LAW, TRUTH, MEANING AND LIES: A METAPHYSICAL LOOK AT BEREAL COLLEGE V. THE COMMONWEALTH OF KENTUCKY

Eric Z. Lucas
Law, Truth, Meaning and Lies: A Metaphysical Look\(^1\) at *Berea College v. The Commonwealth of Kentucky*\(^2\)

By: Eric Z. Lucas\(^3\)

When we look beyond individual words to the statute as a whole, it becomes apparent how the putting of hypothetical cases assists the interpretive process generally. By pulling our minds first in one direction, then in another, these cases help us to understand the fabric of thought before us. This fabric is something we seek to discern, so that we may know truly what it is, but it is also something that we inevitably help to create as we strive (in accordance with our obligation of fidelity to law) to make the statute a coherent, workable whole.\(^4\)

*Lon Fuller*

I. The Birth of Twins

I have to admit that when I was a first year law student I was a "Contracts" nerd who sat at the feet of the Master in constant awe. However, I was not placed in this state of being by

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\(^1\) By "metaphysical" I mean … "in its traditional sense, metaphysics is a theory of ontology, a theory about what exists or what there is. Metaphysics seeks to provide a foundational explanation of the world and reality. Metaphysics purports to give this explanation of the natural world by the study of things beyond nature as having more intrinsic reality than the things of nature. Metaphysics then, seeks to explain the world known to us, the world of sensible experience, by an appeal to concepts prior to or beyond sensible experience. The propositions of metaphysics are not capable of proof through scientific observation or experiment. They are true by virtue of some form of deduction, intuition, or self-evidence." From Chow *Trashing Nihilism*, 65 Tul. L. Rev. 221 (1990) at 236-237.

\(^2\) 123 Ky 209, 94 S.W. 623 (1906).

\(^3\) Eric Z. Lucas is a 1986 graduate of Harvard Law School, and currently serves as a Snohomish County Superior Court Judge in the State of Washington.

Contract doctrine but by the way legal analysis was taught by Professor Gerald Frug of Harvard Law School\(^5\) - a member of the Critical Legal Studies Movement.\(^6\)

For me (and I admit that I am a somewhat unique) every day of Contracts class was like being dipped in the baptismal font of ancient metaphysics.\(^7\) Every day was an experience in new revelations of the philosophy of life and the intellect. And I had to hide my enthusiasm from my classmates who hated and despised Contracts—who developed severe headaches during class and generally could not wait to get out the door.\(^8\) For them "Deconstruction" was a headache but for me it was the revelation of normative human reality. For me, it engendered the birth of my intellectual life.

I was a Contract's nerd but I had no illusions about my capacity to follow in the Master's footsteps. I took the experience as a purely personal one caused by the intersection of my specific point in the general maturation process and this intriguing method of pursuing legal analysis. So for me, Deconstruction and Critical Legal Studies remained a law school experience and part of my distant past or so I thought until the other day.

I was working on another problem, surfing the Internet when I saw a highlight on Critical Legal Studies. I clicked on it and up came an article by Professor J.M. Balkin\(^9\) entitled: "Deconstruction's Legal Career."\(^10\) It had been a long time since I delved into the depths of

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\(^6\) The Critical Legal Studies Movement consists of legal scholars who hold essentially three tenets: 1) that legal doctrine is unstable and indeterminate, 2) that deconstruction as a technique goes beyond its application to legal reasoning into the realm of social meaning, and 3) that all texts undermine their own logic and have multiple and conflicting meanings. See Trashing Nihilism at note 4.

\(^7\) For those of you who think this claim might be suspect see: Gary Peller, The Metaphysics of American Law, 73 CAL. L. REV. 1151 (1985). At p. 1154 Prof. Peller writes: "The transformation from the formalism of the late nineteenth century to the incorporation of legal realism into mainstream legal thought commonly is described as a radical shift. But this shift occurred within the confines of shared conceptual categories, which were not transformed, but merely reordered. Specifically, I argue that legal thought in the liberty of contract era can be understood as resting on the metaphysical belief in a transcendental subjectivity." The concept of "reordering" also has relevance in this article with regard to my discussion of lying.

\(^8\) In my Harvard Law School Almanac (1986) at page 74 there is a picture of Professor Frug. The caption reads: "Prof. Frug, Contracts Section III-b: The head begins to wobble...and then you say, Thank God it's Wednesday."

\(^9\) Professor Jack M. Balkin is Knight Professor of Constitutional Law and the First Amendment at Yale Law School, New Haven Connecticut.

deconstruction. And while reading, two concepts popped up which set my mind to whirling: Privileging\textsuperscript{11} and Nested Opposition\textsuperscript{12}

Privileging occurs when one pole of a conceptual opposition like say the "public/private" distinction is seen as superior to or dominant over the other. Balkin says:

Given a conceptual opposition between A and B, A is privileged over B if A is the general case and B the special case, if A is primary and B secondary, if A is normal and B deviant, if A is of a higher status and B is of lower status, or if A is central and B is marginal.\textsuperscript{13}

Nested Opposition is "a conceptual opposition in which the two terms 'contain' each other." Again Balkin says:

The most general way of stating the relationship between the terms of a nested opposition is that they bear a relationship of mutual dependence and differentiation. The point of deconstructive analysis is to show how this similarity or this difference has been suppressed or overlooked. It tries to find difference and antimony in purported similarity and similarity and mutual dependence in purported differentiation.\textsuperscript{14}

As I said, these concepts made my mind begin to churn because, deep down inside, there were a few unresolved problems generated by this profound law school experience. For instance, legal practitioners use both traditional legal analysis and deconstructive analysis in their practices. Each is effective. But what exactly are their respective roles and do they relate to each other in some way? Is one radical and the other conservative? And in terms of bleed through into the general populous, which one is the more responsible for "spin" that insidious tendency for non-lawyers to use persuasive legal argumentation techniques in a political or personal context?

What suddenly occurred to me was that "Spin" and "Deconstruction" were twins of a sort. Given the concepts of privileging and nested opposition, suddenly, the answers to some of these questions became a little clearer.

\textsuperscript{11} Balkin, supra at 723.
\textsuperscript{12} Balkin, supra at 729.
\textsuperscript{13} Balkin, supra at 723.
\textsuperscript{14} Balkin, supra at 730.
Section II of this paper offers some observations on how traditional legal argumentation works; how it is intimately related to deconstructive analysis and the technique we call doing "spin." Section III of this paper introduces the concept of "fracture," and the unique role it plays in the process of the creation of meaning. It also discusses certain patterns in legal argumentation relating to the concept of fracture, how it relates to the process of lying, and how it has been used in Nazi Germany and the United States of America. This section also relates the concept of illusion to the concept of lying. Section IV discusses the problem of truth. It discusses truth as a relative phenomenon and as an absolute phenomenon. The works of two ancient philosophers—Plato and Bhartrhari—are introduced to help elucidate the truth-making process in contrast to the illusion-making process earlier discussed. Section V provides examples in United States Supreme Court jurisprudence of how at least one justice battled and sought to debunk the illusion-making process of his colleagues. Section VI is a call to action and a conclusion.

II. Traditional Legal Analysis and Deconstruction: Their Relationship

Privileging and Polarization

In my law school experience, traditional forms of legal argument "felt" better to students and were more comforting or comfortable. As mentioned before, when students experienced deconstructive analysis there was a lot of headache generation and much feeling of uncertainty - as if the rug had been pulled out from under one by some magician's trick. You could almost feel the students searching for the misdirection or the hidden trap door, which would reveal the trick hidden in the technique.

It is my position that this feeling comes from the experience of privileging. Balkin discusses it as a conceptual tool but it is actually related to human experience in a very fundamental way for we identify with its positive building type of process. In order to discuss this more fully, I want to use an old pre-civil rights revolution case as the basis of my analysis.

15 This is because traditional forms of legal argument flow from either legal formalism or legal realism points of view, which rest on claims that the law is “objective, determinate and neutral.” Chow Trashing Nihilism supra note 1 at 224. It is my position that analysis that leads to “determinate” conclusions feels better to the novice law student and for that matter most of the general public.

16 This is because deconstructive forms of argument flow from a legal philosophy based in nihilism, which holds that “rather than being determinate, law is contradictory and infinitely manipulable.” Chow Trashing Nihilism supra note 1 at 233. It is my position that analysis, which leads to “indeterminate” conclusions, feels bad, unsettling and unstable to the novice law student and also to the general public.

17 Privileging is really just a special case of doing what lawyers call "making distinctions." It is my thesis that "making distinctions" generates a feeling of comfort because it is a building technique. It is the way we build meaning. We make distinctions. I use Balkin’s term because of its descriptive value and range.
This is the case of *Berea College v. The Commonwealth Of Kentucky*, 123 Ky 209, 94 S.W. 623 (1906).

Berea College was a private school located in Berea Kentucky where, since the late 1800's blacks and whites had been taught side by side as students. In 1904 the Kentucky legislature passed a statute making it unlawful to "maintain or operate any college, school, or institution where persons of the white and Negro races are both received as pupils for instruction."\(^{18}\) shortly after passage of the act, Berea College was indicted under the statute and at trial was found guilty of violating the act. The college appealed saying that this statute violated its rights under the First (Freedom of Association) and Fourteenth Amendments. The college lost its appeal at the state level and lost again when it appealed to the United States Supreme Court.\(^{19}\) However, what is most interesting about the case is the nature of the arguments used. The Supreme Court of Kentucky based its decision in large part on the now defunct doctrine of natural law.\(^{20}\) And although I do not agree with the outcome of the case or the courts rationale, I have always found this case to have profound power and logical coherence: if one accepts the court's premises.

I apologize to the reader in advance. But in order to get a real flavor of the argumentation of the court it is necessary to quote it at length. The court's main argument, presented by Judge O’Rear went as follows:

> The thing aimed at by all of this legislation was not that of volition... All this legislation was aimed at something deeper and more important than the matter of

\(^{18}\) Ky. Acts 1904, chap. 85, p. 181

\(^{19}\) *Berea College v. Commonwealth of Kentucky*, 211 U.S. 45, 29 S.Ct. 33, 53 L.Ed. 81 (1908).

\(^{20}\) For the long quote that follows which is based in natural law see *Berea College* at p. 628.

"[T]he natural law lost much of its political appeal following the onslaught of the New Deal, the constitutional basis for the Court's institutional independence eventually settled on the equal protection clause of the fourteenth amendment. Equal protection was grounded in positive law, which allowed it to protect individual liberties without resorting to an increasingly discredited natural-law jurisprudence. Moreover, its broader mandate allowed the courts to probe much deeper into areas that were once regarded as outside their competence or authority. As the problems and injustices of our systemic, racial discrimination became increasingly clear following the Second World War, these unique properties of equal protection allowed the Court to induce radical changes in American society." Michael W. Dowdle, *THE DESCENT OF ANTIDISCRIMINATION: ON THE INTELLECTUAL ORIGINS OF THE CURRENT EQUAL PROTECTION JURISPRUDENCE*, 66 N.Y.U. L. Rev. 1165 (1991) at 1168. (Emphasis added).
choice. Indeed, if the mere choice of the person to be affected were the only object of the statutes, it might well be doubted whether that was all a permissible subject for the exercise of the police power. The separation of the human family into races, distinguished no less by color than by temperament and other qualities is as certain as anything in nature. Those of use who believe that all of this is divinely ordered have no doubt that there was wisdom in the provision; albeit we are unable to say with assurance why this is so. Those who see in it only nature's work must also concede that in this order, as in all others in nature, there is unerring justification. There exists in each race a homogenesis by which it will perpetually reproduce itself, if unadulterated. Its instinct is gregarious. As a check there is another, an antipathy to other races, which some call race prejudice. This is nature's guard to prevent amalgamation of the races. A disregard of this antipathy to the point of mating between the races is unnatural and begets a resentment in the normal mind... No higher welfare of society can be thought of than the preservation of the best qualities of the manhood of the races...

The natural law which forbids their intermarriage and that social amalgamation which tends to a corruption of the races, is as clearly divine as that which imparted to them different natures... The natural separation of the races is therefore an undeniable fact, and all social organizations, which lead to their amalgamation, are repugnant to the law of nature...

In Berea College, quite clearly, Judge O'Rear creates a distinction or oppositional polarity between the concepts of freedom of choice and determinism. Since freedom of choice (association) is one of the sacred pillars underlying our national life, to defeat that, another law must be discovered which is just as sacred, or more so, than the right of freedom of association. Judge O'Rear finds this superior law in a purported divine or natural law principle of separation of the races. In the course of his legal analysis, Judge O'Rear's creates a distinction that involves a process of "privileging" pure and simple. He does not reject the validity of freedom of choice, but just finds that the law is aimed at something different than "volition." He finds this something else to be "deeper" and "more important," than choice. This something is divine will in the form of natural law. In revealing this law he points to facts, which he finds "certain." He finds the separation of the races proved as a physical fact: color. He finds it proved as an emotional fact: the feeling of antipathy between the races or "race prejudice." He finds a disregard for this antipathy to be "unnatural" and if done "begets resentment in the normal mind..."

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21 Choice is a matter of free will. Determinism then is an immovable limit on that will. In this case two different types of conceptions of the limit are placed on human choice: the limit of divine will and the limit of natural law.
mind." Thus, if you do not feel these feelings you are not normal. On this basis, he finds the "natural separation of the races [to be] an undeniable fact."

Of course, freedom and determination are a very old pair of opposites. Balkin would have no trouble finding them to be a "nested opposition." Accordingly, they should be subject to deconstruction. Today, we understand that "natural law" arguments are largely suspect assertions, which find their real basis in the existence of the status quo. In his opinion, Judge O'Rear uses the status quo of color and race prejudice to prove his point. In reality, definition of race by color will always be problematic, meaning it is not an accurate predictor of race. I

22 See for example John Lawrence Hill, Mill, Freud and Skinner: The Concept of Self and the Moral Psychology of Liberty 26 Seton Hall L. Rev. 92 (1995) at 129-130. Here Hill discusses the problem of freedom and determinism as it exists in the political philosophy of John Stuart Mill:

"More troubling still is the problem which confronts all soft determinist theories. The soft determinist admits that all behavior is determined but maintains that acts, which result from desires, inclinations, or other internal elements of the self, are "free." Yet determinism entails that even these desires, inclinations, and other internally motivating factors are causally determined. This places the soft determinist in the awkward position of contending that we are free in acting from desires and motivations, which are themselves, caused by external forces. Mill cannot escape the conundrum. He maintains that the virtuous are those who are free from internal and external constraint to alter their own character, yet he admits that "the will to alter our own character is given us, not by any effort of ours, but by circumstances we cannot help; it comes to us from external causes or not at all." This is a peculiar sense of the term "freedom."

Assuming, alternatively, either that the doctrine of determinism is true, or simply that the majority of persons lack the internal capacity to develop their own natures, what function can political liberty have? In other words, without personal freedom, what value does political freedom possess? At least one commentator has argued that determinism altogether negates political liberty, that if there is no freedom, there is no freedom tout court. This, however, appears to conflate the two distinct types of freedom.

The traditional view of liberalism is predicated upon a negative view of freedom. On the other hand, at least one commentator has argued that Mill's theory supports a positive conception of freedom. In actuality, Mill's view cannot be reduced to one or the other. Most basically, Mill endorses a negative view of political liberty while recognizing that the achievement of true personal freedom, autonomy, and individuality requires much more than negative liberty and cannot be achieved by simply removing the external barriers to free choice. His hope is that genuine political freedom may assist individuals in achieving inner, personal freedom.

Only on a positive view of freedom does the state have the duty to promote personal happiness and freedom. The next section considers the function of law in the liberal state as the promoter of personal freedom."

(Emphasis added).

23 This is the basis of one of our most infamous cases, Plessy v Ferguson. In the case Mr. Plessy was treated as a black man for purposes of application of the separation of the races under Louisiana train transport separation law.
myself am often mistakenly thought to be of Ethiopian ancestry by Ethiopians—to the point where I was once chased through an airport by two Ethiopians who felt I was snubbing two of my fellow countryman. When they found out that I am an American black they were both confused and embarrassed.

In addition, the association of race prejudice with mating is also inaccurate. Race prejudice is racial hatred. Today we know it to be a source of destructive motivation, which goes far beyond a mere prohibition in the realm of mating. But what is more, common practices of contraception and or sterilization would remove the fear of intermixed racial propagation and in that day arguably could have been legally imposed. Thus the fear of association on that basis goes too far.

But, in deconstructing his argument, what is probably the most powerful fact against his position is the reality of the school itself. Apparently, the school existed for some time with

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24 Enforced sterilization was just beginning to be a formal movement. See: http://en.wikipedia.org/wiki/Eugenic_sterilization. 27 states where sterilization laws remained on the books (though not all were still in use) in 1956 were: Arizona, California, Connecticut, Delaware, Georgia, Idaho, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Vermont, Virginia, West Virginia, Wisconsin.

The first state to introduce a compulsory sterilization bill was Michigan, in 1897 but the proposed law failed to garner enough votes by legislators to be adopted. Eight years later Pennsylvania’s state legislators passed a sterilization bill that was vetoed by the governor. Indiana became the first state to enact sterilization legislation in 1907, followed closely by Washington and California in 1909. Sterilization rates across the country were relatively low (California being the sole exception) until the 1927 Supreme Court case Buck v. Bell which legitimized the forced sterilization of patients at a Virginia home for the mentally retarded.

The United States was the first country to concertedly undertake compulsory sterilization programs for the purpose of eugenics. The heads of the program were avid believers in eugenics and frequently argued for their program. They were devastated when it was shut down due to ethical problems. The principal targets of the American program were the mentally retarded and the mentally ill, but also targeted under many state laws were the deaf, the blind, people with epilepsy, and the physically deformed. Native Americans, as well as African-American women, were sterilized against their will in many states, often without their knowledge, while they were in a hospital for other reasons (e.g. childbirth). Some sterilizations also took place in prisons and other penal institutions, targeting criminality, but they were in the relative minority. In the end, over 65,000 individuals were sterilized in 33 states under state compulsory sterilization programs in the United States.
black and white students learning and living together in perfect harmony. This arrangement was so powerful, that they were encouraged to fight for it. This factual reality argues powerfully against the Judge’s assertion of natural antipathy. Yet, in making this argument these facts seem to be conveniently ignored. And if, in the course of his argument you believe that these facts are not completely ignored then, at minimum, they are relegated to insignificance by the off-hand remark that such relationships are "unnatural" or "not normal."

Thus, the mechanism of traditional legal argument is seen to be this process of privileging. In a legal context we almost always see two sides arguing against each other. This creates a polarity whether nested or not. Then, in trying to discover who wins and who loses we engage in the same process as Judge O'Rear - a process of privileging - a process of trying to find one pole to be superior to the other.

This distinction-making process is made evident when we are taught traditional legal advocacy in our first year moot court competition. We are routinely and traditionally taught that our briefs should be like "ships passing in the night," just as Judge O'Rear has done in his efforts to disconnect this clear case of free association from any of its real moorings in that principle. A local legal writing text informs the reader that:

The facts must be candidly set forth, but the writer may arrange them, phrase them, and expand or condense treatment of particular events so as to emphasize favorable facts and to diminish unfavorable facts. But it could also be described as a process of polarization.

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25 Berea College was organized under the General Laws of Kentucky in 1859. Its original articles of incorporation set forth that the object of the founders was to establish and maintain an institution of learning, 'in order to promote the cause of Christ.' Thus, at the time when the State of Kentucky indicted the school (1904), whites and blacks had been attending school together since the school’s inception – approximately 45 years.


27 C.f., Morris Cohen, *Reason and Nature* (1933). In fact, it is better described as a process of polarization. Typical discussions of traditional forms of privileging or the multiple forms of deconstruction tend to be static in nature. However, these discussions can also be viewed in a dynamic mode. In other words, it is possible to look at the myriad formations of multiplicity as portions of an elastic band rather than discrete particle-like units. It is possible then that the relationship at the heart of a nested opposition is flexible - like a rubber band - and can be expanded and contracted depending on the demands of context. In this way, human concepts can be re-polarized in order to be useful in any given situation. However, like a rubber band, the elasticity of the relationship is not infinite. It has its
My first year handbook presents the concept in much nicer terms when it says, "Counsel's objective...is to tell a story which leads naturally to the desired conclusion." But clearly, how often does a client's case become a story which "leads naturally to the desired conclusion," without engaging in a process of "emphasizing the favorable facts and diminishing the unfavorable facts?" Judge O'Rear engaged in precisely such a process. So does every other lawyer who acts as advocate in a case that he or she is trying to win for the client.

**What Deconstruction Does**

Accordingly, where traditional legal analysis seeks to create a conceptual condition of privilege by making distinctions, and thus, polarizing facts and law in favor of the privileged pole, deconstruction, as a process seeks to collapse the polarity, to **depolarize the conceptual opposition.**

This is how we have the birth of twins. They are not identical twins, but in reality, they are mirror images of each other. **One twin, through the making of distinctions, polarizes, while the other twin, through deconstruction of those distinctions, depolarizes. In this way law works to create meaning.** It does not matter whether the conceptual opposites are metaphysically "nested" or not. This because in any given adversarial context the poles are in fact related, at least for the purposes of that case.

As Balkin says, deconstruction is a process of showing a relationship of "mutual dependence." This can be done by "find[ing] difference and antimony in purported similarity and similarity and mutual dependence in purported differentiation." However, when deconstruction seeks to differentiate, it seems more likely that it will resemble traditional legal arguments whose polarizing acts create privilege. But when deconstruction seeks to find

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29 About this process Balkin says: “The point of deconstructive analysis is to show how this similarity or this difference has been suppressed or overlooked. It tries to find difference and antimony in purported similarity and similarity and mutual dependence in purported differentiation,” supra note. 14.

30 Litigation creates an automatic polarity, which is subject to all of the laws of deconstruction mentioned herein.

31 Balkin holds a similar view at 722. “Deconstruction’s universalistic pronouncements about the problematic nature of all texts, all language, and all readings tended to obscure the actual and selective use of deconstruction by literary critics and philosophers. The movement of deconstruction to law made this selectivity more perspicuous. It made clear that whatever deconstruction itself might be, deconstructive argument is, and always has been, a
similarity or mutual dependence in a purported differentiation, then it will be seen to be pure
decomposition. Pure decomposition is associated with radicalism, in practice, because it has
been a technique used more by the political left than the political right. But radicalism is not a
legitimate description of the technique.

Yet, even at this point if we dare to generalize, we could say that decomposition re-
polarizes what traditional analysis polarizes. It really does not matter. One is the mirror
opposite of the other.

This brings about another conclusion, which may already be clear to the reader at this
point. The theory of nested opposites seeks to reveal that some conceptual oppositions "contain"
each other. It seems an unavoidable conclusion, based on this analysis, that traditional legal
privileging forms of argument and decompositional forms of argument are themselves a nested
oppositional pair, which means that they are related and mutually dependent.

And if this is the case, as I am asserting it is, then it appears a lawyer's intellectual
training is not complete unless he or she is taught both ways of arguing. For completion, it may
be the case that lawyers must be taught how to create distinctions using a privileging which

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rhetorical technique used by scholars for pragmatic purposes. Derrida, after all, did not go around deconstructing
his own arguments to show that they were incoherent."

"...[D]ecomposition does not claim that all extensions of conceptual distinctions to new situations are illicit
or unhelpful. Nor does it argue for the destruction of all conceptual oppositions. The latter view is not only incorrect,
but incoherent, for decompositional arguments implicitly rely on conceptual oppositions to do their work," at 730.

32 Balkin, supra at 720.
33 Balkin, supra at 721. See also Transcendental Deconstruction, Transcendent Justice, 92 Mich. L. Rev. 1131
(1994). At page 9/1140 he states the following:

Like Derrida, I am also concerned with decomposition's possible relationship to justice. In this essay, I
offer an extended critique of Derrida's views in order to make two basic points about the relationship
between justice and decomposition. First, **Derrida offers decompositional arguments that cut both ways:**
Although one can use decompositional arguments to further what Derrida believes is just, one can also
deconstruct in a different way to reach conclusions he would probably find very unjust. One can also
question his careful choice of targets of decompositional: One could just as easily have chosen different
targets and, by decomposing them, reach conclusions that he would find abhorrent. Thus, in each
case, what makes Derrida's decompositional argument an argument for justice is not its use of decomposition,
but the selection of the particular text or concept to decompose and the way in which the particular
de compositional argument is wielded. I shall argue that Derrida's encounter with justice really shows that
de compositional argument is a species of rhetoric, which can be used for different purposes depending upon
the moral and political commitments of the decomposer. (Emphasis added).

34 Balkin, supra at 729.
polarizes, via traditional analysis, and is also taught, via deconstruction, how to depolarize the traditional argument.

**Spin**

In my remarks I have included this section on "Spin" because it is my opinion that legal argumentation is more than a mere rhetorical device. It is a reality-creating device. Today, in America, particularly in politics, but increasingly in every walk of life, we are met with the "Spinmeister." The Spinmeister is a person who when presented with a set of facts, immediately proceeds to deny those facts via the route of the rhetorical device called "Spin."

This was particularly evident in the O.J. Simpson trial. Spin permeated nearly every event in every broadcast of every day. But it was especially evident in the cross examination of Mark Furman by F. Lee Bailey.

I remember the event clearly. At the time being a litigator myself, and always being a great admirer of Lee Bailey, I made a special effort to watch this cross-examination live. As a former big city prosecutor and a lawyer who was still engaging in prosecution on a regular basis, I had severe misgivings concerning the evidence in the O.J. Simpson case. Probable overcharging, violations in evidentiary chain of custody, generally sloppy evidence gathering, allegations of police misconduct, resting the entire case on scientific and technical blood evidence where the experts for each side would predictably nullify each other—seemed to me from the outset a shaky prosecutorial strategy on which to create a winning outcome.

Anyway, Lee Bailey began the cross and it was expertly low key. It avoided telegraphing the direction in which he was going. Then the trap was set. In a series of questions, which on their face appeared innocuous, he got Furman to admit that he had never **said the "N" word.** I jumped for joy at that moment. I told my wife, who was listening with me, that Bailey had just nailed Furman. Because Furman, mugging for the jury and the cameras, was lulled into forgetting one of the main rules of all testimony whether formal or informal—avoid making statements that are absolute. To me, a veteran of many a cross-examination - it was clear that Lee Bailey had some evidence which would prove Furman to be a liar.


15. **Be very careful when making absolute responses.** For example, terms like “always”, “never” and “impossible” should generally be used only after careful consideration.
But the immediate commentary, supposedly by experienced lawyers, was deeply discouraging. My celebration over a professional job well done went into a gloomy silence as I listened to expert after purported expert inform the public what a terrible job Lee Bailey had done. 36 I could not believe my ears. They criticized him as if he should be Perry Mason, who

36 See New York Times, March 20, 1995: Trial Becomes Analysts' Super Bowl, By LAWRIE MIFFLIN: This article reported the remarks of various analysts as follows:

Calling Detective Mark Fuhrman "a mighty, mighty fine witness," Gerry Spence, a lawyer and commentator for NBC and its cable subsidiary, CNBC, told viewers on Wednesday, "As of today, he's beating Mr. Bailey."

"O. J. Today" had Jay Monahan, a lawyer, saying that Mr. Fuhrman had been "too smug" and that Mr. Bailey's cross-examination deserved a grade of B or B-minus that day.

Both Laurie Levenson, a professor at Loyola Law School in Los Angeles and former prosecutor who is the chief Simpson expert for CBS News, and Jack Ford, NBC News's full-time legal correspondent, tend to be more circumspect in their pronouncements.

Mr. Ford has been both a prosecutor and a defense lawyer, and successfully defended one of New Jersey's first death-penalty cases before going into television. He said too many of the so-called experts on television had no experience in murder cases, and sometimes gave misinformation. Also, as a Court TV alumnus, he said he believed lawyers ought to restrain themselves from anointing daily winners and losers.

On "NBC Nightly News" last week, Mr. Ford said there was no "Perry Mason moment where Detective Fuhrman would break down in tears and say, 'Yes I did plant that glove.' " Nor did the defense expect such a moment, Mr. Ford said, adding that the lawyers just wanted to cast doubt on Mr. Fuhrman and "toss out to the jury some of the defense theories." He continued, "We won't know until the end of the case whether the jury bought into any of these theories."

Here is some additional information on F. Lee Bailey: http://en.wikipedia.org/wiki/F._Lee_Bailey#O.J._Simpson:

O.J. Simpson

Bailey joined the O. J. Simpson defense team just before the preliminary hearing. Bailey held numerous press conferences to discuss the progress of the case. In a press conference prior to his cross-examination of Mark Fuhrman, Bailey said, "any lawyer in his right mind who would not be looking forward to cross-examining Mark Fuhrman is an idiot." His famous cross-examination of Fuhrman is considered by many to be the key to Simpson's acquittal. In front of a jury composed predominantly of people of color, Bailey got the detective to claim he never used the word "nigger" to describe blacks at any time during the previous 10 years, a claim the defense team easily found evidence to refute. Ultimately, the statement that Bailey drew from the detective forced Fuhrman to plead the fifth in his next courtroom appearance, thereby undermining his credibility with the jury and the otherwise devastating evidence he allegedly found.

http://en.wikipedia.org/wiki/O._J._Simpson_murder_case#Mark_Fuhrman:
always gets the perpetrator to break down and confess on the witness stand. Experienced professionals know that this rarely, if ever, happens. Yet this was what was being presented to the American public. An excellent professional job of cross-examination, one that should be filmed and used to train other lawyers, was re-polarized as an incompetent effort and one, which was not typically professional.

Those who saw it my way were in the minority. And even though we were eventually proven correct—F. Lee Bailey did have the damning evidence in hand at the time of cross-examination—this was a particularly bitter pill to have to swallow concerning the nature of spin and its effect on the general public. For many in the public still have negative feelings with regard to the professional performance of one of our nation’s greatest legal practitioners.

The nested pair was the old one of what is "good" versus what is "bad." Here a good performance was repolarized as a bad one. This was not merely a rhetorical event. It was political and it was psychological. It had the dangerous afterimage of polarizing the viewing public of the O.J. Simpson fiasco along racial lines.

Thus another nested pair, the black race versus the white race - a nested pair that is mutually dependent in so many different ways we cannot begin to describe them in this brief paper - was polarized along lines of good and evil.

To blacks, Johnny Cochran and the defense crew were perceived as good, when much of their total effort was geared at getting the jury to ignore all of the evidence and center on only

Mark Fuhrman

In March, Fuhrman testified to finding blood marks on the driveway of Simpson's home, as well as a black leather glove on the premises which had blood of both murder victims on it as well as Simpson's. Despite an aggressive cross-examination by F. Lee Bailey, Fuhrman denied on the stand that he was racist or had used the word "nigger" to describe black people in the 10 years prior to his testimony. But a few months later, the defense played audio tapes of Fuhrman repeatedly using the word – 41 times, in total. The tape had been made in 1986 by a young North Carolina screenwriter named Laura McKinny. She had interviewed Fuhrman for a story she was developing on female police officers. The Fuhrman tapes became one of the cornerstones of the defense's case that Fuhrman's testimony lacked credibility. The prosecution told the jury in closing arguments that Fuhrman was a racist, but that this should not detract from the evidence showing Simpson's guilt. Fuhrman's testimony resulted in his indictment on one count of perjury, to which he pled no contest.

37 Every professional trial attorney knows that you never ask a question whether direct exam or cross examination, that you do not know the answer too. This means that when Lee Bailey asked Furman if he had ever said the "N" word, he had the evidence in hand to prove Furman had said the word.
one aspect of the case: police misconduct. True there was police misconduct. But the effort to make this the entire case seems to many observers to be factual distortion of the worst kind.

To whites, the prosecutors were maligned heroes when in fact the work done by them was one of the poorest prosecutorial efforts I have ever seen. What was called a "mountain of evidence" was merely a lot of conjecture substituting for the lack of real hard fact. The female members of the team flirtatiously played on their gender to gain support. Prosecutors baited

38 On this issue of perception see for example: http://en.wikipedia.org/wiki/O._J._Simpson_murder_case#Reaction_to_verdict

Discussion of the racial elements of the case continued long after the trial. Some polls and some commentators have concluded that many blacks, while having their doubts as to Simpson's innocence, were nonetheless more inclined to be suspicious of the credibility and fairness of the police and the courts, and thus less likely to question the outcome. After the civil trial verdict against Simpson, most whites believed justice had been served and most blacks (75%) disagreeing with the verdict and believing the verdict to be racially motivated. An NBC poll taken in 2004 reported that, although 77% of 1,186 people sampled thought Simpson was guilty, only 27% of blacks in the sample believed so, compared to 87% of whites. Whatever the exact nature of the "racial divide," the Simpson case continues to be assessed through the lens of race.

On the issue of a "mountain of evidence" see for example: http://en.wikipedia.org/wiki/Marcia_Clark:

Vincent Bugliosi, successful prosecutor of Charles Manson, openly criticized Clark and the DA's office for bungling the Simpson case by not following simple time lines, showing motive, and past egregious behavior by Simpson to his former wife, Nicole. He also wrote a book called Outrage: The Five Reasons O.J. Simpson Got Away With Murder. Bugliosi was very critical of Clark and Darden. He faulted them, for example, for not introducing the note that Simpson had written before trying to flee. Bugliosi contended that the note "reeked" of guilt and that the jury should have been allowed to see it. He also pointed out that the jury was never informed about items found in the Bronco: a change of clothing, a large amount of cash, a passport and a disguise kit. The prosecution felt these items of evidence would bring up emotional issues on Simpson's part that could harm their case, despite the fact that the items seemed as though they could be used for fleeing.

39 On Marsha Clark: See CNN LARRY KING LIVE Interview with Dominick Dunne Aired November 16, 2005 - 2100 ET

DUNNE: Yeah. Well, you know, I think there are a lot of things going there. You know, he was an American hero. And I think they always feared from the beginning that if he was found guilty, that there would be riots afterwards. I think that was the reason the case was moved from Santa Monica to downtown L.A. So it would not be an all-white jury.

And I think he had one of the best teams, and that was put together by Robert Shapiro, who was the first lawyer. And he brought in Dr. Henry Lee. And their knowledge of DNA was incredible. It was over the heads of the jurors.
and then argued with defense counsel without restraint. One of the worst moments came when the glove evidence was introduced without proper pretrial examination whether "in-camera" or otherwise. This led to the famous line, "if the glove doesn't fit you must acquit." To me this is a comment, which will live on in infamy.

And the jury did not like Marsha Clark. And -- The women. The African American women were all very religious church-goers. And she had a flirtatious manner and wore very short skirts and there was something they didn't like her. And there's certain amount of flirting going on with Chris Darden. And ...

COSTAS: All of this very interesting and perhaps valid as considerations, but should have been peripheral. We call upon 12 citizens to focus on the essence of the case.

40 See New York Times, March 16, 1995, Amid Accusations and Adjectives, Tension of 2 Lawyers Erupts, By DAVID MARGOLICK:

Smoldering tensions between the opposing lawyers in the O. J. Simpson case broke into the open today as Marcia Clark and F. Lee Bailey squared off in an unusually nasty exchange. Ms. Clark called Mr. Bailey a liar; Mr. Bailey dismissed Ms. Clark as "shrill."

Ms. Clark demanded -- a demand Judge Lance A. Ito ignored -- that Mr. Bailey be held in contempt for what she said were misrepresentations about a possible defense witness. Still, the air in his courtroom was thick with contempt of a different sort: the clear contempt in which the two lawyers hold each other. They tangled over everything from candor with the court to the low station of lawyers, from the honor of the Marine Corps to Mr. Bailey's manliness.


On June 15, 1995, defense attorney Johnnie Cochran goaded an assistant prosecutor into asking Simpson to put on the leather glove that was found at the scene of the crime. The prosecution had earlier decided against asking Simpson to try on the gloves because the glove had been soaked in blood (according to prosecutors, from Simpson, Brown and Goldman), and frozen and unfrozen several times. Darden was advised by Clark and other prosecutors not to ask Simpson to try on the glove, but to argue through experts that in better condition, the glove would fit. Instead, Darden decided to have Simpson try on the glove.

The leather glove seemed too tight for Simpson to put on easily, especially over the rubber gloves he wore underneath. Uelmen came up with and Cochran repeated a quip he had used several times in relation to other points in his closing arguments, "If it doesn't fit, you must acquit" often misquoted as "If the glove don't fit, you must acquit." On June 22, 1995, assistant prosecutor Christopher Darden told Judge Lance Ito his concerns that Simpson "has arthritis and we looked at the medication he takes and some of it is anti-inflammatory and we are told he has not taken the stuff for a day and it caused swelling in the joints and inflammation in his hands." The prosecution also stated their belief that the glove shrank from having been soaked in blood and later testing. Prosecutors contended that Simpson's blood found at the crime scene was the result of blood dripping from cuts on the middle finger of Simpson's left hand. Police had noted his wounds on June 13. They asserted these were suffered during the fatal attack on Ronald Goldman. However, the defense noted that none of the gloves found had any cuts. They also alleged that Fuhrman
This kind of polarization is dangerous because it leads all sides to a false understanding and belief in how the system works or does not work. The case was atypical in the history of law: this because of the defendant and the nature of the coverage. Most defendants are not O.J. Simpson either in his celebrity or in his ability to buy excellent legal representation. And very few defendants will receive a trial where every participant is constantly under the glare and provocation of national media attention.

Spin is not the exclusive province of either traditional forms of privileging or its newer twin, deconstruction. Like logic, polarized privileging and depolarizing deconstruction are devices of thought, and rhetoric. By nature, neither one of them is inherently true or false: By nature, neither one of them leads inevitably to truthfulness or falsehood. Each can lead to truth if the process reveals true fact. And each can lead to falsehood if the process is used to distort and ignore true fact.

III. Law and the Creation of Meaning

Laws Are Normative

To put all of this in perspective, for me law school revealed something that I did not know existed: normative reality. This was a “metaphysical” experience for me because I became aware of a whole new realm and this awareness had deep implications about the reality of our world and how it is created and changed.

I now knew that human existence, in some sense, was something other than the natural world. We humans did not create the natural world, which surrounds us. We all come into a world the creation of which is the responsibility of something else. However, I also now knew that there was another world, for whose creation, human beings were responsible. This world had form and content. The content of this new realm was what my teachers called “normative.”

Normative means, “of or establishing a norm.” “Norm” means, “customary behavior.”

To my shock I learned that human law was the result of customary human behavior – not the grand universal principles that I had been led to believe. To some this may seem naïve. But I come from parents who grew up on cotton farms in Mississippi. They both graduated from a sub

had planted the glove at Simpson's house and that the analysis finding that the hair could be Brown's could not be reliable.

par segregated high school. I am a public school kid who is the first in my family to attend college and also the first to attend graduate school. Before law school, “law” was intimately related to that phrase from the Declaration of Independence that: “we hold these truths to be self evident, that all men are created equal and are endowed by their creator with certain inalienable rights, among them life, liberty, and the pursuit of happiness.” 43 I now began to understand that these propositions had been drawn into serious question.

Law, Form And Substance

At one time, it was thought that the laws of man were the incarnation of God’s laws on earth. 44 This is the doctrine of natural law, the doctrine that Judge O’Rear relies on to promote and sustain the status quo in Berea College. Now we know better. We know that the substance of human law resides not in the divine inspirations of God, but rather in the normative efforts of men to achieve meaning. The substance or content of law comes from human norms.45

To most onlookers it may seem that the problem ends there – with human norms, but that is only the beginning. For, this new naïve law student was immediately immersed in the depths of the problem of how these norms become expressed in statutes, codes, and case law. I became baptized into what professors call the problem of “form and substance.” It turns out that the content of law had to be turned into form. Norms become law by being expressed as rules. But then one is taught that “rules” as an expressed form of law are themselves problematic, and that

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43 Declaration of Independence

44 For a discussion of Natural Law See: http://en.wikipedia.org/wiki/Natural_law: In part it says there:

Natural law or the law of nature (Latin: lex naturalis) is a theory that posits the existence of a law whose content is set by nature and that therefore has validity everywhere. The phrase natural law is sometimes opposed to the positive law of a given political community, society, or nation-state, and thus can function as a standard by which to criticize that law. In natural law jurisprudence, on the other hand, the content of positive law cannot be known without some reference to the natural law (or something like it). Used in this way, natural law can be invoked to criticize decisions about the statutes, but less so to criticize the law itself. Some use natural law synonymously with natural justice or natural right (Latin ius naturale), although most contemporary political and legal theorists separate the two.

Natural law theories have exercised a profound influence on the development of English common law, and have featured greatly in the philosophies of Thomas Aquinas, Francisco Suárez, Richard Hooker, Thomas Hobbes, Hugo Grotius, Samuel von Pufendorf, and John Locke. Because of the intersection between natural law and natural rights, it has been cited as a component in United States Declaration of Independence.

45 See Kelsen, generally, infra at note 78.
“a great deal of legal scholarship between the First and Second World Wars went into showing that legal directives that looked general and formally realizable were in fact indeterminate.”

This led to the introduction of law expressed as a set of standards, and the subsequent debate about when a rule or a standard should apply. My CLS professors: Gerald Frug and then later Duncan Kennedy, revealed how rules and standards can be used as tactical weapons to advance certain political or institutional positions if there is a desire to do so.

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46 Kennedy, Duncan, Form and Substance in Private Law Adjudication, 89 Harvard Law Review 1685, at 1700.

47 Kennedy, Form and Substance, supra, at 1708. Kennedy makes the following observation:

*Rules and the Legitimacy of Judicial Action.* In many situations that arise in our legal system, it is open to argument whether substantive norms of conduct ought to be laid down by the courts or by some other, more "democratically legitimate" institution, such as the legislature, the jury, or private parties pursuing their own objectives through institutions like contract or corporate law. Judges making law in these situations have to worry not only about conflict within the judiciary and about effectively controlling subordinate agencies but also about the question of whether they will be seen as "usurping" the jurisdiction of other institutions. In short, there may be conflict about who is the superior and who the inferior legal actor in the premises.

In disputes about the judicial role, the parties appeal to stereotyped images of what courts, legislators, juries, and private right holders "ought" to do. A very deep-seated idea of the judicial function is that judges apply rules. It follows that there will often be a great tactical advantage, for a court, which wants to expand its power at the expense of another institution, in casting the norms it wants to impose in the rule form. The object is to draw on the popular lay notion that "discretion" and "value judgments" are the province of legislatures, juries, and private parties, while judges are concerned with techniques of legal reasoning that are neutral and ineluctable, however incomprehensible.

There are two different ways in which the rule form shores up the legitimacy of judicial action. First, the discretionary elements in the choice of a norm to impose are obscured by the process of justification that pops a rule out of the hat of policy, precedent, the text of the Constitution, or some other source of law. Second, once the norm has been chosen, the rule form disguises the discretionary element involved in applying it to cases. A standard is often a tactically inferior weapon in jurisdictional struggle, both because it seems less plausible that it is the only valid outcome of the reasoning process and because it is often clear that its application will require or permit resort to "political" or at least non-neutral aspects of the situation. For example, the Supreme Court in the 1950's adopted a "balancing test" for the interpretation of the first amendment to the Constitution. The issue was typically whether or not the Court should nullify a statute that the legislature claimed was necessary to protect "national security". The proponents of the balancing test attempted to "weigh the interest in free speech against the interest in national security" as a means to deciding whether the statute was constitutional.

The Justices who favored this procedure were quite explicitly concerned to prevent the Court from encroaching on legislative power. They argued that the use of a standard would enhance both judicial and legislative awareness of the inherently discretionary nature of the Court's jurisdiction. The opposed position
As a law student, and later in one’s professional life problems related to form become dominant. For me, the dynamic earlier described between traditional forms of legal argument and deconstruction, are problems of form: how the intended norm becomes expressed in a rule or standard. In analyzing these two types of argumentation certain ideas become apparent when we view what they share in common.

**Law is Created by Making Distinctions**

What we have discussed so far is imbedded in the formal aspect of the structure of any legal system. Laws, legal argument, and legal analysis all exist by making distinctions. What we have seen so far is that traditional legal analysis creates distinctions by creating conceptual oppositional pairs: like the public/private distinction. This is how meaning is created. To effectively define a concept we seem required to introduce its opposite in order to achieve definition.

We all know the cliché that one can’t know “hot” without knowing what is “cold.” We call it a cliché but here we see that it is literally true that meaning itself is arrived at by the oppositional juxtaposition of certain concepts. This is what happens when we “make a distinction.”

However, the beauty and genius of deconstruction is that it reveals to us another feature of reality: its relational aspect and elasticity. Deconstruction corrects for us the mistaken conclusion that pairs of opposites are contradictions—if the sense of that word means one side necessarily negates and annihilates the other. Deconstruction shows that oppositional pairs do not really work that way. Deconstruction reveals that oppositional pairs are related and was that the first amendment was an “absolute,” meaning that it was a rigid rule. The absolutists bottomed their claim on the very nature of legal as opposed to discretionary justice. They also admitted on occasion that the trouble with balancing was that “it will be almost impossible at this late date to rid the formula of the elements of political surrender with which it has long been associated. The very phrase, balancing of interests, has such a legislative ring about it that it undermines judicial self-confidence unduly.”

Nonetheless, there are limits to the usefulness of the rule form as a tactical weapon, as the Supreme Court has discovered in the controversies both about the one-man-one-vote decision and about its specific time limits for different aspects of the regulation of abortion. *It seems to be the case that while judges are expected to deal in rules, the rules are not expected to be quantitatively precise.* Like "value judgments," the choice between 30 days and 31 days is thought of as political or administrative. The reason, presumably, is that quantitatively precise rules are obviously compromises: the cases close to the line on either side have been disposed of arbitrarily in order to have a line. This makes it implausible that precedent or "legal reasoning” were the only elements entering into the decision.
dependent (nested). And this seems quite reasonable in light of the fact that for meaning to exist both are necessary. This is an extremely crucial conclusion.

Balkin has described this process of creating polarity as “privileging.” This implies that polarization is sort of a hierarchy-creating function because one pole is privileged over the other. However, one of the primary reasons for writing this article is to reveal that there is another “formal” mode of privileging that exists. This is the reason for our focus on the Berea College case.

**Two Kinds of Privileging**

Privileging is a good description of a certain process of thought because it accurately describes an end result. However, as an accurate description of the process of polarization it is not sufficient. It is not sufficient because it leaves out another critical result.

In order to see this other result more clearly we must again turn to Berea College. For although there is a process of privileging going on in that case, it is not the normal process of privileging through hierarchalization. For the process of creating a hierarchy out of ordered pairs has the final result of maintaining a relationship between those pairs. But that is not the result in the case of the relationship between the blacks and the whites in Berea College.

Out of the list of descriptors presented by Balkin to describe what privileging is, the set in the group that best fits the outcome of Berea College is “normal and deviant.” Judge O'Rear concludes that individuals are not normal, that is, they are deviant, if they do not share his natural law conclusions. Accordingly, per Judge O'Rear, it is then proper to deny these individuals their constitutional right to freedom of association.

But what is easily missed in this scenario is the implication. For, even though both whites and blacks in Berea College are formally denied the right to free association, blacks are denied something in addition to those rights. Blacks are effectively denied an educational experience where they can mix with members of the upper class in society. This is not denied to the whites. And this, as we all well know, is a critical experience when a group is attempting to rise above their current level.

So this result is not mere privileging through hierarchalization. It is privileging through separation. In terms of the current discussion, the legal result is that the relationship between

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48 If this logic holds then it is clear that the Democratic and Republican parties, though opposites are in fact not properly contradictory and are mutually dependent.
the poles of the nested pair is being severed. This is done via the natural law concept of the "natural separation of the races." Thus, two societies are created. One has higher status than the other and is thus privileged. But the privilege is not obtained by merely arriving at a hierarchical relationship. It is arrived at via destruction of the relationship.

Let me give you an example. There are many types of hierarchical relations—like teacher-student. But the most common is probably parent-child. In the case of a parent and child, the child clearly does not have the same status of the parent. But there is a clear definite and positive relationship between the poles of the ordered pair. Parent and child are related in a care giving function and the overarching idea is something called the family - a group structure or system. This is true, even in the ordered pair called teacher-student. The end system is called a school.

But in the case of Berea College, the final result is not a pair of connected poles. The black students in this case are relegated to another society or system where the same kind of high quality education available to whites does not exist, among other features.

Accordingly, the term "privileging" should not be used to describe this process of polarization because that use of the term has embedded within it two different kinds of activities. One kind of activity is privileging through hierarchalization. But the other is a process of privileging through what is perhaps best called "fracturing." For in Berea College the end result of the case is a polarizing process, which leaves one pole excluded from the reality of the other. This process fractures the nested pair and the result is achieved utilizing an argument of form.

Fracturing

Clearly, establishing privilege via a process of fracturing involves the destruction of a relationship. In our human reality, it necessarily involves a process of harm. In the Berea College case the decades old, existing relationship between the school’s black and white students

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49 Berea College supra, at note 20.
50 What is happening is that a third concept is introduced in order to attack the conceptual relationship in the nested opposition. There is almost a triangulation going on.
51 By making this comment on education, I am making a society-wide observation. I am not saying that blacks were forever denied higher types of education. In certain sporadic instances blacks did have a high quality education available to them. Howard Law School during the time when Charles Hamilton Houston was a Professor and then Dean is an example of where the highest education was available in a segregated school. However, such was not the norm.
was destroyed. But that is not all. Also destroyed was the right of blacks and whites to voluntarily integrate their society by attending school together. We say the rights of the white students were destroyed and this is true. But in terms of harm, the greater harm done was to the black students because of the additional need to associate with whites to gain the best education. The highest quality education was denied to blacks, as a rule, but not to whites. White students, historically, have not needed to associate with blacks to gain the best education.

The black experience is that when our rights are taken away in order to create white privilege the result is the destruction of black individuality. This destruction of individuality is probably the founding father's intuition behind the Bill of Rights. Recall that privileging is a process of polarization. Fracturing, then, is a process of privileging through polarization where the polarizing process is somehow taken to the extreme. It is this extreme polarization—stretching the rubber band beyond its bounds until it breaks—that creates the fracturing of the relationship. Extreme polarization destroys. The method utilized is to destroy the form (nested pair) and thereby achieve a destruction of substance.

**Nazi Germany and Fracture**

In the nation of Germany during the era of Nazi domination another polarity existed: Christian German v. the Jewish German. In that day and age this polarity came under attack by the highest officials in the Nazi party. This attack also led to what I am calling “fracture” of the polarity. However, the nature of the Nazi attack was not precisely the same as that used in Berea College.

The extreme nature of the polarization (fracture) is not clearly evident in the Berea College case because the extreme polarization process, the process that destroys the “conceptual

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52 See the list of studies cited in Brown v. Board of Education, infra at note 137.

53 For a view on the Bill of Rights and the Founding Fathers see: [http://en.wikipedia.org/wiki/George_Mason](http://en.wikipedia.org/wiki/George_Mason);

**George Mason IV** (December 11, 1725 – October 7, 1792) was an American patriot, statesman, and delegate from Virginia to the U.S. Constitutional Convention. Along with James Madison, he is called the “Father of the Bill of Rights.” For these reasons he is considered one of the “Founding Fathers” of the United States.

Like anti-federalist Patrick Henry, Mason was a leader of those who pressed for the addition of explicitly stated individual rights to the U.S. Constitution, and did not sign the document in part because it lacked such a statement. His efforts eventually succeeded in convincing the Federalists to add the first ten amendments of the Constitution. These amendments, collectively known as the Bill of Rights, were based on the earlier Virginia Declaration of Rights, which Mason had drafted in 1776.

54 What exactly this “extreme” looks like appears in Section entitled “Nazi Germany and Fracture.”
opposition," is masked by the idea of a divine natural law. But this is not the case in the treatment of the Jews in Nazi Germany. In his book, Mein Kampf or "My Struggle," Adolph Hitler describes the Jewish people as "beasts," "a horde of rats, fighting bloodily among themselves," "an ape," "parasites," "a noxious bacillus," "a great master in lying," "blood-sucking tyrants," "ruthless," "dishonest," "usurers," "unscrupulous" and more. In terms of hindsight we know where this led. But in all honesty, when seeing human beings described in this manner, can we really fail to see where this is going to lead?

The manner in which he handles the problem of fracturing polarization is worthy of observation. Hitler says of the Jew:

In this he always represents himself personally as having an infinite thirst for knowledge, praises all progress, mostly, to be sure, the progress that leads to the ruin of others; for he judges all knowledge and all development only according to its possibilities for advancing his nation, and where this is lacking, he is the inexorable mortal enemy of all light, a hater of all true culture. He uses all the knowledge he acquires in the schools of other peoples, exclusively for the benefit of his race.

And this nationality he guards as never before. While he seems to overflow with 'enlightenment,' 'progress,' 'freedom,' 'humanity,' etc., he himself practices the severest segregation of his race. To be sure, he sometimes palms off his women on influential

55 I want to be clear here. The conceptual polarity involved in Berea College is the black person/white person distinction and what it means. What does it mean to be white? What does it mean to be black? Normally, in a conceptual pair the concepts (like hot and cold) become defined in terms of each other. This is not done in Berea College. At the time, in the society at large, black people were considered inherently inferior. The conduct of the school was in defiance of that particular societal convention. However, the case totally avoids discussion of this conflict. This is the real motivation behind the opinion. The legal discussion of these motives and beliefs is neatly avoided, yet the Berea College case still results in the destruction of black personhood in the conceptual pair. The legal conclusion in the Berea College case is again that blacks are not persons like whites—they are something lesser. However, the destruction of the black/white distinction is masked because the work of destruction is done by the natural law/divine law concept of separation of the races. Judge O’Rear thus solves the dilemma of having to define or even discuss the modern conflict in the back/white conceptual pair by replacing it with the divine/human conceptual pair. The black/white distinction is mooted by another distinction (which by the way given its divine origins no human can refute: "Those of use who believe that all of this is divinely ordered have no doubt that there was wisdom in the provision; albeit we are unable to say with assurance why this is so"). The raw power and destructiveness of the attack is deliberately obfuscated by the meaning-building function of the new distinction. And this is why it is so powerful. If you doubt the destructive power on blacks of the educational separation of blacks and whites see Brown v. the Board of Education, et al, infra at note 137.

56 What I mean by this statement is that the conflict is directly engaged in and discussed here, rather than avoided as in the Berea College case.
Christians, but as a matter of principle he always keeps his male line pure. He poisons the blood of others, but preserves his own. The Jew almost never marries a Christian woman; it is the Christian who marries the Jewess. (Emphasis added by EZL).\(^\text{57}\)

Here the polarity of Christian German v. Jewish German is under extreme attack. The underlying idea that relates this polarity is the idea of “humanity” or “being part of the human race.” But note how Hitler attempts to destroy this relationship by excluding Jews from the human race.

The process of painting them as separate is clear. Then if they are separate they can be easily polarized in the extreme. If they are animals, not even human, they can be easily polarized in the extreme. If they can be fractured, through this process of privileging polarization, then it will be easier to justify their destruction. This rhetoric was continued publicly all throughout the Nazi reign.\(^\text{58}\)

In a process of mere hierarchalization it is not necessary to annihilate the opposite pole to achieve dominance. In a process of mere hierarchalization the privileged pole is good but so also is the opposite pole. The child does not have to be evil for the parent to be good. But in a fracturing process one pole is good and the other is evil. One pole can be loved but the other must be hated. Evil must then be annihilated. This is the result of extreme polarization.

**Fracture and Bearing False Witness**

Now, at this point it is clear that the “divine” concept of the separation of the races used by Judge O’Rear in *Berea College* is really, in some sense, a false concept. It presents and justifies racial prejudice in the guise of divine inspiration. More simply put, this masking could be called a lie, yet if not a lie, it is at minimum a grave error. But when it comes to Hitler there can be no mistake in his resort to outright lies. It is more than interesting to see Hitler resorting to the same tactic of false argument in order to make his case against the Jewish people. And in the case of *Berea College* and Hitler’s attack on the Jews in Nazi Germany, I now posit that what

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\(^{57}\) Hitler, Adolph, *Mein Kampf* (Houghton Mifflin Company: Boston)(1971);(Verlag Frz. Eher Nachf, G.M.B.H) (1925) pp. 315-316. Other quotes were from pp. 300-315. In addition to all the other distortions contained in these quotes another observation needs to be made. If Hitler is correct in his comment that “it is the Christian who marries the Jewess”, the statement itself disproves his argument. For, factually he is incorrect. It is through the female “line” that Judaism passes not the male. This observation further supports the premise related to lies and deception discussed infra.

\(^{58}\) Id.
they have in common to achieve fracture can only be described as the utilization of “deception” in argument.

However, the key question at this point is: given the political power of the white race in America at the time of Berea College and the political power of the Nazis at the time of their destruction of the Jewish people—why the need to lie? If all law is truly “normative” in nature, why not just claim the right to act on the basis of the obvious position of the majority’s raw power, privilege and authority? The next section provides a unique answer to these questions.

The Principle of Inherent Interrelatedness

One thing that this article is not attempting to do is to create a new metaphysical theory. In fact, I would go so far as to say, for the purposes of this article, that it makes little difference whether one takes a realist posture toward what is written here or an idealist posture. For what is being attempted here is not an effort to make a general theoretical metaphysical model. It is an attempt to make what could only be called a single metaphysical observation.

It has been said that Jacques Derrida, the father of deconstruction, maintained:

that language excludes totalization and characterizes its differential field as "a field of infinite substitutions in the closure of a finite ensemble." Moreover, even forgoing the question of totality, the very presumption that all the elements or objects in our languaged world are essentially differentially interconnected and reciprocally constitutive of each other (however untotaled or untotallizable they may be) clearly seems in itself to constitute a metaphysical perspective predisposed to cosmic unity and coherence.  

This difficult quote about deconstruction theory makes, for our purposes, two important points. The first is that the nature of language is such that no single word can stand alone, and achieve meaning. The elements in the “field” of language are dependent on each other and in

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59 Metaphysical realism is associated with the work of Immanuel Kant in his work *Critique of Pure Reason*, where he makes the analytic/synthetic distinction. The analytic portion finds its truth-value in language but the synthetic portion finds its truth-value in objective fact.

60 Metaphysical idealism is associated with the works of those philosophers that lead to what has been called a coherence theory of metaphysics. What this means is that knowledge is seen as a body of human convention. It has been called a “field of knowledge.” Idealists believe that the coherence of the field determines its truth-value and that this is independent of any objective validity.


62 “[T]here is no necessary connection between word and object; the connection is conventional and socially created. The word only “means” with reference to other words in the play of difference in the socially created system of
this way are irrevocably interconnected. The second point is that this interconnection is metaphysical in nature. In other words the interrelatedness of the elements of language constitutes part of what is objectively real. And the speaker goes so far as to say the import of such a stance implies a general position of cosmic unity and coherence.

The main point of this article is that the Berea College case and the quotes from the Nazi era also suggest an inherent conceptual interrelatedness otherwise there would be no need to lie.

Fracturing lies have as their goal the annihilation of the opposite pole in order to destroy the inherent meaning of that polarity. It is important to understand that every lie does not lead to a case of fracture. This is due to the fact that there is more than one type of lie. For instance, often we are faced with the defensive lie. Every child is intimately familiar with this sort of lying. It is the lie that occurs in response to an accusation like: “Did you eat the last cookie in the cookie jar when I told you not to do so?” “No, mom, it wasn’t me,” is the defensive lie. It is an attempt to prevent, resist or deflect an alteration in the reality of the self that the self perceives will harm it. This is the lie Bill Clinton told when he said: “I did not have sexual relations with that Monica Lewinsky woman,” one of the most famous false denials in history. But the key to this type of lie, for the purposes of our discussion, is that it is not intended to annihilate anything. It’s intent is to preserve. So this type of lie is not related to our observation.

However, there is another type of lie. This is the offensive/aggressive lie. It has destruction as its primary aim. This type of lie, at its core, is an attempt to paint a person or situation as totally negative in some sense. Much of its power inheres in its tendency to demonize. This is the killing type of slander and innuendo, which ruins reputations and destroys signification. Meaning cannot adhere to ... [a] word ... because its meaning depends upon other words.

Trashing Nihilism, supra note 1, at note 266.

This reality mentioned here can be so in either the realist sense (what is actually out there) or merely in the idealist sense (subjective social conventions about language).

President Bill Clinton stated the following denial on camera at a Whitehouse news conference on education (from http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/whatclintonsaid.htm#Edu):

January 26, 1998

Now, I have to go back to work on my State of the Union speech. And I worked on it until pretty late last night. But I want to say one thing to the American people. I want you to listen to me. I'm going to say this again. I did not have sexual relations with that woman, Miss Lewinsky. I never told anybody to lie, not a single time – never. These allegations are false. And I need to go back to work for the American people.

Some would say “totally evil.”
careers. It is the type of lie Hitler told about the Jewish people. It is the kind of lie Nixon told about John Dean. It is the kind of lie Iago tells Othello about Desdemona. 

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66 See, Stanley I. Kutler, Abuse of Power: The New Nixon Tapes (Simon and Schuster: New York 1997). Note in the following excerpts that everything President Nixon says about John Dean is stated with the full knowledge of his own guilt and that John Dean has been strictly accurate and truthful.

May 8, 1973: The President and Haig, 9:23-10:16 a.m. Oval Office (p. 407)

President Nixon: Oh they may, but, you see, only one person there trying to do that. You realize that. That’s Dean. And Goddamn him, we got to figure out the very worst he’s going to say and be prepared to hit it at the proper time, but no sooner and let the son of a bitch go. They’re not going to give him immunity…. If he doesn’t get immunity, he’s got to be worried about his own skin, how much he wants to admit.

Haig: That’s right. That’s exactly right.

President Nixon: But you know, the other thing is if one—one disloyal President’s counsel, a lawyer of all people, not just a—a Henry Kissinger walking out, you know, as a disgruntled person, people will understand it. But the President’s lawyer? Jesus Christ. I mean, this is a—

Haig: Well, he’s a sniveling coward.

President Nixon: I think we can destroy him—we must destroy him.

May 8, 1973: The President and Haig, 6:59-7:37 p.m. Executive Office Building Office (p. 419)

President Nixon: I think Dean’s out to kill us…. He’s got a lot of cards. He’s got a Goddamn safe full of documents.

Haig: That would be dangerous.

President Nixon: Don’t be surprised about his documents, because this man’s a consummate liar, I can tell you, lying about so many things. He’s likely to say things about Haldeman and Ehrlichman that just aren’t true, let alone me…. Now, the other man we might get into this is [John] Connally. I didn’t mention it to him, but you know, we just have to say, “John, we have a problem we want your advice on.” Connally is a mean, tough, son of a bitch. He’s got tremendous judgment and all the rest…. There’s nothing more important to this country that he could do than this, mash this son of a bitch Dean…

At page 420:

Haig: That’s the problem. That’ll show though. I mean, how could it be otherwise but that the inadequate son of a bitch was at the switch….
The primary characteristic of such a lie is its destructive impulse, its goal of annihilation, to make a thing “be not.”\textsuperscript{68} What is it trying to destroy? As mentioned above, the offensive lie has as its goal the destruction of one of the poles in a conceptual pair/polarity. The clearest and easiest case to focus on is Hitler’s demonization of the Jewish people. He lied about the nature of the Jewish people in order to destroy them and then proceeded to carry out this aim (recall he described them as a “noxious bacillus”).

But why lie? Why not merely redefine? The reason is that true redefinition will, in some sense, maintain the reality (the existence) of the pole in question even though redefinition will result in a re-polarization, which differs from the original. Recall that meaning inheres in making distinctions and that this results in some sort of conceptual polar opposition. Now, this polarity is elastic in a very precise sense. This is what deconstruction proves. This means that the polarity “hot/cold” can be defined in many different ways. For example to Eskimos at the north pole “hot” could be defined as above the freezing point and cold as anything below. Whereas natives of the deserts in Saudi Arabia may define hot in a way that means a camel cannot walk in the sand and cool or cold as any range of temperature that allows one to work in the heat. Clearly, these definitions differ dramatically. However, they are all equally valid and create a recognizable relationship between the two polar concepts. They are all part of the overarching idea of “temperature.”

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\textsuperscript{67} William Shakespeare, \textit{Othello}, The Signet Classic, The New American Library, Inc. (1963). Iago states his full intent in Act II, Scene iii, when he says at line 360 (p.89), “I will turn her virtue into pitch. And out of her own goodness make the net that will enmesh them all.” See also, Act III, Scene iii, for the full execution of the plan.

\textsuperscript{68} David Eddings – in his system of magic this is the only forbidden command. See \url{http://tvtropes.org/pmwiki/pmwiki.php/Main/FantasyCounterpartCulture} where they comment:

In David Eddings’s \textit{Belgariad}, the Sendars are rural Englishmen, the Arends are Norman French, the Tolnedrans are Imperial Romans, the Chereks are Vikings, the Algars are Cossacks, the tunnel-dwelling Ulgos are \textit{Ambiguously Jewish}, maybe (though their god ULGO is apparently based on the pre-Muslim Turkish creator-god Ulgen, whose mythos is also where Eddings got the whole “saying ‘be not’ ends your own existence” schtick) , the Nyissans are vaguely Egyptian or perhaps Indian, and the Angaraks are the “Hunnish-Mongolian-Muslim-Visigoths \textit{Barbarian Tribes} out to convert the world by sword”.

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However, the offensive lie is an attempt to totally annihilate the previously existing meaning of a concept: blacks in *Berea College* cannot remain equal citizens and Jews in Nazi Germany cannot remain human beings. In order to erase what had been there before it is critical to go into insert-replace or denial mode. It is critical to sheer away the prior meaning so that it can be replaced with something else, thus the lie. And this is the critical role of the *Berea College* case. For even though it’s fracturing effect is not as blatant as the Nazi example, the sheering-replacement aspect is self-evident. There the lie is just as aggressive, but the aggression is masked by the power of purported divine authority. So it becomes clear that the prior polarity is being replaced by a completely different meaning. It is being fractured.

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69 If you doubt this then ask yourself why a Judge in ruling on the voluntary attendance of college students at a school has to invoke God and his almighty power to enable his position?

But See Also Balkin at 728, where he says:

Because they are mutually dependent, one cannot get rid of one without destroying the other. Moreover, to abolish the distinction between them privileges their similarity and interdependence over their differentiation, suppressing or hiding the latter. This new privileging is itself subject to further deconstruction.

70 The plausibility of a potential lie is a slightly different problem. For purposes of our discussion I have engaged in what could be called homogenized generalities. This is not an attempt to evade but only clarify. I say this because a real human individual, or the real Jewish people (or black folks for that matter) are constituted by a complicated host of different meanings/characteristics/polarities and not merely the result of one pure characteristic. Thus, an individual may be brilliant, homely, tall, lazy, strong, etc., all at the same time. Thus, an offensive lie that is implausible will seek to generalize the individual’s meaning via a characteristic he or she clearly does not possess: such as describing a tall person as short. However, a plausible offensive lie still utilizes the insert-replace mode of *Berea College* but it does so by expanding one characteristic to define the whole person to replace the manifold set of characteristics that constitute the normal person. For example Hitler describes the Jewish people as “dishonest” “great masters in lying.” Now it is probably impossible for any group to deny that some of its members lie and perhaps some are constant unmitigated liars. So when Hitler describes the Jewish people as “dishonest” the lie then becomes plausible if you have experienced a member of this group lie to you. Yet, his position is still a lie because it paints an entire group with one trait—which is simply false. The same thing exists with black people in the United States who still are “suspected” on an individual basis of being “lazy,” because this was a lie told about black people for centuries to mask the cruel work conditions and treatment blacks were subjected to and to mask the monumental economic contributions blacks as a people have given to make the United States a great nation.

71 I call this approach the “insert-replace” form of argument because the term describes precisely what is happening: one argument is inserted to replace the other. However, these arguments may also accurately be described by these additional terms: “blocking”, “masking,” and “obfuscation.” The argument is “blocking” in that it serves to obstruct a deeper, real and hidden meaning. The argument is “masking” in the sense that it tends to build an illusion-generating mask over the real issue. The argument is obfuscatory in that it tends to generate dissonance with regard to the real issue or underlying idea.
The interrelatedness of the original conceptual pair is what makes the lie necessary. This is due to the fact that it is not possible to completely deny the meaning of a conceptual pole by redefining it in the context of its original relationship. In order to change that meaning the original relationship has to be destroyed, rather than merely altered. The following excerpt from *Berea College* implicitly recognizes this point, when Judge O’Rear states:

> Indeed, if the mere choice of the person to be affected were the only object of the statutes, it might well be doubted whether that was all a permissible subject for the exercise of the police power.\(^72\)

Here, Judge O’Rear is essentially saying, “If black people are to be considered as persons on the same plane as white people then the Constitution would prohibit what I am about to do.” But for him he had another tool, which would prevent this from being the result: the fracturing of and replacement of the idea that allowed black and white people to be considered on the same plane.

To conclude here and to repeat: to destroy the meaning of the original polar concept requires a destruction of the relationship with its original polar mate. This can only be done by reliance on a false defining of the polar concept. This can only be achieved by reliance on a lie.

**Sense and Nonsense**

Recall that “sense” or “meaning” starts with making distinctions. These distinctions result in the production of a conceptual polarity. As has been discussed above, deconstruction practice and theory demonstrate for us that the concepts participating in the polarity are “related” in an irrevocable sense. At least that is the theory.

The effort in this article is to show that the interrelatedness claims of the theory are actual fact. This is the import of what I have described as my “metaphysical observation.” One of the critical aspects of this observation is that the conceptual pair that is the result of “making a distinction” involves a relationship between the two polar concepts that constitutes an essential aspect of how we arrive at meaning.

Now *Berea College* is important because it reveals what has been described as a fracturing of the relationship that creates meaning. Above, the analysis has described the argument developed in the *Berea College* opinion as one of an insert-replace mode. In order to

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\(^72\) *Berea College* at p. 626.
avoid revelation of the fracture occurring, the court replaced the fractured conceptual pair with another conceptual pair.

But what is intriguing about Berea College, in addition to all the other observations that have been made about the case, is that in the course of replacing the conceptual pair, the effort did not serve to replace the fractured relationship. In Berea College, when God spoke, he still left black people excluded and segregated from any educational relationship to white people. The fractured relationship was not restored. In Nazi Germany, the rhetoric and practices of the Nazi party left the Jewish people as enemy combatants in their own country subjected to torture and murder. The fractured relationship was not restored. And this brings us to the heart of the matter.

Perhaps the most critical feature of the false argument and the reason it is necessary for fracture is that false argument is necessary in order to attack the relationship between the two polar concepts. Deconstruction theory, at least as presented by Derrida, asserts that this relationship is inherent and irrevocable. What this means, at least in the context of language, is that the relationship between the conceptual pair cannot be severed without total loss of meaning. And for this reason it is not possible to make a truthful assertion that would result in fracture, for a true statement would always generate a conceptual pair that would be “in relatio.”

This is the reason for falseness. Falseness is an effort to destroy the relationship without reasserting the relationship in any form. It is an effort to exclude and to separate and to annihilate. But what it accomplishes is not accomplished on a metaphysical level—whether that metaphysic is considered on the plane or field of language only (idealism) or is extant in the objective world (realism). What falseness accomplishes is to cast an illusion over the fact that the concepts are in fact irrevocably related. It fractures by creating a psychological delusion. Because it is not possible to will out of existence what irrevocably exists.

For the person who seeks to annihilate a conceptual pole the aggressive/offensive lie is essential because of its capacity to create the illusion of exclusion. Exclusion, separation and disconnection can only be the result of casting an illusion, because it cannot be done in reality. No true statement can accomplish this, for neither man nor concept can be separated from the existent whole.

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Here this idealist posture is the absolute minimum and is asserted for the sake of argument. However, a realist position could also be asserted, which would then claim that the relationship, which creates meaning, in reality, is inherent and irrevocable.
Those who do not succumb to illusions of this sort will simply see such an effort as nonsense, as a matter of deluded subjectivity. For it literally is nonsensical to assert lack of relation to the whole where the effort is impossible. However, those whose discriminative ability does not insulate them from the mindset of exclusion will begin to behave as if the excluded pole is not part of their language, world, humanity, or existence. However, they are simply wrong about this fact. This was the attitude of prejudiced whites toward blacks and this was the attitude of the Nazis toward the Jewish people.

**Signs, Symbols and Idols**

We communicate in a language of “signs” that stand for a certain meaning. You may believe that we may not be able to completely prove it but some signs are true and others are false. In the above discussion we identified formal polarity as a method of establishing meaning and fracture of that formal polarity when there was an attempt to deny its meaning. However, because of the interrelatedness of all signs necessary to achieve meaning, fracture as an activity must involve deception or a lie. This is so because denial of meaning to an existent part of reality is not possible in fact. It is only possible by the casting of an illusion over the reality: Thus the need to lie.

This means that all signs do not have the same value. Another part of this metaphysical observation is that signs that seek to fracture are untrue: like Judge O’Rear’s analysis in *Berea College* and Hitler’s tirades against the Jews in Nazi Germany. They do not lose their ability to “stand for something.” But what they stand for is false and as such illusory. Such signs I have named **Idols**. Conversely, those signs, which adequately express their intended meaning, are called **Symbols**.

So the question then arises: what do we mean when we say something makes sense? Here, as part of this metaphysical observation, I posit that what we mean is that there is a sufficient unity between form and content; there is unity between the sign and what it means. A sign that makes sense is a symbol.

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74 Truly, it is the deepest form of nonsense to refer to the entire Jewish people as a “noxious bacillus.”

75 By describing the idol as illusory or as an illusion do not take this to mean that such states’ have no power. In particular do not assume they have no power to harm. This writer sees the idol as an illusion, a sort of free floating phantasm that can have dramatic effects both on the progenitor and those who have the misfortune to be subject to the illusion. The effect of such illusions on school children is well-documented in *Brown v. the Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, 38 A.L.R.2d 1180 (1954) at note 11. This topic is discussed further, infra, at the Section entitled: Delusion and Illusion at Work Today. See text near note 137, infra.

76 The archaic definition of idol is: phantom. OEED, at P. 702
What do we mean when we say a thing does not make sense? We mean there is dissonance between the sign and what it means. A sign that does not make sense is an idol.

**Dissonance**

This may seem like a bold statement but this metaphysical observation must lead one to the conclusion that all normative systems are inherently illusory. When considered solely from the aspect of form, they all begin as idols. Fracture reveals the metaphysical reality of the form versus substance distinction. It does so by revealing the possibility of destroying the link between form and substance. It reveals the reality of dissonance, and like a beam of light, once the concept of fracture begins to shine, we begin to see that the concept of dissonance does not exist only in the context of an attack (fracture). It also exists whenever the form does not adequately fit the substance it expresses. It exists when form does not have a complete or proper content.

Fracture is a subset of all possible dissonance. Fracture is the subset of dissonance between form and meaning that is deliberately created. But since fracture is a subset, this also means that it is possible for dissonance to exist whenever form and meaning fail to completely unite. **Fracture is premeditated dissonance. But its light reveals the possibility of what could also be described as merely negligent dissonance.**

Take for example the American system of government. Our system of government creates an executive, a legislature and a judiciary. These words are used to describe what they mean. But if the behavior of the institution fails to fulfill its true meaning then is it what it purports to be?

What I mean is simply this: we have an office that is described as “the office of the President of the United States.” This is the supreme executive in our nation. But let’s say, for the sake of argument, that we elect a donkey to be president of the USA. Would such an event be considered real or a joke? Now we know that under our rules a donkey could never be elected president. So this extreme example is not possible. But what if we elected a person to the office who later had a stroke and became incapacitated. Is the incapacitated person the President? I think we all can agree that this person can’t be the president even though they still formally hold office. If attacked during such incapacity we would be leaderless unless someone else assumed control of the government.
Here is another example. Let’s say a person ran for president but by advertising techniques we were all made to believe that the person was way more intelligent and capable than they were in reality. It turns out that the advertising people carefully controlled every word this person said and carefully controlled all public appearances. It turns out that the person we elected is of just below average intelligence and without the handlers would be incapable of running the office. In such a situation is that person the President?

What we see in these examples is the reemergence of the form versus substance problem but with a vengeance. It is now not just a rhetorical or abstract device. It is a real problem. It literally is true that unless the content adequately fills the form, it is not truly what it purports to be. If the person who holds the office of the president does not have the character or capacity to fill the office – to provide substance to the form – then such a person cannot truly be the President of the United States – even if they hold the office (form).

In asserting this, we don’t expect the person to be perfect. However, we do expect the individual to manifest sufficient character to completely fulfill the demands of the office (form). As such the individual is not required to be a perfect human being, but they will be required to perfectly fulfill the meaning of the office (form).

The same holds true with the governor of every state, the mayor of every city, the CEO of every corporation, the pastor of every church, the husband of every wife, and the father and mother of every family—just to name a few of such relationships. An electrician cannot be real if he is incapable of wiring your house. We would call someone who set himself up as such, a fraud, if they did not have the capacity. The same could be said of an incompetent lawyer. In each and every case, where one purports to be what one is not, such a one would also be an idol: a false sign.

IV. The Problem of Truth

Truth: Relative and Absolute

Modern legal training is dominated by the Positivist school of jurisprudence, as exemplified in the legal theories of Justice Oliver Wendell Holmes,77 Hans Kelsen,78 and H.L.A.

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77 Holmes, Oliver Wendell, The Common Law (1881). For more see http://en.wikipedia.org/wiki/Oliver_Wendell_Holmes,_Jr, where it states in part:

In 1881, he published the first edition of his well-regarded book The Common Law, in which he summarized the views developed in the preceding years. In the book, Holmes sets forth his view that the only source of law, properly
The Positivist school breaks with the older schools of jurisprudence, which saw a close connection between law and morality, by discovering law and morality to be separate realms. Speaking, is a judicial decision. Judges decide cases on the facts, and then write opinions afterward presenting a rationale for their decision. The true basis of the decision, however, is often an "inarticulate major premise" outside the law. A judge is obliged to choose between contending legal theories, and the true basis of his decision is necessarily drawn from outside the law. These views endeared Holmes to the later advocates of legal realism and made him one of the early founders of law and economics jurisprudence.

80 See Lon Fuller at note 4 infra, and The Morality of Law (1964). For more see http://en.wikipedia.org/wiki/Lon_Fuller

Eight Routes of Failure for any Legal System
1. The lack of rules or law, which leads to ad-hoc and inconsistent adjudication.
2. Failure to publicize or make known the rules of law.
3. Unclear or obscure legislation that is impossible to understand.
4. Retroactive legislation.
5. Contradictions in the law.
6. Demands that are beyond the power of the subjects and the ruled.
7. Unstable legislation (ex. daily revisions of laws).
8. Divergence between adjudication/administration and legislation.

Fuller presents these problems in his book The Morality of Law with an entertaining story about an imaginary king named Rex who attempts to rule but finds he is unable to do so in any meaningful way when any of these conditions are not met. Fuller contends that the purpose of law is to "subject human conduct to the governance of rules". Each of the 8 features which lead to failure form a corresponding principle to avoid such deficiencies which should be respected in legislation. If any of these 8 principles is not present in a system of governance, a system will not be a legal one. The more closely a system is able to adhere to them, the nearer it will be to the ideal, though in reality all systems must make compromises. These principles, Fuller argues, represent the "internal morality of law", and he argues that compliance with them leads to substantively just laws and away from evil ones.

In his review of "The Morality of Law" Hart criticises Fuller's work, saying that these principles are merely ones of efficacy; it is inept, he says, to call them a morality. One could just as well have an inner morality of poisoning as an inner morality of law, but of course we find this idea absurd.
The positivist school also purports to discover “law as a science” which science finds its foundation in a fundamental rule called a “basic norm.”

Thus, as a young law student we were taught that:

Inasmuch as the norms that are the basis of the value judgments are enacted by human, not superhuman, will the values constituted by them are arbitrary. Other human acts of will create other norms opposite to the former ones; and these other norms, then, constitute values that are opposite to those constituted by the former. That which is “good” according to the one norm may be “bad” according to another. Therefore the norms, enacted by men and not by divine authority, can only constitute relative values…a norm…cannot be either true or untrue, but only valid or not valid.81

Now of course, this idea of arbitrary and relative value is in stark contrast to the values we were taught as American children. These other values are implied in the Declaration of Independence when it says:

We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness…82

As you can see just from reading these simple words, the values referred to here are not considered arbitrary values of a basic norm. Rather, the values referred to here are clearly Absolute values rooted in propositions and ideas that are considered to represent what could only be described as Universal Truths.

I think it would be fair to say that today, in our American society, these two ideas are at war: truth relative and truth absolute. The relativists claim the higher moral ground because they believe that their position represents tolerance for other points of view, which can therefore form the basis of a philosophy of peace. The absolutists claim the higher moral ground because they believe that without clear and undeniable truths our society is a boat without a rudder which will founder on the rocky shoals of uncertainty and immorality, eventually destroying itself like some second Sodom and Gomorrah.

81 Kelsen supra at p. 8.
82 Declaration of Independence
That relativity is a truth in and of itself, which can no longer be denied, is a point that is clear to most philosophers. Unfortunately, the general populous does not share this enlightened view, mostly because they do not understand how it might work. But what the modern enlightened mind has lost in this new view is the inner spiritual certainty and strength of a view that truth is absolute and that grasping the truth “shall set you free.” In other words, the modern mind in embracing the truth of relativity has abandoned the opposing concept that truth is absolute.

What this article purports to have discovered, in the context of one single metaphysical observation, is that truth is both relative and absolute at the same time.

**Truth: Horizontal and Vertical**

To say that truth is both relative and absolute seems like a contradiction. Yet, we have already seen that pairs of opposites are not contradictory constructs but rather are complementary concepts created by our efforts to achieve meaning when we make a distinction. Truth described as relative and absolute is merely the same kind of “nested opposition” we always create when we are seeking to create meaning.

Most of this article we have been discussing the complexities inherent in what I will now call Horizontal truth. The pairs of opposites, battling away on their own plane of existence, are an example of Horizontal or shall we say relative truth. As we saw earlier, in a real sense, relativity is necessary in order to preserve meaning.

In order to properly describe hot in the North Pole where all temperatures are a degree of coldness, it may be necessary to describe 32 degrees as hot. This seems to be wrong but only to a culture whose real hot is between 80 and 95 degrees. To members of a culture existing in a realm where these types of temperatures will never be reached, trying to define what is “hot” in terms of these temperatures is not only conceptually wrong it is factually impossible because it is beyond experience. For a member of a North or South pole community “hot” is when the ice melts. This is the idea of Horizontal truth.

The definitions of each conceptual pole change depending on the cultural context. The nuances of the conceptual polarity change depending upon the cultural context. This allows each culture, if necessary, to make a distinction and define an idea based upon their unique cultural experiences. Amazingly, conceptual polarities are flexible and elastic enough to contain all possible definitions of the hot-cold polarity. This is the truth that Deconstruction reveals.
However, we should not lose sight of one thing: both the cold cultures and the moderate cultures have as the underlying idea of their hot-cold polarity the idea of “temperature.” The idea of temperature underlies or contains the polarity of hot-cold. The fact that hot-cold will always refer to the idea of temperature, is an example of a truth that could be described as Absolute. This is what we are referring to when we introduce the concept of Vertical truth. It is vertical because the reference is to an idea that is not on the same plane of the distinction. Even in our casual language we talk about “understanding” – grasping that principal or idea which underlies the conceptual level.

In this article, the concept of fracture discovers this other vertical plane of existence. Up until now we have discussed fracture in terms of horizontal reality (conceptual polarity/nested opposition/privileging) but we have also touched upon the vertical aspect when we reviewed the insert-replace type of argument.

We have shown, clearly, that the killing lie is trying to destroy the pairs of opposites. The goal of this type of lie is to destroy the relationship between the poles of the nested opposition. Horizontal rhetorical devices are used and may even appear to be efficacious, but when the destruction is in earnest this lie always seeks to destroy what could only be called the underlying idea. In Berea College this was done utilizing the insert-replace type of argument. In Berea College the idea being attacked by the legislation was the idea of the human right to free association. In Berea College if blacks are as human as whites then to separate them from whites arbitrarily on the basis of their skin color and race is an insult to their humanity and a violation of their unalienable human right to free association. However, if they can be defined as less than human then the relationship can be destroyed and they can be separated from whites. This is the role of the concept of the “natural” segregation of the races.

The same analysis applies to the example of the Nazi Party’s attack on the Jews. If the idea of their underlying humanity can be shorn away, if they can be effectively described as sub-human, then the relationship to their fellow German citizens is destroyed and the Nazis are free to annihilate them. But note the attempt to destroy the meaning relationship inherent in the conceptual opposition is achieved when THE VERTICAL LINK OF THE CONCEPTUAL OPPOSITION TO ITS UNDERLYING IDEA IS SHORN AWAY. The killing lie seeks to destroy the conceptual link to absolute or vertical truth.

**Dissonance: Complete and Partial**

Fracture is an example of complete dissonance. The effort is to sheer away the underlying idea. And in this way destroy the relationship between the conceptual opposition that is the target of fracture. The discussion in prior Sections demonstrates this analysis.
However, the fracture discussion also revealed something else. This discussion revealed the inherent interrelatedness of the elements of language. This unity is what makes the lie necessary when there is an effort to annihilate the conceptual opposition. Recall that this led to the concepts of sense and nonsense. The signs that make sense are symbols and the signs that are nonsense are idols. This distinction suggests a certain relationship to what we have now identified as the underlying idea. Those signs that make sense are the ones that possess a connection with the underlying idea. Those signs that are nonsensical or idols are the ones where a break of some sort has been interposed between the sign and the underlying idea. We call this break an illusion because the disconnect does not exist in objective reality. It only exists psychologically. This disconnect we call dissonance.

But in giving examples of dissonance recall that we discussed various “incarnations” of the idea of the President of the United States: the donkey, the stroke victim, and the marketing product. We understand immediately that the donkey example is a joke because it is impossible – complete dissonance but without any attempt to hide the dissonance. We understand the stroke victim because we perceive the disconnect between what the person once was and how the stroke has lessened the person. This example is not perfect but it gets us closer to the idea of partial dissonance.

However, the President as marketing-product raises questions, which are difficult to manage. The marketing and control, in this example, are tools of deception that have been used to hide the capacity of the real individual. Yet, this individual is President of the United States – it is a fact. But, we know somehow that this person is the president, yet in a real sense is not the president. What we have in this example is what can only be called partial dissonance. There is both truth and falsity in the sign before us. And it is this difficulty that reveals the deeper level of reality.

For we know that there are degrees of being President of the United States. When one is a “good” president there has been near perfect expression of what we mean when we refer to the individual’s efforts to fulfill the office. When we say a person has been a “bad” president we are relating that this individual fell far short of our expectations of what an individual should demonstrate in fulfilling the office. These degrees of expression can range from almost total lack of expression to perfect expression. We can imagine the perfect president. We can imagine the perfect expression of the fulfillment of this idea. The imagination of perfection implies reference to another plane of being, if you will. It implicates the underlying or overlaying realm: The realm of ideas.

**Vertical Truth: Two Views – Plato and Bhartrhari**
The theory of underlying ideas is not new. It exists in the ancient Greek philosophy of Plato and in the ancient Indian philosophy of the grammarian Bhartrhari. In Plato’s philosophy he discussed this in various books among those entitled: *Parmenides* and *Timaeus*. Bhartrhari discusses his philosophy of underlying ideas in his work the *Vakyapadia*. We will look at each philosopher’s theory below.

**Plato and the Doctrine of Forms**

When Plato uses the word “form” he is not using it in the same way we have been using it in this article when we make the “form versus substance” distinction. In our usage form is the structure and substance is the content.

However, when Plato uses the word form, in his theory of forms, he is using the word form to refer to an underlying eternal pattern or idea on which the final product is based. We find a fairly clear explanation of this process in the translator’s introduction to the *Timaeus* where he states:

> It is certain, however, that Plato would have taken with complete tranquility our modern skepticism. He would have pointed out that science cannot be accurately true since it deals with the temporal, the finite, the forever changing, never with the eternal. But yet the visible world is a copy, an image, of what is eternal and true. It is a changing reflection of that which is changeless and therefore, imperfect though it is, in it can be found the truth…

Here, for the translator, we are clearly dealing with an eternal pattern on which the changing world is based. Plato makes the point himself in the text as follows:

> This question, however, we must ask about the world. Which of the patterns had the artificer in view when he made it—the pattern of the unchangeable or of that which is created? If the world be indeed fair and the artificer good, it is manifest that he must have looked to that which is eternal, but if what can be said without blasphemy is true, then to the created pattern. Everyone will see that he must have looked to the eternal, for

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84 Id., at 1152.


86 See *Collected Dialogues* at p. 1152. Quoting the translator’s Introduction to the *Timaeus*: B. Jowett translator (1953 first edition 1871).
the world is the fairest of creations and he is the best of causes. And having been created
in this way, the world has been framed in the likeness of that which is apprehended by
reason and mind and is unchangeable, and therefore of necessity if this is admitted, be a
copy of something... 87

Time then…was framed after the pattern of the eternal nature…for the pattern exists from
eternity… 88

The two sufficed for the former discussion. One, which we assumed, was a pattern
intelligible and always the same, and the second was only the imitation of the pattern,
generated and visible... 89

Thus I state my view. If mind and true opinion are two distinct classes, then I say that
there certainly are these self-existent ideas unperceived by sense, and apprehended only
by the mind…Wherefore also we must acknowledge that one kind of being is the form
which is always the same, uncreated and indestructible, never receiving anything into
itself from without… 90

Thus, clearly, Plato’s conception of our universe is that of a created, finite, time-bound
order that has as its basis and source an eternal pattern or eternal set of ideas. And as such, the
created world is not truth but if contemplated truth can be found through it.

Plato saw these forms or ideas as real. In fact, since they were eternal he believed that
these ideas were more real than the created world. Horizontal truth is the scientific
understanding of the ever-changing world. However, vertical truth is possible: knowledge of the
eternal ideas underlying the creations of the external world.

Bhartrhari

Recall that I indicated earlier that the ancient Indian philosopher Bhartrhari’s philosophy
was captured in a book he wrote entitled the Vakyapadia. In his book about this philosopher
entitled Bhartrhari, Professor Harold G. Coward writes the following at the beginning of
Chapter 2: The Vakyapadia’s Theory of Language:

87 Id., at 1162.
88 Id., at 1167
89 Id., at 1176
90 Id., at 1178.
The seventh-century Chinese pilgrim to India, I-tsing, reports in his diary that in the education curriculum of the day Bhartrhari’s *Vakyapadia*, coming after mastery of Patanjali’s *Mahabhasya*, was the crowning work studied by the best and most serious students. Even at the great Buddhist University at Nalunda, the Vakyapadia was studied alongside the eighteen schools of Buddhist philosophy. As the histories of the period indicate, the Gupta age gave the highest place to the study of Sanskrit grammar and the knowledge that language in its purest form can bring. Bhartrhari’s Vakyapadia was considered to have been the culminating work in this Sanskrit…Grammar school tradition, a reputation it has maintained to the present day.91

This is a fairly powerful statement about a work that for today’s university student is virtually unknown. However, the statement is not unjustified, for Bhartrhari seeks to solve the most puzzling philosophical, religious and psychological questions human beings have raised from time immemorial. And he does it all from the basis of language.

For instance he asks how does a child learn language? Coward describes Bhartrhari’s response as follows:

He sets out to analyze the meanings of words and the means by which such word knowledge is manifested and communicated in ordinary experience. In his *Vakyapadia*, Bhartrhari states, “In the words which are expressive the learned discern two aspects: the one [the sphota] is the cause of the real word [while] the other [dhvani] is used to convey the meaning.” These two aspects, although they may appear to be essentially different, are really identical. The apparent difference is seen to result from the various external manifestations of the single internal sphota. The process is explained as follows. At first the word exists in the mind of the speaker as a unity, or sphota. When he utters it, he produces a sequence of different sounds so that it appears to have differentiation. The listener, although first hearing a series of sounds, ultimately perceives the utterance as a unity – the same sphota with which the speaker began – and it is then that the meaning is conveyed.92

For Bhartrhari, the two aspects of word-sound [dhvani] and word-meaning [artha], …constitute the sphota. He emphasizes the meaning-bearing or revelatory function of this two-sided unity…He generally describes one’s cognition of the sphota from the

92 Bhartrhari at 36.
listener’s perspective. By a child learning a word, or by an adult on first hearing a word, the sphota is usually at first cognized erroneously. Having failed to grasp the whole sphota the listener asks, “What did you say?” Through a series of erroneous cognitions, in response to the repeated vocalizations…there arises a progressively clearer cognition of the sphota. Finally, there is a completely clear cognition of the whole sphota…, which Bhartrhari describes as a case of special perception or intuition. The initial error has given place to the truth in which the two aspects of the word-sound and the word-meaning have become completely identical in the unity of the sphota.93

It is clear, then, that Bhartrhari conceives of all beings as born with…speech, already present within. As the child grows this inner sphota, which potentially can be developed into any language, is transformed into language of the particular speech-community into which the child was born. When the young child utters his first single word ejaculations, “mamma,” “dog,” “cookie,” and so forth, it is clear that whole ideas…are being verbalized: for example; “I want mamma,” “See the dog,” “Give me a cookie!” Even when a word is used merely in the form of a substantive noun (e.g., “tree”) the verb “to be” is always understood so that what is indicated is really a complete thought (e.g., “It is a tree”).94

Bhartrhari observes that man does not speak in individual words. For him the chief reality in linguistic communication is the idea or meaning-whole of the individual sentence…Along with this emphasis comes the notion that as we listen to a group of words composing a sentence, there is at some point a flash of insight or intuition (the cartoon “light-going-on” situation) in which the whole meaning of the sentence is comprehended. Bhartrhari technically terms this experience pratibha. Pratibha in Indian thought is described as a supernormal perception that transcends…time, space, and causality and has the capacity to directly “grasp” the real nature of things. The sentence is pretty much a psychic entity, a mental symbol that in itself is the meaning. The mental perception of this meaning-whole...is a case of pratibha. Because the whole sentence meaning is inherently present in the mind of each person, it is quite possible for the pratibha of the sphota to be grasped by the listener even before the whole sentence is uttered. More often, however, inference and reasoning may have to be applied to the

93 Id. Note that we have common sense examples of this reality. It makes sense that if this were the case people who are very familiar with each other would not have to actually speak. It is commonly experienced that couples who have been married a long time are known to “finish each other’s sentences,” or communicate fully in partial words and partial sentences that leave others confused.
94 Id., at 38-39.
words of the sentence so that the individual’s cognition is brought to the level where the intuitive grasping…of the meaning-whole…becomes possible.95

At the end of the section on Plato I wrote:

“Plato saw these forms or ideas as real. In fact, since they were eternal he believed that these ideas were more real than the created world. Horizontal truth is the scientific understanding of the ever-changing world. However, vertical truth is possible: knowledge of the eternal ideas underlying the creations of the external world.”

Here, in this section on Bhartrhari, we have a detailed presentation on just how this process of vertical truth can be asserted as real and part of our everyday human experience. For Bhartrhari, grasping the inner meaning of the spoken or written word is what we mean when we say we “understand.” What we are grasping, according the Bhartrhari, is the inner idea. These “inner ideas” are what overlay or underly the horizontal communications that we partake in when we speak and write.

What I have shown in this paper is how words are used to obfuscate and attack the process of understanding so that the individual is left confused —or to use words we have used earlier – is left in a state of confusion or error or illusion or dissonance. Bhartrhari demonstrates how the normal process of cognition may necessarily involve “misunderstanding,” “error,” or “illusion.” What I have been describing, in this paper is how error and illusion can be used deliberately to attack the process of understanding. What we have focused on in this paper are bogus legal arguments used to attack the process of understanding and thereby deprive individuals and groups of their legal rights and thereby their rightful status as full human beings.

What follows is a discussion of the efforts made by one Supreme Court Justice to respond to this problem in the Berea College case and some others like it.

V. Law and Debunking Illusion

Justice John Marshall Harlan

To describe false argument as an attempt to annihilate one pole of a conceptual pair (fracture), which results in illusion, is perhaps far simpler to describe than it is to critique.

95 Id. at 39.
However, we have some help. Perhaps the most pure legal thinker ever to put pen to paper, Justice John Marshall Harlan\textsuperscript{96} was, if nothing else, an unerringly flawless debunker of illusion. In the sections which follow we will describe the basic methods he utilized to out illusion. These techniques occur primarily in two cases, Harlan’s dissents in: \textit{Berea College v. the Commonwealth of Kentucky}\textsuperscript{97} and \textit{Plessy v. Ferguson.}\textsuperscript{98}

\textbf{False Argument}

Berea College appealed the Kentucky Supreme Court decision to the United States Supreme Court. The United States Supreme Court upheld Kentucky’s decision, but on a different basis.\textsuperscript{99} Now, it appears to this writer that the Court encountered some difficulty addressing the blatant racism of Judge O’Rear’s decision. So the majority determined to ignore the racist arguments of Judge O’Rear and decide the case utilizing a different rationale. The majority chose to avoid the black/white racial distinction by reformulating the question to the court as one of individual versus corporate regulation. Utilizing a technique we have already seen in the Kentucky Supreme court’s original decision, the U.S. Supreme Court decided to rely on insert-replace methodology. The Court simply replaced the black/white distinction with the individual/corporate distinction. By so doing it evaded describing the conflict inherent in the real polarity at issue (black/white), and thereby avoided any reference to the racism inherent in Judge O’Rear’s decision.

Describing the law passed by the Kentucky legislature the Court said:

\begin{quote}
The act of 1904 forbids “any person, corporation, or association of persons to maintain or operate a college,” etc. Such a statute may conflict with the Federal Constitution in denying to individuals powers, which they may rightfully exercise, and yet, at the same time, be valid as to a corporation created by the state. \textbf{It may be said that the court of appeals sustained the validity of this section of the statute…it is…}
\end{quote}

\textsuperscript{96} Two justices of the United States Supreme Court held that name: the author of the dissents in \textit{Berea College} and \textit{Plessy} and many others (who is also known as the “Great Dissenter” John Marshall Harlan I. A Supreme Court Justice from 1877-1911) and his grandson (John Marshall Harlan II, who was a Supreme Court Justice from 1955-1971).

\textsuperscript{97} 211 U.S. 45, 29 S.Ct. 33, 53 L.Ed. 81 (1908).

\textsuperscript{98} 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896)

\textsuperscript{99} The case was an 8-2 majority with Justices Harlan and Day dissenting. I also want to note that the great Oliver Wendell Holmes, thought by some to be America’s greatest jurist, voted with the majority. It is my opinion that this vote alone should call into question his purported greatness.
unnecessary for us to consider anything more than the question of its validity as applied to the corporation.

The statute is clearly separable, and may be valid as to one class while invalid as to another. Even if it were conceded that its assertion of power over individuals cannot be sustained, still it must be upheld so far as to restrain corporations. 100

(Emphasis added by EZL).

Here the Supreme Court reformulates the black race/white race conceptual polarity by replacing it with the polarity of “individual action versus corporate action.” The Court attempts to bifurcate (fracture) the obviously invalid portion of the statute and the regulation of one pole of the pair (the individual) while preserving as valid the regulation of the other pole: the corporation. In so doing the Court is seeking to insulate the “as applied to corporations” part of the statute from the clear Constitutional defect in the “as applied to individuals” portion of the statute. But what is more important, the High Court engages in false argument when it seeks to destroy the relationship between the poles of the individual/corporate distinction—just as Judge O’Rear sought with his divine separation of the races concept (which sought to destroy the relationship between the poles of black and white). 101

In debunking this position Justice Harlan begins his argument by quoting the statute by name (An Act to Prohibit White and Colored Persons from Attending the Same School), and quoting the whole text of the statute, section by section, which included the statement that, “it shall be unlawful for any person, corporation, or association of persons” to operate a school where whites and blacks attend together. 102

100 211 U.S. at 47.
101 Recall that the key to the “falseness” of the argument is just this metaphysical attempt to destroy any relationship between the conceptual poles.
102 The complete statute is as follows:
Sec. 1. That it shall be unlawful for any person, corporation, or association of persons to maintain or operate any college, school, or institution where persons of the white and Negro races are both received as pupils for instruction; and any person or corporation who shall operate or maintain any such college, school, or institution shall be fined $1,000, and any person or corporation who may be convicted of violating the provisions of this act shall be fined $100 for each day they may operate said school, college, or institution after such conviction.
'Sec. 2. That any instructor who shall teach in any school, college, or institution where members of said two races are received as pupils for instruction shall be guilty of operating and maintaining same and fined as provided in the 1st section hereof.
'Sec. 3. It shall be unlawful for any white person to attend any school or institution where Negroes are received as pupils or receive instruction, and it shall be unlawful for any Negro or colored person to attend any school or institution where white persons are received as pupils or receive instruction. Any person so offending shall be fined $50 for each day he attends such institution or school: Provided, That the provisions of this law shall not apply to any penal institution or house of reform.
'Sec. 4. Nothing in this act shall be construed to prevent any private school, college, or institution of learning from
Concerning the majority’s claim that it was justified to bifurcate the statute to focus only on section one and its reference to corporations, Justice Harlan wrote:

But, looking at the nature or subject of the legislation, it is inconceivable that the legislature consciously regarded the subject in that light. It is absolutely certain that the legislature had in mind to prohibit the teaching of the two races in the same private institution, at the same time, by whomsoever that institution was conducted. It is a reflection upon the common sense of legislators to suppose that they might have prohibited a private corporation from teaching by its agents, and yet left individuals and unincorporated associations entirely at liberty, by the same instructors, to teach the two races in the same institution at the same time. It was the teaching of pupils of the two races together, or in the same school, no matter by whom or under whose authority, which the legislature sought to prevent. The manifest purpose was to prevent the association of white and colored persons in the same school. That such was its intention is evident from the title of the act, which, as we have seen, was ‘to prohibit white and colored persons from attending the same school’. (Emphasis added).

In the above quote, Justice Harlan challenges the Court’s obvious deception in its attempt to bifurcate the statute as “inconceivable.” He says it is “absolutely certain” that the legislature’s “manifest purpose” was to prevent association of black and white students. He relies on the obvious language of the whole statute, including section one, and the statute’s title as proof of the legislature’s intent. But what is more, he clearly proves that the statute must be read as a whole. He collapses the attempt at bifurcation by revealing the contradiction inherent in the Court’s position. It is inconceivable and absurd to conclude that the state would disallow a corporation to teach blacks and whites together, but allow individuals or associations to do so. The majority’s bifurcation of the individual/corporate distinction allows this absurd (contradictory) result. And as such, Justice Harlan shows that the argument is false. This demonstration is critical particularly in light of our consideration of the next argument.

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103 Here Harlan also makes an absurdity argument.
104 Manifest purpose runs right into the “essential” and underlying idea.
105 211 U.S., at 62.
106 For clearly if the court does not resort to this deception then it will be forced to rule in favor of the college and its black and white students rights to free association.
Interdependence

Curiously enough, there is a rule of statutory construction that closely resembles our “principle of inherent interrelatedness.” It is the rule of independence/dependence with regard to the various parts of a statute. The Berea College majority inserts the individual/corporate distinction, and then seeks to bifurcate it in order to reach the independence/dependence rule of statutory construction. If the majority can pull this off successfully then this opinion, with its racist effect, will have a firm concrete-like foundation in legal doctrine without being racist on its face. The illusion will be complete. About this rule the majority stated:

As one section of a statute may be repugnant to the Constitution without rendering the whole act void, so one provision of a section may be invalid by reason of its not conforming to the Constitution, while all the other provisions may be subject to no constitutional infirmity. One part may stand, while another will fall, unless the two are so connected or dependent on each other in subject-matter, meaning, or purpose, that the good cannot remain without the bad.108

(Emphasis added by EZL).

In the above quote the conceptual polarity is independent/dependent. To uphold its individual/corporate bifurcation the majority must show that the corporate section is independent of the other allegedly constitutionally defective parts of the statute. In making this effort the Court then stated:

The point is not whether the parts are contained in the same section, for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance,--whether the provisions are so interdependent that one cannot operate without the other.109

In the above quote the Court seeks to avoid the very obvious problem that its distinction does not exist in the form of the statute by listing in separate sections (the very point with which Justice Harlan begins his argument), by attempting to rely on an asserted lack of “inseparably connected in substance” in the body. Here the majority tries to support the sectional/substance independence argument with: 1) deference to the Kentucky Supreme Court, 2) that the

107 See text near notes 59 and 60 that is the Section entitled: The Principle of Inherent Interrelatedness.
108 211 U.S. at 56.
109 Id.
110 And when a state statute is so interpreted, this court should hesitate before it holds that the supreme court of the state did not know what was the thought of the legislature in its enactment. Id., at 56.
Kentucky legislature has the right to amend a corporate charter at any time, \(^{111}\) and 3) that one reasonable interpretation of the statute is that the college could teach the two groups at the same place as long as it was at different times, or vice versa.\(^{112}\) Somehow, the Court views these arguments as supporting its proposition that “in substance” the corporate provisions stand independently of the provisions governing individuals and associations.\(^{113}\)

To all of this Justice Harlan replies as follows:

Undoubtedly, the general rule is that one part of a statute may be stricken down as unconstitutional and another part, distinctly separable and valid, left in force. But that general rule cannot control the decision of this case. Referring to that rule, this court in *Huntington v. Worthen*, 120 U. S. 97, 102, 30 L. ed. 588, 7 Sup. Ct. Rep. 469, said that, if one provision of a statute be invalid, the whole act will fall, where ‘it is evident the legislature would not have enacted one of them without the other.’\(^{114}\)

(Emphasis in original).

Consistent with this declaration, Justice Harlan proceeds to argue the constitutional doctrine surrounding this rule of statutory construction at length. He discusses authority where in striking the defective portions of the statute the Court could not find what remained to be valid because it would enact what “the legislature never meant.”\(^{115}\) He addresses the majority’s point

\(^{111}\) Rev. Stat. [Ky.] 553), which act was amended by an act of March 10, 1856 (2 Id. 555), and which in terms reserved to the general assembly ‘the right to alter or repeal the charter of any associations formed under the provisions of this act, and the act to which this act is an amendment, at any time hereafter. Id. at 57, (Emphasis added by EZL).

\(^{112}\) Construing the statute, the court of appeals held that ‘if the same school taught the different races at different times, though at the same place, or at different times at the same place, it would not be unlawful.’ Now, an amendment to the original charter, which does not destroy the power of the college to furnish education to all persons, but which simply separates them by time or place of instruction, cannot be said to ‘defeat or substantially impair the object of the grant.’ Id. at 57, (Emphasis added by EZL).

\(^{113}\) Given a clear statement of the majority’s objective it becomes apparent that these arguments make no sense and have no logical coherence.

\(^{114}\) Id., at 62.

\(^{115}\) In *Sprague v. Thompson*, 118 U. S. 90, 94, 95, 30 L. ed. 115-117, 6 Sup. Ct. Rep. 988, 990, the question arose as to the validity of a particular section of the Georgia Code. The supreme court of that state held that so much of a section of that Code as made certain illegal exceptions could be disregarded, leaving the rest of the section to stand; this upon the principle that a distinct, separable, and unconstitutional part of a statute may be rejected and the remainder preserved and enforced. ‘But,’ the court took care by say, ‘the insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of
concerning substance by discussing authority where the Court approved a reading of independence between provisions but only where the sections were “entirely separate in their nature.” And he discusses authority, which he says is “a case very much in point.” In *Connolly v. Union Sewer Pipe Co.*, the Court found one statutory section wholly discriminatory because it exempted local agricultural and livestock producers from regulation. There the Court found the whole statute unconstitutional because it felt the legislature would not have passed the regulation without the protective provision. And he cites the rule on dependence as follows:

> The general principle was well stated by Chief Justice Shaw, who, after observing that, if certain parts of a statute are wholly independent of each other, one part may be held void and the other enforced, said, in *Warren v. Charlestown*, 2 Gray, 84: 'But, if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected, must fall with them.'  

(Emphasis in original).

Justice Harlan’s review finds that a determination of independence will be made if it comports with: 1) what the “legislature meant,” 2) the provisions are entirely separate in their nature, 3) if the whole statute is not needed for it to stand, and 4) if the legislature did not intend for the statute to act as a whole. After his review of the cases Justice Harlan found the Kentucky Georgia, the statute is made to enact what confessedly the legislature never meant.’ (Emphasis in original). *Id.*, at 62.

116 In *Marshall Field & Co. v. Clark*, 143 U. S. 649, 696, 36 L. ed. 294, 311, 12 Sup. Ct. Rep. 495, it was held that certain specified parts of the tariff act of 1890 [26 Stat. at L. 567, chap. 1244] could be adjudged invalid without affecting the validity of another and distinct part, covering a different subject. But that, as the court held, was because ‘they are entirely separate in their nature, and, in law, are wholly independent of each other.’ (Emphasis in original). *Id.*, at 63.


118 ‘The principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But, if an obnoxious section is of such import that the other sections, without it, would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative. . . . Looking, then, at all the sections together, we must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and live-stock dealers were excluded from its operation and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and, in that view, it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the 9th section.’ (Emphasis in original). *Id.*, at 64.

119 *Id.*, at 64.
statute to be constitutionally defective because it violated each one of these provisions. In so finding he concluded:

All the cases are, without exception, in the same direction. Now, can it for a moment be doubted that the legislature intended all the sections of the statute in question to be looked at, and that the purpose was to forbid the teaching of pupils of the two races together in the same institution, at the same time, \textit{whether the teachers represented natural persons or corporations}? Can it be said that the legislature would have prohibited such teaching by corporations, and yet consciously permitted the teaching by private individuals or unincorporated associations? Are we to attribute such folly to legislators? Who can say that the legislature would have enacted one provision without the other? If not, then, in determining the intent of the legislature, the provisions of the statute relating to the teaching of the two races together by \textit{corporations} cannot be separated in its operation from those in the same section that forbid such teaching by individuals and unincorporated associations. Therefore the court cannot, as I think, properly forbear to consider the validity of the provisions that refer to teachers who do not represent corporations. If those provisions constitute, as, in my judgment, they, do, an essential part of the legislative scheme or policy, and are invalid, then, under the authorities cited, the whole act must fall. The provision as to corporations may be valid, and yet the other clauses may be so inseparably connected with that provision and the policy underlying it, that the validity of all the clauses necessary to effectuate the legislative intent must be considered. There is no magic in the fact of incorporation which will so transform the act of teaching the two races in the same school at the same time that such teaching can be deemed lawful when conducted by private individuals, but unlawful when conducted by the representatives of corporations.\textsuperscript{120}

(Emphasis in original).

Clearly, the majority cannot find that the form of the statute demonstrates a bifurcation of the individual/corporate provisions of the law. And it cannot find, as Justice Harlan has shown, that the various provisions are different in substance, for they regulate the same activity—blacks and whites being taught together. The legislature would not want one to stand without the other. For as he asserts, isn’t it absurd and contradictory to conclude, “the legislature would have prohibited such teaching by corporations, and yet consciously permitted the teaching by private individuals or unincorporated associations?” Justice Harlan’s analysis, which demonstrates how the majority’s assertions fail to meet the provisions of the doctrine are shown to be even more forceful and conclusive by this revelation of the contradiction (absurdity). The majority’s

\textsuperscript{120} \textit{Id.}, at 65.
attempt to reach the independent/dependent rule of statutory construction fails entirely in the face of this absurd (contradictory) result. And as such, Justice Harlan shows that his argument based on interdependence prevails. Justice Harlan’s dissent shows that the majority’s argument and attempt to weave an illusion fails.

**True Intent and Real Meaning**

To repeat a point made earlier, one of the objectives of this article is to show that there is a metaphysical basis for meaning that is in some sense real, and that when real meaning is attacked there must be an effort to destroy the basis of meaning and weave some sort of illusion. So far we have seen both lower state courts and the United States Supreme Court misdirect, deceive, ignore, evade, and generally twist and turn its way through legal doctrine all the while failing to address the real conflicts inherent in the Berea College case. To some this may appear to be a moot point since these matters are now historical. However, meaning is meaning and the same techniques are employed today, in our time, to destroy real meaning and weave illusion to the detriment of us all.

It may seem intellectually simple and emotionally naïve but one wonders why there is such an absence of a straightforward discussion of the problem of race relations. Justice Harlan wondered the same thing. He says:

In my judgment the court should directly meet and decide the broad question presented by the statute. It should adjudge whether the statute, as a whole, is or is not unconstitutional, in that it makes it a crime against the state to maintain or operate a private institution of learning where white and black pupils are received, at the same time, for instruction. In the view, which I have as to my duty, I feel obliged to express my opinion as to the validity of the act as a whole. I am of opinion that, in its essential parts, the statute is an arbitrary invasion of the rights of liberty and property guaranteed by the 14th Amendment against hostile state action, and is, therefore, void.121

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121 *Id.*, at 67. And in relation to the discussion of *Plessy*, which follows Justice Harlan makes the same point when he states: “These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship. Finally, and to the end that no citizen should be denied, on account of his race, the privilege of participating in the political control of his country, it was declared by the fifteenth amendment that ‘the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude.’
To repeat another point of this article: when there is an attempt to destroy meaning it harms real people and is often a precursor of that intent to harm. Justice Harlan sees this point also and heaps ridicule on the Court for its participation in this sort of activity. He says:

So, if the state court be right, white and colored children may even be forbidden to sit together in a house of worship or at a communion table in the same Christian church. In the cases supposed there would be the same association of white and colored persons as would occur when pupils of the two races sit together in a private institution of learning for the purpose of receiving instruction in purely secular matters. Will it be said that the cases supposed and the case here in hand are different, in that no government, in this country, can lay unholy hands on the religious faith of the people? The answer to this suggestion is that, in the eye of the law, the right to enjoy one's religious belief, unmolested by any human power, is no more sacred nor more fully or distinctly recognized than is the right to impart and receive instruction not harmful to the public. The denial of either right would be an infringement of the liberty inherent in the freedom secured by the fundamental law. Again, if the views of the highest court of Kentucky be sound, that commonwealth may, without infringing the Constitution of the United States, forbid the association in the same private school of pupils of the Anglo-Saxon and Latin races respectively, or pupils of the Christian and Jewish faiths, respectively. Have we become so inoculated with prejudice of race than an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes, simply because of their respective races? Further, if the lower court be right, then a state may make it a crime for white and colored persons to frequent the same market places at the same time, or appear in an assemblage of citizens convened to consider questions of a public or political nature, in which all citizens, without regard to race, are equally interested. Many other illustrations might be given to show the mischievous, not to say cruel, character of the statute in question, and how inconsistent such legislation is with the great principle of the equality of citizens before the law.\textsuperscript{122}

(Emphasis added by EZL)

Here the harm is revealed in all its absurdity. To make it short, it harms the individuals and races at issue, but it also harms the great principles for which, our nation supposedly stands.

The Illusion of Separate But Equal

\textsuperscript{122} Id., at 68-69.
The United States Supreme Court announced the doctrine of “separate but equal” in the case of *Plessy v. Ferguson.* Recalling that *Plessy* is a case about a man who bought a train ticket to ride in the car reserved for whites. When he tried to take his place the conductor refused him admittance to the white car and ordered him to the black car. Plessy refused and was arrested. In his moving papers Plessy claimed to be “seven-eights Caucasian and one-eighth African blood” and that the “mixture of colored blood was not discernible in him.” Given the nature of the Court’s arguments concerning the color line, this is a very curious set of facts on which to base such a decision. And in a certain real sense this is the beginning of the illusion.

In terms of historical form, our discussion of the case of *Berea College* gets ahead of ourselves since *Plessy* is prior in time. But in terms of the substance of the discussion, arguments of fracture and their nature are more clearly revealed by starting with *Berea College.* And given that start, we will not rehash the evasive arguments used in *Plessy* that resemble those used in *Berea College.* This is because, in *Plessy,* there is one argument that is the real key to the illusion that the Court either casts or buys into. This argument differs from the divine law argument used in the lower court decision in *Berea College* (that the Supreme Court then was forced to take pains to avoid in its decision).

In *Plessy,* the Court takes a more direct and subtle approach to the problem that relates directly to the doctrine of separate but equal. This is the argument that bifurcates “equal rights under the law” into political equality and social equality.

In *Plessy* the Supreme Court in addressing the 14th Amendment states:

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this

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123  163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896); supra notes 23 and 98.
124  *Plessy* at 541 U.S. 1142 S.Ct.
125  *So analysis will not be done in this section on Plessy’s arguments that are*: related to the 13th, 14th and 15th Amendments to the U.S. Constitution or the cases cited by the Court interpreting those Amendments; related to the cases relying on the bans associated with intermarriage; relating to jury rights; related to Commerce Clause and the legal understanding of what constitutes a public highway or intra-state versus interstate commerce; related to States rights versus Federal rights; and those related to reasonable use of the police power.
is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced.126
(Emphasis added).

Here the Court directly embraces “the absolute equality of the two races before the law.” But then in the very next breath amazingly bifurcates that absolute right into, “social, as distinguished from political, equality.” This is an argument of fracture. It refuses to discuss the real polarity of the: white man’s legal rights versus the black man’s legal rights. Instead it slips in this new vacuous distinction that reinserts race prejudice back into the debate in the guise of principle. But unlike Judge O’Rear’s main argument in Berea College, this argument’s cognitive power rests in the creation of this new distinction between “political equality versus social equality.” Some may find this to be some sort of rehash of a natural law argument because of the reference to “the nature of things.” However, it is this writer’s view that the power of this argument comes from the legalistic distinction that is made concerning “political equality” and “social equality,”127 and our natural tendency to create meaning by making distinctions.

Justice Harlan rejected this argument outright when he wrote:

State enactments regulating the enjoyment of civil rights upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretense of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned. This question is not met by the suggestion that social equality cannot exist between the white and black races in this country. That argument, if it can be properly regarded as one, is scarcely worthy of consideration; for social equality no more exists between two races when traveling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of a city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot box in order to exercise the high privilege of voting.128 (Emphasis added).

126 Plessy at 544, 1140.
127 I say this distinction is legalistic because equality before the law is a legal principle or rule but “social equality” is an empirical condition asserted as if it were a principle.
128 Plessy at 560-561, 1147.
Justice Harlan does not mince words when addressing the nature of these “separate but equal” statutes as “cunningly devised” under a pretense to equal rights, when their real purpose is to destroy those rights. Consistent with other statements made in his dissent he insists on discussing the “real meaning” and “real purpose” of these measures without evasion.  

Also, Justice Harlan does not even regard the “social equality” argument as “proper” argument. He asserts this because the fact of social equality is not implicated in any of the occurrences he lists: riding in a train together; traveling on the same road; traveling in the same street car; voting; or, sitting on the same jury, etc. None of these situations require that blacks and whites be equal socially for them to occur. Justice Harlan says they are “arbitrary” and cannot be justified on any “legal grounds.”

So in terms of our argument of fracture, what does the idol of separate but equal seek to annihilate? The doctrine of separate but equal, with its covert distinction between political equality (formal) versus social equality (substantive) is a direct attack on the social freedom of black people. This doctrine and these laws sought to annihilate that freedom, which had just recently been granted by the War Amendments to the U.S. Constitution.

Justice Harlan recognized this when he wrote:

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129 In other portions of the opinion his statements are even stronger where he wrote: “Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of commodation for travelers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. The fundamental objection, therefore, to the statute, is that it interferes with the personal freedom of citizens.” Plessy at 1146.

“In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case.” Plessy at 1147.

“The thin disguise of ‘equal’ accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.” Plessy at 562.

130 Justice Harlan wrote: “The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution. It cannot be justified upon any legal grounds.” Plessy at 562.
I do not deem it necessary to review the decisions of state courts to which reference was made in argument. Some, and the most important, of them, are wholly inapplicable, because rendered prior to the adoption of the last amendments of the constitution, when colored people had very few rights which the dominant race felt obliged to respect. Others were made at a time when public opinion, in many localities, was dominated by the institution of slavery; when it would not have been safe to do justice to the black man; and when, so far as the rights of blacks were concerned, race prejudice was, practically, the supreme law of the land. Those decisions cannot be guides in the era introduced by the recent amendments of the supreme law, which established universal civil freedom, gave citizenship to all born or naturalized in the United States, and residing here, obliterated the race line from our systems of governments, national and state, and placed our free institutions upon the broad and sure foundation of the equality of all men before the law.\(^\text{131}\)

(Emphasis added).

Universal civil freedom is the clarion call raised by Justice Harlan in response to the majority’s decision. Freedom exists in the opportunity to choose how, where and when one will conduct oneself in society. On this point Justice Harlan wrote:

The fundamental objection, therefore, to the statute, is that it interferes with the personal freedom of citizens. 'Personal liberty,' it has been well said, 'consists in the power of locomotion, of changing situation, or removing one's person to whatsoever places one's own inclination may direct, without imprisonment or restraint, unless by due course of law.' If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so; and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.\(^\text{132}\)

(Emphasis added).

Separate but equal, this most pernicious illusion, constituted a covert action whose effect was the slow annihilation of the black people of this nation. Its harm is not as easily recognized as the immediate murder of the Jews, engaged in by the Nazis, because of the time factor involved. Separate but equal results in a slow homicide, created by the deathblow of the badge

\(^{131}\) *Plessy* at 563.

\(^{132}\) *Plessy* at 1145-1146.
of inferiority, which such a legal doctrine creates. The damaging blow of inferiority was clearly recognized by Justice Harlan who wrote in response:

I am of opinion that the state of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that state, and hostile to both the spirit and letter of the constitution of the United States. If laws of like character should be enacted in the several states of the Union, the effect would be in the highest degree mischievous. Slavery, as an institution tolerated by law, would, it is true, have disappeared from our country; but there would remain a power in the states, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom, to regulate civil rights, common to all citizens, upon the basis of race, and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community, called the 'People of the United States,' for whom, and by whom through representatives, our government is administered. Such a system is inconsistent with the guaranty given by the constitution to each state of a republican form of government…

Fortunately, after being the law of the land for over fifty years, the Supreme Court reversed the legal sanction of this illusion, this idolatry, in the case of Brown v. the Board of Education. The Court in Brown recognized that:

'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation

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133 In comparison to the criminal code, the Nazi fracture is premeditated homicide or Murder in the First Degree. Here the doctrine of separate but equal is like the crime of negligent homicide (under its most benign construction) or manslaughter. However, one must not forget or belittle what these two have in common: they are both homicides. This is why I maintain they are both cases of fracture.

134 Now black people are often compared to other minorities who come to this nation as immigrants and appear to outperform the black population. Hopefully, it will now be clear why this “appearance” is so. The meaning of being black in America comes with this dagger suspended over one’s heart that must at some point be overcome. In a real sense this means that one must climb out of a hole just to get even. This is just not the case with other minorities, particularly if they are immigrants who come from a foreign land complete with a proud history and complete set of traditions. They begin their climb from a higher point. And in some cases even with a sense that they are superior to whites. Note that the American Indian is similar to blacks in this regard. Note also that the current success of the American Indian, where it is occurring, is closely associated with their treaty and reservation rights, which have come to act in a certain sense like reparations. Black people have yet to receive the promised forty acres and a mule, which means only that the situation of black people in America has no inherent advantages whatsoever.

135 Plessy at 564.

with the sanction of law, therefore, has a tendency to (retard) the educational and mental
development of Negro children and to deprive them of some of the benefits they would
receive in a racial(ly) integrated school system.'

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. 137 Any language in *Plessy v. Ferguson* contrary to this finding is rejected.138

Unfortunately, today many black people are still suffering the effects of this illusion and its badge of inferiority. Hopefully, this work will help destroy the remnants of that illusion.

**Delusion and Illusion at Work Today**

In the section on Dissonance we come to see that this discussion really reveals two kinds of illusion: dissonance that is premeditated (fracture) and dissonance that is the result of a thoughtless mistake or error (negligent). Consistent with my discussion, I call the premeditated act “illusion” and the negligent act “delusion.”

Delusion is defined as: “a false belief or impression.”139 Illusion on the other hand is defined as: deception; a misapprehension of the true state of affairs.”140 Both result in signs that are idols and as such are harmful. But as mentioned earlier, delusion is just a mistake, an error, and a failure to completely arrive at the meaning utilizing a given form. However, the other, illusion, is the result of the deliberate act of a person or group to deceive another person or group in order to harm them or otherwise take advantage of them.

One critique of my discussion with regard to comparing the Supreme Court to the Nazi regime is that what the Supreme Court did is not what the Nazi’s did. And at this point in my discussion, after all has been explained, I am willing to concede this but only to a point. As


138 Brown at 692, 495.

139 OEED at p 378.

140 OEED at p. 705.
mentioned above, what the Nazi’s did was akin to premeditated murder. And in this way is different from what the Supreme Court did. However, the Supreme Court’s action was still premeditated, deliberate, deception, and given Justice Harlan’s dissent they could not be unconscious concerning the potential for harm. But, if you construe these facts in their best light, the Supreme Court of that day is only guilty of negligent homicide and not premeditated murder because they did not intend murder, they were only wrong about the degree of harm that might be inflicted—like an individual who shoots a gun into a crowd.

In our world of today we are constantly faced with idols of delusion and illusion. We are constantly presented with forms that can only be described as “free floating phantasms,” signs that represent a meaning but whose meaning rests on a false belief (delusional at best) or are deliberately calculated to mislead and destroy (illusion).

Routinely, in divorce actions, even those where there are children, both counsel and litigants attempt to annihilate the other side. In the State of Washington, divorce is “no fault.” And in child custody matters, there is a presumption of joint custody that must be overcome to deprive a parent of or limit their normal role. Yet, counsel and litigants continue to assert fault where fault cannot be properly argued. Today litigation is widely perceived by both counsel and litigants as “scorched earth war” where the one left standing wins.

141 See RCW 26.09 et, cet.
142 See RCW 26.09.187, which states in part as follows:

(3) RESIDENTIAL PROVISIONS,
(b) Where the limitations of RCW 26.09.191 are not dispositive, the court may order that a child frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time if such provision is in the best interests of the child. In determining whether such an arrangement is in the best interests of the child, the court may consider the parties geographic proximity to the extent necessary to ensure the ability to share performance of the parenting functions.

143 In early 2009 I had a case where a husband had his wife arrested during a court session break on an animal cruelty warrant in order to try and argue that her treatment of the dogs came under the “waste of marital assets doctrine.” Then he testified that the dogs were not for commercial value but only “pets and companions.” It was clear to the court that this was interposed to argue fault and little else.
144 Early in my first term I had a case where the wife divorced a wealthy man and her divorce settlement made her independently wealthy. She then married the boyfriend. I had the divorce between the wealthy wife and the boyfriend. The lawyer for the wife argued that after a nearly seven-year relationship that the boyfriend should get nothing. Of the property at issue I awarded the wife approximately $250,000 and the boyfriend approximately $18,000. The wife’s attorney was livid and moved for reconsideration. On Reconsideration I wrote in part:

Overview
The aspect of this case that the court finds most troubling is what appears to be the reckless and callous disregard both parties seem to have for the humanity of the other and those in their care. Respondent has demonstrated such an attitude during the marriage with his drug use and the attitude he had toward Petitioner’s son.
However, over time I have come to see that such behavior proves a real truth. And it is not the truth for which those holding to the cultural relativist position assert. As we have seen, the aggressive lie occurs through a process of polarization. Its reliance on falseness and deceit to fracture is its hallmark. However, as such it implies that there is a right and true meaning. For if this were not the case, the polarity fracture would have no context in which to occur. It is our proposition then that every lie rests on the truth. Every lie has as its foundation a right, true and inherent meaning. Otherwise the lie could not exist.

**Values Multiplicity**

Men and women are opposites, physically and conceptually. It is possible for them to live in an Amazonian fantasy type of society where women rule all and men are brought out only to stud or vice versa. But that is not our reality. Our reality is that these opposites attract

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Petitioner demonstrates this attitude in her failure to dedicate available funds for the future of her handicapped son, and in her demands on the court for an almost “scorched earth” disposition, with regard to Mr.…. that would leave him nothing as the final order of this court.

The court would remind the parties of the following:

*The court in a divorce action must have in mind the correct character and status of the property as community or separate before any theory of division is ordered…Characterization of the property however, is not necessarily controlling; the ultimate question being whether the final division of the property is fair, just and equitable under all the circumstances.*” (Emphasis in original).


I would respectfully remind the parties that the overall rule is a fair, just and equitable division of the assets. This court does not view the problem as a winner-take-all proposition, (even in light of the issue of waste in this case). Under the facts of this case, this court does not view such a disposition (winner-take-all) as “fair” or “just.”

Petitioner would have the court treat this seven-year relationship as if it were a three-year marriage. It is true that the court did not find it to be meretricious (as the discussion below will further elucidate). However, that does not mean the prior years are to be treated as if they did not exist. Such a response seems to be more than somewhat fictional, and if the court’s decision is based on such a fiction, it does injury not only to the parties, but to the court, the practitioners and the interests of justice in our society overall.

What is the value of a person’s life? What is the value of a person’s company and time? This court surely does not know. However, this court does know one thing. The value of a person’s life and time, particularly for a seven-year period cannot be zero. It seems unfair to this court to conclude that seven years of a person’s life amounts essentially to nothing. Yet, this is precisely what Petitioner is asking the court to conclude. The court asks Petitioner to put herself in Respondent’s place. If the court were to treat her in this manner, to conclude that seven years of her life were worth nothing, would she consider this fair?
and when joined in a good marriage the two opposing poles support each other. We need to realize that this is a sound principle and analogies to it can be made in many critical areas.

As a professional lawyer and a judge, I am pointing out the similarity of the arguments of the Nazi’s with certain types of arguments that occur in legal cases because as de Toqueville\textsuperscript{145} correctly observed the habits of lawyers extend beyond the precise limits of legal practice. He observed:

\begin{quote}

The influence of legal habits extends beyond the precise limits I have pointed out. Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question. \textit{Hence all parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings.} As most public men are or have been legal practitioners, they introduce the customs and technicalities of their profession into the management of public affairs. The jury extends this habit to all classes. The language of the law thus becomes, in some measure, a vulgar tone; \textit{the spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it descends to the lowest classes, so that at last the whole people contract the habits and the tastes of the judicial magistrate.} The lawyers of the United States form a party which is but little feared and scarcely perceived, which has no badge peculiar to itself, which adapts itself with great flexibility to the exigencies of the time and accommodates itself without resistance to all the movements of the social body. But this party extends over the whole community and penetrates into all the classes which compose it; it acts upon the country imperceptibly, but finally fashions it to suit its own purposes.\textsuperscript{146}

And in our world of today, besides the litigiousness of our society, the primary manifestation of this influence is the use of "spin." Today it is almost impossible to get a straight answer. If you call a person and inform them of a problem their immediate response is to try and spin it to show how it must be your fault and not theirs.

These occurrences are bothersome enough. But there is also another, more vicious kind of spin, that finds its root in fracturing polarization. It is most often observed in political rhetoric and its polarizing efforts have the objective of destruction of the opposition. The phrase

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\item[\textsuperscript{145}] Alexis de Tocqueville, \textit{Democracy In America}, The Henry Reeve Text as revised by Francis Bowen and edited by Professor Phillips Bradley, New York: Alfred A. Knopf (1945) at 290.
\item[\textsuperscript{146}] Id., at p. 290. Emphasis added by EZL.
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"scorched earth" politics is a clear manifestation of this activity. And it is something to which we need to begin to look on with derision.

For political victory does not have to result in the destruction of the opposition. In fact, few democracies would be able to exist if the opposition was destroyed, on a regular basis, as a result of struggles for power and privilege. Political victory only requires hierarchy. It does not require annihilation.

Accordingly, our citizenry is more litigious. This is because they have a real desire to destroy. When I practiced I constantly informed my clients that they did not need to destroy the opposition in order to be made whole. It often takes an almost Herculean effort to convince them of this simple fact. Private conflict begins less and less with negotiation.

Even news reporting has taken on more and more of the aspects of this worse kind of spin. Reporters practice "gotcha" journalism, which seems to have as its objective, not the revelation of the truth but the destruction of the career. It often seems that the truth is no longer sufficient. 147

These forms of normative reality building are not in themselves inherently evil. But they possess, embedded in them a process of polarization, which is in fact a process of destruction.

147 For more on Gotcha Journalism: See Wikipedia at: http://en.wikipedia.org/wiki/Gotcha_journalism. It defines Gotcha Journalism as follows: Gotcha journalism is a term used to describe methods of interviewing which are designed to entrap the interviewee into making statements which are damaging or discreditable to their cause, character, integrity, or reputation. The aim is to make film or sound recordings of the interview which can be selectively edited, compiled, and broadcast or published to show the subject in an unfavourable light…. Methods include misrepresenting the topic of the interview, then switching to an embarrassing subject, leading the interviewee to commit to a certain answer, and confronting them with pre-prepared material designed to contradict or discredit that position, repeatedly baiting the interviewee to befuddle them and get their guard down to elicit an embarrassing response. Another technique is for the interviewer to remain silent after something the subject has said, which often leads the subject to say something to fill the silence. Gotcha journalism is often designed to keep the interviewee on the defensive by, for example, being required to explain some of their own statements taken out of context thus effectively preventing the interviewee from discussing their own agenda for the interview.

The intent of gotcha journalism is always premeditated and used to defame or discredit the interviewee by portraying them as self contradictory, malevolent, unqualified, or immoral. This affect is also achieved by replaying selected quotes from public speeches and following with hand-picked footage or images that appear to reinforce negative images of the interviewee.

Some of the techniques can be used to get a subject with something genuinely discreditable to hide to reveal wrong-doing; there is a fine line between robust and gotcha journalism.
This has been introduced as the concept of fracturing or privileging through fracturing polarization.

This concept has been introduced because it is used on a daily basis in society as "spin" but the users do not seem to understand the destructive consequences of this use. In an adversarial system of justice, destruction as a remedy is quite often a result. But just like a gun in a child's hands, the indiscriminate and general use of destructive rhetoric in our society must give us pause.

Values Relativity

Is it delusional to believe that our society is a “war of cultures” where values or norms exist in a sea of competition? It is this writer’s position that this type of belief leads to the concept of values relativity. Values relativity, as a concept, is important today because the practice of law by many lawyers, whether they realize it or not, has embedded in it the philosophy of values relativity.

Values relativity as a concept comes from the theorist Hans Kelsen. He wrote that we live in a world of norms and that “a norm…cannot be either true or untrue, but only valid or not valid.” Accordingly, such a philosophy assumes that there are no right or wrong values, no right or wrong norms, only valid or invalid ones—where invalidity is solely based on the particular system in which you find yourself. He further states that the values constituted by human will are “arbitrary.” Thus, a belief held in America may be valid in America but not be so, say in China.

What this means is that, for many lawyers—anything goes—because no value is considered right or wrong. For those who practice in this manner the only thing that matters is superior force or skill. For them, there is no such thing as right or wrong. In my past, I confronted a growing number of opposing attorneys, and in my present a growing number of litigants appearing before me, who actually behave in this manner. They feel justified to say anything or take any position, which the opponent cannot prove false. Their aim clearly is to use the law to annihilate the opponent by any means available: lie, cheat, steal, does not matter. I have even experienced opposing counsel destroying documents from the court file. But since I or no one else actually witnessed the destruction the court would not take action. But doesn’t this position and its consequent behavior have many serious implications? Do we really

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148 My first contact with this idea was when Charleton Heston used the term “cultural war” in a talk to the Claremont Foundation, which talk was broadcast on CSPAN on October 11, 1998.
150 Id.
want counsel to practice law in this manner and do we really want our citizens to view law, lawyers, and litigation in this light?

For if there is no right or wrong value, no right or wrong norm, then correspondingly, how can there be a right or wrong meaning? Isn’t everything then arbitrary? And if everything is arbitrary then how can our lives have meaning?

This paper asserts that there is an inherent meaning that governs all forms seeking manifestation or there would be no need to lie. If this proposition is true, then the idea that “norms are arbitrary” is false. The idea of a values existing in a sea of competition” until the competitor is overcome or destroyed is false. It is an idol, a delusion, a free-floating phantasm working its mischief in the court systems of our nation (an possibly even in the wider world) acting as a justification for unethical and uncivil behavior leaving nothing but harm in its wake. Just like the “norm” of separate but equal.

VI. Conversion

No one is perfect. Every idol could be a symbol in the making. Goethe once said, “Treat a man as he might be and he will become what he should be.” The attitude toward the idol should be the same. Every idol should be converted to the symbol it can be.

Every identification of an idol and every critique of one must be given with a comprehension of that fuller meaning which the form is capable of expressing. This is the case because it does no good to call someone a Nazi without being able to identify the Angel the Nazi can become.

This section is necessary because of the metaphysical observation of the nature of meaning. Meaning only becomes possible if the form is able to fully express it. If there is no unity or only partial unity between form and meaning the result is an idol. This means that all makers of meaning must strive for the most complete expression of meaning possible utilizing their particular form.

The Process of Truth and The Process of Lying

151 See Goethe quotes: one source is: http://www.wisdomquotes.com/cat_expectations.html. The complete quote from this source is: Treat a man as he is, he will remain so. Treat a man the way he can be and ought to be, and he will become as he can be and should be."
Hopefully, what this article has now helped you to see is that truth is a process and it’s conceptual twin is the fact that lying is a process. Truth is a process where the form that we experience in the everyday world seeks to express an idea that underlies it and is the source of its reality. This truth-making process is the case whether we are talking about a tree, a dog, quantum mechanics or an individual person. Each of these examples can be a symbol of the idea that is their source. In Indian culture, it is understood that a person can be considered to be an “incarnation” of an idea like “intelligence” or “love.” The extent to which the form expresses the underlying idea is the extent to which the form expresses its truth. As such, a mother who harms her children would not be seen as a “true mother.” A mayor who steals from his city would not be considered a “true mayor.” A President who leads his nation to ruin would not be considered to be a “true President.” In Indian terms, each of these individuals would have failed to incarnate their underlying idea. In our terminology they would be idols, not symbols. What can also be gleaned from these examples is that for each individual the idea is a goal. It is an ideal. The goal then is to be the perfect expression if that “ideal,” to be the perfect incarnation of that ideal: to be symbolic.

Conversely, lying is a process where the form is cut off from its inner idea. In the article we call the deliberate severing of this relationship, “fracture.” However, we observed that this relationship could be strong or weak without a complete severing. This is the idea of dissonance, error or misunderstanding. Bhartrhari indicated that all understanding of the inner idea starts with a process of dissonance or misunderstanding, until true understanding is reached. Revealing lying as a process also serves to reveal the various techniques used when there is a deliberate effort to sever the tie. It should give us pause in our everyday endeavors to clearly observe these actions at work and to refrain from their utilization.

152 See Generally, Paramahansa Yogananda Autobiography of a Yogi, Self Realization Fellowship (1946). See also: http://www.yogananda-srf.org/special_ancmnts/150annv_sy/150annv_e.html where it states:

May 10, 2005 marks the 150th anniversary of the birth of Swami Sri Yukteswar — the revered guru of Paramahansa Yogananda. Swami Sri Yukteswar, an ideal exemplar of India’s ancient heritage of illumined rishis, is venerated as a Jnanavatar (“incarnation of wisdom”) by people all over the world who have been inspired by his life and teachings. He manifested the self-mastery and divine attainment that have been the highest goal of truth seekers throughout the ages.

In his Autobiography of a Yogi, Paramahansa Yogananda describes his many years of spiritual discipline in Sri Yukteswar’s ashram in Serampore, India. Yogananda wrote of his Guru: "Each day with him was a new experience in joy, peace, and wisdom….Sri Yukteswar was reserved and matter-of-fact in demeanor. There was naught of the vague or daft visionary about him. His feet were firm on the earth, his head in the haven of heaven. Practical people aroused his admiration. ‘Saintliness is not dumbness! Divine perceptions are not incapacitating!’ he would say. ‘The active expression of virtue gives rise to the keenest intelligence.’
But what it should also do is reveal to each and every person that “direction” matters. It matters whether you are tending toward greater and greater expression of meaning or tending to create more and more obstacles to meaning. It could be stated that one life is a life towards greater and greater light and the other is a life that tends toward darkness.

**Converting Delusion**

Recall that delusion is just a “false belief or impression.” The idol then will stand for that false belief. Given that the idol is expressing a false meaning, then only arriving at the true underlying meaning will convert the idol to a symbol. Each individual person is a form in the process of expressing a meaning. If that meaning is false then one must correct the error in order to fully express what the form is capable of expressing.

What this means for the individual is that he or she must strive for perfection. It is not the all-encompassing perfection of the omnipotent or the omniscient, but it is the limited perfection of the form at hand. One has to try and be the best judge, lawyer, justice, law professor, president, governor, mayor, CEO, husband, wife, son, daughter, father and mother one can become. A mayor does not have to perfect being a president. The mayor has to perfect being a mayor. The daughter does not have to perfect being a son. The daughter only must strive to be the best daughter possible.

In terms of this article, one must ask: What does it mean to be a lawyer? What does it mean to be a law professor? What does it mean to be a judge? This article answers the question as follows: the meaning does not inhere in the power associated with the form. Perfection and meaning do not lie in that direction.

It is possible for a lawyer to be what Charles Hamilton Houston called a “parasite” on society or a “social engineer.” This is the lawyer as idol or symbol. He taught his students to be social engineers, to be symbols, and the result was *Brown v. the Board of Education* and the subsequent beginning of the liberation of all black people and all other citizens of America from the evils of racial segregation.

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153 Please find a more complete version of the quote below from Charles Hamilton Houston, which can be found at: http://www.brownat50.org/brownBios/BioCharlesHHouston.html

“A lawyer’s either a social engineer or he’s a parasite on society.” ... A social engineer was a highly skilled, perceptive, sensitive lawyer who understood the Constitution of the United States and knew how to explore its uses in the solving of "problems of . . . local communities" and in "bettering conditions of the underprivileged citizens."
But clearly, if these words are true, then a lawyer, at minimum, must stand for truth and not falsehood. A lawyer and all those who serve the law must take pride in arriving at the true meaning of a statute, case, or principle and take shame if the tools of the profession are used to perpetrate falsehood and harm.

It means in practice a lawyer must not resort to arguments of fracture and not utilize arguments that intentionally distort the meaning of a case or situation. To do so, in these terms, is to violate the very soul of the law – which is to arrive at the true meaning of a norm, case, or controversy.

More than anything, this article reveals that it is the direction of the effort that is of utmost importance. We may not be able to reach the goal of ultimate truth or ultimate perfection. But nevertheless that must be the direction we take as far as the form utilized will travel.

As a profession we need to stand for truth and meaning. Too long have we been known by our fellow citizens as agents of deception. The era of deception in legal practice must be brought to a close. Arguments of fracture and subsequent annihilation should be looked on with derision whenever they occur: whether in private forms of litigation, or public discourse. If this is done it may be possible to usher in a new golden age of law, where law is about understanding “the fabric of thought before us...so that we may know truly what it is, ....as we strive in accordance with our obligation of fidelity to law” to make life a coherent, workable whole.