

Harold Anthony Lloyd*

I. WORDSWORTH AND LANGDELL

Nuns fret not at their convent's narrow room;
And hermits are contented with their cells;
And students with their pensive citadels;
Maids at the wheel, the weaver at his loom,
Sit blithe and happy; bees that soar for bloom,
High as the highest peak of Furness Fells,
Will murmur by the hour in foxglove bells:
In truth the prison unto which we doom
Ourselves no prison is; and hence to me,
In sundry moods, 't was pastime to be bound
Within the sonnet's scanty plot of ground,
Pleased if some souls (for such there needs must be)
Who have felt the weight of too much liberty,
Should find brief solace there, as I have found.
Wordsworth¹

Wordsworth's sonnet on form should intrigue lawyers and students of the law.

Though the weaver must accept the forms his loom permits, choice remains in what and how he weaves. Lawyers primarily trained in Christopher Columbus Langdell's case method can easily miss this flexibility bound up with form. Facts can often seem merely given in redacted appellate cases, and case strategies and choices leading to the redacted

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

¹WILLIAM WORDSWORTH, SELECTED POETRY 137 (Stephen Gill and Duncan Wu, ed., Oxford 1997)

opinions themselves are often largely lost. However, just as a weaver's work never simply magically appears, neither do the facts of a case nor even the case itself. Instead, as the discussion below demonstrates, facts and cases are the products of framing and other choices human beings have made.

Second, Wordsworth's verse applies equally well to students who complain that form (such as the "IRAC" form discussed below) stifle creativity.² Form eliminates neither choice nor genius as the entire sonnet itself demonstrates. Instead, freedom requires form. To take any action, we are of course constrained by whatever defines that action. How can Wordsworth's weaver, for example, weave loom products without a loom? Similarly, how can we have good thought apart from compliance with the rules³ and any forms that define it?

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

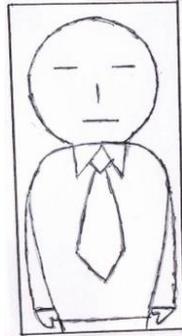
In this article I shall therefore such freedom within the context of good legal form. More specifically, I shall explore how we frame legal thought at multiple levels and the flexibility we have in such framing. In so doing, this article will examine resulting basic forms of legal thought. As we shall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

² See Gerald Lebovits, *Cracking the Code to Writing Legal Arguments: From IRAC to CRARC to Combinations in Between*, 82 New York State Bar Association Journal 49 (2010) (noting student complaints of stifled creativity).

³ See *infra* note 25 on the nature of rules.

II. BEGINNING WITH “RIAC”

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



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

A. The Reference

1. The “Drawing”

To begin thinking about the drawing above, we of course first need to be clear about which lines above concern us. Are we referring to all and only all of the lines and other marks of that drawing? Or are we only referring to some of them? Clarifying this first level of thought is clarifying the thought’s reference or referent (i.e., that to which it refers).⁶ If I refer to all and only all of the lines and other marks in the drawing above

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

⁵ See Harold Anthony Lloyd, [*Plane Meaning and Thought: Real-World Semantics and Fictions of Originalism*](#), 24 Southern California Interdisciplinary Law Journal 664 (2015) Wittgenstein’s Duck-Rabbit is a famous example that serves equally well. See Harold Anthony Lloyd, and [*“Original” Means Old, “Original” Means New: An “Original” Look at What “Originalists” Do*](#), 67 NATIONAL LAW. GUILD REV. 140 (2010).

⁶ The central question of reference theory is “[i]n virtue of what does a linguistic expression designate one or more things in the world.” THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 587 (Cambridge 1995).

while you are either referring to (i) only a few of them, or (ii) all of them plus something else such as the paper on which they are drawn, or (iii) something else entirely such as the color of the lines, we are from the outset talking across ourselves and are mistaken if we think we are discussing the same thing. The same occurs if opposing lawyers are in fact not talking about the same thing. Actually, the problem is worse: lawyers in such case are spending their clients' money to talk across each other. Though this point may seem an easy one in the abstract, unnoticed reference problems easily plague everyday practice.

2. The "Watch"

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

learn too late how not only language but a photograph and pointing as well had seemed to fail everyone concerned.

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

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

⁷ See MODEL RULES OF PROF’L CONDUCT r 1.1 (“A lawyer shall provide competent representation to a client . . . [which requires] thoroughness and preparation reasonably necessary for the representation”); and *id.* r. 1.4(a) (“A lawyer shall: reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”) As Comment 5 to Rule 1.1 notes: “Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem” *Id.* r. 1.1 cmt. 5.

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

simple question could have led quickly to each client's real desires and then to a quick settlement. Of course, simply parsing Kim's final appellate opinion (much less redacted portions of the opinion) is unlikely to teach us any of this.

3. The "Easement"

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

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

4. No Natural References

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

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

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

5. The Nature and Flexibility of Framing

All of these examples also underscore the role and flexibility of framing in thought. In order to refer to a specific part of experience or the world, we must separate that part from the rest of experience or the world. In other words, we must put an accurate “fence” or “frame” around that part of experience or the world. In drawing these

⁹ See generally *Land Survey Techniques*, (last visited February 18, 2014), <http://www.surveyors.com/land-surveyors/land-survey-techniques/>.

¹⁰ See *id.*

referential framing lines, the good attorney investigates and understands his client's interests well and otherwise performs adequate inquiry as to the referential frame itself. Again, despite the "given facts" in a redacted Langdellian appellate opinion, the good attorney also knows that there are no natural or given frames for carving out a particular reference.¹¹

When framing such reference, one must also take care to recognize the limits such framing will place on remaining thought. For example, in a murder trial one way to frame the drawing above would be: "This is a picture of (i) a dozing person, (ii) a person meditating, (iii) a person praying, (iv) a plastic mannequin, or (v) a corpse in an open coffin." If we agree these are the only possibilities, we have thus limited the potential issues¹² raised by the reference. (We turn in more detail in Section II(B) to issues raised by references.) Under this framing, we can only ask whether this is a drawing of a sleeping person, a person in meditation, a person in prayer, a plastic mannequin, or a corpse in an open coffin. However we answer this question, it cannot be a drawing of anything else such as a drawing of a marble statue in a shipping crate or a vampire sleeping in its coffin.

¹¹ As Hillary Putnam puts it, "to ask how things are 'in themselves' is in effect, to ask how the world is to be described in the world's own language, and there is no such thing as the world's own language, there are only languages that we language users invent for our various purposes." HILLARY PUTNAM, *PRAGMATISM* 29 (Blackwell 1995). As I have discussed elsewhere, understanding this lack of natural or given frames for reference also highlights the role of metaphor in reference and in other levels of thought. *See* Lloyd, *PLANE MEANING*, *supra* note 5, at 682-683.

¹² The definition of "issue" includes "[a] point or matter of discussion, debate, or dispute." *AMERICAN HERITAGE COLLEGE DICTIONARY* 721 (3d ed. 1993). Issue differs from reference: we can agree on the reference yet disagree on the issue or issues. For example, we can both agree that we are referring to the same lines and marks in the drawing above while one of us may frame the issue as "whether we have a sleeping male or dead male" while another may frame the issue as "whether we have a sleeping male or a mannequin."

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

6. Highlighting and Concealing

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

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

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

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

My wife talked to a famous singer last night.¹⁴

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

For example, the “famous singer” frame may allow the speaker to drive the conversation in the direction of the speaker’s own status. The “another man” “last night”

¹³ See GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 163 (1980) . Concepts by their very nature require this. Since concepts are not literally the things conceptualized, there cannot be a perfect one to one match. See, e.g., *id.* at 13.

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

frame (especially without reference to the phone fact) might, on the other hand, allow a divorce seeking husband to pursue that agenda with greater ease. Good lawyers thus cannot simply accept reference frames (or other frames) as “true” without considering what such frames highlight, downplay, and hide and whether that which is highlighted, downplayed, and hidden is consistent with their clients’ interests.

B. The Issue(s)

1. Framing In and Framing Out

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

For example, imagine again that we have referentially framed the above drawing so that it can only be a picture of (i) a dozing person, (ii) a person meditating, (iii) a person praying, (iv) a plastic mannequin, or (v) a corpse in an open coffin. With this reference frame clarified, we can next frame the issues either broadly or narrowly.

Broadly, we might frame the issue as which of the five possibilities above is true? Do we have (i) a dozing person, (ii) a person meditating, (iii) a person praying, (iv) a plastic mannequin, or (v) a corpse in an open coffin? However, we might also issue frame more narrowly. For example, we might more narrowly ask whether the reference could really

¹⁵ Again, the definition of “issue” includes “[a] point or matter of discussion, debate, or dispute.” AMERICAN HERITAGE COLLEGE DICTIONARY 721 (3d ed. 1993). By moving from the level of pure reference to explore the reference further, we are setting up the reference for further discussion. Again, issue is distinct from reference: we can agree on the reference but disagree on the issue or issues. Again, for example, we can both agree that we are referring to the same lines and marks while one of us sees the issue as framed above or as “whether we have a sleeping person or dead person” or as “whether we have a sleeping person or a mannequin.”

be a plastic mannequin when there is evidence that the drawing was made before plastic was in general use.

However we frame the issues, we must be vigilant about what we are framing in and framing out. For example, if we have a murder trial and have agreed on the above five reference possibilities, the prosecutor might make his victory impossibly by not raising and pursuing the issue of whether the drawing is of a corpse in a coffin. On the other hand, defense counsel might doom his client by failing to raise and pursue the issues of whether the drawing is of (i) a dozing person, (ii) a person meditating, (iii) a person praying, or (iv) a plastic mannequin. If there is at least reasonable evidence of any of these four possibilities, defense counsel should of course explore such issues to establish reasonable doubt.

2. Framing and Connotation

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

¹⁶ See DANIEL KAHNEMAN, THINKING FAST AND SLOW 367 (Farrar et al. eds., 2011) (providing these frame examples.)

C. The Analysis

1. Framing the Options

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

Returning to the drawing above, the parties might have agreed that the only issue is whether the drawing represents a plastic mannequin. If so, they would have also framed as follows the overall course that subsequent analysis could take: proceed in the affirmative, the negative, or the indeterminative as to whether they have a plastic mannequin. For example, the affirmative approach might reason that we must have a drawing of a plastic mannequin because the features are too symmetrical for a real person. The negative approach might reason that it is not a mannequin because mannequins are used to model clothes in an appealing fashion and a mannequin that appears to be sleeping cannot do that. The indeterminative approach might reason that since the drawing could equally be a mannequin of any material or a sleeping person or maybe even a dead body, we just cannot know the answer without more evidence.¹⁷

2. Looking Ahead

The reader will note that each of these approaches depends upon certain descriptive or normative rules. Are people generally not as symmetrical as mannequins? Are mannequins that appear to be sleeping or dead really not suitable for modelling

¹⁷Of course, whichever analytical direction one takes, one must also be careful both to avoid mistakes of reasoning. Such mistakes include deductive and inductive fallacies as well as omitting or misunderstanding relevant facts and law when performing the analysis. See for e.g. RICHARD A. LANHAM, *A HANDLIST OF RHETORICAL TERMS* 77-78 (2nd ed. 1991) (listing formal and informal fallacies). An exploration of such errors is beyond the scope of this article.

clothes? What do we mean by “mannequin,” “sleeping person,” and “dead body”? Looking ahead for a moment, the analytical role of logic and legal rules suggests a need to expand the analysis level to include the notion of rules, something we shall do in Section III below when we expand “RIAC” to “RIRAC.”¹⁸

D. The Conclusion

1. Rhetoric and Force

If we wish to resolve analysis, we must also have a conclusion. Where we have multiple plausible conclusions (as we do above with the plausible affirmative, negative, and indeterminative analyses of whether we have a plastic mannequin), we can reach a conclusion either by use of rhetoric or force or both.¹⁹ Though force can involve the unpleasant, it can also simply involve the unobjectionable use of power as when a teacher uses status power to dictate a plastic mannequin for purposes of the class hypothetical. Of course, the “given facts” of a redacted appellate case likely give little insight into the role of rhetoric or force in deciding the mannequin “facts” here.

2. Containers and Hedges

Whatever our conclusion and however we reach it, we tend to see conclusions and their categories as “containers” of things “with an interior, an exterior, and a boundary”.²⁰ For example, if we conclude that we have a drawing of a plastic mannequin, we will tend to think that we have filed the drawing “inside” that category of things.

¹⁸ See also RICHARD K. NEUMANN, JR. & KRISTEN KONRAD TISCIONE, *LEGAL REASONING AND LEGAL WRITING* 30-33 (2013) (addressing the “[i]nterdependence [a]mong [f]acts, [i]ssues, and [r]ules.”)

¹⁹ See ANTHONY G. AMSERDAM & JEROME BRUNER *MINDING THE LAW*, 48, 165-93 (on the use of rhetoric); *METAPHORS WE LIVE BY*, *supra* note 13, at 157 (“whether in national politics or in every day interaction, people in power get to impose their metaphors.”)

²⁰ See GEORGE LAKOFF & MARK JOHNSON *PHILOSOPHY IN THE FLESH* 20 (Basic Books 1999).

As physical containers, conclusions and their categories therefore raise issues of both fit and strength. How good is the fit and how strong is the container? Will it really hold and if so for how long? If we are doing a predictive analysis such as an objective memorandum, we need to answer these questions and we do so by hedging. Our linguistic hedges include words like “likely” fit, “possible” fit, “unlikely” fit, and so on.²¹ In such objective analyses, one cannot predict with absolute certainty how a court will rule on any issues and a competent attorney should never attempt to do so.²² However, in persuasive analysis such as persuasive arguments and briefs, firmer conclusions can and generally are appropriate as a part of an advocate’s role.²³

E. “RIAC” Recap

In their most basic form, complete thoughts will thus include references, issues, analyses, and conclusions. In other words, basic forms of complete thoughts will include a RIAC (reference, issue, analysis, conclusion) form, which form can itself be further refined as noted in the sections that follow.²⁴

III. FROM “RIAC” TO “RIRAC”

A. From “A” to “RA”

Though RIAC serves the purposes noted above, one can refine and expand it still fuller to a form that more fully reflects complete legal thought. Since legal analysis

²¹ See *id.* at 20. See also METAPHORS WE LIVE BY, *supra* note 13, at 123-24 (on “hedging” of metaphors). See also CHRIS COUGHLIN, JOAN MALMUD ROCKLIN, & SANDY PATRICK, A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS 169-170 (2d ed. 2013).

²² In legal writing, such probability statements can include such words or phrases as: “will probably” “will likely,” “will probably not,” “will likely not,” and “might” among others. See COUGHLIN, *supra* note 21, at 226.

²³ I would avoid, however, telling a court that it “must” do anything since it is the role of judges and not the parties to issue orders.

²⁴ See Sections III et seq. below.

generally involves the application of a legal rule or rules,²⁵ the single “A” in “RIAC” can be usefully refined and expanded to “RA” with the “A” now standing for “Application” and the “R” standing for “Rule.”. RIAC can thus be usefully expanded to RIRAC (Reference(s), Issue(s), Rule(s), Application(s), and Conclusion(s).)

For example, imagine a homicide framed as a “murder case” where the “facts” are beyond a reasonable doubt that the “defendant purposefully and without justification or excuse caused the death of another person.”²⁶ Here the reference would be the purposeful killing without justification or excuse of another person. The issue would be “Is the defendant guilty of murder?”²⁷ To address this issue, the prosecutor of course must find some applicable rule addressing murder. If the applicable rule provides that that “[a]ny person who, without justification or excuse, purposefully causes the death of another person, is guilty of murder,”²⁸ a murder conclusion seems a pretty straightforward matter of simple deduction.

B. Symbiosis

This example also shows the symbiotic relationship of framing references, issues, and rules. One must frame each of these with the others in mind or risk failure. Where a

²⁵ A detailed investigation of the nature of legal rules is beyond the scope of this article. For purposes of this article, I shall agree with others that such rules should satisfy at least three criteria: (1) “be simply stated—concise enough for the reader to grasp easily;” (2) be readily applicable without circular or ambiguous terms; and (3) be “consistent with the cases and law in the jurisdiction.” See also Harold Anthony Lloyd, [*Let’s Skill All the Lawyers: Shakespearean Lessons on the Nature of Law*](#), 11 *Vera Lex* 33, 64-74 (2010) (discussing the semiotic dialogue). Also for purposes of this article, I shall consider “rule” to include standards as well. See WILSON HUHNS, *THE FIVE TYPES OF LEGAL ARGUMENT* 51 (3rd ed. 2014). (“The application of a rule depends solely on the existence of specific facts. . . . The application of a standard involves the consideration of one or more facts in light of one or more underlying values”)

²⁶ *Id.* at 194.

²⁷ *Id.*

²⁸ *Id.*

rule requires lack of justification or excuse, the “facts” referred to must include these “facts.” However, this requires care in framing because “justification” is a legal term of art reached only after application of a rule as to what that means. One thus needs to choose more “neutral” terms to avoid simply begging the question in the analysis.²⁹ Understanding the need to differentiate between and not jumble reference, rule, and analysis helps give us the clear head we need to avoid such confusion. Rather than beg the question, separating reference, rule, and analysis leads us to ask what facts prior to rule application would be considered “unjustified.” If we learn, for example, that the defendant committed the homicide for no other reason than the mere adventure of the deed, we could apply our rule to those facts without circularity.

To take another example, when considering whether police officers unconstitutionally arrested same-sex adults engaging in private consensual sex, we must have legal rules to resolve the matter. However, we cannot fully separate the framing of these rules from the framing of the issue or issues. Is the issue here whether those arrested have "a fundamental right to engage in homosexual sodomy"³⁰ involving all the historically-loaded baggage that term entails³¹ or is the issue whether those arrested have a basic constitutional right to be free of governmental intrusions into their private, consensual expression of affection?³² Again, either frame of the issue must involve the framing of a corresponding rule or rules and these in turn require frames for the necessary facts.

²⁹ See for e.g., NEUMANN, *supra* note 18 (discussing and giving examples of what is and is not a fact).

³⁰ *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003).

³¹ *Bowers*, 478 U.S. at 191.

³² *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

C. “RIRAC” and Communication

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

Fortunately, RIRAC can help the lawyer avoid this common communication error. Focusing on the first “R” or Reference(s) can help her to remember to communicate *all* the relevant facts as she has framed them. Focusing on the “I” or Issue(s), the second “R” or the Rule(s), and the “A” or Application(s) can help her remember to set out in full the issues as she has framed them, the applicable rules as she has framed them, and her actual applications of those rules. Focusing on the “C” or “Conclusion(s) can help her remember not only to include a clear conclusion but to include any appropriate hedging as well.³³

D. “RIRAC” and “IRAC”

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

³³ See for e.g. COUGHLIN, *supra* note 21, at 169-170.

to be vigilant in remembering that reference requires framing, too, and is a critical part of legal meaning and thought.

IV. SOME CAVEATS AND MISPLACED OBJECTIONS

Of course, RIRAC and IRAC (and their variations) do not in themselves assure good results. Good results also require knowledge, skill, and facile framing at each level of thought. Thus, those who question IRAC, for example, as purporting to be “a yellow brick” road that one only need follow “from start to finish”³⁴ are misguided. The form claims no such powers in itself.³⁵ As we have seen, RIRAC and thus IRAC require significant framing and other choices. Furthermore, a good RIRAC and thus a good IRAC must of course have good style including rhythm, tone, and flow if they are to keep the reader’s attention and persuade or convince.³⁶ Nothing in the RIRAC or IRAC form automatically provides such style. This must come from the thinker himself.

As this need for style suggests, RIRAC and IRAC forms (and their variations) do not improperly stifle creativity as students may sometimes feel.³⁷ In addition to style, the selection, framing, and formation of categories noted above necessarily involve creativity. Furthermore, once one has mastered basic forms of thought, one can of course move to variations of RIRAC or IRAC that might serve particular situations better so

³⁴ See Brett Rappaport, *Using Elements of Rhythm, Flow, and Tone To Create a More Effective and Persuasive Acoustic Experience in Legal Writing*, 16 J. LEGAL WRITING INST. 67 (2010) (citing Rebecca Adams, “Writing Non-Fiction” in *Instead of Full Stops: A Guide to Writing and Publishing Non-Fiction* 1996).

³⁵ See for e.g. Christina L Kunz and Deborah A. Schmedemann, *Our Perspective on IRAC*, Second Draft Newsletter November 1995 (“... IRAC can be taught so that students understand not only why it is useful as a thinking and writing tool, but also that proper use of it requires judgment and creativity”).

³⁶ See generally Rappaport, *supra* note 34.

³⁷ See again Lebovits, *supra* note 2 (noting student complaints of stifled creativity).

long as such variations still address all necessary levels of thought.³⁸ One cannot, however, successfully improve or embellish a core of good thought that does not exist.³⁹ Finally, when using basic forms of thought, we should of course also otherwise use all available helpful linguistic and liberal arts skills and this, too, necessarily involves creativity.⁴⁰

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

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

Judges, lawyers, and clients want to start with conclusions.⁴¹ Unlike readers of Conan Doyle or Christie, judges, lawyers, and clients do not mind “spoilers,” do not mind having the ending first. They want to know up front “who dunnit” so they can explore

³⁸ In addition to CREAC, ICREAC, and IREAC discussed below, RIRAC and IRAC can generate countless other forms. See again for e.g. Tracy Turner, *Finding Consensus in Legal Writing Discourse Regarding Organizational Structure: A Review and Analysis of the Use of IRAC and its Progenies*, 9 JALWD 357-58 (2012) (setting forth a table of 20 forms); Lebovits, *supra* note 2, at 50 (setting forth a table of 17 forms).

³⁹ Bret Rappaport, *Tapping the Human Adaptive Origins of Storytelling by Requiring Legal Writing Students to Read a Novel in Order to Appreciate How Character, Setting, Plot, Theme, and Tone (CSPTT) Are as Important as IRAC*, 25 T. M. Cooley Law Review 299 (2008) (Students need IRAC from the outset of law school “. . . to learn how lawyers view the world, deconstruct disputes, and from that deconstructed base, spot issues and construct arguments that help their client prevail. . . . Without the fundamental understanding of the logic and reason of the law, students would flounder, for the real world of law is made up of such things.”)

⁴⁰ See Harold Anthony Lloyd, [*Exercising Common Sense, Exorcising Langdell: The Inseparability of Legal Theory, Practice and the Humanities*](#), 49 Wake Forest L. Rev. 1232-35 (Winter 2014). See also for e.g. Rappaport, *supra* note 39 at 299 (“Literature and its elements, character, setting, plot, theme and tone, have a rightful and valued place in a student’s second or third year”). I would also say that literature and other liberal arts should have a place in the first year. See *id.* note 151 (acknowledging that others support “using literature in the first-year legal-writing class.”)

⁴¹ COUGHLIN, *supra* note 21, at 165-166.

the reasoning that lies behind.⁴² Judges and lawyers want the answers first because time is precious; clients want the answer first because that is generally their primary concern rather than the reasoning that lies behind.⁴³

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

Unless clear on their face, rules need sufficient explanations that clarify and support the analysis and conclusion the lawyer provides. Although, clients can be generally most concerned with conclusions, some clients will want to follow the analysis in varying degrees of detail. Thus, it is important to provide clients at least the opportunity to read clear explanations where rules are not clear on their face. Furthermore, if things go wrong, a good lawyer must be able to explain her reasoning and point out this reasoning was also initially available to the client. Additionally, in the classroom a professor can better understand student errors and deficiencies if students explain their thinking. It can therefore be useful to modify CRAC further to add a rule explanation provision so CRAC thus becomes CREAC with the “E” standing for “explanation.”⁴⁴

⁴² *See id.*

⁴³ *See Id.*

⁴⁴ Again, in addition to ICREAC and IREAC discussed below, RIRAC and IRAC can generate countless other forms. *See again for e.g.* Turner, *supra* note 38, at 357-58

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

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

Karl Llewellyn⁴⁵

To learn legal analysis students must of course solve problems themselves. Yet, law professors nonetheless have an obligation to provide detailed and structured overviews of law and its practice. Students pay in both money and time to be in law school and no doubt have a right to a meaningful amount of material delivered in a logical and digestible form. “Piece-wise” instruction that “largely leaves students to themselves”⁴⁶ makes no more sense than a lawyer’s largely leaving clients to themselves. (I think providing only “piece-wise” Langdellian guidance⁴⁷ can raise ethical questions for teachers no less than practitioners—especially if teachers are members of the bar—but that is a topic for another day.)⁴⁸

In providing instruction that is not “piece-wise,” the forms discussed above can provide student “clients” with the same benefits that they provide legal clients. When addressing any matters, instructors should be confident that students comprehend the basic RIRAC form of thought for all the reasons discussed above. Once confident that

(setting for a table of multiple forms); Lebovits, *supra* note 2, at 50 (also setting forth a table of multiple forms).

⁴⁵ KARL LLEWELLYN, *THE BRAMBLE BUSH* 109 (Ocean Publications 1989).

⁴⁶ *Id.*

⁴⁷ For my thoughts on the great damage Langdell and his followers have done to legal education, *see generally* Lloyd, *Exercising Common Sense*, *supra* note 40.

⁴⁸ Exploring that topic might begin with Model Rule 8.4(c) which provides that it is “professional misconduct for a lawyer to” “engage in conduct involving dishonesty . . . or misrepresentation.” If law schools hold out “piece-wise” Langdellian guidance as truly preparing students for the practice of law (especially if this “guidance” is given by faculty who have never practiced law themselves), does this create ethical issues under the rule? At the very least, this sounds like a conversation we ought to have.

students understand the need for framing reference in a shared way that permits further discussion of any matter, class instruction can shift to other forms as the instructor deems appropriate—though one further modification is useful for the classroom.

While legal clients focus on conclusions and thus often like the CREAC form, student “clients” must learn to spot issues as well. For this reason, an instructor using CREAC in class discussions of problems can find that an ICREAC model (i.e., adding “Issue(s) to CREAC) works better in class discussions. For example, imagine a discussion of the doctrine of consideration in a restrictive covenant context. The instructor might begin with a series of “issue” questions such as: “Is a penny promised but never delivered sufficient consideration for a covenant not to compete?” “Is promised continued employment sufficient consideration for such a covenant?” “Is a change of title without more sufficient consideration for such a covenant?” “Is an increase in an employee’s duties sufficient consideration?” “Is a decrease?”

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

Whether to use ICREAC or IREAC is always a situational judgment call. Over the course of teaching, one will find that one approach works better in some cases and not

in others. One big advantage of ICREAC is that it avoids the game of “hiding the ball” with issues. As a student, I found that “game” particularly annoying not only as a waste of precious time but I also wondered whether wasting such time was in fact necessary because the teacher could not fill the allotted class time with substance. I imagine these reactions are not unique to me.

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

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

Of course, students must also learn to do their own IRACs and CREACs and other assigned analyses in order to learn how good lawyers think and reason. In my commercial leasing class, for example, I find it very helpful to assign weekly problems which students must address in IRAC form. Initially, a few students may complain about this but by the end of the course I generally hear that this was one of the most useful parts

of the class. This makes sense since, again, good thinking needs to be in the form of good thought. However, though these assigned IRACs are useful, they do not remove the need for the professor's ICREACs and IREACs providing the benefits discussed above.

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

VII. CONCLUSION

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

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

Overlooking such freedoms is not only misleading in itself. It also misses the need to study how such freedoms are and should be exercised. When facts are simply

presented as “given” and strategic and other choices go unrecorded and unnoticed in redacted appellate opinions, no thorough analysis of these overlooked subjects can occur. This is extremely troubling since such overlooked subjects are at the very heart of the lawyer’s craft.

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

More specifically, a good grasp of reference assures that parties are in fact talking about the same matter or matters (the “reference”), also increases the likelihood of ascertaining all the relevant “facts,” and to the extent reasonable increases the likelihood of frames most consistent with a client’s real interests. A good grasp of issues both brings necessary focus on what is important in the reference and again, to the extent reasonable, increases the likelihood of frames most consistent with a client’s real interests. A good grasp of applicable rules and how to frame and apply them on its face increases the likelihood of representing a client well. A good grasp of conclusions and how to frame and hedge them also does the same.

Approaching all these levels of thought with RIRAC form in mind also helps assure both that no necessary steps are omitted either in thinking or in communicating

such thought. Use of the professorial ICREAC and IREAC helps perform similar functions in the classroom. Additionally, IRAC and CREAC may prove desirable substitutes in the situations discussed. Even then, however, there is much safety in that “pensive citadel,” in keeping RIRAC in the back of one’s mind. Legal writing professors are the pioneers in this regard. It is long past time for others to join them.

APPENDIX
A BRIEF OVERVIEW OF SOME BASIC FORMS OF THOUGHT

Basic Forms of Thought

RIAC (Reference, Issue, Analysis, Conclusion)

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

Some Variations on RIRAC

IRAC (Issue, Rule, Application, Conclusion)

CRAC (Conclusion, Rule, Application, Conclusion)

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

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

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