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Performing The Constitution

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PERFORMING THE CONSTITUTION

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Umberto Eco's novel, *Foucault's Pendulum*,[1] is a tale of three minor figures in the publishing field who become aware of a widespread belief among the fringe elements of Western society that a secret and globally portentous Plan has been unfolding for several centuries. These fringe elements are obsessed, finding hidden evidence of The Plan in a variety of texts, some of them seemingly quite innocuous. The novel's protagonists decide, at least partly out of whimsy, that they themselves would read even more prosaic texts as holding similar evidence.

In their *tour de force*, they triumphantly interpret a humble driver's manual as saying that the automobile exists "only to serve as metaphor of creation."[2] The drive shaft of the automobile is the trunk of the tree of Belboth.[3] The engine is Omnia Movens, "communicat[ing] its creative energy to the . . . higher wheels: the Wheel of Intelligence and the Wheel of Knowledge."[4] The clutch is "the Sefirah of grace that establishes or interrupts the flow of love that binds the rest of the tree to the Supernal Energy."[5] The "alternation of intake and exhaust . . . [is a] complex, divine respiration."[6]

My purpose as well is to address the matter of textual interpretation, more specifically, to make a small and no doubt unnecessary addition to the already mountainous heap of academic worry over the much-vexed question: "What is the meaning of the Constitution?" Before you, gentle reader, become unduly alarmed, however, I do not propose to discuss how the Commerce Clause fits into the ebb and flow of divine respiration. Nor will I explore the role of Article Three courts in the function of the cosmic engine, the Omnia Movens.

Rather, my point of departure is a provocative idea offered by the prolific and much-awarded English playwright Tom Stoppard on the occasion of an academic lecture. During the question and answer period which followed the lecture, a member of the audience asked him what his reaction was when directors staged his plays in ways that obviously got their meaning

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1. UMBERTO ECO, FOUCAULT'S PENDULUM (William Weaver trans., 1989). The author gratefully acknowledges the suggestion of Tanya J. Dobash that I would find this book well worth reading.

2. *Id.* at 378.

3. *Id.*

4. *Id.*·

5. *Id.* at 379.

6. *Id.*

wrong. Stoppard replied, "Well, actually, I look forward to seeing my plays staged so that I can find out what they mean."[7]

Implicitly underlying Stoppard's puckish reply is a particular and perhaps idiosyncratic conception of the meaning of a text, in this case, the script of a play. What I propose to do in this essay is explore this proposition: What would be the consequences of imputing to the Framers of the Constitution a conception of its meaning similar to the one that Tom Stoppard has for his plays—to assume, that is, that the Framers, all skilled politicians, considered the Constitution to be a performance document, to be acted out then and in the future within a particular social, economic, and cultural context, one that would undoubtedly change over time? The idea is to make moot the question of original intent by positing that the proper meaning of the Constitution is neither something inherent in the text itself nor a reconstruction of the Framers' intent, but instead is the product of the performance of the text.

Starting with these "what if" propositions, I propose to explore two questions. First, I will address in some detail how the Constitution would come to have meaning. Then, I will explore, though in a considerably more preliminary way, what consequences this would have for the judicial function of deciding constitutional questions, a function that is intimately bound up in the matter of constitutional meaning.

It is clear, of course, that Tom Stoppard's conception of textual meaning opens himself to having to accept the many different ways in which directors and actors can stage any one text of a play. Contemporary productions of Shakespeare's plays exemplify the rich variation that is possible. Particular roles, for instance, can be cast with an actor or actress of a different race— Denzell Washington cast as Richard III or Morgan Freeman as Petruchio in *The Taming of the Shrew*. The temporal or physical setting of the play is subject to considerable variation—staging *As You Like It* in Dickensian costume or *The Taming of the Shrew* in the American Wild West. The performers can put a variety of different "spins" on particular characters, for example, the particular characterization of Richard III that the director asked of the Richard Dreyfuss character in the film, *The Goodbye Girl*.

Indeed, as Umberto Eco demonstrates with the driver's manual, the potential range of possible interpretations to which a text is subject threatens to be limitlessly broad. This, after all, is one of the powerful messages of deconstruction—the controversial practice of certain *avant garde* academicians of taking great pleasure in endlessly standing texts on their heads. Clearly, *Foucault's Pendulum* offers a sobering message, one that requires me to sharpen how I formulate the task of this essay: Given our commitment to the Rule of Law, how do we "perform the Constitution" without falling into utter whimsy—or paranoia?

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7. Tom Stoppard, *The Text and the Event*, Lecture at Washington & Lee University (Dec. 2, 1981).

In the pages that follow, I will offer particular conceptualizations of meaning in theatre, in language, and in the judicial function, conceptualizations based not on meaning as an attribute of a text but instead as the current product of an ongoing process. These conceptualizations do not command mainstream acceptance; at best, they command only grudging respect. Each, however, derives from the attempt of seasoned and trenchant observers to describe pragmatically what goes on in these activities.

Then, I will argue both that these conceptualizations capture how the Constitution ought to have meaning, and that this approach, though it eschews the possibility of textual determinacy and fixed meaning, nevertheless remains faithful to the commitment to the Rule of Law. Finally, I will try to suggest in a preliminary way how this approach to textual meaning might affect judicial practice; what, as Oliver Wendell Holmes, Jr.,[8] Jerome Frank,[9] and Karl Llewellyn[10] might say, judges and lawyers "do about the Constitution."

I. TEXTS

A. *Theatre*

The Prague Linguistic Circle, an influential school of structuralist thought that flourished in the 1920s and 1930s,[11] produced an efflorescence of theories about theatre and drama.[12] Theatre, according to Prague School theory, is "the complex of phenomena associated with the performer-audience transaction: that is, with the production and communication of meaning in the performance itself and with the systems underlying it."[13] Drama, by contrast, is "that mode of fiction designed for stage representation and constructed according to particular ('dramatic') conventions."[14] What is theatrical, according to these definitions, "is limited to what takes place between and among performers and spectators."[15] Although the intellectual ferment of the Prague School was part of the larger structuralist movement of that era, the concept of theatre that emerged strongly empha-

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8. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

9. Jerome Frank, *What Courts Do In Fact* (pts. 1-2), 26 ILL. L. REV. 645, 761 (1931).

10. "What these officials do about disputes is, to my mind, the law itself." KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 12 (1960).

11. *See* FREDERICK J. NEWMEYER, LINGUISTIC THEORY IN AMERICA: THE FIRST QUARTER CENTURY OF TRANSFORMATIONAL GENERATIVE GRAMMAR 37-38 (1980); JOSEF VACHEK, THE LINGUISTIC SCHOOL OF PRAGUE: AN INTRODUCTION TO ITS THEORY AND PRACTICE 3-39 (1966).

12. *See* KEIR ELAM, THE SEMIOTICS OF THEATRE AND DRAMA 5-19 (1980). For a representative collection of Prague School work on theatre, see SEMIOTICS OF ART: PRAGUE SCHOOL CONTRIBUTIONS (Ladislav Matejka & Irwin R. Titunik eds., 1976).

13. ELAM, *supra* note 12, at 2.

14. *Id.*

15. *Id.*

sized that the genesis of theatrical meaning lay in an interactive process among principals and audience.

The English director Jonathan Miller, writing with the experience of his distinguished career, argues that there is no "ideal performance"[16]—*the* true meaning—of a great play because the play seems "capable of an almost infinite number of alternative performances."[17] Alternative performances are possible because the text of a play is only an enabling document and not an "identifying document"—one that specifies a single meaning.[18] The text of a play cannot be an identifying document in a technical sense:

> Playwrights do not include—and cannot, because of a shortage of notation—all those details of prosody, inflexion, stress, tempo and rhythm. A script tells us nothing about the gestures, the stance, the facial expressions, the dress, the weight, or the grouping or the movements. So although the text is a necessary condition for the performance it is by no means a sufficient one. It is short of all these accessories which are, in a sense, the *essence* of performance. The literal act of reading the words of a script does not constitute a performance.[19]

Nor can the text of a play be an identifying document in a cultural sense:

> Confronted by classical works, some of which have survived for several hundred years, it is easy to forget that the author did not write them for posterity. Plays, like any other art form, are created for the artist's contemporaries, which means, to some extent at least, that certain things are understood without having to be explained.
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> . . . The play can become mummified by dogma; there is evidence to show that Chekhov suffered in this way. After his death in 1904, Chekhov's colleagues at the Moscow Arts Theatre succeeded in establishing a canonical production of each of his plays. The proprieties were supervised by his widow who extended her vigilance to the smallest detail. But the style of the company was superseded by developments in every other area of the European theatre, with the result that the orthodox production began to look quaint and even irrelevant. Something comparable happened to Wagner and to Brecht.[20]

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16. JONATHAN MILLER, SUBSEQUENT PERFORMANCES 33 (1986). Copyright © 1986 by Jonathan Miller used by permission of Viking Penguin, a division of Penguin Books USA Inc..

17. *Id.* at 34.

18. *See id.*

19. *Id.*

20. *Id.* at 48-49.

Any one production of a play, then, "is inevitably a limited version of the range of possible interpretations."[21] According to Miller, what generates the particular version that is performed are the perceptions which director and actors bring to the text in order to generate hypotheses about the possibilities of the text.[22] Moreover, perception is not an objective, neutral matter:

> *Perception* always approaches its domain with interests, preoccupations and prejudices about what is important in a work whether of art or literature. If we agreed that the function of the director is to restore as much of the information of the original performance as he could, what he would infer as being important about the original production would not provide a faithful copy of its original but merely tell us what *he* thought was important in it. He would automatically and unavoidably be introducing an interpretation, and even at his *most* obedient would introduce preconceptions. I believe that it is better to be conscious of your preconceptions rather than simply to be the victim of them.[23]

Thus, a production of a play can only be an interpretation, even if the director sets out to replicate rather than interpret. Moreover, because the interpretation proceeds from the perceptions of director and actors and because these perceptions are a function of their values, what is particular about any production is ideological in nature.

Perhaps paradoxically, however, value-laden interpretation does not constrain the possibility of meaning; it liberates meaning. As with the canonical productions of Chekhov's plays, as time passed, the less we would understand of the original production of a play. Were a play to be frozen into a canonical production, "the theatre would become rather like a museum or a church in which the audiences would be subtly changed into congregations, witnesses of a rite rather than spectators of a play."[24]

Instead, the limitedness of any production can become a virtue:

> As long as we recognize and accept the argument that performance is, necessarily, a limitation, then the destiny of a great play is to undergo a series of performances each of which is incomplete, and in some cases may prove misleading and perverse. By submitting itself to the possibility of successive re-creation, however, the play passes through the development that is its birthright, and its meaning begins to be fully appreciated only when it enters a period that I shall call its *afterlife.*[25]

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21. *Id.* at 23.
22. *See id.* at 43.
23. *Id.* at 53.
24. *Id.* at 55.
25. *Id.* at 23.

The afterlife is not, however, a process that tends toward a convergence of meaning. Indeed, we perform great plays, for instance Shakespeare's, because of the possibility that unforeseen meanings will emerge.[26] Rather, "it is only by undergoing the consecutive processes of death and reproduction that plays can enjoy the self-renewal without which an afterlife is inconceivable."[27] Indeed, Miller believes that "it is precisely because subsequent performances . . . are interpretations, rather than copies, that they have survived."[28] The term "life" connotes growth and change; the afterlife, then, proceeds as a process of renewal.

Prague School theory, like Jonathan Miller, holds that no one production is exhaustive of the potential meaning of a play.[29] While Miller emphasizes the nature of the production, Prague School theory focuses more particularly on the performance, tending to pick up where Miller leaves off. Prague School theory understands the performance as a network of meanings; the performance itself is a text.[30]

What emerges is a conception of theatre as a complex, multilayered activity. The production is a function of the perceptions that director and actors bring to the playwright's text. The production generates the performance, which is also a text. Because the performance is a text, then necessarily it too is the subject of interpretation. Because the audience is to read the performance-as-text, it is with the audience that the ultimate responsibility for meaning lies.

The audience itself, that is, not only is involved in the performance but also is obliged to be involved—"we enter the theatre and agree to participate in the performer-spectator transaction."[31] Thus, the pleasure of attending a play lies not in the passive process of being entertained; rather, it lies in active participation, an exercise in spectator competence—from the recognition and understanding of the theatrical frame to the much more complex understanding of the theatrical code.[32] The role of the spectator lies literally in reconstructing the meaning of the play.[33]

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26. *Id.* at 35.
27. *Id.* at 67.
28. *Id.* at 55.
29. ELAM, *supra* note 12, at 38-44.
30. *Id.* at 12.
31. *Id.* at 52.
32. *Id.* at 94-96; *see also id.* at 7, 34.
33. One might say that this "spectator's meaning" lies at the end of a chain of conveyed meanings. The meaning that the actors are attempting to convey by their performance derives from their understanding of the meaning that the director is trying to convey through her conceptualization of the play. And the director's meaning derives from her understanding of the meaning that the author is trying to convey through the text of the script. Nor does this chain of meaning end with the audience at the particular performance. Subsequent to that performance, some spectators will function as critics, whose interpretations and assessments will provide food for thought for other spectators to rethink their own "performance" of the play, a process that often enough will be carried out in conversation with other spectators of the same performance. And, of course, this process by which members of the audience make

Implicit in the question posed to Tom Stoppard is the assumption that one can ask, "What is the meaning of a play?" A much-honored playwright, a much-honored director, and a significant intellectual school tell us, however, that the meaning of a play is not a determinate attribute embedded in the text. Rather, meaning is a particular result of a particular performance. The play, then, is an unfolding event, an event, as has been so well put, that "happens halfway between the stage and the audience."[34]

B. Language

This essay began with the proposition that, in order to understand the meaning of the Constitution, we should treat it as a text to be performed. We arrived at a description of theatre—the activity of performing performance texts—that locates the meaning of the play not in the text itself but instead in the performance. No single meaning, however, emerges from performance. Rather, the meaning is a function of the particular values that directors and actors bring to the production. We face the spectre of someone producing Noel Coward's *Blithe Spirit* as . . . a driver's manual.

Does this mean, then, that to treat the Constitution as a text to be performed is to make it incapable of determinate meaning? Or is the indeterminacy of the text of a play aberrational as compared to texts generally? Plays, that is, might well be indeterminate solely because, unlike texts generally, they are written to be performed. As Jonathan Miller observes, the "literal act of reading the words of a script does not constitute a performance."[35] Indeed, a "play that has been kept unperformed has been aborted."[36]

Consider, however, *Pierre Menard, Author of Don Quixote*,[37] one of the *Ficciones* of the late Argentine writer, Jorge Luis Borges. In this short, fictional sketch, the narrator, a friend of a recently deceased author, Pierre Menard, discusses Menard's *oeuvre*. The narrator gives special attention to one of Menard's major projects, one that was begun in 1918—the writing of *Don Quixote*:

> He did not want to compose another *Don Quixote*—which would be easy—but *the Don Quixote*. It is unnecessary to add that his

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known and develop their meanings of the play can have a feedback effect on what directors and actors do in subsequent productions of that play. At subsequent productions of the play, the audience will often enough be made up both of those who are performing their roles as a spectator of that play for the first time and of those who are repeating their performance. Indeed, to conceive of this process as a *chain* of meaning is thoroughly inadequate. Rather, what comes into being is a *web* of meaning that extends both over time and over those members of a culture who participate in, or are touched by, theatre.

34. The author remembers this statement from an interview of a playwright on National Public Radio several years ago. Unfortunately, efforts to track down the particulars have been unsuccessful.

35. MILLER, *supra* note 16, at 34.

36. *Id.* at 23.

37. Jorge Luis Borges, *Pierre Menard, Author of Don Quixote, in* FICCIONES 45 (Anthony Kerrigan ed. & Anthony Bonner trans., 1962).

aim was never to produce a mechanical transcription of the original; he did not propose to copy it. His admirable ambition was to produce pages which would coincide—word for word and line for line—with those of Miguel de Cervantes.[38]

Menard, we learn, eschews the altogether too easy approach of trying to become Cervantes: "To be, in some way, Cervantes and to arrive at *Don Quixote* seemed to him less arduous—and consequently less interesting—than to continue being Pierre Menard and to arrive at *Don Quixote* through the experiences of Pierre Menard."[39]

Menard, does not, of course, finish the task. A partial text, however, remains: "the ninth and thirty-eighth chapters of Part One . . . and a fragment of the twenty-second chapter."[40] These fragments indeed "coincide—word for word and line for line—with those of Miguel de Cervantes."[41]

It is clear that Menard enjoyed a measure of success. Yet, it is also clear that the two works, nevertheless, are profoundly different:

> [T]he fragmentary *Don Quixote* of Menard is more subtle than that of Cervantes. The latter indulges in a rather coarse opposition between tales of knighthood and the meager, provincial reality of his country; Menard chooses as "reality" the land of Carmen during the century of Lepanto and Lope [de Vega].[42]

Moreover, it is possible to find in Menard's fragments, as one cannot in Cervantes's *Don Quixote*, the influence of Nietzsche.[43] One also observes: "Equally vivid is the contrast in styles. The archaic style of Menard—in the last analysis, a foreigner—suffers from a certain affectation. Not so that of his precursor, who handles easily the ordinary Spanish of his time."[44]

It is an altogether common habit of mind to approach texts with the assumption that they are capable of determinate and stable meaning. This assumption, in turn, rests on a conception of language that it functions as a window on, or a mirror of, nature—the more perfected the language, the more accurate its capture of reality. And even if we are aware of indeterminacy and instability in the meaning of texts, and even if we sense that any language has its particular imperfections, it is also a common habit to assume that determinacy, stability, and accuracy are the criteria of what texts and language ought to be and that it is possible to improve our language so that it satisfies these criteria more closely.

The simple fact, however, is that academicians in the humanities, those whom we might expect to be the most capable of carrying out the project

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38. *Id.* at 48-49.
39. *Id.* at 49.
40. *Id.* at 48.
41. *Id.* at 49.
42. *Id.* at 51.
43. *Id.* at 52.
44. *Id.* at 53.

of perfecting our language, have progressively failed to do so. Indeed, the humanities have become something of a Tower of Babel—far from agreement either on what particular texts mean or even on how one goes about establishing meaning for texts, there is only an increasingly chaotic diversity in method and in result.[45] Author-oriented interpreters, the hermeneuticians, contend with the advocates of New Criticism, who seek meaning in the text itself. Both contend with a bewildering array of rivals—the reader-oriented interpreters, the deconstructionists who take almost perverse pleasure in multiplying the number of possible interpretations of a text, the historicist interpreters and sociocritics who focus on the context in which the text was written, the formalists who find textual meaning by pigeonholing texts into one or another archetypical category, and structuralists who seek the underlying universal structure of language.

When an author produces a text, it is relatively safe to assume that she does so in order to communicate with a reader. What meaning, however, does·the reader of her text derive? And, more importantly, how does the reader go about deriving that meaning? Eco's driver's manual and Borges's *Don Quixote* illustrate nicely the indeterminacy of the text itself. The methods of the historicists, sociocritics, and formalists all ultimately founder on having to make one kind of assumption or another about the author's intentions—was she a product of her times, or was she trying to break the conventions of her times? Did she intend to produce this particular category of text—is her text, seemingly in the form of a poem, really a metaphor for a driver's manual?

The hermeneutic approach, which commands considerable respect in our own Constitutional endeavor, also ultimately founders on its own problem of circularity. We can illustrate the problem by imagining ourselves coming upon a fragment of text that clearly is part of *Don Quixote.* But *whose Don Quixote* is this? Is it Miguel de Cervantes's? Is it Pierre Menard's? Let us say that we are told, on excellent authority, that the fragment is Pierre Menard's. Upon reading the fragment, we can see that it seems to show the influence of Friedrich Nietzsche. Was it, however, Menard's intention to incorporate certain of Nietzsche's strict and penetrating insights?

Knowing, of course, that this fragment could not have been written before 1918, and that Nietzsche last published in 1888,[46] we know that this influence is well within the realm of possibility. But is it a certainty? Monsieur Menard is deceased, he has thoughtfully destroyed all his notebooks, and his extant letters and recollected conversations do not address the matter. What is left to us is to demonstrate that the text is entirely compatible with its having been influenced by the brooding German philosopher, indeed, compellingly so, thereby making our way clear to impute

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45. A succinct presentation of the congeries of interpretive schools appears in ROBERT E. SCHOLES, SEMIOTICS AND INTERPRETATION 1-16 (1982).

46. *See* BENET'S READER'S ENCYCLOPEDIA 694 (3d ed. 1987).

such authorial intent to Menard. Unfortunately, of course, we have used our reading of the text as a means of discovering the author's intent, which we are seeking to establish in order to arrive at the proper reading of the text.

Jonathan Miller well understands the unavailability of author's intent:

> If we had a video copy of the first performance of Shakespeare's *Twelfth Night*, it is no good saying it exemplifies everything that it shows because people would disagree immediately as to what it is showing.
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> . . . If called upon to copy it we would copy what we thought was important, and in'that very act would adapt the production even if we had agreed to the idea that copying meant producing something indistinguishable. The reproduction of the play would indeed look identical to us but a subsequent generation, twenty-five years later, would wonder why we had picked out various features and not others from the tape.[47]

This leaves us with deconstruction. The recent "deconstructive turn" in humanistic studies has led to an apparent anarchy in textual meaning. At its extreme, deconstruction involves the playful manipulation of texts in order deliberately to find often outlandish meanings in them—a metaphor for creation, for example, in a driver's manual. An approach that posits, even celebrates, the radical indeterminacy of the text might seem to be the antithesis to the Rule of Law, allowing the reader almost unlimited power in determining the meaning of a legal text. Yet, in the theoretical underpinnings of deconstruction lie the elements of an approach to language that is altogether congenial to the task of providing an account of meaning that is consistent with the Rule of Law.

The underpinnings of the deconstructionists' mad rush toward chaos in meaning lie in the early twentieth century thought of a structuralist, the Swiss linguist, Ferdinand de Saussure. In his description of language, de Saussure emphasized the distinction between the structure of language, *la langue*, from language in use, *parole*.[48] Focusing his attention on *la langue*, de Saussure posited that the basic element of language structure is the linguistic sign, made up of the *signifier*—the word or sound pattern—and the *signified*—the concept that the signifier embodies.[49] It was de Saussure's insight that the linguistic sign is arbitrary.[50] That is, the form of the signifier

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47. MILLER, *supra* note 16, at 52-53.

48. *See* FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 7-15 (Charles Bally & Albert Sechehaye eds. & Wade Baskin trans., McGraw-Hill 1966) (1959); *see also* JONATHAN CULLER, FERDINAND DE SAUSSURE 39-45 (rev. ed. 1986); ROY HARRIS, READING SAUSSURE 21-25 (1987); TERENCE HAWKES, STRUCTURALISM & SEMIOTICS 20-22 (1977).

49. *See* DE SAUSSURE, *supra* note 48, at 65-67; HAWKES, *supra* note 48, at 24-25.

50. *See* DE SAUSSURE, *supra* note 48, at 67-69; CULLER, *supra* note 48, at 28-33; HAWKES, *supra* note 48, at 25-26.

is not a consequence of the signified—the signifier is not generated by any of the attributes of the concept embodied in the signified.

For example, the signifier for the signified that denotes a four-legged mammal with hyperactive panting at one end and hyperactive tail-wagging at the other end can, and does, take a variety of forms—"dog" in English, "chien" in French, "hund" in German.[51] None of these signifiers is, of itself, "doggish" in any way. The *form* of the signifier does not depend on the particular attributes either of the signified or of the phenomenon which the signified captures.[52]

Moreover, although the sign refers to particular perceived phenomena in the world "out there," the substantive content—the meaning—of any one sign is a function not of these phenomena but instead of the structure of the system of signs that makes up the language. As de Saussure put it, "in language there are only differences *without positive terms*."[53] The meaning of a sign, that is, is not a positive aspect of that sign; rather, this meaning is negative in the sense that it is *not* the meaning of all of the other signs in the structure.[54]

The implications of de Saussure's structuralist account of language are rather unsettling. The story in Genesis of Adam naming the animals[55] captures our subconscious assumption that we can know reality only through language. "Naming makes it so" goes the common aphorism,[56] although we presume that reality determines the names that we bestow. What emerges from de Saussure's account of the arbitrary linguistic sign, however, is the surprising tenuousness of the relationship between language and reality.

Perhaps the deepest and most insightful working out of the consequences of the structuralist account of language is the work of the French theorist Jacques Derrida.[57] In Derrida's analysis, language is an abstraction from reality rather than a capture of it.[58] Language is an abstraction in the sense that meaning is a consequence not of an ultimate exterior truth but instead of the abstraction—the imposition of structure—that language makes possible.[59]

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51. *See* DE SAUSSURE, *supra* note 48, at 67-68; CULLER, *supra* note 48, at 28-29.

52. The exception to this rule is *onomatopoeia*, defined as the "formation of words in imitation of natural sounds . . . (as *buzz, hiss, bob-white*)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1577 (1981). For a discussion, see DE SAUSSURE, *supra* note 48, at 69.

53. DE SAUSSURE, *supra* note 48, at 120.

54. *See* HAWKES, *supra* note 48, at 28.

55. *Genesis* 3:19-20.

56. *See* ERNST CASSIRER, LANGUAGE AND MYTH 23-43 (Susanne K. Langer trans., Dover 1953) (1946).

57. *See* JOHN K. SHERIFF, THE FATE OF MEANING: CHARLES PEIRCE, STRUCTURALISM, AND LITERATURE 35 (1989). Derrida's most prominent development of these consequences is JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri C. Spivak trans., 1976). A succinct presentation of Derrida's concept of language as sign system, a presentation that is admirably approachable, given the complexity, counter-intuitiveness, and paradoxical nature of Derrida's concepts, is set out in SHERIFF, *supra*, at 32-50.

58. *See* SHERIFF, *supra* note 57, at 38.

59. *See id.* at 34.

Moreover, because no positive meaning exists in the individual signs that make up language, language is a system in which there is only the endless deferral of meaning.[60] Because of this deferral, then, the meaning of a text depends on context.[61] Because, however, the possible contexts are without limit, and because no one context captures all possible contexts, the speaker's intention cannot limit meaning and there is no possibility of *the* meaning of a text.[62] Hence the phenomenon of deconstruction—with meaning endlessly deferred, there can be no closure of any text. The meaning of any text turns out to be whatever meaning one has arrived at when one stops for whatever reason—perhaps only exhaustion—deconstructing it.

So far, we seem only to be going further astray. While the formalists, historicists, sociocritics, and hermeneuticians cannot provide a complete account of meaning and cannot point the way toward deriving fully determinate meaning from a text, they surely *approach* closure rather than utter chaos. Moreover, despite what the deconstructionists can do with texts, we know quite well that, in fact, we *do* convey meaning with language. It is true that the communication process does not always proceed perfectly.[63] To say, however, that the process works imperfectly is decidedly not to say that it does not work at all.

Shift the focus of inquiry, however, from structure—*la langue*—to process—*parole*. The American pragmatist Charles Sanders Peirce proposed a concept of the linguistic sign that differed strikingly from that of his structuralist contemporary, de Saussure.[64] For Peirce, the linguistic sign

> is something which stands to somebody for something in some respect or capacity. It addresses somebody, that is creates in the mind of that person an equivalent sign . . . which . . . I call the *interpretant* of the first sign. The sign stands for something, its *object*. It stands for that object, not in all respects, but in reference to a sort of idea, which I have sometimes called the *ground* . . . .[65]

Peirce elaborated on his concept of the ground in this way: "If a Sign is other than its Object, there must exist, either in thought or expression, some explanation or argument or other context, showing how—upon what

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60. *Id.* at 45.

61. *Id.* at 44-45.

62. *Id.*

63. For engaging accounts of the nature and cause of conversational miscommunication, accounts which also are suggestive of the account of the processes of meaning that this essay is intended to explore, see DEBORAH TANNEN, THAT'S NOT WHAT I MEANT: HOW CONVERSATIONAL STYLE MAKES OR BREAKS YOUR RELATIONS WITH OTHERS (1986); DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION (1990).

64. SHERIFF, *supra* note 57, at 53-72, presents an accessible account of Peirce's different, but equally difficult, concept of language as sign system.

65. Charles Sanders Peirce, Division of Signs, *in* 2 THE COLLECTED PAPERS OF CHARLES SANDERS PEIRCE ¶ 228, at 135 (Charles Hartshorne & Paul Weiss eds., 1931-35) [hereinafter COLLECTED PAPERS]. The quote in the text appears in SHERIFF, *supra* note 57, at 56.

system or for what reason—the Sign represents the Object . . . that it does."[66]

Peirce's definition of the linguistic sign at first blush appears to be hopelessly vague—"something which stands to somebody for something in some respect."[67] On closer consideration, however, one can see that it offers a far more complex account of language. First, the sign is as much a process as it is a thing. What is important to Peirce is that the sign *creates* a second sign, the interpretant, and meaning is a function of this interpretant.

Second, Peirce accounts for meaning not in terms of an arbitrary sign, lodged in a structure of signs and taking its meaning from that structure negatively. Rather, meaning derives positively through the function of the ground, a function of an "idea," "explanation," or "argument." In Peirce's scheme, then, the ground seems to function as a set of values which determines the relationships among the object, the sign, and the interpretant.

Third, Peirce's conceptualization takes the reified object of the structuralist account from somewhere "out there" into the mind. The sign has meaning only in relation to the interpretant, which is a concept in the mind of the addressee of the sign. Moreover, the ground—"a sort of idea"—is a mental concept as well. Language, then, is a process, inseparable from what we do. And what we do is an activity in the human mind.

Peirce left his concept of the linguistic sign undeveloped in substantial respects, particularly with respect to the ground. We can, however, derive an understanding of what the nature of the ground must be from the present-day work of Stanley Fish. Just as Jonathan Miller and Tom Stoppard do not regard meaning to be an attribute of the text of a play, Fish counts himself as among those "who preach the instability of the text and the unavailability of determinate meanings."[68] According to Fish, we do not find meaning *in* texts:

> meanings come already calculated, not because of norms embedded in the language but because language is always perceived, from the very first, within a structure of norms. That structure, however, is not abstract and independent but social; and therefore it is not a single structure . . . that changes when one situation, with its assumed background of practices, purposes, and goals, has given

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66. Division of Signs, *in* 2 COLLECTED PAPERS, *supra* note 65, ¶ 230, at 136. The quote in the text appears in SHERIFF, *supra* note 57, at 56.

67. Compare a Prague School description of theatre: "Everything that makes up reality on the stage—the playwright's text, the actor's acting, the stage lighting—all these things in every case stand for other things. In other words, dramatic performance is a set of signs." Jindrich Honzl, *Dynamics of the Sign in the Theater*, 6 SLOVO A SLOVESNOST 177 (1940), *reprinted in* SEMIOTICS OF ART, *supra* note 12, at 74. This definition makes it possible to speak of performance in the theatre as a text.

68. STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES 305 (1980) [hereinafter FISH, IS THERE A TEXT?].

way to another. In other words, the shared basis of agreement . . .
is never not already found, although it is not always the same one.[69]

These structures of norms form the basis for what Fish terms *interpretive
communities*—"meanings are the property neither of fixed and stable texts
nor of free and independent readers but of interpretive communities that
are responsible both for the shape of a reader's activities and for the texts
those activities produce."[70] Thus, while *the text* itself is unstable and a
determinate meaning of it is unavailable, any of us at any particular time
will experience that text as stable and determinate to the extent that we are
members of an interpretive community. We belong to such a community
simply by the fact that we successfully communicate with others through
language. Those with whom we can communicate successfully make up our
interpretive community.

Fish's point is that we experience language within a structure of socially-
created norms. The interpretive community is nothing more or less than the
social group which generates these norms and whose members hold them.
Meaning cannot be a matter of individual free play because of the norms
structure that an individual's particular interpretive community holds. While
this structure is subject to change over time,[71] the very fact that the
community members do communicate among themselves suggests that this
norms structure is relatively stable in the short run.

Moreover, no meta-structure of norms is available; rather, only alter-
native, particular norms structures are available. Thus, two individuals, each
a member of a different interpretive community, will read the same text
differently. Consistent with the notion that no meta-structure of norms is
available, there is no neutral position from which to read a text. To interpret
a text—that is, to bring meaning to it—requires *a* norms structure. We
must view the world from within one set of norms or another.

Stanley Fish's concept of the interpretive community provides a way of
understanding the ground of Peirce's linguistic sign. Functionally, the ground
provides a set of assumptions within which we immediately experience any
text.[72] There is no "distance between one's receiving of an utterance and
the determination of its meaning—[no] . . . dead space when one has only
the words and then faces the task of construing them."[73] Moreover, the
assumptions which the ground brings to the linguistic sign form a particular
set of socially created norms, implicit assumptions about the nature of the

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69. *Id.* at 318.

70. *Id.* at 322. Thomas Kuhn describes scientific activity in the same way when he speaks
of the "paradigms" that "scientific communities" hold. THOMAS S. KUHN, THE STRUCTURE
OF SCIENTIFIC REVOLUTIONS 174-98 (2d ed. 1970).

71. Fish explores the nature, processes, and consequences of change in the beliefs that
an interpretive community holds in STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE,
RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 141-60 (1989)
[hereinafter FISH, DOING WHAT COMES NATURALLY].

72. FISH, IS THERE A TEXT?, *supra* note 68, at 318.

73. *Id.*

world, assumptions which generate the meaning of the otherwise empty structure of signs. Jonathan Miller clearly understands how the ground determines the meaning that we bring to a text when he observes, *"Perception* always approaches its domain with interests, preoccupations and prejudices about what is important in a work whether of art or literature."[74]

Over time, the particular set of norms that the ground embodies is subject to change. The change that any particular interpretive community experiences, however, is not part of a larger process that leads to a convergence of norms among different interpretive communities. The change leads instead simply to another set of norms, a different ideology, for that community. The sets of norms remain heterogeneous among interpretive communities.

We can glimpse the nature of the ground of language in our reactions to periods of radical cultural change. The Civil War precipitated just such a period. The theretofore novel American experience of the North in carrying out a massive undertaking through mass organization made possible the rapid reorganization of productive enterprise into the hierarchical capitalist structure that fully emerged by the end of the nineteenth century.[75] Writing in 1869, however, Charles Francis Adams, Jr. described "the system of corporate life" as "a new power, for which our language contains no name."[76]

Some one hundred and twenty five years later, we again have entered a period of rapid cultural change, a period in which a long-standing consensus over the permissible content and style of public discourse has crumbled under the onslaught of urgently pressed claims for the recognition of alternative values—gender and racial equality, sexual orientation, and dissenting political views. A recent intensive sociological study revealed a growing perception of, and unease over, impersonality and fragmentation in American life, an unease which is leading toward a growing yearning for the possibility of a more communitarian way of life.[77] This study further revealed a striking inability of people to articulate this yearning.[78] The desire for, and the values of, this alternative way of life turn out to be as ineffable as the system of corporate life was for Charles Francis Adams.

What these two examples suggest is that this ineffability—the inability to capture in language emerging ways of life—is a direct consequence of the ground of language. The particular norms that make up the ground

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74. *See supra* text accompanying note 23.

75. GEORGE M. FREDRICKSON, THE INNER CIVIL WAR: NORTHERN INTELLECTUALS AND THE CRISIS OF THE UNION 98-112, 199-225 (Harper Torchbook ed. 1968) (1965).

76. Charles F. Adams, Jr., *A Chapter of Erie*, 109 N. AM. REV. 1, 105 (1869), *reprinted in* CHAPTERS OF ERIE AND OTHER ESSAYS 1, 97 (Charles F. Adams, Jr. & Henry Adams eds., 1871). The quote in the text appears in ALAN TRACHTENBERG, THE INCORPORATION OF AMERICA: CULTURE & SOCIETY IN THE GILDED AGE 3 (1982).

77. ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985).

78. *Id.* at viii, 19-20, 151, 157.

necessarily reflect so strongly the now receding way of life that the norms consistent with the emerging way of life are absent from the ground. Because they are absent, then necessarily our language does not allow us the capability for expressing the emerging way of life.

These examples also demonstrate the complexity of the process by which the particular substantive content of the ground comes about. Change in the ground appears to come about as a process of slippage between what I have just termed "an emerging way of life" and the particular substantive content of the ground, which reflects the recently dominant but now eroding way of life. If we understand the world through language, then the very fact of slippage indicates that there are both positive and normative elements to our experience of the world. Indeed, the slippage is between these two facets.

The positive element is the ground, which brings to bear a set of norms—an ideology—within the operation of the Peircean process of language, thereby shaping how we view the world at a subconscious level; there is no "distance between one's receiving of an utterance and the determination of its meaning."[79] The normative element—how we *ought* to view the world—necessarily operates at a more conscious level. This element is captured by the term "world view," or cosmology.[80] Because we understand the world through language and because we do have a conscious world view, the particular substantive content of the ground must come about as a complex process of mutual feedback between the ground of language and the world view. Our examples show that we glimpse this process when there is substantial slippage between the two.

Language, as the ongoing project of the structuralists demonstrates, is reifiable into an object. If we are to explain, however, how language works— how texts in particular and the world in general come to have meaning— then we must understand language as a process. Moreover, it is a social process, one in which each of us participates intimately; language is a human social practice. We saw that the play is not so much an object as it is an event that arises out of the mutual experience of actors and audience. We see that language, too, is an event—as William Butler Yeats asked, "How can we know the dancer from the dance?"[81]

We now have an explanation for the intuitively unsettling arbitrariness of the linguistic sign. Language is not a tool for capturing the meaning inherent in things. It is not a transparent window on the world. Rather,

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79. *See supra* text accompanying notes 72-73.

80. By "world view" or "cosmology" is meant a "way of life," a viable combination of shared values and beliefs and of patterns of interpersonal relations. MICHAEL THOMPSON ET AL., CULTURAL THEORY 1 (1990). So defined, there are a limited number of particular and alternative ways of life available, each of which incorporates a particular and incomplete understanding of the world. *Id.* at 3. For a succinct introduction, see Mary Douglas, *Introduction* to ESSAYS IN THE SOCIOLOGY OF PERCEPTION 1-8 (Mary Douglas ed., 1982).

81. WILLIAM BUTLER YEATS, *Among School Children, in* THE POEMS OF W. B. YEATS 215, 217 (Richard J. Finnerman ed., 1983).

language functions as an often highly selective filtering process of what it is that lies outside of ourselves. The norms embedded in the ground determine the filtering process. These norms can change, and as they change, meaning changes as well.

II. JUDGING

I began this essay with the purpose of demonstrating how we can treat the Constitution as a performance document consistently with the Rule of Law. Yet, in exploring the nature of meaning, I have strayed even further from the idea that texts can have determinate meaning. Instead, the view that has emerged in the foregoing analysis is that meaning is a function of what we do with texts. Theatre is an activity by which we bring meaning to the text of a play. Language is an activity by which we bring meaning to an ultimately incomplete and always-evolving sign system that makes up language.

On the idea that I may as well hang for a sheep as for a lamb,[82] I propose now to offer a description of the law in just the same way as we have looked at theatre and language—not as a reified object but instead as an activity that we experience. The legal realist movement provides a suggestive starting point for this kind of description. Writing in 1931, Jerome Frank, one of the more articulate and prolific of the legal realists, picked up on the notion of the "judicial hunch."[83] As Judge Frank described it, the judge determines the outcome of the case before her in an intuitive and impressionistic way. Having formed a conclusion, the judge then works backwards from the decision to its rationale, to state the outcome in terms of the law as set out in the texts of precedent and statute.[84] Contrast this legal realist view with that of the formalists, who conceive the judicial outcome as a function of antecedent legal principles applied to the circumstances of the dispute. To the formalists, the judicial process proceeds deductively—from given Rule to Case to Result.[85]

These two views—realist and formalist—describe the judicial process. What, however, is *the law* itself? The formalists would define the law as a coherent rational structure of principles and rules. The matter becomes interesting when one asks how one learns of this structure. The straightforward answer would offer the ongoing occupation of legal academicians—to determine this structure from the accumulated body of judicial decisions.

The first matter of interest is that this academic practice involves the entirely different logical category of *induction*—proceeding from Result to Case to arrive at the Rule. This progression, however, suggests that the

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82. I have shamelessly stolen the use of this hoary expression from EZRA J. MISHAN, WELFARE ECONOMICS: AN ASSESSMENT 49 (1969).

83. Frank, *supra* note 9, at 655 (citing Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decisions*, 14 CORNELL L.Q. 274 (1929)).

84. *Id.* at 655-63, 764-69; Hutcheson, *supra* note 83, at 285.

85. Frank, *supra* note 9, at 648-49.

Result generates the Rule, which is contradictory to the formalist view of judicial deduction, and which returns us to the problem of integrity. Of further interest is the ambiguity of this inductive practice. Experience with this practice confirms that it is simply not possible to fit all decisions into the structure of principles and rules without compromising its coherence. The academician, therefore, must select among the cases. Since the field that is selected determines the structure that is reported, then the fact that selection occurs suggests that the academician has crossed the line from the activity of reportage to the activity of creation. The deduction-induction account of the law is clearly unsatisfactory on its own terms.

We have not, however, exhausted our logical inquiry. There is a third category of reasoning, *abduction*, by which the Result directly generates the Rule, which is then applied to the Case.[86] The endeavor of scientific inquiry provides a ready example—the working out of the orbit of Mars by the seventeenth-century astronomer Johannes Kepler.[87]

Kepler's first step was to observe certain facts about the position of Mars over time, for instance, positions a and b.[88] His next step was *abduction*. Using these facts, Kepler hypothesized an elliptical orbit for Mars because, were it true, the observed positions of Mars would be a matter of course. Kepler's following step was *deduction*. Based on the hypothesis of an elliptical orbit, he predicted other positions of Mars, for instance, c and d. Finally, Kepler tested the hypothesis by checking whether these deduced predictions were correct. This final step is *induction*. *Abduction*, then, yields a hypothesis; *deduction* derives various consequences from the abduced hypothesis; and *induction* tests these deduced consequences.

This description captures the standard paradigm of scientific investigation at its least complex. More commonly, however, the process does not begin and end with a single abduced hypothesis. For example, it often happens that the testing process of induction shows that the deduced consequences—for instance, predictions e and f of the orbital position of

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86. A brief presentation of the three forms of logical reasoning appears in UMBERTO ECO, SEMIOTICS AND THE PHILOSOPHY OF LANGUAGE 39-43 (1986). Charles Sanders Peirce treated the category of abduction more extensively. *See* CHARLES SANDERS PEIRCE, *Abduction and Induction, in* PHILOSOPHICAL WRITINGS OF PEIRCE 150-56 (Justus Buchler ed., 1955). The discussion in *Abduction and Induction* is a compilation of several fragments that Peirce wrote at different periods. Lessons from the History of Science, *in* 1 COLLECTED PAPERS, *supra* note 65, ¶¶ 71-74, at 29-31; Pragmatism and Abduction, *in* 5 COLLECTED PAPERS, *supra*, ¶ 189, at 117; Hume on Miracles, *in* 6 COLLECTED PAPERS, *supra*, ¶¶ 522-528, at 356-360; A Neglected Argument for the Reality of God, *in* 6 COLLECTED PAPERS, *supra*, ¶ 477, at 325. For further useful discussion, see James F. Harris & Kevin D. Hoover, *Abduction and the New Riddle of Induction*, 63 THE MONIST 329 (1980).

87. Kepler's work on the orbit of Mars is one of the examples that Peirce used to illustrate abduction. Lessons from the History of Science, *in* 1 COLLECTED PAPERS, *supra* note 65, ¶¶ 71-74, at 29-31; Partial Synopsis of a Proposed Work in Logic, *in* 2 COLLECTED PAPERS, *supra*, ¶¶ 96-97, at 53-56.

88. Kepler's three steps are described in Partial Synopsis of a Proposed Work in Logic, *in* 2 COLLECTED PAPERS, *supra* note 65, ¶ 97, at 54-56.

Mars—are not confirmed by actual observation; there is a deviation between predicted and observed positions. A further step of abduction is then necessary, adjusting the hypothesis to account for the new evidence.[89] This variant can involve an iterative feedback process which repeatedly adjusts the hypothesis until it exactly fits perceived reality.

The discovery of the planet Neptune provides an example of this more complex interactive abductive process. The succession of divergences between predicted and actual orbital positions of Uranus ultimately generated an abduced orbit whose shape could only be explained by the influence of a yet undiscovered planet. Abduction yielded a hypothesized orbit for this new planet, deduction yielded predicted orbital positions, and observation confirmed its existence.[90]

The logical category of abduction provides a powerful concept for describing what the legal realists observed of the judicial process of decisionmaking. The judicial practice of working back from the decision to the rationale fits the abductive step of adjusting Rule to Result. Under this description, judicial decisionmaking proceeds in a way that is strongly analogous to scientific practice, as an iterative process of adjusting the rules and principles embodied in precedent to the outcomes of disputes. Legal academicians seem to capture the apparent structure of rules and principles that comprise "the law" by induction from judicial outcomes. It is entirely consistent with the legal realists' description of the judicial process as abductive that the academicians find that the law is always in the process of becoming.[91] The legal realists' description is consistent as well with the views of Jonathan Miller and the Prague School that the meaning of precedent—the law embodied in prior text—also is always in the process of becoming.

If, however, it is dispute outcomes that infuse principles and precedent with meaning through an abductive process, what generates these outcomes? More particularly, why is it that the outcome of any dispute is nothing more than the product of judicial caprice, a function, as critics of the legal realist position put it, of what the judge had for breakfast?[92] We can see more clearly the complex nature of the process that generates meaning in the law by considering several examples of judicial decisionmaking.

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89. For a description of this iterative process, see JOHN N. DEELY, LOGIC AS LIBERAL ART: RETHINKING LOGIC IN THE PERSPECTIVE OF SEMIOTICS (Toronto Semiotic Circle Monograph No. 3, 1985); John N. Deely, *The Coalescence of Semiotic Consciousness*, in FRONTIERS IN SEMIOTICS 5, 28-29 (John N. Deely et al. eds., 1986).

90. 20 ENCYCLOPEDIA BRITANNICA, Macropaedia 171 (15th ed. 1990).

91. Morton Horwitz, describing a nineteenth century treatise writer whose work quickly became outdated as courts fashioned new doctrines, notes that the "common law is especially cruel to those whom it casts aside. It either ignores them, soon forgetting that they ever existed, or, more usually, uses them as authority for propositions they did not accept." MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 38 (1977).

92. *E.g.*, Robert M. Hutchins, *The Autobiography of an Ex-Law Student*, 7 AM. L. SCH. REV. 1051, 1054 (1934).

In a compelling analysis of the medieval English judicial record, Roger Groot has traced the course of decisions in the early thirteenth century by which suicide became a felony.[93] Today, of course, this development seems quite puzzling. Why impose legal sanctions on an act that, by its very nature, renders the perpetrator unavailable for punishment?

The puzzle clears up, however, if we consider the consequences at that time of making this act a felony, the larger development of the legal treatment of instances of sudden death, and the nature of the medieval cosmology. One consequence of an act being a felony was the forfeiture of the chattels of the perpetrator. This had the effect of thrusting on the suicide's community a burden of care for the suicide's surviving dependents.

Also relevant is the judicial treatment of the larger matter of sudden death. If the death had come about by homicide, a murder fine fell on the community. In the case of an accident, moreover, the practice was to destroy the instrument of the accident; if a tree branch had accidentally fallen and killed a passerby, the tree was destroyed. The community was thereby impoverished to the extent that the tree had value to it. Once suicide had become a felony, there was a consistent effect in these three cases of sudden death—a burden of some substantial sort fell on the community in which the death had occurred. The community itself, that is, suffered a form of punishment.

That the justices would derive this consistent treatment, and that they would treat these events in the particular way that they did, seems to be altogether consistent with the medieval mind. It is difficult to imagine today what the medieval consciousness was like. Our consciousness is thoroughly Cartesian, experiencing the world in terms of a sharp subject-object dichotomy.[94] Each of us is "in here," with a sharp boundary between the self and the rest of the "out there" world. Moreover, we limit the "out there" world only to that which we can apprehend and measure with the senses.

The medieval consciousness, by contrast, experienced an enchanted, moral world, an experience that was participatory and reciprocal rather than detached and manipulative.[95] The world was moral in the sense that everything happened for a reason, whether that reason was bound up in good or in evil. The world was enchanted in that the greater part of creation, and the more powerful part, was incorporeal. Moreover, corporeal beings, including what we would call inanimate objects, were capable of being imbued with these incorporeal spirits, which were usually invisible but on

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93. Roger D. Groot, When Suicide Became Felony (Oct. 29, 1991) (unpublished manuscript, on file with author).

94. For an extended argument that human consciousness in the Western world has radically changed from the "participating consciousness" of medieval times to the "Cartesian consciousness" of the present, see MORRIS BERMAN, THE REENCHANTMENT OF THE WORLD (1981). For a description of Cartesian consciousness, see *id.* at 15-65.

95. For descriptions of the medieval participating consciousness, see *id.* at 67-132; CAROLLY ERICKSON, THE MEDIEVAL VISION: ESSAYS IN HISTORY AND PERCEPTION 3-47 (1976).

occasion visible. The experience was participatory in that the medieval individual found herself immersed in a highly charged, highly value-laden milieu—a creation that was alive[96]—rather than demarcated, as we experience ourselves, from an amoral, mechanistic world.

A star, for example, to our mind is simply a lifeless object that exists a huge distance away. To the medieval mind, however, a star was an entity animated by, and forming a link with, incorporeal beings. As such, it could reflect, and thus reveal, the purposes and designs of the incorporeal realm and could also directly influence the individual. We experience faint echoes of the enchanted, moral, participatory world of the medieval consciousness when we celebrate Halloween with all its goblins, witches, and ghosts.

The medieval mind, then, would not easily be able to conceive of what today we would call an "accident," something that happens without the fault of a responsibility-bearing person. A sudden death by accident was an event with no overt explanation. It was, however, an event that must have had a cause, and the cause must have been rooted in morality. Because a sudden death was a breach of the normal order of things, it must have been an event that arose out of some occurrence of evil within the community in which it happened. Thus, also, the community must bear responsibility and suffer punishment for an evil hidden in its midst.

Suicide, because it too was a breach of the normal order of things, must be the result of some hidden evil within the community, and the law must see to it that the community bear responsibility in some tangible way for harboring evil. Thus, the medieval English justices, by coming to treat suicide as a felony, quite simply were acting consistently with their cosmology. Because that cosmology was necessarily embedded in the ground of their language, it was altogether congenial with that cosmology to speak of suicide as a category of act for which the law imposed responsibility in a proper way.

The seventeenth century was a period of transition from the medieval participatory cosmology to our modern Cartesian cosmology. *Paradine v. Jane*,[97] a chestnut of the law school property course which arose out of the unrest during the English Civil War, affords a glimpse of the process of this transition. The dispute in *Paradine* was over whether a tenant holding land for a term for years continued to owe rent during a period when he had been deprived of possession, through no fault of either landlord or tenant, by the King's forces.

The outcome turned on how the court was to conceptualize the relationship between landlord and tenant—was it more like the hierarchical tenure between the medieval lord and vassal, by which the two parties were bound up in a highly personal, reciprocal relationship,[98] or was it impersonal,

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96. ERICKSON, *supra* note 95, at 12-13.

97. Aleyn 27, 82 Eng. Rep. 897 (K.B. 1647).

98. Paradine v. Jane, Aleyn 27, 82 Eng. Rep. 897, 897 (K.B. 1647). The court noted that, "where the law creates a duty or charge, . . . there the law will excuse him." *Id.*

arising out of an arms length bargain between equal and autonomous individuals that typifies the market transaction today?[99] The language of the lease agreement was ambiguous, falling neatly between the rubrics that captured each of the two kinds of relationship.[100] The court, obviously aware that it was engaged in a doctrinal departure, reached its outcome by conceptualizing the relationship as an arms length bargain. The court thereby chose to place the landlord-tenant relationship within the emerging modern cosmology of individual autonomy.

The landmark decision of the United States Court of Appeals for the District of Columbia in 1970 in *Javins v. First National Realty Corp.*[101] affords a third glimpse of the deep issues at stake in the judicial process. In *Javins*, the court was struggling to alleviate the circumstances of the impoverished tenants of slum-condition urban apartments by imposing on the landlord responsibility for the physical condition of the apartments during the lease term.[102] In his opinion, Circuit Judge J. Skelly Wright expressly rejected applying "landlord-tenant law, derived from feudal property law"[103]—"leases of urban dwelling units should be interpreted and construed like any other contract."[104] The opinion then proceeds to infer a warranty of habitability into the lease of an urban apartment.[105]

As an exegesis on contract doctrine—either by way of applying it or by way of developing or changing it—the opinion fails.[106] There is no analysis of the expectations that ought to arise from the quality of the consideration that flows to the landlord.[107] Nor is there any treatment of the matter of warranty disclaimer.[108] The court, having conceptualized the

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99. *See id.* at 898. The court added, "for the law would not protect him beyond his own agreement." *Id.*

100. *See id.* at 897. The courted stated: "Now the rent is a duty created by the parties upon the reservation." *Id.* That is, the way in which the parties expressed their relationship was not like one of feudal tenure, in which the tenant's duty to render rent-service, and the reciprocal duty of the landlord to defend the tenant's possession, would arise out of the mere fact of that tenurial relationship. Nor, apparently, did the lease agreement contain an express promise by the tenant to pay a certain rent, particularly one that was unconditioned on ouster of possession by a stranger to the relationship. Rather, the lease agreement contained a *reservation of rent* by the landlord, a provision of the form, "L grants possession to T for a term of X at a rent of Y." The particular form in which the rent payment was expressed being neither fish (tenurial in nature) nor fowl (contractual in nature), the court cast the issue as having to classify it as one or the other.

101. 428 F.2d 1071 (D.C. Cir. 1970).

102. *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1077 (D.C. Cir. 1970).

103. *Id.* at 1074.

104. *Id.* at 1075.

105. *Id.* at 1077.

106. In terms of impact, of course, the opinion was a considerable success. *E.g.*, Eyal Zamir, *Toward a General Concept of Conformity in the Performance of Contracts*, 52 LA. L. REV. 1 (1991). Zamir observed: "The new ruling [*Javins*] was shortly adopted in most of the states of the United States, and, following the case law, legislative reforms were carried out in many states, thereby crystallizing the new rule." *Id.* at 26.

107. *See Javins*, 428 F.2d at 1079.

108. *See id.* at 1080.

case as a contract dispute, offered a rationalization for the outcome that it wanted to reach that was, in terms of contract doctrine, clearly forced.

The problem, of course, is that the court wanted to make the landlord responsible for the welfare of the tenant. Such responsibility, however, is not compatible with the assumptions of atomistic individualism and market impersonality that underlie the modern conceptualization of bargain. Ironically, the responsibility of the lord for the feudal tenant that lies at the core of the "feudal property law" that the court so summarily rejected is entirely compatible with the outcome that the court wanted to reach.

These three examples reveal much about the complex nature of the judicial process. They demonstrate quite clearly the logical pattern of abduction. In each example, the court reached an outcome that was a clear departure from precedent. In each, the outcome of the dispute required a substantial development of, or addition to, the structure of principles and rules that one might derive from precedent. The Result generated the Rule to be embodied in the law as text.

Moreover, these three examples offer a glimpse of courts interacting with the ground of their language as they resolved the disputes before them. The medieval English court redefined an event, suicide, to conform to the then dominant, homogeneous ground that derived from the participatory medieval consciousness. The seventeenth century English court, at a time of transition toward the modern Cartesian cosmology, reached its outcome by reconceptualizing the relationship between the parties in more modern terms, consciously reformulating the law to bring it forward into the emerging cosmology. The contemporary United States Court of Appeals, strongly desiring to bind a corporate urban landlord into a supportive relationship with its impoverished tenants, was, like Charles Francis Adams, Jr. a century earlier, unable to "find a name" for this relationship in a language whose ground is imbued with the modern cosmology of the impersonal marketplace. The court could provide only a forced rationalization for the outcome that it had chosen.

As these examples show, a court is sometimes complicit with the ideology that the ground of its language embodies. Sometimes, a court is resistent to this ideology. Sometimes, a court consciously tries to shift it. The ground, however, necessarily plays a strong role in the meaning that the legal process generates.

Because of this strong role, the meaning of the text of the law, like the meaning of the play, will not converge into stability and determinacy. Meaning will not converge because the circumstances in which disputes arise change as human technology and the sheer presence of humanity generate continued change in our physical situation.[109] More importantly, meaning

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109. The illustrative example of the abductive process, determining the orbit of the planet Mars is dissimilar from the three judicial examples in a particular way—Kepler's investigations converged on a determinate, stable orbit for Mars; the examples from the law suggest that there will be no convergence in legal meaning. The dissimilarity, however, is only apparent.

will not converge because language—the communicative code of the law as text—changes as our cosmology changes and interacts with language's ground.

It is inevitable that our cosmology changes. Thomas Kuhn's concept of scientific paradigms describes the process.[110] There is a recurring pattern in the practice of science. At any particular time, a particular paradigm—"the entire constellation of beliefs, values, techniques, and so on shared by the members of a given community"[111]—will govern that practice. A new paradigm, however, will begin to capture the imagination of that scientific community because it offers solutions to certain currently vexing problems that remain unsolved under current practice. Kuhn's scientific revolution is the displacement of an old paradigm by a new one.

Once this revolution has occurred, scientific investigators will then develop this new paradigm by using it to solve an ever-widening range of problems.[112] Ultimately, however, there arises a growing set of nagging problems that are incapable of solution within the now dominant new paradigm. At this point, adherence to this paradigm begins to break down when someone proposes yet another paradigm that solves this current set of insoluble problems.[113] The stage is now set for a new revolution.

Thomas Kuhn's descriptions do not apply just to scientific practice. Just as his concept of scientific communities offers the same account of meaning as does Stanley Fish's concept of interpretive communities,[114] Kuhn's description of scientific practice applies to human experience generally.[115] Kuhn equates scientific revolutions to changes in world view.[116] When a new paradigm has emerged, scientific practitioners now see the same phenomena differently; they no longer observe as before.[117] Paradigms, then, and the ideologies that they generate in the ground of language, are necessarily incomplete. Because they are incomplete, language acts as a filter of the phenomena of the physical world.

Any paradigm, any cosmology, any ideology, is powerful because of the insights that it provides. At the same time, however, that it allows us

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The physical circumstances of the solar system do change; this change, however, is infinitesimal over the time frame of Kepler's observations, unlike change in the context of the time frame in which judges resolve disputes. Kepler's investigations would not have converged on a stable "meaning" of the orbit of Mars were conditions in the solar system to change at the same rate as change in the human physical and social context in which courts work.

110. KUHN, *supra* note 70.

111. *Id.* at 175.

112. *Id.* at 10-51. This activity proceeds by way of what Kuhn terms "convergent thinking." THOMAS S. KUHN, THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE 225-39 (1977) [hereinafter KUHN, ESSENTIAL TENSION].

113. KUHN, *supra* note 70, at 52-135. This activity proceeds by way of "divergent thinking." KUHN, ESSENTIAL TENSION, *supra* note 112, at 225-39.

114. *See supra* text accompanying notes 68-73.

115. *See* THOMPSON, *supra* note 80, at 69-100.

116. KUHN, *supra* note 70, at 111-35.

117. *Id.* at 132-35.

to see, its inevitable incompleteness blinds us to other ways of seeing.[118] Thus, our language-created world of experience is incomplete, and we will eventually become dissatisfied with the incompleteness of that particular world. This is why, over time, human experience is an experience of changing cosmology. Indeed, we can understand Morton Horwitz's *The Transformation of American Law*[119] as nothing other than a trenchant description of a paradigm shift in legal meaning carried out through an abductive process of judicial dispute resolution. Horwitz's description thus exemplifies the shifting nature of legal meaning that does not converge into stability and determinacy.

These accounts of meaning also explain why the realist account of the judicial process is not a prescription for judicial caprice. When judges depart from the law as text, they clearly are appealing to different values from those embedded in prior law. Their appeal, however, is made with language and to use language is to use ideology—the ideology embedded in the ground. That is, the very act of communication is a sharing with the addressee of the values embedded in language. In this sense, then, the different values to which the judge appeals in departing from the law as text are not capriciously applied personal values; rather, they are socially constructed values.[120]

The pragmatic truth of the legal realist account is that the law can only be what "judges do about the disputes before them." The critics of the realist account are mistaken in charging that this conceives the law as a function of what the judge has for breakfast. It is true that there is no stability in, or convergence of, legal meaning. This instability is not, however, a consequence of judicial caprice. Rather, it is a consequence of the ultimate instability of the substantive content of the ground of our language.

In 1881, Oliver Wendell Holmes, Jr. observed, "The life of the law has not been logic: it has been experience."[121] We can now understand the nature of this experience—it is no less than the ongoing process by which humanity continually defines itself—the experience that is language. Moreover, we can now understand that the deep function of the judicial process is the struggle over the particular norms—the ideology—that will be embedded in the ground of our language.

III. PERFORMING THE CONSTITUTION

To this point, I have argued that texts have no intrinsic meaning and that the meaning which we bring to texts not only fails to converge toward stability but also can change, even radically, over time. Yet, I have proposed

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118. *Cf.* PAUL DE MAN, BLINDNESS AND INSIGHT: ESSAYS IN THE RHETORIC OF CONTEMPORARY CRITICISM ix (2d ed. 1983).

119. HORWITZ, *supra* note 91.

120. FISH, DOING WHAT COMES NATURALLY, *supra* note 71, at 139.

121. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 5 (Mark Howe ed., 1963).

that we accept the Constitution as any other text, particularly that we treat it as if it were the text of a play—a performance document. In this view, constitutional meaning would be the product of the judicial process carried out as a sophisticated kind of performance in which judges and counsel share the roles of directors and actors, and the parties to the disputes and the citizenry make up the audience.

How can we, however, "perform the Constitution" and yet remain faithful to the Rule of Law? The answer lies in understanding both the particular conceptualization of the law embodied in the Rule of Law and the particular values that underlie it. The common meaning of the Rule of Law is formalist in nature—it posits law as a reified structure of coherent principles and rules standing off from, and acting as a check on, public and private social and political action that might threaten the integrity of the system of individual liberties that is the core value in our political order.

Two principal values underlie this formalistic formulation of the Rule of Law. The first is the pronounced human craving for determinate meaning. We need determinate meaning because it is an aspect of order. We need order because most of us, most of the time, in most matters, are risk averse. This risk aversity generates the endemic problem of the human condition, that we perceive ourselves as always poised on the brink of chaos. When you read Borges's *Pierre Menard, Author of Don Quixote,* and then think deeply about it, you begin to feel the familiar world slipping away. And' this is not a comfortable feeling.

The second underlying value is integrity. If the law is to have a function consistent with the strong constitutional principle of individual liberty, then the law must function with as much autonomy as possible. Here, "autonomy" has two aspects. In one aspect, public officials charged with creating and applying the law ought not do so for self-interested reasons. This is the matter of autonomy from the caprice of those vested with formal authority. In the other, individuals who acquire substantial economic and social power ought not to be able to capture the law to serve their own interests. This is the matter of the autonomy of each individual from the power of others.

This essay has tried to demonstrate that we cannot fulfill the desire for order that underlies the formalist formulation of the Rule of Law. We cannot do so because we cannot generate a fixed structure of meaning through language. Meaning is strongly determined by the particular ideology embedded in the ground of language. Since no ideology is complete, the substantive content of the ground will inevitably tend toward instability. Worse, even if we were somehow to reduce constitutional meaning to a formal structure, the Constitution would quickly become just as mute as Chekhov's plays became when his widow succeeded in freezing them into canonical performances.

Thus, the gist of my argument is for the recognition of the inevitable condition of language. We can only produce texts that are indeterminate of themselves. The only meaning they can have is the meaning that we bring *to* them. No one—not the author, not the reader—can infuse a text with

determinate, stable meaning without ultimately making it mute. This is not so much a paradox as it is a tautology—as the ground of our language inevitably changes, we must reinterpret prior texts if they are not to become incapable of "speaking to us." We must perform the Constitution as prior text to keep it from dying.

Even more to the point, we should not equate indeterminacy, particularly the textual indeterminacy that this essay has described, with incoherence. The simple fact is that we have always found coherent meaning in the Constitution, and we have always done so, on a functional level, by treating the Framers as Stoppardians.[122] On a deep, implicit, unacknowledged level, we have always "performed the Constitution" because we have found no other practicable way to infuse it with meaning.

Indeed, we betray that we do so—and not just with the Constitution but with texts generally—through a splendid crystallized Freudian slip: How many times have you been part of an exchange in which one person, having come across an unidentified object—whether a natural object, an artifact, or a text—shows it to the other and asks the commonplace question, "What *do you make* of this?"

My argument, then, advocates that we do no more than come out of the closet by acknowledging that we are all Stoppardians. As I have tried to show, the judicial process is an argument over the ground of language. Because what is at stake is what the particular value content of the ground is to be, then this is an argument over politics at the most sophisticated level. What is surprising is that this needs to be said. After all, it has been some one hundred and fifty years since the trenchant observer Alexis de Tocqueville pointed out that this is what the judicial process is all about.[123]

What, then, of the other value underlying the Rule of Law, integrity? At present, the Rule of Law as formalism compels us to hide behind such rubrics as "original intent" and "original meaning." Textual performance, however, can only be for the here and now—"meaning" can only "mean" for the present. The Rule of Law as antiformalism recognizes that the goal is to prevent some from using the law in order to establish and maintain hegemony over the rest. At any one time, there will be a hierarchy of power within society. Those with power will be able to maintain and institutionalize their power to the extent that their values can be maintained in the ground of our language—by generating a tyranny of ideology. And a powerful tool for maintaining their values is a judicial process that freezes Constitutional meaning into a canonical performance by not openly acknowledging that the process is a contest over the ground of language.

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122. *See* FISH, Is THERE A TEXT?, *supra* note 68, at 370. Fish observed: "The final question concerns the practical consequences of [Fish's] argument [about the nature of interpretation]. Since it is primarily a literary argument, one wonders what implications it has for the practice of literary criticism. The answer is, none whatsoever." *Id.*

123. "There is hardly a political question in the United States which does not sooner or later turn into a judicial one." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270 (J.P. Mayer ed. & George Lawrence trans., 12th ed. 1988) (1835).

Under the realist conceptualization of the judicial process, a judge can act with integrity when the values underlying her decision cohere with a particular ideology that has standing in the language of an interpretive community. The larger judicial process, however, lacks integrity if there is a hegemony of one ideology. Integrity comes only from a heterogeneity of ideologies. This is why the pluralism of values properly is a basic tenet of our political order. The Rule of Law problem of autonomy is not solved by seeking stability in meaning; rather, it is solved by seeking instability in meaning. This is the best guarantee against a tyranny of ideology.

Jonathan Miller's concept of the afterlife of a play—"It seems to me that it is precisely because subsequent performances of Shakespeare's plays are interpretations, rather than copies, that they have survived"[124]—posits that a text continues to bear meaning for the present only to the extent that people in the present continue to reinterpret it. The concept of the afterlife gives substance to our repeated use of the rubrics "the living law" and "the living Constitution."[125] It provides, as well, a way of achieving in an imaginative way Thomas Jefferson's prescription for periodic revolution.[126] As Alpheus Mason would put it, the best that we can hope to do is maintain heritage and heresy—deadening structure and terrifying chaos—in creative tension.[127]

A core element of the medieval cosmology was "the significance of vision as a creative force and as a mode of human understanding."[128] In our modern Cartesian consciousness, the creative force of vision has receded, overwhelmed by our understanding of vision as a tool of passive observation.

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124. MILLER, *supra* note 16, at 55.

125. MICHAEL ROMAIN, A PROFILE OF JONATHAN MILLER 33 (1992) (quoting Jonathan Miller). Miller observed:

> A lot of the time, you see, people work very automatically—precedent seems to be the only guide to subsequent performance. If this were the case, then all evolution would come to a standstill. You simply have to allow for the fact that what Darwin calls 'variation' is built into the very nature of reproduction. Things which have to be reproduced in order to exist quite unavoidably start to vary from the prototype—they start to depart from the prototype. In biology the reason for that is that the genetic material is unstable—it has a built-in tendency to generate mistakes. Now some of those mistakes are fatal, and cause the death of the organism at a very early stage before it even appears on the scene as a competitor. But the fact of such instability is the raw material of change and adaptation to new circumstances. I think something comparable happens in the arts, particularly the reproductive arts. For something to have to be reproduced means that there is the unavoidable possibility of it departing and drifting away from the prototype. It's an extremely interesting business.

Id.

126. "I hold it, that a little rebellion, now and then, is a good thing, and as necessary in the political world as storms in the physical." Letter from Thomas Jefferson to James Madison (Jan. 30, 1787), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 412, 413 (Adrienne Koch & William Peden eds., 1944).

127. *See* Alpheus T. Mason, *To Be More Safe: America's Continuing Dilemma*, 45 VA. Q. REV. 545, 553 (1969).

128. ERICKSON, *supra* note 95, at 27.

The account of meaning that I am offering seeks to return the emphasis in the reader's function to seeing the text creatively. We can limit the effects of our inescapable blindness by a continual openness to insight.

IV. CONCLUSIONS

A rather clear aim of this essay has been to reject a formalistic approach to constitutional meaning. More by implication, I have also sought to reject two other views that are strongly urged in the current literature of legal academia, both associated with Critical Legal Studies. I will caricaturize one as Crit-Utopianism, which posits the development of a conflict-free society as the goal of the law.[129] The caricature for the other is Crit-Nihilism, which understands the law as nothing more than the instrument of those who wield the greater share of power in society.[130]

The power of the Greek myths is in their compelling capture and distillation of salient aspects of the human condition. One of these myths tells us of Sisyphus, wicked king of Corinth, whom the gods punished by consigning him to the lower world where his everlasting task was to roll a large stone up a hill, which rolled back down just as he reached the summit.[131] The Myth of Sisyphus embodies the account of meaning that this essay advances. In order to have meaning, we must incorporate a set of values into the ground of our language. Because we can never have a perfect set of values, each set that we do adopt will ultimately fail. We seek the Truth. Our fate in this quest, however, is Sisyphus's fate.

My version of the Myth of Sisyphus argues that the Crit-Utopians do no more than tell us how terrific the view will be when we get to the top of the hill. The Crit-Nihilists become discouraged with the task because of its ultimate futility. And the Formalists insist that, if we can just perfect our technique, we will reach the top. The ancient Greeks did not describe Sisyphus's hill in any detail. My point is that we ought to look, because what we really ought to be doing is enjoying the flowers that we find on our way up.

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I will leave you, gentle reader, with just one more example, a fragment of French poetry:

Reine, Reine, gueux éveille.

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129. *Cf.* ROBERTO M. UNGER, KNOWLEDGE AND POLITICS (1975) (goal of political action is to develop social order in which there are no longer conflicts between desires of individuals and those of society).

130. *Cf.* Mark V. Tushnet, *A Marxist Analysis of American Law,* 1 MARXIST PERSPEC. 96 (1978) (describing law's facilitative, repressive, and ideological functions as instrumental to those with power in societal heirarchy).

131. EBENEZER C. BREWER, DICTIONARY OF PHRASE AND FABLE 1039 (Centenary ed. rev'd 1981); WILLIAM SMITH, EVERYMAN'S SMALLER CLASSICAL DICTIONARY 270 (E.H. Blakeney & J. Warrington eds., 1958).

Gomme à gaine, en horreur, taie.[132]

In English, this fragment says,

Queen, Queen, arouse the rabble
Who use their girdles, horrors, as pillow slips.

. . . Doesn't it?

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132. FRANÇOIS CHARLES FERNAND D'ANTIN, MOTS D'HEURES: GOUSSE, RAMES (THE D'AN-
TIN MANUSCRIPT) pt.II, no. 16 (unpaginated) (Luis d'Antin Van Rooten ed. & trans., 1967).