinations at the same statistical frequency that they occur in ordinary language can produce "an otherwise random stream of nonsense that is recognizably English nonsense." Id.
words of the Code are more likely to mean nothing than to mean many things. 95 Unlike literature, however, in which the author's meaning need not be concrete or serious, 96 the serious meaning of a tax statute is presumed. 97

In a recent tax case, Justice Scalia noted that redundancy was so commonplace that by itself it would not indicate ambiguity. Scalia found that the provision was merely another example of "iteration ... obviously afoot." United States v. Thompson/Center Arms Co., 112 S. Ct. 2102, 2111 (1992) (citing Moskal v. United States, 111 S. Ct. 461, 471 (1990) (Scalia, J., dissenting)); see also Gwen T. Handelman, Zen and the Art of Statutory Construction: A Tax Lawyer's Account of Enlightenment, 40 DEPAUL L. REV. 611 (1991).

95. Even tax experts do not defend the language of the Code. Professor Griswold has complained, "[The tax legislation of the 1980s has produced a monstrosity. The tax statutes are far too complex." Samuel Olchyk, Interview with Erwin N. Griswold, Former Dean and Langdell Professor of Law Emeritus, Harvard Law School, 11 A.B.A. SEC. TAX NEWSL. 56, 59 (1992); see also Cheek v. United States, 498 U.S. 192, 206 (1991) (holding that an airline pilot's honest though unreasonable belief that wages were not income was not a valid defense to a willful violation of the Code); James S. Eustice, Tax Complexity and the Tax Practitioner, 8 TAX ADVISER 27, 35 (1977) (arguing that the practical goal for new tax legislation should be "to strive for a reasonably understandable law that can be interpreted without excessive cost relative to the scope of the transaction involved"); Ferguson et al., supra note 79, at 807 (stating that "the statutory language ... is virtually incomprehensible to all but the professionals").

96. Discussing the interpretation of literary works, one scholar writes,

Substantive values define the kinds of content an interpreter will think a text (or author) has "in mind." The objection may be raised that Jane Austen had no thoughts such as those feminists now read in (or, in this objection, "read into") her novels. But, of course, feminists answer that Austen need not have been aware of her indictment of her own society; she need not have put it in terms of our polemics. Nevertheless, she surely did intend this portrait, even if she believed, as feminists do not, that this is how things must and even, in part, should be.

Jessica Lane, The Poetics of Legal Interpretation, in INTERPRETING LAW AND LITERATURE, supra note 94, at 278 (Sanford Levinson & Steven Mailloux eds., 1988); see also Judith S. Koeffler, The Feminine Presence in Billy Budd, 1 CARDOZO STUD. L. & LITERATURE 1, 2 (1989) (arguing that Melville intentionally "confuses gender characteristics and subverts conventions of masculine and feminine ... in order to preserve from the strangulating gaze of modern industrial society ... the love of men for men").

97. In fact, this may not always be a valid presumption. See Lewis, supra note 79, at 444 (noting that jokes almost were printed as part of a tax act's legislative history). According to Lewis, the federal district court in Burns v. United States, 242 F. Supp. 947 (D.N.H. 1965), relied on an unauthorized sentence in a committee report to negate a Tax Court decision. See Lewis, supra note 79, at 445. Lewis was a member of the task force that drafted the committee report. S. REP. NO. 1013, 80th Cong., 2d Sess. 3–5 (1948) (discussing the 1948 estate and gift tax marital deduction and the split gift legislation). Some jokes are enacted only to be deleted from legislation after almost a year. See Jack Teuber, Technical Corrections Bill Introduced, 87 TAX NOTES TODAY 113-1 (June 11, 1987), available in LEXIS, Fedtax Library, TNT File (noting that the deduction for the purchase of Louisiana State University and University of Texas football tickets was deleted). Revenue Ruling 84-132 held that payment to a university in exchange for seats at athletic events was not a charitable gift. See Jack Teuber,
Written language, whether in the form of a statute or a literary work, requires interaction by the reader before it can be applied to a current transaction. To paraphrase Stanley Fish's general discussion of interpretive authority, the codes as bodies of knowledge are "inseparable from the practices [they] enable." In short, any code, from the rules of conduct in the street to the Constitution, is not a set of self-executing maxims. The Internal Revenue Code must be applied to a given case, and, by this act of specification, the Code is either expanded or restricted and "therefore changed."

Deconstructionism undermines the enterprise of literate reasoning. Yet deconstructionists play the game on the traditional paper field with the same pieces. The problem with learning from a text is not merely that words are ambiguous but that words do not embody the underlying principle. According to the painter David Salle, "[W]e're only able to say what, in a sense, can be said. We all speak and think and act within what linguists call the obligatory."

An idea and its expression are not coextensive. The medium of expression, like the skin on a drum, channels thought so that the expression by the thinker and the idea itself are not totally alike. Generally, the tangible form reflects some portion less than the whole of the thought. However, even if that portion were one-hundred percent of the thought, the expression differs from the idea because its medium of expression changes it, as the acidity of soil

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98. FISH, supra note 93, at 151.


100. FISH, supra note 93, at 150-51. Fish apparently was describing a peculiarly American hermeneutic. In the civilian tradition, the statute, rather than the judicial interpretation of the statute, is the principal authority. Hence, a judicial precedent has the same persuasive value as the writings of a legal scholar. See generally JOHN H. MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEM OF WESTERN EUROPE AND LATIN AMERICA 56, 60 (2d ed. 1985).


102. DUNNING, supra note 25, at 232 n.4; see also DERRIDA, supra note 29, at 50, 83 (stating that "we think only in signs" and that language "is absolutely incapable of accommodating certain forms of modern thought" such as mathematics).

103. Thus, when an idea is expressed, there are two versions of the idea. Cf. Hartigan, supra note 78, at 75 (arguing that "[w]ords will never catch" a new way of seeing the law).
changes the flavor of carrots. For example, an idea expressed by beating a drum is effected as much by the vibrations of the skin on the drum as by the timing of the musician. Hence, what is thought or known cannot be expressed exactly in words.

According to Wittgenstein, "Understanding concepts requires looking at the various activities of which they are a part." Several of Magritte's paintings of changes in state express a similar thought. However, unlike Magritte and Wittgenstein, many lawyers tend to focus on words and not the idea of which the words are only a copy. The more detailed the provision, the less flexible the idea. Nevertheless, the discrete presentation of knowledge is the inevitable baggage of literate thought. In a literate society, one learns the technique of classification in early childhood. Studies, such as Piaget's, on the process of reasoning and its development in children, demonstrate that much of our thought involves a classification of ideas that is consistent with the scientific method used by biologists in the classification of animals and plants. The transfer of this process from concrete analysis (for example, one physically looks at, smells, touches, dissects—the plant) to more abstract learning (for example, one verbalizes an entirely abstract concept—a corporation) produces a distinctive method of reasoning (logic) based upon matching physical and functional characteristics. This method of reasoning creates serious deficiencies in the study of law.

The process of dividing or categorizing information by physical similarities or other shared properties (superordinate groupings) leads to the development of abstract thought,

104. The idea would sound different if it were expressed as words instead of rhythm and differ still more if the idea were painted on canvas. The expression itself cannot help but change like the individual rendition of a repeated pattern done by hand. But that does not mean that the idea has changed.
105. Patterson, supra note 28, at 361 (paraphrasing Wittgenstein).
106. See Rene Magritte, Lifeline, in L'INVENTION COLLECTIVE NO. 2 (Apr. 1940), reprinted in GABLIK, supra note 50, at 183; RENE MAGRITTE, CLAIRVOYANCE (painting 1936) (depicting an egg posing for the portrait of a bird); RENE MAGRITTE, DISCOVERY (painting 1927) (depicting a woman changing from flesh to wood); RENE MAGRITTE, NAPOLEON'S MASK (painting 1935) (depicting a funeral mask combined with the motion of clouds and sky).
107. Analyzing text rather than ideas results in a text that is closer not to the original idea but to a copy of the degraded image copied from a copy of a copy rather than from the master work.
108. See supra note 51.
including the development of legal principles. Such abstract thinking, however, limits the kinds of problems that the judicial system itself can solve. Superordinate categories do not address the relationship between different groups. For example, systematic, abstract thinking groups cats and tigers closer together (as felines) than it groups cats and mice, even though experiential thinking combines the latter two more easily than the former two. The cat-mouse type of concrete, real-world relationship is outside the categories used in abstract, literate reasoning.

Russian psychologist Alexander Luria compared the thought processes of preliterate peasants in Uzbekistan with those of educated people in various other societies. He found that preliterate individuals organized thought and answered questions in a fundamentally different way than those with even a minimal formal education. During a classification test, the experimenter showed the subject four picture cards—three adults and a child—and casually said it was obvious that "the child doesn't belong in this group." But the peasant disagreed. "Oh, but the boy must stay with the others. All three of them are working, you see, and if they have to keep running out to fetch things, they'll never get the job done; but the boy can do the running for them." Similarly, "[a]sked to pick from a set of three objects—a saw, a log, and an ear of grain—the one that goes with an ax and a sickle, another subject replied, 'If you want them to be the same, you'd have to pick the ear of wheat. A sickle reaps grain, so this ear will be plucked by this sickle.'" Luria found that his subjects had a "general insensitivity to abstract forms of classification, a resistance to reasoning through language." This changed with minimal exposure

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109. See KANDINSKY, supra note 80, at 12 (noting that material classification relates to the past and not to the future, which has no material existence). According to Kubler, "[w]e can grasp the universe only by simplifying it with ideas of identity by classes, types and categories, and by rearranging the infinite continuation of non-identical events into a finite system of similitudes." GABLICK, supra note 50, at 143 (quoting GEORGE KUBLER, THE SHAPE OF TIME 67 (1962)). Events do not repeat, "but it is in the nature of thought that we understand events only by the identities we imagine among them." Id. (quoting KUBLER, supra, at 67).


111. Id. at 343.

112. Id.
to school.

With the advent of the Children's Television Workshop, many of us as very young children learned that "[o]ne of these things is not like the others,"\(^{113}\) that is to classify into "superordinate" general categories such as "toys" and "clothes."\(^{114}\) Perhaps these are categories that will fit easily on a printed page.

Cognitive anthropologists recognize that different modes of communication foster different ways of thinking because they "involve developments in the storing, analysis, and creation of human knowledge, as well as the relationships between the individuals involved."\(^{115}\) According to Jack Goody, the acquisition of "writing, and more especially alphabetic literacy," is one of those developments that significantly affects the way users think.\(^{116}\) Texts permit greater scrutiny than oral statements and therefore encourage an "increase in scope of critical activity, and hence of rationality, skepticism, and logic."\(^{117}\) They also encourage abstraction by allowing the content of knowledge to be expressed through other than face-to-face exchanges and by relieving the burden of memorization:

No longer did the problem of memory storage dominate man's intellectual life; the human mind was freed to study static "text" (rather than be limited by participation in the dynamic "utterance"), a process that enabled man to stand back from his creation and examine it in a more abstract, generalized, and "rational" way. By making it possible to scan the communications of mankind over a much wider time

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\(^{113}\) JON STONE & JOSEPH RAPOSO, One of These Things (1970 Jonico Music, Inc.) (sheet music on file with the University of Michigan Journal of Law Reform); see also MARTHA MINOW, MAKING ALL THE DIFFERENCE 1-4 (1990) (discussing how the classification game played on Sesame Street is the first step to thinking like a lawyer).

\(^{114}\) See GARDNER, supra note 110, at 343. Magritte attacked the ambiguity of conventional classification models by painting The Fright Stopped, depicting a bowler hat with a medicine label, "For External Use Only," as well as by mislabeling common shapes and labeling amorphous shapes with concrete nouns. See GABLIK, supra note 50, at 142-43.


\(^{116}\) Id.

\(^{117}\) Id.
span, literacy encouraged, at the very same time, criticism and commentary on the one hand and the orthodoxy of the book on the other.\textsuperscript{118}

Goody concludes that literacy "encourages special forms of linguistic activity associated with developments in particular kinds of problem-raising and problem-solving, in which the list, the formula and the table played a seminal part."\textsuperscript{119} These devices permitted previously impossible systematizations of knowledge, which became the foundation of logic\textsuperscript{120} and of law.\textsuperscript{121} At a more advanced stage of education, law school relies on interpreting statutes and appellate opinions, and the distilled theory of an actionable claim is severed from the transaction and the people it affects in real life. As a result, one often finds not only that a statute is misinterpreted, but that whole sections of it may be repeated verbatim by one who misses its application in an actual case.

The students’ loss gets passed on to society. The search for statutory meaning from the configuration of words in a linear format has logical as well as mechanical limitations in the choice of remedies—usually money—that the courts offer. These remedies often do not provide litigants with a satisfying solution to their problem. In an appellate case, human conflict is merely tangential to the abstract issues of the law. The causes of conflict, and the aftermath of the

\textsuperscript{118} Id. (footnote omitted).
\textsuperscript{119} Id. at 162.
\textsuperscript{120} Id. at 44.
\textsuperscript{121} A more recent attempt to find differences in cognitive processes is Don Le Pan’s argument concerning average people in the Middle Ages. See 1 DON LE PAN, THE COGNITIVE REVOLUTION IN WESTERN CULTURE: THE BIRTH OF EXPECTATION (1989). Le Pan argues that they were unable to form expectations (as moderns do) because they lacked understandings of causal probability and temporal objectivity. Le Pan’s survey of medieval English literature leads him to conclude that, in this respect, most people then employed cognitive processes similar to those observed by psychologists in children of the modern era and recognized as qualitatively different from the cognitive processes of modern adults. Id. at 76. For this reason, medieval literature and histories tend to be arranged paratactically in single-strand narratives. Only with the development of an expectative faculty could writers exceed simple parataxis and begin to elucidate causal connections, or grasp the concept of simultaneity. The acquisition of those abilities is the foundation for the more complex narratives that began to emerge in Elizabethan England, Le Pan argues. Id. Le Pan does not limit his argument just to stories that developed primarily in an oral tradition—he also considers texts, such as histories, that first emerged in written form. Yet, as Goody notes, writing, not just "extensive literacy," produces the consequences he discussed. See GOODY, supra note 115, at 151–53.
solution (perhaps continued conflict), generally are not relevant to the holding of the case.\textsuperscript{122} Because of this, the context in which the legal principles operate and the problems that legal solutions cause generally are not part of the education of lawyers.\textsuperscript{123} Law schools have failed "to train lawyers to be sensitive and responsive in their dealings with clients."\textsuperscript{124} This failure "has important consequences for the legal system as a whole."\textsuperscript{125}

In tax statutes and cases, human disputes are strained through the impersonal rules of law so as to be nearly unrecognizable to common understanding.\textsuperscript{126} The law abstracts real activities and vacuously describes them as \textit{contracts} and \textit{property rights}. Worse still, tax law then distorts the abstractions. As described by Plato, one may "imagine men ... living in an underground cave-like dwelling place ... with their neck [sic] and legs in fetters, so that they remain in the same place and can only see ahead of them."\textsuperscript{127} The sunlight at the entrance to the cave is a long way off. Light comes from a fire. The men can see only the shadows of themselves and each other. "[S]uch men would believe the truth to be nothing else than the shadows of the

\textsuperscript{122} Sometimes final settlement eludes the litigants. For example, in the first of the series of \textit{Galler} cases, the court held that various provisions of a shareholder's agreement were valid and gave the plaintiff the right to an accounting of all money earned by the corporation in order to determine what money was owed her. Galler v. Galler, 203 N.E.2d 577, 587 (Ill. 1964). Subsequent cases enforced other aspects of the agreement. \textit{See} Galler v. Galler, 217 N.E.2d 111, 113 (Ill. App. Ct. 1966) (dismissing an appeal from an order directing that a meeting of shareholders be held and that designated persons be elected directors); Galler v. Galler, 238 N.E.2d 274, 277 (Ill. App. Ct. 1968) (affirming an order establishing salaries for 1966 and later years); Galler v. Galler, 316 N.E.2d 114, 121 (Ill. App. Ct. 1974) (affirming orders that two of the corporation's officers repay excessive salaries plus interest from the period 1956-65), \textit{aff'd}, 336 N.E.2d 886 (Ill. 1975).

\textsuperscript{123} The profession long has been seen as exacerbating human conflict. \textit{See}, \textit{e.g.}, \textit{William Shakespeare, The Second Part of King Henry the Sixth} Act 4, Sc. 2 ("First, let's kill all the lawyers.").

\textsuperscript{124} Sarat, \textit{supra} note 9, at 43.

\textsuperscript{125} \textit{Id.} Sarat, writing about antagonism between lawyers and clients in divorce cases, notes that the clients "insist that lawyers attend to issues beyond those that are technically relevant, and they often regard lawyers' resistance to those issues as insensitive or inappropriate." \textit{Id.} at 47.

\textsuperscript{126} Adalberto Jordan, \textit{Imagery, Humor, and the Judicial Opinion}, 41 U. MIAMI L. REV. 693, 700 (1987) ("Law aggrandizes the dispute with the use of such lifeless terms as 'cause of action' and 'litigation,' and enshrines an otherwise human problem in a formal legal setting.").

artifacts." Like Plato's imagined men, lawyers see only the shadows of their clients' transactions; the tax lawyers stand at the deepest end of the cave, seeing no shadows but hearing the stories told by those lawyers who do. They see neither real events nor even the law's shadow of the event. As a result, tax solutions have the greatest degree of distortion in relation to an actual occurrence.

The creation of tax concepts based on Plato's admonition that one would be "imitating" the intelligible by looking "at actual living creatures, then at the actual stars, and finally at the actual sun," continues the classic duality between theory and action. However, the primacy of theory free of all empirical sensual experience (characterized by a lawyer-like attempt to use knowledge gleaned from Socratic dialogue) has not led to the realization of Plato's ideal world. Lawyers have not come near to "the final goal of the intelligible as the prisoner escaping from the cave reached the final goal of the visible." Instead, the development of tax theory divorced from action produces a system of legal reasoning based on the theoretical values that fetter the working lives of people involved in production and commerce.

Consequently, the flaws in thought caused by the study of law are carried into a simple and even predictable pattern of action. When solutions to basic social problems are attempted through the enactment of laws, new problems result. Through tax law, government discourages certain activities by adding to their cost or by encouraging a variation in the pattern of activity. Eventually, lawmakers

128. Id.
129. Id. at 183.
130. Id.
131. The action of the "real world" and "the actual effects of law on people" were, according to Langdell, irrelevant to the "ultimate answers to all legal questions." Collier, supra note 34, at 200. In contrast, feminist scholars do "research out of books [and] . . . legal research with people." Lucinda Finley, Feminist Jurisprudence, 1 COLUM. J. GENDER & L. 5, 21 (1991) (speaking as a panelist during Myra Bradwell Day at Columbia Law School). The feminist movement starts with practice, then moves to theory: "Feminism was a practice long before it was a theory." MacKinnon, supra note 7, at 14. The arguments that won cases concerning sexual harassment and sex discrimination under civil rights law "were based on the plaintiffs' lives as women." Id. at 15.
reform the law to impose a tax on the variation, or shift the incidence of tax to different activities. The cycle of amendment is a cycle of problems, solutions, and new problems. A change in the Code, for instance, is difficult to explain in a written text because it has diverse ramifications. A change in one section may affect other sections. The effect may be obvious and direct, or it may be obscure and indirect, intended or not.

A change to the Code temporarily disturbs the balance accommodated by the entrenched law. The effect is much like the continuous repositioning of balls in a pool game. One ball propels another ball, which affects the configuration of the balls on the table and which, in turn, affects the strategy of both the player and his opponent. A single change in the tax law can cause disturbances in many other areas and can impede the understanding of any given topic of taxation.

Even if one could master the technical knowledge, this achievement alone would not carry with it a full understanding of how the law works. Randy Barnett denominates "the problems of knowledge, of interest, and of power" as the motive forces behind laws. However, the interplay of knowledge, interest, and power is not apparent from the casebook problems drawn from appellate cases,


135. It seems that as soon as one learns the solution in the Code, one learns that the solution creates another problem. Statements constantly must be revised. To state an opinion safely, one learns to speak in parentheticals instead of clear statements. Thus, one must plan business transactions on the assumption that the tax law will not penalize a particular action in the future. For example, the tax deduction on interest charges was limited severely in 1986. I.R.C. § 163(h) (1988) (eliminating deduction for consumer interest). This change hurt many debtors. In response to this change, law firms tried to protect their clients by influencing transition rules to exempt a particular transaction from the effect of the new law. For a discussion of how tax exemptions often cater to a particular person, see supra note 69.

136. Barnett, supra note 132, at 64.

137. The student is told to solve a hypothetical problem by reading the words of the statute without any real comprehension of how it works. At this stage, solving the tax problem is like solving a puzzle. The solution of the puzzle may bring the student satisfaction. Learning how to solve tax puzzles, however, is not learning to integrate
the Code, and the regulations. The interplay of knowledge, self-interest, and power in the individual player is hidden in the history of the text. In the real world—which is not limited, constricted, or contorted by the rules of evidence—the concepts of self-interest and power are inseparable from technical knowledge. Nonetheless, traditional texts exclude self-interest and power at the onset of the acquisition of knowledge. This omission leads to difficulty in pairing theory with its application. Instead, the focus is on technical knowledge itself.

The abstract terminology of the Code aims at mathematical precision rather than human truth. The fact that two and two are four, or that three and one also are four, will not explain who selected those elements or why he did so. Learning taxation through the examination of technical knowledge explains how, and perhaps when, but not who, what, or where.

The focus on technical knowledge, to the exclusion of power and self-interest, results in a scattered view of taxation where each principle forms a discrete concept. Moreover, because self-interest and power are not part of the initial study of taxation, policy and technical knowledge become

the issues of technical knowledge, interest, and power. The law student, like Grover from Sesame Street, learns to count six apples but cannot count oranges. The broad tax concepts of self-interest and power get lost in the details of the statute.

138. In a court, one is bound by the rules of evidence which do not permit the self-interest and the power of someone other than the plaintiff or the defendant as evidence. In addition, information which is dramatic may be kept out of a trial because it is prejudicial and inflammatory, or sometimes because the evidence would surprise the other side. See FED. R. EVID. 403.

139. Barnett, supra note 132, at 65.

140. For example, a seemingly neutral question is whether the taxpayer has income or a tax liability. Numerous commentators have pointed out, however, that the beneficiary of a particular tax rule generally is not identified in terms of self-interest and power (nor by age, religion, social class, sex, or marital status). See, e.g., Babette Barton, Economic Fables/ Tax Related Foibles, 45 TAX L. REV. 471 (1991); Richard C.E. Beck, The Innocent Spouse Problem: Joint and Several Liability for Income Taxes Should Be Repealed, 43 VAND. L. REV. 317 (1990) (stating that both earner and nonearner spouses are liable for the tax owed on a joint return); Beverly I. Moran, One Tax Piece of the Savings and Loan Crisis: Can the Federal Home Loan Bank Board Use the Internal Revenue Code to Bail Out the Ailing Savings and Loan Industry?, 22 U. TOL. L. REV. 351 (1991); Toni Robinson & Mary Moers Wenig, Marry in Haste, Repent at Tax Time: Marital Status as a Tax Determinant, 8 VA. TAX REV. 773 (1989) (reviewing the effect of marital status on tax liability); Camilla E. Watson, Broken Promises Revisited: The Window of Vulnerability for Surviving Spouses Under ERISA, 76 IOWA L. REV. 431 (1991) (discussing the discriminatory effect on gender of facially neutral marriage proposals).
disengaged. The study of policy is a separate block of knowledge in the continuum of study. Because of the time it takes to read the texts of statutes and commentary, the technical mastery of the tax law and its economic or social policy become artificially separated blocks of knowledge.

The value of visual images as educational tools, whether simple drawings and props, or the multiple images and sounds composing a video, is established clearly. Pictures predate written text in education, even the Socratic style accommodates vivid images and figures.

Video tapes can be valuable, but not necessarily neutral, educational tools. Video combines the elements of sound and story with disparate elements of visual art—color, light,

141. A growing body of empirical evidence supports the use of pictures for teaching at higher levels of education. "The two major media for communicating scientific information to students are words and pictures. In spite of the traditional bias toward verbal over visual forms of instruction, a growing research base suggests that text illustrations can have important effects on student learning." Richard E. Mayer & Joan K. Gallini, When Is an Illustration Worth Ten Thousand Words?, 82 J. EDUC. PSYCHOL. 715, 715 (1990); see also William H. Kenety, Observations on Teaching Trial Practice, 41 J. LEGAL EDUC. 263, 267 (1991) ("I teach trial practice students to use visual aids as much as possible.").

142. For example, young children learn to read, that is, follow sequences, through picture books.

143. PLATO, supra note 127, at 168–70.


145. Colors help to communicate the basic knowledge of human experience. RUDOLF ARNHEIM, The Rationalization of Color, in NEW ESSAYS ON THE PSYCHOLOGY OF ART, supra note 16, at 205, 212. The pattern of colors in a picture or a field of vision shows relationships: "the ways in which the things of the world belong together and stay apart, their ways of building, combining and separating, of need and spurning one another." Id. at 211–12. Aronheim refers to the untitled 1832 sketch of a triangle made by the artist Eugene Delacroix wherein the three primary colors (red, yellow, and blue) face the three secondary colors (orange, green, and purple). The colors seem to reach out toward each other. Id. In Titian's painting, Diana in Her Bath, the two principle figures are linked across a large space by the use of the color red. Id. at 209. A totally different feeling was expressed by Mondrian's use of color. In Mondrian's paintings, the primary palette "express[es] total independence, total distinction, and, through the lack of relation, also a total absence of dynamics; he reserve[s] the dynamics of relation to the interplay of his shapes." Id. at 209–10; see PIET MONDRIAN, BROADWAY BOOGIE-WOOGIE (painting 1942–43) (depicting yellow, red, and blue squares and rectangles on a white background).

Color is capricious, changing in moving from daylight to tungsten light, fading, and depending significantly on the color next to it. ARNHEIM, supra, at 205–07 (discussing the unreliability of color). As Aronheim notes:

In a painting by Matisse the deep purple of a robe may owe much of its saturated redness to a green wall or skirt bordering on it, whereas in another area of the painting the same robe loses much of its redness to a pink pillow or even looks
sculpture, architecture, and movement. Communication may occur without text or simultaneously with the text. However, the camera is not neutral and causes distortion in two principal ways. First, one sees only where the camera points. Even if one questions the location, one cannot... quite blush in response to a bright yellow corner. Depending on what local association one is looking at, one sees a different color.

Id. at 208; see also JOSEF ALBERS, INTERACTION OF COLOR 76–77 (Yale Univ. rev. pocket ed. 1975) (explaining that the identical shade of red next to white and next to black will appear dissimilar to the human eye).

At the primary level, certain colors have “fixed meanings” dictated by culture. ARNHEIM, supra, at 209; see also MANLIO BRUSATIN, A HISTORY OF COLORS 44–45 (Robert H. Hopcke & Paul Schwartz trans., 1991) (stating that blue is a symbol of the promised kingdom to Christians and that green is a sign of the new community of believers). Goethe believed that “[s]ingle colors affect us, as it were, pathologically, carrying us away to particular sentiments.” ARNHEIM, supra, at 210 (quoting Johann Wolfgang von Goethe, Der Farbenlehre didaktischer Teil). Colors have strong emotional impact.

The nature of color itself, however, still eludes science. Based on his experiment of a prism breaking white light into rays of colors ranging the spectrum, Newton theorized “that the colors corresponded to frequencies... in proportion to the speed of the vibrations.” GLEICK, supra note 14, at 164. To a modern physicist, red is “light radiating in waves between 620 to 800 billionths of a meter long.” Id.

Although novelists have used verbal references to colors, the references do not communicate color in a way comparable to moving visual technicolor images. In a novel by Toni Morrison, the character Baby Suggs, hovering between life and death, “used the little energy left her for pondering color. Bring a little lavender in, if you got any. Pink, if you don’t. And Sethe would oblige her with anything from fabric to her own tongue.” Robin West, Communities, Texts, and Law: Reflections on the Law and Literature Movement, 1 YALE J.L. & HUMAN. 129, 143 (1988) (quoting TONI MORRISON, BELOVED 3–4 (1987)). Toni Morrison uses the tongue to allow the reader to infer the kindness and ingenuity of a character. The tongue does not signify color traits, but character traits.

Color has different functions in print and in pictures. In the movie Batman Returns, we see Cat Woman lick Batman. BATMAN RETURNS (Warner Brothers 1992). In Beloved, however, the image of color is disembodied; although we may recall the shape and shade of the tongue, we do not imagine its surroundings and hence its intensity. Although the color pink signifies the tongue and its primitive role as a sensory organ, the pink tongue is also what is signified. It appears muted in contrast to Cat Woman’s blood red lipstick and to the black costumes of the principal characters. The identical monochromatic color of the costume shows the connection of the characters. Even though both the movie and the novel are narratives, the movie director cannot avoid the literal significance of color.

146. See Betsy Sharkey, Anton Furst: Lost in the Dream Factory, N.Y. TIMES, Feb. 16, 1992, § 2, at 1, 18 (quoting a description of the film designer’s belief that film is multidimensional).

147. The evidentiary aspects related to using video at a trial are beyond the scope of this Article. Videotapes, however, are widely accepted as evidence. See People v. Fondal, 546 N.Y.S.2d 26 (App. Div.) (allowing the use of a videotape of defendants shoplifting), appeal denied, 75 N.Y.2d 770 (1989). For a general discussion of the evidentiary rules applicable to visual evidence, see 3 SCOTT, supra note 11, §§ 1294–1333.
question the viewpoint in a larger sense because the component aspects of video—lighting, sound, focus, and scale—are all unconscious cues. Second, dramatic presentation causes distortion. At best, such distortion can represent truth in an abstract or poetic sense, rather than in a literal sense—what some call the "higher truth." Some commentators believe that this type of distortion is inherently necessary to keep the viewer’s attention. “Absent an extreme situation, the holder in due course doctrine is just not going to be great entertainment, not even in L.A.”

148. See László Moholy-Nagy, The New Vision (photograph 1925–26) (depicting the subject’s outstretched hand close to the camera, which appears much larger than her head, which is further from the camera); see also Arnheim, supra note 44, at 85 (stating that a spectator cannot use past experience to judge what he sees).


150. Kandinsky, supra note 80, at 9 (arguing that the internal truth can be expressed only in art); Isidore Silver, Libel, the “Higher Truths” of Art, and the First Amendment, 126 U. PA. L. REV. 1065, 1066 (1978); see also Roger & Me (Warner Brothers 1989) (presenting the closing of a General Motors plant in Flint, Michigan in documentary format and taking some poetic license in depicting the chronology of events).

What is truth depends on one’s vision of the world and of the legal system. See generally Anthony Chase, An Obscure Scandal of Consciousness, 1 YALE J.L. & HUMAN. 105, 121 (1988) (noting that truth should not be confused with realism); Robin West, Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory, 60 N.Y.U. L. REV. 145 (1985) (arguing that the four schools of jurisprudence correspond to “core myths” of literature). West describes the connection between romance and natural law, irony and legal positivism, comedy and liberalism, tragedy and statism in a comparison of legal theory with literature:

The narrative visions that recur in legal theory lead us to focus upon ourselves and the possibilities we envision for ourselves in a way that strict empiricism does not allow. The narrative vision in legal theory helps us understand our own internal experience of the real world and our idealistic hopes for it. At its best, the descriptive component of the narrative in legal theory can lead us to reexamine our initial experiences of authority, to reassess our early reactions to relationships based on reason and power, and to formulate a wiser, more self-reflective vision of the future moral possibilities of the law.

Id. at 210; cf. Chase, supra, at 106 (stating that the four voices of legal writing include the professional, critical, scholarly, and human). The distinction between this Article and others dealing with the narrative is that the subject here is not a literary narrative, but a visual communication. In his article, Chase treats movies as a form of popular culture that may be criticized in accordance with literary theories.

151. Stephen Gillers, Taking L.A. Law More Seriously, 98 YALE L.J. 1607, 1608 (1989) (arguing that distortion is necessary to motivate the public to consider moral-legal issues). However, one should not underestimate the sex appeal of human greed, or the potential to use the law itself as a character in a video drama. Id. at 1611. Commercial television programs such as L.A. Law use the crafts of acting and storytelling to entertain. Id. at 1619. The same crafts should be used to teach law.
The video's potential for distortion also is its source of strength for teaching. The narrow, flat field of focus of the video recorder enhances learning in several ways: by demonstrating step-by-step comprehension of legal concepts; by distinguishing an essential tax principle from its myriad applications; and by giving the viewer a common experience to replace the lost consensus of a prior generation. In a multicultural society, video creates a common experience, a shared reference point for a diverse group. Perhaps, because the pulsating dots that create the picture on a television monitor replicate the blinking pattern of human vision, one remembers television as the recollection of an event witnessed in person.

A video that presents dramatized hypotheticals offers an alternative to textbook learning, and not merely because it presents information in a memorable—because interrelated—context. Visual thinking differs from the dramatization of

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152. Collier, supra note 34, at 201 (quoting Edward White as commenting that the length of law review articles "may be due in part to a collapse of consensus"); see also Gardner, supra note 110, at 239 (arguing that television is a "self-contained experience" dominated by the visual component).

153. Furthermore, video and computer exercises permit students to learn at an individual pace. Surprisingly, there are few scientific studies of how normal children and adults learn from watching television. Most studies, however, show that people have better short-term memory of events learned from television than from other means of communication. The studies of long-term memory are inconsistent. See, e.g., W. James Potter, Perceived Reality in Television Effects Research, 32 J. BROADCASTING & ELECTRONIC MEDIA 23, 36 (1988) (criticizing assumptions used in research, including an assumption of a linear relationship among variables in mass-media research); John Stauffer et al., Recall and Learning from Broadcast News: Is Print Better?, 25 J. BROADCASTING 253 (1981) (noting that a college student's recall from television and print are similar but significantly higher than from audio sources). See generally Marsha Kinder, Playing with Power in Movies, Television and Video Games 9-10, 101-08 (1991) (analyzing the effects on the players of adventure stories and games that use inherently masculine symbols of power such as wands).

154. See William C. Wees, Light Moving in Time: Studies in the Visual Aesthetics of Avant-Garde Film 86-88 (1992). Most of us are not aware of the act of "seeing as a physiological, nerve-centered event before it becomes a conscious recognition of labeled and familiar objects and events." Id. at 85. The process of seeing made visible by Stan Brakhage in films such as Sirius Remembered apparently includes periods of blurred retinal images and darkness which are caused by each blink and generally are ignored "and rendered invisible in the conventional visual world." Id. at 86.

155. William W. Patton, Opening Students' Eyes: Visual Learning Theory in the Socratic Classroom, 15 LAW & PSYCHOL. REV. 1, 1-18 (1991) (discussing innovations in teaching torts to first-year students). The first innovation Patton suggests is the use of diagrams—"geometric organizers, as visual mnemonic devices"—in order to help students organize their knowledge. Id. at 4. Such organizers are useful because they combat the common failure of students to achieve "an organized, large-scale conceptual
a legal issue or "the facts" in a brief. The visualization of tax concepts develops ideas in the filmic tradition of the silent era of motion pictures, rather than in a dramatic tradition developed from Homer and Shakespeare. The visualization of ideas forces one to look for an essential feature of the subject and to observe how the subject relates to the general flow of transactions which are significant for tax purposes.

Let us start with "basis," an elemental concept in individual taxation. Understanding the term is necessary to further learning of fundamental tax principles, including, for example, how property transfers are taxed. However, basis is, in essence, merely a tool for determining gain or loss. Like the ideal concept of twoness, basis has no real, tangible existence. Thus, it also must be defined in terms of and analytical model.

Id. at 3. The second is to pose discussion of a legal concept (Patton uses the intentional infliction of emotional distress) in terms of a board game. Id. at 7-10.

In general, dramatic works, such as Shakespeare's, are 80% dialogue and 20% action; film is the opposite. Television is divided equally between action and words, with the exception of soap opera, which is 80% dialogue. Interview with Lynda Myles, playwright and former script writer for Santa Barbara, in New York, N.Y. (July 1, 1992). Arnheim states that, although unnoticed by most audiences, stage art is unnatural and stylized "because the actors never stop talking." ARNHEIM, supra note 44, at 76. On the other hand, film portrays abstract ideas in terms of concrete images rather than words and in this respect appears more natural. Id. at 122. For example, a pistol shot may become visible in the rapid "rising of a flock of birds." Id. at 93.

Elegantly and with perfect table manners he carves his unusual dish—he lifts off the upper so that the sole with the nails sticking up in it is left like the backbone of a fish from which the meat has been removed; he carefully sucks the nails as if they were chicken bones, and winds the laces round the fork like spaghetti.

ARNHEIM, supra note 44, at 122. The essential shape of the boot and its representation of poverty are clear. The scene is comic because it takes on the viewpoint of the wealthy. Id. at 122-23.

For a picture of tax concepts, see JOSEPH M. DODGE, THE LOGIC OF TAX 282 (1989) (showing the burden of excise taxes in economic theory graphically). Visualization is more common in other areas of law such as evidence. See Neil B. Cohen, Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge, 60 N.Y.U. L. REV. 385 (1985) (applying graphic presentation of laws of probability to evidence); Richard D. Friedman, Route Analysis of Credibility and Hearsay, 96 YALE L.J. 667 (1987) (using an algebraic-graphic technique to analyze issues of credibility and hearsay).

See generally DOUGLAS A. KAHN, FEDERAL INCOME TAX 14-15 (1990); Glen A. Kohl, The Identification Theory of Basis, 40 TAX L. REV. 623 (1985) (stating that basis identifies the portion of a taxpayer's wealth that will be exempt from taxation in the future).
its function. The basis is always a number to be subtracted to determine gain. It is the maximum amount a taxpayer can receive without recognizing gain.\textsuperscript{160} To paraphrase one commentator, "to fully understand the function" of basis, one must understand the situations or problems in which it arises; understanding these problems will lead to an understanding of the function of basis.\textsuperscript{161}

There are several distinct methods of determining basis.\textsuperscript{162} Therefore, in order to illustrate the function of basis and how basis must be defined, one must introduce a second, ancillary concept: an individual variety of basis, such as cost basis or gift basis. In order to learn the concept of basis, one must do three things at once: (1) comprehend its essential, unchanging quality as a number that is subtracted from the amount realized in order to calculate gain or loss for tax purposes (that is, learn its function); (2) understand that its particular numerical value in a given problem is determined in a variety of ways, only one of which is the correct basis to apply in the specific context of the problem (that is, learn several definitions); and (3) although it contradicts all sense of logic, accept that the economic or financial stakes of the real world are not relevant to the process (that is, learn that tax has its own internal logic\textsuperscript{163}).

Thus, learning the tax concept of basis through conventional linear or textual presentation involves not only isolating tax theory from prior life experience, but also learning several component parts of the concept as separate blocks of knowledge and then reintegrating these components into an understanding of basis. The process is like trying to discover the taste of cinnamon toast by ingesting butter first, then cinnamon, then toast, and finally sugar. Of course, one will not find the combined taste by examining one layer at a time. Trying to learn basis that way is almost as absurd. But that is the way that basis is taught. The conventional teaching process generally includes readings in the statutes,

\textsuperscript{160} See KAHN, \textit{supra} note 159, at 14.
\textsuperscript{161} Barnett, \textit{supra} note 132, at 63–64.
\textsuperscript{162} KAHN, \textit{supra} note 159, at 15.
\textsuperscript{163} DODGE, \textit{supra} note 158, at 20 (stating that "the internal logic of tax is 'basis'").
regulations, cases, and commentary. How one can use basis to one's advantage and how the Treasury exacts a price for enjoying an immediate advantage from basis are not even part of this process.

The use of a narrative permits one to link basis, by analogy, to human relationships: seller and buyer or donor and donee. Thus, the narrative illustrates the determination of basis by highlighting the different relationships between taxpayers, rather than the particular relationships between the taxpayer and his property. The narrative also allows one to compare tax logic, in which basis is handed from one taxpayer to another, with the economic consequences of the transfer of property.

In addition, the narrative allows the comparison of economic consequences with tax consequences which flow from the applicable basis. For example, suppose that the transferee acquires property by paying the transferor twenty dollars. In an economic sense, one would infer that the cost of the property, twenty dollars, will become the transferee's basis. To use the Kahn definition, twenty dollars is the maximum for which the transferee can sell the property without a profit or, to use tax terminology, without realizing a gain. However, if the buyer and seller are married, this relationship will override the economic consequences of the transaction. The applicable basis is not the cost basis, but a basis generated by a section of the Code applicable to transfers between spouses or former spouses in connection

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164. For a list of recent commentary on basis, see GERSHAM GOLDSTEIN, INDEX TO FEDERAL TAX ARTICLES (Isa Lang & Michael Lang eds., Spring Cumulative Supp. 1992) (indexing 59 articles on basis published between October 1987 and the spring of 1992).

165. Cf. Joseph M. Dodge, Transfers with Retained Interests and Powers, 50 TAX MGMT. A79–81 (5th ed. 1992) (arguing that a completed gift which is not included in the transferor's gross estate will avoid increasing the tax base).

166. See West, supra note 150, at 146. Legal theory relies heavily on the narrative form. West uses the legal theories of Freud to support the views of legal liberalists: that law must be autonomous from politics and that law has a moral role in the history of human civilization. West analyzes Totem and Taboo, Freud's historical account of the origin of law, and Civilization and Its Discontents, in which Freud applied his rule of law to the origin of law and public morality. See Robin West, Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law, 134 U. PA. L. REV. 817 (1986).

167. The "cost" of a gift will be paid in the future. The recipient knows that she owes a debt to the donor. However, a gift basis does carry a hidden, but nevertheless present, obligation.

168. See Kahn, supra note 159, at 14.
with a divorce. In the latter case, the basis of the property becomes not what the buyer paid the seller, but what the basis of the seller was at the time of the transfer. In turn, that basis is determined by the relationship of the seller-spouse with the former owner of the property. The amount of the basis will be determined under the appropriate formula based on the seller's relationship.

Thus, the buyer's basis cannot be determined by what she paid. The buyer is treated as a transferee-spouse. Hence, she has a status inconsistent with the status of one who acquires property by paying its fair market value in cash. In effect, the transferee's marital status makes the cash payment irrelevant.

When, as in the prior example, the tax laws' consequences challenge both one's reasoning and one's intuition, the narrative serves an additional function. The juxtaposition of the statute and its application are possible in print. However, a video is able to add the element of criticism to the explanatory material regarding the statute. The absurdity and the surprise of the cash paying transferee can be fused with the former elements on one screen. Thus, because one can acknowledge the surprise of the transferee while one learns to apply the basis rule for transfers between spouses, the rule, and the confirmation that its application produces strange tax consequences, can be processed simultaneously. The viewer's natural tendency to try to make sense of the statute will be suppressed.

The memory of the narrative overcomes the impulse to reject the correct but illogical tax basis rule, that is, that the transferee's payment of cash did not affect his basis in the property. Thus, the statute, its application, and an evaluation of the statute—a surprising result—are both learned and retrieved from memory as one complete thought.

In contrast, the use of a linear format in which the principle and evaluation of the principle are presented serially requires several processes to categorize the transaction.

170. The use of narrative can include humor. This, however, is risky. See Jordan, supra note 126, at 700. More than artistic failure may follow if the joke is funny enough to make good newspaper copy, but is not politically correct. See id. at 702–03. Failure also may occur if the joke is published in Kansas. See id. at 724–25 (noting that the Supreme Court of Kansas fired a clerk who included a humorous poem in an official report).
apply the law, and disclaim the economic selection of a cost basis for the transferee of the property. With a video presentation, the inquiry can be focused artificially on the relationship between two spouses and their relative power. It is clear that the spouse who paid cash and could not use the cost basis has less power than the spouse who took the cash and did not have income. In short, it is the memory of the emotional and visual content which heightens interest in a tax concept such as basis. The narrative element of a video reinforces the technical principle that the relationship between the transferor and transferee determines the transferee's basis in the property.

The use of the narrative in video can establish the need for a particular tax principle before the viewer learns the principle. The narrative enhances the viewer's concentration on the material that can be boring to the unsophisticated (or even the sophisticated) reader. Thus, one need not attempt to acquire the technical language before the clear need to use that language is established.

For example, if a character makes a mistake in tax planning, the character, and not the viewer, suffers the bad tax consequences. The viewer is not embarrassed by not knowing what will happen because someone else will slip on the banana peel. In addition, a video presents many examples in a short time. Eventually, the viewer will anticipate the bad tax consequences and feel confident about learning tax. Hence, the eventual interpretation of the text will be a positive, rather than a negative, experience.

With video technology, one need not isolate the various elements of a tax concept. By visually demonstrating how a kind of chameleon principle, such as basis, works in different situations, video prompts one to discover the workings of the concept as a whole. For example, a concrete image can clarify that basis always is used for the same function.

171. The purely rational presentation of law does not take into account the "subtle and perennial tensions among conscious, preconscious, and unconscious processes." GARDNER, supra note 110, at 14.

172. First, we learn that the cookie tastes good. Then, we learn its name. "The child explores the world first through action, then through imagery, and finally through language." RUDOLF ARNHEIM, A PLEA FOR VISUAL THINKING, in NEW ESSAYS ON THE PSYCHOLOGY OF ART, supra note 16, at 136. One learns language by combining tone with symbolic meaning and concrete application. To learn the law, one must learn a new language before one learns how to use that language in a context.
such as a red block.\textsuperscript{173} The basis\textsuperscript{174} then may appear as a larger rectangle when it represents a cost basis and a smaller rectangle when it represents a gift basis. However, whether large or small, the basis always is subtracted to determine gain. The video can show simultaneously that the concept of basis always performs the same function in the same way even though the performance appears in a number of different contexts in which the size of the basis is greater or smaller depending on its context.

Thus, one sees basis as a recognizable concrete object—a red rectangle—and at the same time, one sees that it always performs the same function. The color red can be incorporated in supplementary graphics in which simple arithmetic examples illustrate the application of the basis principle. In addition, the ordering of the process can be illustrated by representing visually the chronology of events in determining the calculation of gain or loss for tax purposes. That is, although the formula for determining gain is subtracting the basis from the amount realized (the sale price of property), the amount of one's basis must be determined by reference to a prior transaction. This complicated process can be explained in seconds through moving pictures.

Through video technology, the basis is always a symbolic, but nevertheless concrete, picture of the term.\textsuperscript{175} The changes in the amount of the basis, such as the high or low basis, do not obstruct the fact that gain is always determined by subtracting the basis from the amount realized. The concept is inescapable. The fact that the particular basis being used for this function is a cost basis, a gift basis, or some other form of basis is relevant to the context of the example. The function of basis is the focus of the example, but the peculiar species of basis is a part of the background

\textsuperscript{173} \textsc{Nobody Gets Married for the First Time Anymore, Part I: How Divorce Became the Last Tax Shelter in America} (Thirsty Productions 1990) [hereinafter \textsc{Nobody Gets Married for the First Time Anymore}]. There, basis is portrayed as a red three-dimensional box, and an animated red rectangle, on both of which the word “basis” appears. The word is used in addition to a specific shape and color both for additional reinforcement of the symbol and to teach one who cannot see red.

\textsuperscript{174} Here, an arbitrary graphic, a rectangle, depicts an abstract concept. For a discussion of the visualization of processes and broad concepts, see R.E. Wileman, \textit{Exercises in Visual Thinking} 47–49, 91, 101 (1980).

\textsuperscript{175} Cf. \textsc{Stuart Davis, Rue Lipp} (painting 1928) (depicting scale glass objects, opaque to the background and translucent within).
or context of the problem and, hence, appropriately treated in a secondary way.

Through the use of video, one is able to fuse the concrete and symbolic images and thereby to manipulate the function of basis in a variety of situations without losing sight of the function of basis. Basis exists in order to determine gain or loss for tax purposes. Thus, through the use of multisensory presentation that is possible with video, the theory of basis is shown immediately. Furthermore, the symbolic and the concrete aspect of basis is repeated continuously with each peculiar application of the concept.

In giving a physical dimension to a tax concept, video technology also shows that basis is handed from one character (the transferor) to another (the transferee). One sees, in general, that the basis is acquired through the taxpayer's relationship with the former owner of the property and not the taxpayer's relationship with the property itself. Since basis—an object—is acquired from a relationship with another taxpayer, the idea that basis can change because of the owner's relationship with the other taxpayer is easier to accept. Literature or acculturation teaches that property received from one's favorite aunt or from one's spouse will have a distinct cost to the donee, while property purchased for oneself has a different cost. It is easier to comprehend that the basis of property differs according to the relationship between the transferor and the transferee. Thus, video provides a context and history simultaneously with the introduction of a tax principle.

Although most of formal education is concerned with the

176. The act of seeing describes several layers of comprehension.

Seeing is an act, according to Magritte, in the course of which it can happen that a subject escapes our attention. "A thing which is present can be invisible, hidden by what it shows." For example, "it is possible to see someone take off his hat in salute without thinking of politeness."

GABLIK, supra note 50, at 12.

177. Future technology may allow students to become a character in an interactive computer simulation of a legal problem and affect the outcome of the video. See Andrew Pollack, Where Electronics and Art Converge, N.Y. TIMES, Sept. 15, 1991, at F1. The technology generally is called "virtual reality" or VR, but "[w]onks, hackers, computer scientists, cognitive psychologists, graphic artists and mirror-worldly philosophers are happily engaged in [a] linguistic melee [to name the technology]." William Safire, On Language: Virtual Reality, N.Y. TIMES, Sept. 13, 1992, § 6 (Magazine), at 18.
written and spoken word, reality is what we see—"we see our world." But we do not see unambiguously. Hence, strong visual symbols such as a flag send multiple messages. Movement

178. WILEMAN, supra note 174, at 16 ("Despite the fact that we see our world more than we speak or read of it, we are rarely trained in the use of visualization, i.e., communicating messages visually."). Visual forms of communication lead to "complex relationships between words (verbal images) and pictures (visual images). Part of this complexity stems from the fact that there are many types of verbal/visual image relationships." Id. at 33. Picture symbols include models, sculptures, photographs, and drawings. Graphic symbols include the concrete silhouettes, or stylized "concept related graphic" and the arbitrary graphic symbol, such as using a square to represent a corporation. Verbal symbols include a definition or description or a single word such as a noun. The representation travels from the concrete to the abstract. Id. at 23, 32–33.

179. Id. at 16. A picture, a chart, a geometric symbol, and a highlighted portion of a verbal formula all are visual concepts. In contrast, text flashed on the screen is not a visual concept.

The power of visual images can be inferred from the imprisonment and murder of artists by totalitarian governments. See Michael Kimmelman, Visions of Truth, Smuggled Out of Hell, N.Y. TIMES, June 30, 1991, at H2–28 (reviewing works by imprisoned artists who were forced to paint Nazi propaganda depicting a concentration camp as a model Jewish ghetto and who secretly painted the horror of life there). Karel Fleischmann painted a "movie house as a hospital in which the empty numbered seats are like tombstones identifying the dead by the numbers that the Nazis made them wear." Id. at 27. The paintings were hidden, some smuggled out to Switzerland. When the Nazis found out about their work, two artists were "immediately tortured and then deported to Auschwitz, where they died. Both captor and captive understood equally how art could mold the world's perception of reality." Id.

180. See Texas v. Johnson, 491 U.S. 397 (1989). Johnson burned a flag in protest against the policies of the Reagan administration at the Republican National Convention in Dallas during 1984 and was convicted of flag desecration. Id. at 399–400. The Texas statute recognized the flag as a "venerated object." Id. at 400. Justice Brennan, writing for the Court, held that on its face the statute violated freedom of speech protected by the First Amendment: there was no way to separate the act of burning the flag from the message that it intended to convey. Id. at 415–16. The bedrock principle of the First Amendment "is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Id. at 414.

In his concurring opinion, Justice Kennedy wrote that "the flag holds a lonely place of honor[;] . . . the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit." Id. at 421 (Kennedy, J., concurring). The flag was a symbol of the right to express political beliefs, the very symbol that protects the flag burner who degrades it. In his dissent, Justice Rehnquist stated that he would have upheld the statute because of the unique and historical significance of the flag as a symbol of national unity:

Millions and millions of Americans regard [the flag] with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag.
enhances the linguistic quality of a visual or verbal image.\textsuperscript{181} For example, the action at "all fall down" in the nursery rhyme \textit{Ring Around the Rosy} is a combination of rhyme and movement which indicates that the subject of the fall is people. But without movement, the phrase alone could refer to other things, like blocks, waterfalls, pain, or breaking. If one blew over a house of cards, it would have a different, banal meaning.\textsuperscript{182} It would not mean death because the

\textit{Id.} at 429 (Rehnquist, C.J., dissenting). Justice Stevens equated the act not with speech but with spray painting public property. Hence, the flag cannot be one's own property to destroy. \textit{Id.} at 437 (Stevens, J., dissenting). The dissenting position that the flag burning was not speech was not accepted. For Rehnquist, flag burning is not the "picture . . . worth a thousand words" but a "roar," and tone is not communication protected by the First Amendment. \textit{Id.} at 432 (Rehnquist, C.J., dissenting). For the rest of the Court, however, it appears that the message or the intent to communicate an idea is what makes an utterance an act of speech.

181. Kandinsky saw in dance the possibility of abstract musical, pictorial, and physical movement. \textit{KANDINSKY, supra} note 80, at 51; \textit{see also} Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (holding that nude dancing is a form of "expressive conduct" which is protected by the First Amendment). At issue in \textit{Glen Theatre} was an Indiana statute that prohibited nude dancing and required erotic dancers to wear pasties and G-strings. The Court held that the statute was a permissible burden on the desired activity because the restriction imposed was unrelated to the suppression of free expression. \textit{Id.} at 2462. The restriction sought to prevent public nudity, not the erotic message conveyed by the dancers. \textit{Id.} at 2463. In a concurring opinion, Justice Souter also agreed that "performance dancing is inherently expressive." \textit{Id.} at 2468 (Souter, J., concurring). The dissent, however, argued that the nudity element of the dance itself was an expressive component of the dance and could not be categorized as conduct separate from the expression: "[N]ude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators . . . [b]ut generating thoughts, ideas, and emotions is the essence of communication." \textit{Id.} at 2474 (White, J., dissenting). \textit{Compare} \textit{HENRI MATISSE, DANCE} (painting 1909) (depicting nonrepresentational nude dancers in circle) \textit{with DANCE II} (painting 1909) (depicting the same subject, but in a darker color and with details of muscle indicating older dancers and strain).

182. A visual image, like a joke, should need no explanation. \textit{See generally} \textit{NIGEL HOLMES, DESIGNER'S GUIDE TO CREATING CHARTS \\& DIAGRAMS} 9 (1984) (arguing that a chart "can interpret the figures as well as present them"); Patton, \textit{supra} note 11, at 29 ("[T]here are between 900 billion and two trillion statistical graphics printed annually worldwide. 'Clutter and confusion are failures of design, not attributes of information.'") (quoting Edward R. Tufte, Political Science Professor at Yale University)).

An animated video sequence depicts loan proceeds as dollar bills and the obligation to repay as a balloon labeled "loan" to demonstrate the principle that the forgiveness of a loan results in gross income for the debtor. Forgiveness of the loan is inferred by the disappearance or explosion of the object representing the loan (the balloon labeled "loan"). Since the money remains, one sees that the debtor has income at the point that the obligation to repay disappears. \textit{See NOBODY GETS MARRIED FOR THE FIRST TIME ANYMORE, supra} note 173 (noting how divorce changes the principle of \textit{Crane v. Commissioner}, 331 U.S. 1 (1947)). \textit{Crane} held that the amount of debt to which transferred property is subject is included in the amount realized by the transferor. 331 U.S. at 14. The amount realized less basis (usually the cost of the property) determines the amount of gain which will be included in gross income.
reference to people is made in the gesture and the pause in the action. In addition, movement by itself carries a linguistic message. Unspoken communication was created as an art form by the work of dancers such as Martha Graham. Graham’s movements were the “invention of a new and codified dance language[,]… [p]owerful, dynamic, jagged and filled with tension.” In movement,

183. According to some scholars, the words “falling down” appear in modern English versions of the rhyme giving “would-be origin finders the opportunity to say that the rhyme dates back to the days of the Great Plague.” THE OXFORD DICTIONARY OF NURSERY RHYMES 365 (Iona & Peter Opie eds., 1951). A rosy rash was a symptom of the Great Plague and posies of herbs were carried to ward off the disease. “[S]neezing was a final fatal symptom, and ‘all fall down’ was exactly what happened.” Id. The English version uses the words “A-tishoo! A-tishoo!” (an English onomatopoeia for the sneeze sound) in place of the American “Ashes, Ashes.” Other English versions of the rhyme do not end with the words “all fall down,” and the Oxford editors prefer the happier versions. See id. at 364–65. It appears that the American version (likely a linguistic degeneration, akin to the process by which the British cry for the end of the game “hide and seek,” namely, “All ye, All ye, Urchins free,” became “All-e, all-e, Auction free”) is closer to the ancient roots of the rhyme than the more evolved English forms standardized in the late 19th century.

184. See Young v. New York City Transit Auth., 729 F. Supp. 341 (S.D.N.Y.) (holding that begging is graphic, informative, persuasive speech), rev’d, 903 F.2d 146 (2d Cir.) (holding that begging in the city subway system is not expressive speech protected by the First Amendment), cert. denied, 498 U.S. 984 (1990). Compare R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992), in which petitioner was accused of burning a cross in the yard of a black family. He was charged with violating an anti-hate ordinance, which prohibited anyone from placing on public or private property symbols, objects, graffiti, etc. that were intended to arouse anger in others on the basis of race, color, creed, religion, or gender. The Court held the ordinance was unconstitutional on its face because it was content-based; content-based regulations are presumptively invalid under the First Amendment. Id. at 2541. In Young, the ban against personal begging as opposed to eleemosynary solicitations in New York subways prompted a suit on behalf of the homeless which symbolized the relation between the destitute and the state, and raised the issue of whether begging is a protected form of political expression. Paul G. Chevigny, Begging and the First Amendment: Young v. New York City Transit Authority, 57 BROOK. L. REV. 525, 527 (1991). The Young plaintiff claimed that his speech was not political, but he did not claim that his speech was commercial. For an explanation of restrictions on commercial speech, see Board of Trustees v. Fox, 492 U.S. 469 (1989). In more recent cases, the Supreme Court has focused on whether the act of speech occurred in a public forum and not the issue of whether begging was a form of speech. See International Soc’y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2706 (1992) (holding that airports, unlike roads, are not traditional public fora and upholding a ban on solicitation); Lee v. International Soc’y for Krishna Consciousness, Inc., 112 S. Ct. 2709, 2710 (1992) (striking down a ban on distribution of literature at airports). But see id. at 2710 (Rehnquist, C.J., dissenting) (noting that travelers are annoyed equally by literature or begging).

language is physical, giving "visible substance to things felt," and at least within a culture, the mute communication is intuitive.

The act of seeing is essentially one of perceiving movement: essentially grabbing and clutching at moving images. For the brain, vision is a motor activity, "inextricably bound to the 'sense' of movement." Whether one believes, as Martha Graham did, that movement does not lie or, as others do, that television does not convey "experience, but a selected set of images that in their very partiality" distort and forever alter "the original event," television communicates through movement. For many, television at its best appears as reality, "a 'reality' so potent it cannot be denied" by the viewer. However, seeing is both the product of what is out there and the reaction of our brain's visual system. That is, our brain ignores "ambiguous" perceptions and focuses on the "socially

186. Id. The linguistic qualities of movement such as the art pioneered by Martha Graham communicate with the audience through a visceral rather than an intellectual response. Id.

187. Wees, supra note 154, at 86–87. Similar findings were made by the child psychologist Arnold Gesell. Id.

188. Id. at 87.

189. Id. In the courtroom, movement will revive the jury. See Joseph, supra note 11, § 9.03(1)(3). For example, charts which contain removable pieces which reveal previously hidden information, or magnetic boards where pieces move, are helpful for the jury. See id. app. K, at A-81 (depicting a magnetized diagram of an intersection with moveable cutout cars).


192. Pollack, supra note 177, at F1 (discussing projected environments).

193. Fox, supra note 191, at 7. Whether the quality of truth will be ascribed to an image will vary with the current popular view of the medium, the forum in which the object is presented (its context), and the viewer's expectation of the intent of the artist. Mark Roskill & David Carrier, Truth and Falsehood in Visual Images 115 (1983). According to Roskill and Carrier, the "truth" of a visual image may be realized in three different senses. First, as an icon, "embodying a certain quality or effect." Id. at 117; see also Rene Magritte, Fantomas (painting 1912). Second, as an index, "evidently securing that a happening or process took place." Roskill & Carrier, supra, at 117; see also photographs showing the American flag on the moon. Third, as a symbol, "summing up and showing forth certain social and political values." Roskill & Carrier, supra, at 117; see also Giorgio De Chirico, Song of Love (painting 1913) (depicting disparate images of dream symbolism which taken together represent love); Saint Augustine, Soliloquies 2.10(18) ("We should, instead, seek that truth which is not self-contradictory and two-faced so that it is true on one side, false on another."). Reprinted in 44 Fathers of the Church 1 (Thomas F. Gilligan trans., 1948) (n.d).

194. Wees, supra note 154, at 28.
shared perceptions" of the ordinary members of the culture. Television frames our view in that one looking through a lens focuses on what is conventionally important and ignores most of one's surroundings. Thus, the conventional view of an observer is magnified when the observation is made of an event on television.

Because its images move, television shows events in real time. However, the video image, like film, is actually a series of stills which, like a "flip book," are perceived as movement. The illusion of movement is created by our brain, not by our eyes. Thus, when as few as two photographs are placed together, it is natural to see a connection. In contrast, even if closely sequential photographs are viewed separately, our brain often does not connect the images.

This visual phenomenon worked for the defense at the trial of the police officers in the Rodney King video. At the trial, the freeze-frames, shown one at a time, became disconnected from one another and eliminated the physiological (as well as the logical) relationship that flows between the frames in a video. "[T]he fundamental biological reaction is that of reacting to happenings not that of contemplating objects." In effect, the defense inserted a still photograph into the center of a moving picture. Such a sudden discontinuity of timing causes the "impression of rigid standstill"—the absence of movement eliminated the quick changes of relative space between the figure of King and the group of

195. Id. at 69.

196. Max Wertheimer described experiments in "illusory movement," where he set up two lighted slots near one another in a dark room and pushed up each light one at a time before his subject. "If the distance and the exposure time were correctly chosen, the person had the overwhelming impression that there were not two separate slots lighting up one after the other and beside each other, but that one slot appeared on the left, ran over to the right and was there extinguished." ARNHEIM, supra note 44, at 88. The same unified impression, "stroboscopic fusion of objectively separate stimuli," happens in film. Id. This is the fundamental principle of the movie. Id. Film is the imperceptible montage of single frames. Id. The video image contains 30 frames (stills) per second. Each frame contains two fields. Hence, a second of video includes 60 images.

197. See CHRISTIAN METZ, FILM LANGUAGE 46 (Michael Taylor trans., 1974) ("Going from one image to two images, is to go from image to language.").

198. Metz notes that still photos are not narrative. "An isolated photograph can of course tell nothing!" Id. at 45-46.

199. ARNHEIM, supra note 44, at 135.

200. Id. at 101. The effect of inserting a still differs from an actor holding a pose. "[T]here is an astonishing difference between such voluntary cessation of motion and the absolute rigidity of a photograph . . . ." Id. at 102.
officers. The moving picture showed force; the still photos did not.

Similarly, playing the video in slow motion changed the element of force. The slower film decreased the acceleration of the baton and lessened its perceived speed. One senses force in the acceleration of speed—not in the decrease of speed. Slow motion changes the forceful blows to a wave of the hand.

Additionally, highlighting the figure of King alone changed the configuration formed by the group of police and King. The shape of the event changed both geometrically and psychologically. Furthermore, highlighting the figure of King exaggerated the grid-like perspective of the lens and the cold and manufactured look of the photographic process.

The Rodney King video became part of a genre—television shows in which the police are the heroes. Therefore, the video evidence, even if true or commonplace in reality, had the "enormous weight that must be raised by whoever wants to say" something for the first time on the screen. The "choice of film as means of expression, as a form of saying . . . automatically results" in a preference for certain subjects. In this context, the portrayal of the police as villains was inconsistent with the medium. The prosecution’s reliance on the video caused a specific difficulty with the genre previously established by television; therefore, the video evidence was not plausible.

Thus, changes in the tempo of the action and freezing the action changed perception. In the case of the King video, the perception altered significantly. Even minor alterations, however, could have had significant effect. Scientists have discovered that "[t]iny differences in input could quickly become overwhelming differences in output," an effect named "sensitive dependence on initial conditions"—what meteorologists sometimes call the Butterfly Effect. For example, "a butterfly stirring the air today in Peking can transform

201. See METZ, supra note 197, at 70 (discussing cowboys in black and white costumes).
202. Cf. id. at 70–71 (discussing the unstable but paradigmatic category of the cowboy movie).
203. Id. at 246; see JAMES MONACO, HOW TO READ A FILM 146 (rev. ed. 1981) (explaining the codes of the cinema).
204. METZ, supra note 197, at 235, 238–39, 244–46; see id. at 249–52 (noting the imperfect relationship between the truth and the "Plausible").
205. GLEICK, supra note 14, at 8.
storm systems next month in New York." There is less order in the universe of our law than meteorologists find in weather predictions. The outcome of the police brutality trial is a vivid example of how law has "strayed far from human intuition about the world." Since the 1960s, scientists have turned from the "reality that could be frozen motionless" to finding "the connection between motion and universal form," the flows that produce the shapes we see from instant to instant. The new science, called "chaos" uses computers and pictures to study motion, and to see things that "physicists had learned not to see." Classical scientists view the world as a collection of unrelated objects. "For practical handling we deal with the constituents of our world as 'things,' which are defined by their physical properties, i.e., their shape, size, color, texture, etc." Thus, we learn to ignore the movement of objects (the flow) and hence are not consciously aware "that objects are perceived as possessed by directed forces." In contrast to visual perception, tones are understood as activities, not objects. "[T]ones are always happenings in time." Whether music is perceived as embodying an emotion because of a

206. Id.
207. Id. at 6 (discussing the field of theoretical physics).
208. Id. at 196.
209. Id.
210. Id. at 197.
211. Id. at 4.
212. Id. at 45. Chaos is, in fact, only part of the behavior of complex systems. There is also the counterintuitive phenomenon of antichaos, which holds that some very disordered systems spontaneously transform into a high degree of order. See Stuart A. Kauffman, Antichaos and Adaptation, SCI. AM., Aug. 1991, at 78, 82-83 (stating that computer models suggest that biological evolution may have been shaped by self-organization and natural selection).

213. ARNHEIM, supra note 16, at 214. In the traditional study of dynamics, the world is viewed as a continuous series of autonomous events, segmented into smaller parts which are linked together by the arbitrary designation of points beginning and ending at fixed points, rather than a related system of ever-changing attractions and fleeting relationships with beginnings and endings imposed by the temporary intrusion of linear reasoning on the vibrant action. The traditional way of analyzing movement is useful for most of what happens on earth, including rocket travel. It is not, however, a useful way to solve human problems because it requires limiting unknown variables. See IAN STEWART, DOES GOD PLAY DICE?: THE MATHEMATICS OF CHAOS 57 (1989) (comparing mathematics with Joseph Heller's Catch 22).


215. Id. at 215. For an excellent example of recapturing and recreating the music of an earlier period, and therefore recreating the events themselves, listen to McCAYLE, REED, AND VIDRINE, 1929 AND BACK (Swallow Records 1991).

physiological structure or because of an emotional convention, tone and emotion are not new languages. "A state of mind" appears as "a pattern of sounds."217 For example, according to the gestalt theory, movement in the form of dance or music has a kindred structure "so compelling perceptually that it is directly . . . experienced."218

Music highlights the repetition of events to form a pattern of operation or explains that variations repeat the pattern rather than change it.219 Unlike text or pictures, music signifies action or "happenings," or "a pattern of dynamic relations,"220 as opposed to objects.221 Music adds even more by helping to set the emotional content of the visual imagery. For example, the horror glissando used in mystery movies and radio suspense programs222 cues the audience that the following transaction will have dangerous (scary?) consequences.

Musical tone further clarifies the message223 by adding a meaning separate from that of the word spoken.224 For example, when law depends entirely on the discrete text,
tone specifies the meaning of its words. Thus, if one reads a text aloud, the voice and its pauses funnel the meaning of the text so that its seemingly infinite interpretations appear serially. Even the addition of multiple but individual inflections presents the interpreter with the potential of classifying and eventually grading the alternative interpretive possibilities.225

The dramatic possibilities so abundant in the law—and the possibilities to amplify them through tone, music, and movement—are treated as incidental to the goal of perfecting legal analysis.226 When video does appear in the law school classroom, it appears only as the servant of the school’s prime educational vehicle, the analytico-verbal vehicle. Lectures may be videotaped for the convenience of the instructor, for example. But the taping does not change the content of the lecture significantly. As early plastic manufacturers failed when plastic was substituted in designs created for wood and metal, lawyers use video merely to record what was intended to be read. They ignore its synthetic perspective complementary to the analytic style of most lectures and textbooks.227 Historically, our society fears visual expression.228 I suggest that the form of abstract reasoning entailed by homogeneous literacy cannot address the issues facing a postliterate society in which kinetic visual images and tones, not words, dominate semantic communication. The

225. But see Gardner, supra note 110, at 239 (noting that television viewers draw inferences from the video information rather than their own personal experiences). Studies of children have compared reading aloud to one group and showing a video of the same story to another group. The book group used their prior life experience to evaluate the action in the story, but the television group did not. The television children, using different lines of reasoning, relied overwhelmingly on what they had seen—how difficult an action looked or how someone appeared to feel—to buttress their conclusions. The children rarely went beyond the “superficial flow” of video information to consider “what was plausible.” In contrast, the book children were far more likely to draw on their own personal experiences. Although I have not found a similar study on adults, if video suspends the viewer’s imagination, one may question the probative value of video in trial and appellate courts.

226. See generally Symposium, Pedagogy of Narrative, 40 J. LEGAL EDUC. 1, 2 (1990) (“Law has become an increasingly active feature in any story that we might try to tell or live. So it is fitting that legal academics should rediscover the narrative perspective and recommence the telling of stories.”).

227. Kandinsky wrote, “To harmonize the whole is the task of art.” KANDINSKY, supra note 80, at 3.

228. Naron, supra note 149, at 93 (noting that Benjamin Franklin was the first American political cartoonist and the first politician thus ridiculed). But see United States v. Brentley, 961 F.2d 425, 426 (3d Cir. 1992) (holding that a videotape of the trial satisfied an indigent defendant’s right on appeal to a free trial transcript).
expression of dynamic function rather than objects may generate changes in conventional legal thought. Legal thinking is stuck in Newton's world of objects. Based on quantum theory and chaos, scientists have revised the common view of reality. Legal doctrines are crumbling and new patterns of thought have not yet developed, nor will new legal principles emerge through the thought forms of a bygone age. In other words, printed matter itself, and not just certain styles of presenting it, limits legal reasoning and is an important reason why the role—or at least the influence—once granted the lawyer in the community and society has diminished. Although words still help us reason, the computer or the television has supplanted the printed page as the source of authority in the world outside the courtroom. Legal reasoning now must be based on more than verbal metaphors to be convincing.

229. See Daniel Bell, *Into the 21st Century*, Bleakly, N.Y. TIMES, July 26, 1992, at E17 (claiming that there are no unified sets of beliefs to take the place of old ideologies); cf. Collier, *supra* note 34, at 240–43 (stating that Justice Scalia's willingness to overturn precedent weakens the doctrine of stare decisis).