

1990


## Generalization in Interpretive Theory

Joseph Vining

*University of Michigan Law School, [jvining@umich.edu](mailto:jvining@umich.edu)*

Available at: <https://repository.law.umich.edu/articles/1628>

Follow this and additional works at: <https://repository.law.umich.edu/articles>

 Part of the [Legal Profession Commons](#), and the [Public Law and Legal Theory Commons](#)

---

### Recommended Citation

Vining, Joseph. "Generalization in Interpretive Theory." *Representations* 30 (1990): 1-12.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

## Generalization in Interpretive Theory

THERE ARE ARGUMENTS at large about the nature of legal interpretation, proceeding from an implicit proposition that interpretation is the same phenomenon or experience whatever its setting. An assumption that there is one phenomenon can be found in discussions among lawyers of interpretation and in discussions among nonlawyers of legal interpretation—and as often in the work of those who would deny there is any significance to theorizing about interpretation, as of those who think persuasion to a particular theory will have the utmost consequence for law and society.

Proceeding from such a proposition, rather than toward it, raises the risk that distinctive features of legal interpretation may be overlooked. If there is to be a common understanding or theory of interpretation it should not be built upon misinterpretation of the evidence. As examples from law appear more frequently in nonlegal settings, and nonlegal examples in discussion of law, distinctive features of legal interpretation are the more easily overlooked. These features are linked, but they may be roughly divided and treated under four headings. Some are more obvious than others. Some will be more obvious to lawyers than to nonlawyers, but it is an odd characteristic of current discussion that the reverse may also be true.<sup>1</sup>

### Identification of the Text

The first of these features of legal interpretation has to do with what is often called identifying a text. Some, such as Steven Knapp and Walter Benn Michaels, argue that identification of marks or sounds *as* a text involves belief that they are a product of the intentions of an agent (using “agent” in its special philosophic sense rather than its common or legal sense).<sup>2</sup> Others would identify marks as a text through their relationship to other marks in a somewhat free-floating system.<sup>3</sup> But, for both, there seems to be assumed something lying before the reader, some determinate set of marks, some work, much as there is an object before one when one comes up to a piece of sculpture or listens to a piece of music that has a beginning and an end. That is not the situation in law.

Not that one never comes in law to a sentence, a page, an opinion one has to read and make sense of; of course one does, but that is at the very end of one’s

interpretive work, and perhaps that is not even then the end. For in the repeated runs at analysis of a situation made possible by a hierarchical institution of argument, one piece of writing with the meaning of which one has been wrestling, one section of a statute or constitution, the law of one jurisdiction or another, may be pulled away and replaced by another sentence, another section, another book.

When a practitioner asks, “What is the law here? How is this case to be analyzed?” no hand thrusts out a text and says, “Here, this is what we are now going to read and construe.” Interpretation in law is, from the beginning, of the law. The law is not to be equated with any particular set of marks or sounds nor even with the meaning of any particular set of marks or sounds. And a small methodological consequence of this may be noted, that it would not be true to the experience of interpretation in law to suppose that if one could achieve an account of the identification of and reading of one or another example of a legal text, one would then have in hand the problem of legal interpretation.<sup>4</sup>

Cases do not come ready made, as teachers repeatedly emphasize to students being gradually introduced to law. The initial question in practice is of the form “How ought this situation to be thought about under the law?”—after, of course, the situation is delimited as *a situation*—or “What ought to be done here under the law?” In the course of analyzing a situation, one text, then another, may be invoked and become the focus of attention. Starting as an “Occupational Health and Safety Act case,” a death in a factory may end as a case of corporate homicide under the general criminal law. It may become a constitutional case as well as a case of ordinary law. A car repossession case involving allocation of money and risk, seen immediately as a case of common law contract or a “Uniform Commercial Code case” between “buyer” and “seller” or “debtor” and “creditor,” may in addition become a “Federal Trade Commission Act case” between “dealer” and “customer,” involving federal administrative regulation of economic power. Or it may become a case of civil wrong, a tort case, rather than a contract case, or a securities law case rather than a case of either contract or tort.<sup>5</sup> The applicability of particular texts, the focusing upon particular judicial opinions, evolves as analysis proceeds.

Recalling this very basic aspect of the practice and experience of legal interpretation is not to introduce what is sometimes thought most distinctive about the world of law, the clever litigator working against that which is self-evident. There is no self-evident nature of a case to be worked against. If a case comes to litigation (as it does, indeed can, in only a very tiny percentage of the situations in which a legal question is put), it may be given well-formed contours by the time it gets to an appellate court. Still, appellate judges, even appellate judges, must struggle with its nature or characterization. Once an appellate opinion is written, of course it appears the case always was what it came to be. The interpretive question seems to be how given texts are applied to particular facts—even though those particular facts are remarked upon, and corralled off from the whole, in response to

the proposed applicability of texts. And perhaps, once the appellate opinion is written, the interpretive question not only seems to be that, but is. But then that appellate opinion becomes merely one more of the many expressions of the law that legal practitioners, starting again with another situation, may or may not be led to as they go about considering what the meaning of the law is for the situation they have before them.

This evolutionary quality of the text to be interpreted, that is encountered in practice, is not simply a matter of canon formation—particular texts or parts of texts gradually becoming central in legal analysis, the focus of discussion, through hierarchical devices or otherwise. And it does not simply reflect the flight of any text, once composed, into mere candidacy for attention (though this is implicated: if authority consists in being paid attention—which is also a form of praise—every text is only a candidate for attention, and its capacity to evoke and maintain attention can never be assumed). Largely unexplored, this is in law an analogue, pale perhaps, of the formation of melody in music. It is difficult to explore, however comfortable with it thousands of practitioners appear to be in their daily work. On it, on what a case is “about” and how it takes shape, any very direct comment confronts the special problems language imbued with the static poses for discussion of the dynamic.<sup>6</sup> But an eye can be kept on it, and an eye at least on the actual dynamism of legal thinking must help avoid a misleadingly photographic view of law as one in which a human being or human beings in general stare at a line carved over a doorway, or at a book in the hand, or, to take an example sometimes discussed in literary theory, tracings in the sand on a beach.<sup>7</sup> Particular texts simply do not step forward when one asks, “What is the law here, how am I to interpret the law?” And even the universe of possibly relevant texts always has a quivering edge.

This fact indeed, or, if not fact, this truth of legal experience, is always in the background of “easy cases.” A case easy in the hands of one may not be easy in the hands of another, and the text that records the disposition of a case as an easy case becomes just one more datum to be considered critically by a later analyst looking at a new situation. Situations are not, in contemplation of law, each unique in the sense Tolstoy took to be his own view of situations in history;<sup>8</sup> but situations in contemplation of law are living, and that alone brings them, and the law, out from under the picture of matching up a rule to a set of facts.<sup>9</sup>

### **Types of Writings**

Mention of constitution, statute, contract, opinion points to the second problem in the thrust toward generality in discussions of interpretation. The fruitful pulling of experience in law toward experience in other fields has in it the danger that those reflecting upon interpretation may be tempted to induce

their sense of interpretation from the instances of it they see, including instances in law, without sufficiently taking into account that much of the writing being treated in law may be different in kind and that writings in law may differ in kind from one another. What is perceived to be going on in work with a contract, for example, is not ground for any very definite assertion about what is done in working with a statute, and neither the handling of contracts nor of statutes is more than a provocative source of speculation about the way a constitution or a set of opinions is read. Even among lawyers methodological conclusions are sometimes drawn after—and as a result of—carelessly lumping various kinds of legal texts together.

In literature the language of texts is rarely negotiated and bargained over. Particular texts rarely begin their life fashioned by more than one hand. There is Beaumont and Fletcher, there is the phenomenon of editing, there is the folk ballad built up through successive contributions of anonymous singers, and there is the writer who writes or revises a piece over a lifetime. But among the texts literary critics discuss there is not often one in the genesis of which an individual agrees to words he does not want or mean to say, through some exchange relationship with another or as a result of delegating the writing of it, or the words of which are the immediate outcome of a process of assembly in which many have been independently at work. Nor is there often one with words attributed to a human being who may never have seen them, as to a voter or to a principal “bound” by the words of an agent. In law such texts are encountered quite often, and this should give pause to literary critics working with law, and indeed to philosophers reaching out to law who are similarly schooled in and accustomed to text-focused discussion in their various fields of professional inquiry.

The differences to be found upon examination of legal texts, type by type and text by text, are pertinent to the large uncertainties of current discussion. In particular, lawyers’ work with contracts, statutes, the writings of agents, and the writings of delegees does not as such point to the objectivity of language or the irrelevance of a statement’s origin. To take only contracts and statutes: in the construction of many contracts the true intent of the parties is explicitly excluded as a subject of inquiry. This may illustrate only that in many cases legal analysis is not interpretation of meaning. Legal analysis of writing can proceed rather in what might be called a “tort mode.” “Tort,” the law of civil wrong, has as its concern action and visiting the consequences of action upon the actor, and a party may be made to pay money (or money is shifted from one stream of wealth to another) because she should have known the consequence of inserting or allowing someone acting for her to insert a mark or a set of marks into a machine called a contract, regardless of what she might have wanted those marks to express.<sup>10</sup> The history of contracts is prominent in the teaching of contracts, in great degree because the emergence of contract from tort and the difficulty even now of distinguishing between tort analysis (of acts intended or unintended, and their con-

sequences) and contract analysis (if the latter suggests inquiry into the concrete meanings of words) can be thus demonstrated and emphasized.

As for statutes, often and perhaps typically the origin of a statute's words in committee processes and bargained or strategic voting forecloses inquiry into the meaning of those who have touched it. Nonetheless, statutes in general seem to be read, and not simply as vector products of the forces that made them in the legislative machinery.<sup>11</sup> But this fact, this evidence of what lawyers do, is again not ground for conclusions (by lawyers or nonlawyers) about the way other kinds of texts—opinions or administrative regulations or, a fortiori, nonlegal texts—are or should be read. The reading of statutes for “their intent,” the paying of close attention to nuance and form in them, may be a necessary and even desirable form of self-delusion. Self-discipline is still discipline; a society under the rule of law may allow itself some arbitrary freedoms, play a trick or so on itself. But the scope of such reading and the amount of such attention are limited by the necessity and the desirability of self-delusion.<sup>12</sup> It is not to be concluded that because, in law, texts that are the product of machinery seem to be interpreted, therefore interpretive theory should pay attention generally to marks on paper and sounds that are the product of processes untouched by mind. The often noticed tendency in legal practice to pull back to and focus upon judicial opinions may be not merely a result of the conventions of legal education, evidence not merely of judge-centeredness or concentration upon litigation by sociologically uninformed lawyers, but a reflection of a belief that opinions are more likely to be texts that can be read and can be the subject of interpretation.

### **Distinctions Between Reading and Writing**

The third observation to be made about generalization in current discussions of interpretation is that it may be overlooked how much lawyers—readers of legal texts—are also and (almost) at the same time writers of legal texts. In order and association this point could as well follow discussion of the first—the difficulty of establishing what the text is that one is to interpret—as the second, the differences in the kinds of writings that are attended to in law.<sup>13</sup>

While there are sensitive general accounts of the phenomenon of reading that show the reading of a major literary work and the reading of law as a responsible reconstitutive act,<sup>14</sup> the widespread image of law as *given* to the subject—whether in Babylonian bas-relief, Weberian sociology, or modern positivism<sup>15</sup>—has in it the potential to mislead, and may exert the greater influence as law ceases its intellectual isolation and excites the curiosity of those who are not lawyers. When one picks up a novel or poem the possibility of a difference between reading the novel or poem and writing it is an obvious starting point (not quite

so obvious of course in music or drama, where performance is necessary to the play or the song).<sup>16</sup> But in law a difference between reading and writing is not an obvious starting point at all, not just because one cannot pick up and hold in one's hand a large and shifting mass of legal texts with indefinable edges, but because as a lawyer one reads for the purpose of oneself making a statement of law for which one is responsible. Lawyers in the schools make their statements to students or the world at large; in administration or in what is commonly designated as the practice of law lawyers make their statements to client or commission or, acting as judges or attorneys general, to the world at large.<sup>17</sup> The lawyer reads in order to write, must read from the beginning in an active frame of mind and must make a statement of—and for—the law. That statement, in turn, becomes part of what is read for a time by others who themselves must make statements of law. Insofar as lawyers listen to any general account of interpretation that ignores their constant writing of the law, they are led astray; and insofar as those outside the profession seek to illumine their own experience of interpretation with an understanding of legal interpretation as passive or static, they are led astray.

### Identification of the Author

How much do all these points—the difficulty of identifying the text, the variety of texts, the joinder of writing with reading—fold into and derive from that most signal feature of legal discourse, that writers of legal texts do not speak for themselves? Perhaps this is a fourth point; perhaps it is not (but it is not the same as the appearance in law of delegated writing). Certainly it should not be overlooked when looking to law.

To put it concisely though paradoxically, if writers of legal texts (again, not including contracts, which may not be speech) were to speak for themselves, they would speak without authority. They speak for the law or for an entity—the *court*, the *agency*, the *legislature*—that in turn speaks for the law, with the possible exception of the legislature, and even then there is an ostensible speaking for, for the “sovereign” if not “the law.” The late-twentieth-century sensibility may want to ignore these others, these authors beyond, as *passé* figments, but if one does ignore them one does so at the price of depriving speech of authority.

It is further true that a speaker's speaking for an entity—or for the law—is never a given, but is a question always alive, to be determined by the listener. Though a situation may be disposed of for the moment, as if the speaker spoke the law, the question whether the speaker was authorized so to dispose of that situation may be examined whenever the disposition is examined; there is no foreclosing of the question: it is posed and answered in a nonfinal way again and again as time goes on.

From this general observation legislators again may possibly have to be

excepted (other than with respect to the narrow range of utterances that may be disregarded on constitutional grounds). But if the legislator is an exception, that very fact is part of the reason listeners are pressed back to the utterances of judges—that blank interposition, that wall between the listener and the author whom the listener is seeking to hear, which a legislative claim always to speak for the sovereign presents. Of course the legislature could claim to be not agent but itself sovereign, but that is not the assertion that is made. It is, possibly, an assertion that never has been made where authority has been claimed and law invoked.

### Convergences

Emphasizing these features of the experience of legal interpretation does not proceed from or inevitably toward some form of nominalism. Consider again that central term in current discussion, intent. Precisely because they are writers lawyers might be expected to be especially sensitive to the complexities of intent. That they are writers is what might hold them back from embracing propositions about authorial intent made in arguments either for or against its existence or importance to interpretation—this rather than philistinism or foreignness in the work they do.

Legal writing is often not expressive. Very often it is manipulative only. But when it is expressive and there is true effort to make a statement of law, participation in it is almost as fine as participation in any kind of writing. The writer of a poem does not say what the poem means by reference to his conscious intent in the writing of it, because he cannot; and in adding one more voice to those who have made this point I may invite for company the not insubstantial number who, though they may not consider themselves poets, have been moved now and again to write a poem. If the poet could so explain himself, he might then have written differently. Much about a poem can in a real sense be explained to the writer of it without (as we say) putting words into his mouth. Listening to another expound his poem, the poet, if he is to respond at all, reflects not on the memory of his conscious thought but on why he stopped his daily business to write (daily business including taking a walk or staring at his desk) and, if the poem did not appear in full bloom, on how and why he labored over it as he did. The experience of reaching—one always reaches in a poem—includes the experience of trying to get lines and words right. And, it must be said, the writer of legal prose does the same.

He writes, and looks. The thrust of *this* seems inconsistent with *that*, the emphasis within this passage is misleading, this or that word is not just (the very metaphor *just* is a legal one). The writer tries to get the word, passage, or statement more satisfactory, or, in some rare cases, satisfactory. If he does not abandon it for reasons of time or fatigue, it may eventually lock into place, not be improv-



able without hurting it in some (other) way. But, as he works, molding and rewriting, he cannot say *what* he is doing. If he could the labor would be over. It will be allowed, and by those who dwell upon the writing of a paragraph of prose as well as those who venture to write poetry, that in the placing of words, and in all that touches upon the aesthetic of echo and multiple reference, much self-consciousness or consciousness of what one is doing leads away from the living and resonant and toward the rote and the dead. But the same is true in the first drawing of a word from the mind, when, as the saying is, a word comes to mind.<sup>18</sup> Intentions are veiled, they are being expressed in the work, and writer as well as reader looks to the work as evidence. (The lawyer especially is in the position of having readers: other writers may be able to conceive of writing without readers talking to them about it, but not lawyers, who are therefore constantly confronted with the question of their own intent.)

And what the reader does, the close reader, is seek ultimately to identify with the writer who is thus reaching and trying. If such resonance and such identification turn out to be possible, the writing is good, a carrier of meaning. Hermes is without clothes, save for his traveling hat, because he assumes such a multitude of forms.

### **Advantages of Particularity**

There are thus generalities to be achieved. It needs merely to be noted that what is critical in the achieving of them is to see from the inside those experiences that are to be merged. But particularity has its larger uses too. An attentive understanding of law might be helpful in saving practitioners in other fields from misdirection. Take as an example the field currently being most vigorously developed—with what is widely thought to be the most significant potential for large practical changes in ways of life—the design and programming of sophisticated computers.

Work on equipping computers to process human language draws on linguistics, which in one of its prominent current forms distinguishes what are proposed as rules for the construction of sentences, “syntax,” from “semantics,” which has to do with the meaning of the constructed sentences. One hears it said that syntax determines what constitutes a *legal* sentence of human language, and there is hope for machine programs that will reject *illegal* sentences—all without regard to meaning.<sup>19</sup>

The terms *legal* and *illegal* in this setting should be a little warning, a cause for caution. *Legal* and *illegal* are powerful and attractive terms, used to make the governing distinction between syntax and semantics more vividly plausible, but also quite possibly drawn upon for the substance of the distinction itself. There is something of the same in Virginia Woolf’s reference to “law” in her comment

in *Three Guineas*, “The Church being a spiritual profession has to give spiritual and not merely historical reasons for its actions; it has to consult the mind, not the law.”<sup>20</sup> If it should come to be understood that consulting the law is consulting the mind, and that what is legal or illegal is not determinable without an inquiry into meaning, the work of machine designers and programmers and speculation upon the possibilities of future human organization based upon their contributions would not be confuted; but legal practice and thought would no longer be a source or prop of work in these fields. Its powerful attractions and validations would be withdrawn. If machine designers are then left with a notion of rules, divorced from meaning and mind, that can be connected only to natural science and the laws and rules thereof, and if this should prove unsatisfactory given the source and character of a scientific law, they may just possibly be freed to proceed in new directions, and will at least be somewhat better protected from elaboration that in the end proves disappointing and discouraging, if not indeed dangerous as it is absorbed into the forms and methods of human organization.<sup>21</sup>

### **Prospects**

So too explorers from the literary and linguistic disciplines who sail into law may discover something of help to them in their own thinking, if they stay for a time—if they do not return too quickly with the news that great numbers of apparently intelligent people are reading for meaning marks on paper that no one means, or marks that are the product of forces not associated in any way with mind. If they come to law, as some literary critics do, bringing with them belief that there is an ineradicable connection between the spoken and a speaker, they may help lessen somewhat the pressure lawyers have felt so long from pushing against the long depersonalizing thrust of the modern age. Their presence may even make it more difficult for lawyers to mislead themselves, as they do, when talk turns to the Rule of Law and (trying to express what it is to live in a world in which no one including the legal analyst is above or outside the law) they end somewhat like the tragic Antigone, projecting an image of law as a set of rules outside, a grid that, could you only tap it with your fingernail, would give out a hard metallic ring. Lawyers may need nonlawyers to help them turn to what they actually do when under the Rule of Law they work responsibly with common and public texts.

Regardless of what those who are now discovering law leave behind, on their return to their own disciplines they may find it more difficult to collapse meaning and the speaking voice either into the intent of an author bound to time and place or into one or another form of system or process, a language system, the reasons of history. They may find that they are encouraged, themselves, to maintain a connection between words and intention, to keep words a gateway to intention

even for the fashioner of them. The small space within the skull of the individual is not the only retreat from the empty reaches of system and process, if it is a retreat at all. Nothing rules out another alternative a priori; lawyers cannot forsake the personal and the concrete for the impersonal objectivity of system, but they do not stop with mere particularity. After a sojourn listening to lawyers and attending to what lawyers actually do, some at least may be less uncomfortable than before with an occasional thought of a person speaking who is not an individual, an occasional thought even of a transcendental intention, less uncomfortable too with the possibility of conceiving their own activity as having, like law, something of a moral thrust toward the future and the whole and toward action—of conceiving writing and speaking, perhaps in general, as a discovery of what one did not know was in one, with others taking it up to place it against the whole and using it to make their own statements, which are then again subject to criticism against the whole by anyone who is also in responsible contact with what there is to be expressed.

## Notes

---

Rudolf Arnheim, Alton L. Becker, John H. D'Arms, Kenneth J. Dewoskin, Bruce Mannheim, Jennifer Nedelsky, Robert Post, Philip Soper, James Boyd White, and Christina B. Whitman have made helpful comments on the manuscript.

1. The contributions and footnote references in "Interpretation Symposium," *Southern California Law Review* 58 (1985): 1–725, provide a contemporary survey of discussion of legal interpretation other than in work in cognitive science and artificial intelligence. A series of papers by Steven Knapp and Walter Benn Michaels offers an elegant entrée to discussion among literary critics of interpretation generally. See "Against Theory," *Critical Inquiry* 8 (1982): 723–42; "A Reply to Our Critics," *Critical Inquiry* 9 (1983): 790–800; "A Reply to Richard Rorty: What Is Pragmatism?" *Critical Inquiry* 11 (1985): 466–73; "Against Theory 2: Hermeneutics and Deconstruction," *Critical Inquiry* 14 (1987): 49–68. Knapp's and Michaels's contributions between 1982 and 1985 are collected in convenient form together with related papers by others in W. J. T. Mitchell, ed., *Against Theory: Literary Studies and the New Pragmatism* (Chicago, 1985). With respect to artificial intelligence and its possible application to computer reading or writing of statements of law, see Anne von der Lieth Gardner, *An Artificial Intelligence Approach to Legal Reasoning* (Cambridge, Mass., 1987); Herbert Simon, *The Sciences of the Artificial*, 2nd ed. (Cambridge, Mass., 1982), 130–59.
2. Knapp and Michaels, *New Pragmatism*, 16, 140–41.
3. A text is to be thought only *somewhat* free floating because much contemporary reflection on the possible objectivity of language, outside law, is reluctant to grant that the meaning of a word or a sentence in a language is an empirical matter. E.g., Stanley Cavell, *Must We Mean What We Say? A Book of Essays* (Cambridge, 1976), 1–43.
4. This is quite aside from differences in kinds of legal texts, to be noted below, but not to say that examples of texts—such as the inheritance statute in *Riggs v. Palmer* (see

Ronald Dworkin, *Taking Rights Seriously* [Cambridge, Mass., 1978]), or the opinion in *Rylands v. Fletcher* (liability without fault in tort; see A. W. Brian Simpson, “Legal Liability for Bursting Reservoirs: The Historical Context of *Rylands v. Fletcher*,” *Journal of Legal Studies* 13 [1984]: 209–64)—are not examined closely, or that it is not profitable to do so.

5. Cf. *Ford Motor Co. v. Federal Trade Commission*, 673 F. 2nd 1008 (9th Cir., 1981), cert. denied, 459 U.S. 999 (1982); *People of Illinois v. Film Recovery Systems, Inc.*, no. 8311091, Circuit Court of Cook County, Ill. (1985).
6. My own comments may be found in Joseph Vining, *Legal Identity* (New Haven, 1978), 93, 94, 119–20, 134; *The Authoritative and the Authoritarian* (Chicago, 1986; revised ed., 1988), 21–22, 74, 176, 217–18, 221.
7. E.g., Knapp and Michaels, in Mitchell, *New Pragmatism*, 19.
8. I think of the epilogue to Leo Tolstoy, *War and Peace*, trans. Rosemary Edmunds, 2 vols. (Baltimore, Md., 1976), 2:1339–1444.
9. Nonlawyers are sometimes astonished to find this true even in matters involving business: when one is engaged in one’s affairs and sells an orange grove, and, under the law of contract, engages to harvest and sell the oranges for the buyer of the tract, the securities laws may become relevant. Though what one has in one’s hands are a property deed and a contract, and though no gilt-edged paper changes hands, the situation one has brought about may eventually be analyzed in “totality,” “in truth,” “substance,” “reality”—the words are used—as the “selling of a security.” See *Securities and Exchange Commission v. W.J. Howey Co.*, 328 U.S. 293 (1946); *Securities and Exchange Commission v. Glen Arden Commodities, Inc.*, 368 F. Supp. 1386 (E.D. N.Y., 1974), aff’d sub nom. *Glen Arden Commodities, Inc. v. Costantino*, 493 F. 2nd 1027 (2nd Cir., 1974).
10. Knapp and Michaels are aware of this. See “Against Theory 2,” 63. The involvement of an agent (“agent” in its legal rather than philosophic sense) extends and complicates such analysis.
11. The “tort mode” is not really applicable to legislation. Unlike contracting parties’ acts, the consequences of legislators’ acts are not visited upon legislators themselves but upon others and upon the future of the world; nor can the consequences accorded legislators’ acts be reduced to reversible shifts in money flows.
12. Further discussion of this aspect of the legislative text may be found in Vining, *Authoritative and Authoritarian*, chaps. 9, 10, and 11.
13. Perhaps not all should be called texts. Some, as noted, may not be speech or treated as speech.
14. See James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (Chicago, 1984).
15. See, e.g., Anthony T. Kronman, *Max Weber* (Stanford, Calif., 1983), 11, 22, 28, 45, 53, 73, 89–91; Joseph Raz, *The Authority of Law* (Oxford, 1983).
16. E.g., Knapp and Michaels, in Mitchell, *New Pragmatism*, 103. Art invites, but does want to daunt. Restating into life what is heard—reviving and building—it nonetheless wants a circle woven round it thrice: to deny to its readers, through closure, the possibility of doing what it has just demonstrated the possibility of doing.
17. The word *client* may not convey the spread of the audiences to whom a lawyer speaks in ordinary practice. The client is often an institution, or an agency of government. Others beyond the client may be expected to rely upon an opinion letter. In fact, in some circumstances an opinion letter may be mandated by statute.

Special considerations, and rule formulations of them, apply to lawyers’ statements to a judge in litigation.

18. Owen Barfield's *Poetic Diction: A Study in Meaning*, 2nd ed. with afterword (Middletown, Conn., 1972), is in part a meditation, indeed a lawyer's meditation, on the place of conscious thought in writing and speaking.

The first word that comes to mind is of course not necessarily the last. The critical faculties are there to meet it. But the critical faculties can be engaged only if there is something for them to be engaged upon.
19. E.g., Michael A. Arbib, *In Search of the Person: Philosophical Explorations in Cognitive Science* (Amherst, Mass., 1985), 32; "English as a Computer Language," *The Economist*, 4 April 1987, 84–85.
20. Virginia Woolf, *Three Guineas* (New York, 1963), 125.
21. Since writing the above, I find Roy Harris making a similar point in stronger fashion in *The Language Machine* (Ithaca, N.Y., 1987), particularly at 136–37, using inter alia A. M. Turing's reference to "authority" in his "Computing Machinery and Intelligence" (1950) in Alan Ross Anderson, ed., *Minds and Machines* (Englewood Cliffs, N.J., 1964), 8.