THESE RULES ARE MADE TO BE BROKEN DOWN: TEACHING STUDENTS THE ART OF DECONSTRUCTING RULES OF LAW

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ABSTRACT

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JEREMIAH A. HO

Despite its often contended (and oft-contentious) meanings, legal academics and educators still resort to the now-entrenched phrase, “think like a lawyer,” to describe the goal of law schools in educating their students. But even a brief deconstruction of the phrase brings its varied interpretations to light: What does it mean to “think like a lawyer”? It might easily imply an existing difference from thinking like a doctor, a banker, or a representative from another profession. But within the law, does “think like a lawyer” exclude thinking like a judge or a legislator (both roles comprising those who might have been lawyers in another life)? And which lawyer for that matter? Erwin Chemerinsky? Oliver Wendell Holmes? Perry Mason? An average, reasonable lawyer? A “bad” lawyer? To attempt to tease out the “definable” components of the phrase reveals the phrase’s imprecision, and the difficulties in using “think like a lawyer,” as a proscribed law teaching goal.

Borrowing from the notion established by notable law professors, Michael Hunter Schwartz, Sophie Sparrow, and Gerald Hess, that the goal of teaching law students should be to allow students to accomplish effective legal problem-solving rather than thinking like a lawyer, this Article focuses on the teaching of one particular skill needed for such problem-solving: how legal thinkers methodically and effectively approach reading, comprehending, and critiquing the law. Language comprises the nuts and bolts of the law, but law school curricula generally do not focus on sharpening the elevated levels of perception needed for legal thinkers to internally process case holdings, blackletter rules, and statutes for whatever tasks await them. In fact, the traditional case method of teaching law students to “think like a lawyer” often only briefly and abstractly addresses the components of legal reading and then expects students to master the skills out on their own, which poses increasing problems in light of the noted decline of literacy and comprehension skills in the recent adult population in the U.S.

This Article addresses an approach to teaching legal literacy skills through deconstruction from both within the law and as an import from post-modernist thought. By doing so, this Article explores how teaching one method of rule reading and comprehension—termed “rule deconstruction”—to first-year law students introduces them to both formalist and anti-formalist techniques to approaching the language of the law and equips them with the heightened sensitivity that legal thinkers must embrace for dealing with legal reading. First the Article will first present a method of teaching “rule deconstruction” in its prima facie meaning to introduce a formalist perspective to breaking down complex legal rules and legislative materials in class that can link rule comprehension to student outlining skills and exam performance. Then the Article will take “deconstruction” in its post-structuralist incarnation and harness its postmodern tendencies into an anti-formalist method for dealing with the language of rules that can take student comprehension of rules into a more critical and theoretical realm. All of this is done with the goal of equipping the law student with both a hands-on and theoretical engagement with rules that challenges them to be both better legal thinkers and problem-solvers as well.
These Rules Are Made to Be Broken Down: Teaching Students the Art of Deconstructing Rules of Law

By

Jeremiah A. Ho

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BY

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I. INTRODUCTION

When prompted with defining the goal of a well-balanced legal education, traditionally many in legal education have resorted to the often contended (and oft-contentious) phrase, “think like a lawyer,” an institutional term of art sprung from Christopher Langdell’s pedagogical reforms and efforts at Harvard in the 1870s,1 then recited first in print and

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later onto film by Kingsfield at a fictional 1970’s Harvard, and since then debated by generations of legal educators. Deconstructing the phrase, “think like a lawyer,” reveals the challenges behind the phrase, however. What does it really mean to “think like a lawyer”? Although the phrase appears to represent a process that law students should desire to master, a more specific close reading of the term creates a myriad of possible definitions, which suggests that its meaning is more elusive than it seems. The phrase, “think like a lawyer,” implies an existing difference from—say—to think like a doctor, an artist, a fisherman, or even a human, for that matter. Does “think[ing] like a lawyer” exclude or include thinking like a

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3 See e.g., Kurt M. Saunders & Linda Levine, *Learning to Think Like A Lawyer*, 29 U.S.F. L. Rev. 121, 121-22 (1994) (“There has been much debate as to exactly what thinking like a lawyer involves and how best to teach students. Indeed, the history of modern legal education reveals the tensions inherent in defining and teaching the methodology of legal thinking.” (citations omitted)).
judge or a legislator—those who are also involved in the legal and judicial process? Those who might have been lawyers at some point? Went to law school? Does it exclude other activities, such as arguing and writing like a lawyer (which debatably may or may not involve thinking)? And what kinds of thoughts do lawyers have? Which lawyer, for that matter, if the phrase only references to “a (singular) lawyer”? Which lawyer’s thoughts? Erwin Chemerinsky’s? Lord Blackstone’s? Perry Mason’s? Or the thoughts of the newest admittee to a state bar? Further, is the word “like” in “think like a lawyer” used analogically to mean “to resemble”? Because reading the phrase this way too literally, this use of the word “like” also implies that such thinking is not exactly the way a lawyer really thinks. Such thinking is merely “like a lawyer” and not “as a lawyer should or does.” To return from this tongue-in-cheek examination to looking at the phrase’s most common usage and meaning, nevertheless, one can see a truth or sincerity to the phrase as law schools should strive to provide students a well-balanced education that eventually allows them to become effective lawyers—thinking and otherwise. But if “think like a lawyer” takes into account all of those other questions above, then one can find it highly arguable that law schools are even close to providing students means
to achieve that end, which then undermines the veritable phrase. Perhaps then the phrase is not altogether accurate or precise enough of a description of what law schools should do to help students become future legal thinkers, and therein lies reason for unease with the phrase.

From their recent primer on teaching law students, Professors Michael Hunter Schwartz, Sophie Sparrow, and Gerald Hess have offered an engaging counterpoint by framing their perceived goals for legal education in the language of teaching: “We have chosen to start a book on teaching with what we know about effective learning. That choice is deliberate. From our perspective, teaching is effective only if it produces significant learning.”4 Here, Schwartz, Sparrow, and Hess are more descriptive, pointed, and concrete with their goal than hanging everything on a more nebulous, less defined phrase. With this last sentence altogether isolated for examination, the way in which these professors have chosen “deliberately” to craft and define the symbiotic relationship between

teaching and learning—by the necessary logic of “only if”—produced a noticeable authoritative and governing tone. In other words, though more likely intended to be a humble standard or a definition, the statement also partially sounds like a rule—with its necessary and sufficient conditional syntax (again, the “only if”) and its own possible term of art (“significant learning”). And the professors provide a clearer direction with which to extrapolate what they meant by significant learning. Reading further, one would uncover that “[s]tudents have learned something significant when they can apply what they have learned to solve a previously-unseen problem.”

More specifically, “[t]ranslated into the law school context, we would say our students have developed competency when they are able to solve a legal problem (analyze a hypothetical or real set of facts) by articulating arguments competent lawyers would make and predicting how courts would resolve the issue.”

More concretely than “think[ing] like a lawyer,” this type of significant student learning lays out more directly its implications for both student success in law school and practice.

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5 Id. at 4 (emphasis added).

6 Id.

7 Id.
Significant student learning should be the focus of law schools and legal educators—not because it would be a testament to their teaching if students achieved such desired learning, but because ultimately it would serve the overall function of the legal academy if graduates are competent legal problem-solvers.

Whichever motto of legal education one chooses, however, recent reports have indicated that law schools are not measuring up in terms of providing students adequate skills instruction to effectively solve and address legal issues and problems. The Carnegie Foundation’s 2007 report on legal education found that, in the current state of legal instruction, law schools are not effectively preparing their students to master skills of problem-solving: “One limitation is that casual attention that most law schools give to teaching students how to use legal thinking in the complexity of actual law practice.”8 A result that creates “the impression that lawyers are more like competitive scholars than attorneys engaged with

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the problems of clients.” In the same year as the Carnegie Foundation’s report, the Clinical Legal Education Association released its Best Practices for Legal Education, which concurs that “[l]aw schools do some things well, but they do some things poorly or not at all. While law schools help students acquire some of the essential skills and knowledge required for law practice, most law schools are not committed to preparing students for practice.” Strictly in step with our rule for effective teaching and the Carnegie Foundation’s report, a key recommendation from Best Practices is that law schools should keep in mind that “[t]he primary goal of legal education should be to develop competency, that is, the ability to resolve legal problems effectively and responsibly.” Does this recast the phrase, “think like a lawyer”? Moreover, the Carnegie Foundation report observes that its own criticisms are not novel and that historically critics have found student learning in the legal academy less than significant:

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9 *Id.*


11 *Id.* at 6.
Legal theorists such as Karl Llewellyn and Jerome Frank long ago pointed out the need to connect training in legal argument with the fashioning of legal interventions and artifacts in the various milieus of practice. Prestigious commissions of both the American Bar Association and the Association of American Law Schools have issued well-documented and closely argued reports making the same argument. The 1992 MacCrate report concluded that law schools were paying inadequate attention to lawyering skills and professionalism. A few years later, in 1996, the Professionalism Committee of the American Bar Association’s Section of Legal Education and Admission to the Bar further articulated the lack of adequate preparation for professionalism and the need for law school programs that would support the development of a stronger sense of ethical integrity, civility, and commitment to the profession’s public mission.12

Such observations widen the gap between the idealism of phrases, such as “think like a lawyer” or “significant student learning,” and the reality of the state of law schools currently.

One of the problem-solving skills that law schools fail to teach adequately surrounds that of legal literacy.13 How do legal thinkers

12 Sullivan et al., supra n.__, at 189.

13 See Stucky et al., supra n. __, at 15. As Best Practices describes, “[s]tudents are trained to develop legal literacy through emphasis on vocabulary, close reading, and textual interpretation, all of which contribute to their ability to develop their knowledge and comprehension of the field.”
methodically and effectively approach reading, comprehending, and
critiquing the law? Although language comprises the nuts and bolts of the
law, law school curricula generally do not focus on sharpening the elevated
levels of perception needed for legal thinkers to internally process the case
holdings, blackletter rules, and statutes for whatever their tasks await.

\textit{Id.} However, “[f]aculty often model important ways of ‘thinking about
thinking’ particularly with regard to testing one’s own knowledge and
understanding, but rarely cue students explicitly about what they are doing
or elaborate on the importance of such skills.” \textit{Id. See also}, Leah M.
Christensen, \textit{Legal Reading and Success in Law School: An Empirical
Study}, 30 Seattle U. L. Rev. 603, 603 (2007) (“One of the most important
skills in law school is the ability to read a judicial opinion efficiently and
accurately, yet relatively few empirical studies have researched how law
students read legal text. Not only are the legal text ‘largely
incomprehensible’ to novice readers, law schools do not always spent
sufficient time instructing students how to read legal text. Instead, we
assume our students are good legal readers upon enter law school.
However, legal reading is a challenging task for a new law student.”
(citations omitted)).
Instead, law students are most frequently told in a cursory manner that they need to read cases and legislative materials carefully without any other guidance or demonstration to contextualize this advice; like many things in legal education, the process expects that students will have to just figure it out on their own. This realization has been shared by other scholars and legal educators and has created a certain irony in that, although a lawyer’s life is heavily engaged in reading and writing within the language of the law, the legal academy does not seem to focus much on the very skills of that engagement. Our students should be able to read and work critically and effectively with the concrete language that make up the law—i.e., rules statements and statutes. The skill of reading rules is one that students will eventually use ubiquitously in their legal careers to find nuances and effectively apply the law to a situation that seeks a legal conclusion. Where will they begin their work, if not with the law? And what is the law if it not language? Narrowly applying this notion in one aspect, law professors and instructors should be interested in teaching the methods and skills of legal problem-solving, and this would, logically-speaking, include the ability to understand and decipher the law from various angles—including the linguistical, and not merely the substantive. However, instructors
frequently fail to impart the skill of reading and dissecting rules critically as part of competent legal analysis, not because they are not able to impart this skill on their students. They fail merely because they do not teach it—especially in first-year curricula when a formal introduction into reading and deconstructing rules of law would make most sense.

This Article explores how teaching one method of rule reading and comprehension—termed “rule deconstruction”—to first-year law students can introduce students to both formalist and anti-formalist techniques to approaching the language of the law and hopefully equip them with the heightened sensitivity that legal thinkers must embrace for dealing with legal literacy and the language of the law. The expectation that students should seek to discover and hone these skills on their own could be problematic as recent trends in higher education points to a decline in reading and writing skills of the current generation of post-secondary students and young adult learners, which will likely become a noticeable problem in law schools soon to come.\textsuperscript{14} Law professors should not have to

switch hats and suddenly become writing and linguistics instructors but if the goal of legal education is to produce effective legal thinkers, then implicitly professors will need to address this trend by showing students how to deal with the language of rules in the law—not just for their success in the law school classroom but also in their legal careers.

Part Two of this Article will give context to the urgency and importance of teaching methods of rule reading and comprehension. Meanwhile, Parts Three and Four will explain and discuss “rule deconstruction” as one particular method for accomplishing such and postsecondary expectations across the curriculum. Not only does this survey underscore the dichotomy regarding the relative importance placed on teaching grammar and punctuation skills between the two camps, if raises concerns about the development of reading skills. Of particular importance for legal educators, the ‘survey results indicate a general lack of reading course in high school and a decline in the teaching of targeted reading strategies after ninth grades.’ The report suggests that all high-school courses across the curriculum should provide texts that challenge students to read and understand complex materials and develop students’ strategic reading skills.” (footnotes omitted).
Part Three will use “deconstruction” as its prima facie meaning to introduce a formalist perspective to breaking down complex legal rules and legislative materials in class that can link rule comprehension to student outlining skills and exam performance. This method builds on techniques that were formally introduced by Professor Michael Hunter Schwartz in his *Expert Learning for Law Students*. Then Part Four will take “deconstruction” in its post-structuralist form and harness its post-modern tendencies into an anti-formalist method for dealing with the language of rules that can take student comprehension of rules into a more critical and theoretical realm. All in all, this Article will focus on these two implications that the method of rule deconstruction affords a law teacher for showing students just how perceptive one can and should be when dealing with rules effectively and critically like a legal thinker. Significant student learning should lead to competent problem-solving, but ultimately it starts with effective teaching.

II. BACKGROUND

A. *THE CASE-METHOD*

The reason why law schools rarely teach legal literacy skills in a direct and comprehensive manner may lie within traditional Langdellian
case-method pedagogy, which prefers ivory-tower, Socratic questioning-and-answering over more upfront lecturing styles and which possibly would have frowned upon more straightforward lessons on rule analysis from a practitioner’s angle. After all, as legal educators have noted, the traditional case-method pedagogically concerns itself with teaching legal analysis through an examination of a series of cases within a particular body of law in order to synthesize that law’s specific tenets, rather than candidly setting out the blackletter law at the outset and then proceeding to the skills to explore the law’s subtleties and nuances from there. 15 Often, for

15 See Shirley Lung, The Problem Method: No Simple Solution, 45 Willamette L. Rev. 723, 730-34 (2009) (“Criticism of the case method is now commonplace in the literature on legal education. While not all who address the topic uniformly agree the case method should be abandoned, there are standard complaints. Most law professors purport to use the case method to impart analytical skills such as case reading, issue spotting, fact analysis, policy analysis, application, theory, and synthesis. Students are also expected to learn how to craft persuasive arguments, assess alternative positions, and exercise clinical judgment from reading the dissecting case opinions. Yet a significant failure of the case method by many accounts is
the law student, the task of learning the law became a solitary act of
deciphering that the law student accomplished before arriving to class with
hope that her professor would re-affirm her understanding or point her in
the right direction. Even in case reading and interpretation, the student was
required to distill the rule of law but was left to do so on her accord. The
use of case briefing and the rule explanation exercises in legal writing
courses helped somewhat to alert students to proper close reading, isolation,
and synthesis of rules of law in their materials. Yet still the law student
was left at her own whims—and also at her own peril—to figure things out
on her own in a rather Spartan way. 16

16 Id. at 732-33 (“The case method, which is often combined with
the Socratic method, is also roundly lamented as a passive learning
experience that alienates students. The vicariousness of ‘learning by
watching’ carries over into classroom dynamics as professors engage in a
series of questions and answers with one student at a time. Professor
Michael Hunter Schwartz explains this method assumes that ‘somehow the
professor's comments, questions, and corrections of the selected student not
As several law professors have even noted, the skill of discerning a rule from a case is not formally taught on a regular basis in the law school setting. Professors Richard Michael Fischl and Jeremy Paul in their book for students on exam-writing, *Getting to Maybe*, sardonically observe that “[m]any students enter law school expecting to memorize a mass quantity of legal rules for regurgitation-on-command” but encounter surprisingly only will help the selected student, but will rub off on all the students in the class.’ Students are expected to ‘play along’ in their heads and to follow, evaluate and assess student responses, while also deciphering the professor's comments. This task appears nearly impossible when the professor does not give clear responses or guidance about her or his instructional goals at any given point. Many students respond by ‘plodding along’ and detaching themselves from the classroom.”) (footnotes omitted) (quoting Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 San Diego L. Rev. 347, 350-52 (2009)).

that most of the ‘rules’ you are expected to master are buried in the text of judicial opinions. In spite of the fact that you’re paying thousands of dollars a year to have a faculty of experts teach you the law, it turns out that your professors expect you to figure out the rules—often referred to as ‘case holdings’—on your own. What’s worse, you never seem to get them right.\footnote{Id. at 11.}

Even more recently, Professor Peter T. Wendel, in his book for first-year students, *Deconstructing Legal Analysis*, reveals while demonstrating how to distinguish between rule statements and policy discussions in case reading that “I do not know a single law professor who makes explicit reference to this distinction. It is another one of those methodological skills that law professors assume students will master as part of the ‘reading and analyzing’ analytical process—but there is no express mention of the skill or instruction as to how to master it.”\footnote{Peter T. Wendel, *Deconstructing Legal Analysis: A 1L Primer* 79 n. 1 (Aspen Publishers 2009).}

Likewise, the skill of taking a rule apart—what you do after you’ve found the rule and distinguished it from policy reasoning—is equally a “methodological skill” that remains buried under the case method: “Although it is designed to teach analytical skills, the case method often
leads students to believe that law is the study of ‘black letter’ rules rather than methodologies. This long-standing pedagogical tradition helps explain why young lawyers can memorize legal rules but not know what to do with them.”

In theory, the case method would seem to welcome the teaching of this skill in law school classes because of the method’s preoccupation on using case holdings to create an overall picture of the way a particular law is commonly laid out, which invariably underlies instruction on finding and piecing together rules for better lawyerly understand and application.

However, the case method’s reliance on Socratic dialogue pushes away formal lessons on skills in general so that any constructive insight a student takes away about breaking down a rule statement for practical purposes is secondary and indirect—almost an afterthought—to the on-going, compelling dialogue about the meaning of a rule, the policy implications, and perhaps various judicial or factual applications of that rule. And in this context, those kinds of discussions naturally dominate over rudimentary lectures on how to read and dissect a rule statement, frequently causing law courses to see the doctrinal forest for the individual governing trees—and

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even their elemental branches. In addition, the often-pegged “hide-the-ball” teaching style of many law professors favors not being as forthright with students which might serve as another reason why law professors do not as readily demonstrate breaking down statutes and rules. Furthermore, one of the case method’s original purpose was to shift perception of the legal academy from appearing as mere trade schools for lawyers to becoming actual research and educational institutions that promote the study of law as a science, which also might have implications outright on teaching of skills. Although the endeavor to transform the study of law into a scientific discipline eventually was abandoned, the case-method itself survived and its original preferences to relegate the importance of showing concrete, practical skills “of the trade” persists. Whatever the reasons may be and however how ironic it may appear, rule and statute reading is a skill not often directly emphasized in the law school classroom.

B. **OUR CURRENT STUDENTS: MILLENNIALS, HYPERTEXTUALITY, AND LITERACY**

The indirectness with which law school teaching exhibit towards teaching many important practical skills—including critical reading and
rule literacy—may become more problematic than ever before as the current generation of law students are increasingly populated by Millennial students, who have had learning experiences less compatible to the law school “hide-the-ball” style of instruction. Millennials—or sometime referred to as “Generation Y”—are those individuals that Generational theorists have studied with birthdates spanning from the late 1970s to the early 2000s. As we sail past the threshold of the new millennium, many of those born in the early part of the demographic timeline have entered law school and, subsequently, the legal profession. In her 2008 study of law students, Professor Joan Catherine Bohl used Law School Survey of Student Engagement (“LSSSE”) data to approximate that “one-third of law students were members of Generation X; two-thirds were members of Generation Y, or the Millennial Generation.”

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well have noted that “a metamorphosis is underway”23 with the current population of students in law schools as currently “most belong to the generation born between 1982 and the mid-2000s, the Millennials.”24 Although relying on generational theory to postulate about students might seem suspect at first, part of effective teaching is “guiding students about the best way of studying the material”25 and so knowing who our students are and how they currently process information and skills would be helpful

23 Benjamin V. Madison, III, The Elephant in Law School Classrooms: Overuse of the Socratic Method as Obstacle to Teaching Modern Law Students, 85 U. Det. Mercy L. Rev. 293, 295 (2008) (“Make no mistake, a metamorphosis is underway. If baby boomers are the TV generation, and the last generation of the twentieth century was the X Generation, young women and men now entering law school are known as the ‘Millennial Generation.’ ”).


for facilitating their learning.\textsuperscript{26} Accordingly, their collective experiences in reaching adulthood may help reveal traits that can be used for enhancing learning experiences as adults. For instance, a 2006 study of medical students at Northeastern Ohio Universities College of Medicine found that “[l]earning about who Millennial students are, and how this generation may differ from the previous generation of medical students, may have educational implications for both academic and student affairs.”\textsuperscript{27} This pronouncement seems just as relevant for other disciplines that Millennials

\textsuperscript{26} Jennifer Jolly-Ryan, \textit{Disability to Exceptional Abilities: Law Students with Disabilities, Nontraditional Learners, and The Law Teacher as Teacher}, 6 Nev. L. J. 116, 142 (2005) (“Like students, the effective teacher is a learner. But to be an effective teacher, the legal educator must know more than the substance of the subject. The effective teacher must understand the variety of students, including the variety of disabilities presented in the classroom, and know how students think and process the information.”).

are currently studying and pursuing, including law—especially when those in the legal academy and profession have voiced caution against the glacial slowness of law schools in adapting new outlooks on teaching. Professor Benjamin V. Madison’s take is that “[f]ailing to recognize changes in students, from one generation to the next (particularly changes in the way they process information) represents a major part of the problem in legal education.”

Even a recent bar journal article in the state of Montana has noted that “Millennial law students challenge current teaching methods, and ask why they need to memorize, when all they have to know can be looked up on the Internet.” As information processing and perception changes with the advance of technology, this sentiment of change will likely grow.

What makes Millennial students particular is their preference for immediacy and relevance when learning new concepts and skills, which has affected their capacity to process text and information in a non-linear way. Because Millennial students were influenced by the rise and incorporation

28 Madison, supra n. __, at 295.

of digital technology in daily life, “the immediacy of information available . . . has created a community characterized as ‘just in time’ learners.”\(^30\) As noted by Bohl and other educators, “[t]he fast paced, omnipresent access to data, entertainment, and entertaining data that technology created also shaped Gen X Y students into expert multitaskers who tend to block out information not seen as immediately relevant”\(^31\) and as a result, such students “are not interested in specific information until they see the need for it; they tend to want the information ‘just in time.’ ”\(^32\)

In addition, Professor David I.C. Thomson, in his book *Law School 2.0*, has broached the idea that because of this exposure to technology, many Millennial students exhibit “hypertext-formed minds” that access and process information non-linearly but rather minds that are used to engaging in materials in a pick-and-choose fashion:


\(^{31}\) Bohl, *supra* n. __, at 781 (footnote omitted).

\(^{32}\) *Id.* at 782 (footnote omitted).
The Web, of course, is constructed on the concept of hypertext, with infinite and non-linear connections between related types of knowledge. Hypertext is by definition non-linear; indeed, it is designed to support discovery and construction of knowledge of the user through the interlinking of related documents. It could thus be argued that increasingly students entering law school will not only have had greater experience with a learning-centered approach in their prior schooling, but also with minds that have been formed, at least in part, by the experience of learning in a hypertextual way.\footnote{David I. C. Thomson, \textit{Law School 2.0: Legal Education for a Digital Age} 32 (Matthew Bender & Co., Inc. 2009).}

Thomson is not alone in this observation. Professor Bernard J. Hibbits has also noted that technology has displaced traditional reading and information-processing skills for those that favor non-linearity.\footnote{See Bernard J. Hibbits, \textit{The Technology of Law}, 102 Law Libr. J. 101, 106 ¶ 29 to 108 ¶ 35 (2010).} Because much of today's literacy takes place online, students have developed a kind of search-and-sort mentality towards reading that Hibbits characterizes in a series of actions that include gathering, filtering, scanning, navigating, comprehending, and evaluating.\footnote{\textit{Id.}} Hibbits has coined “neteracy” as a term, which he and other academics have embraced, to describe this brokering
between traditional literacy skills with the format of online media and casts hypertextuality as part of the outcome:\footnote{id}{Id. at 105-06 ¶ 26.}:

Because neteracy privileges hyperlink navigation and user manipulation of content, nerate thought is highly nonlinear, anti-hierarchical, and indeterminate. Because neteracy encompasses the verbal and nonverbal, it is holistic. Because neteracy facilitates continual feedback, revision, and collaboration, nerate thought—perhaps even nerate truth—is interactive and social, even collective. Because neteracy is dynamic and personal, it is intuitive and narrative, emphasizing experience over exposition. Because neteracy is fluid, almost by definition a work in progress, nerate thought is highly adaptable and creative, indulging work-arounds, repurposings, and innovation in general.\footnote{id}{Id. at 110 ¶ 48.}

Whichever approach to looking at the Millennial generation learning one selects, each has implicitly noted that a preference for immediate relevance exists, which perhaps suggests that “just-in-time” learning and “hypertextual or nerate” minds—both products of life-long engagements of the instantaneousness of digital technology and both rooted in accessing information quickly and relevantly—might be different ways of indicating the aspects of the same learning behavior.
In addition, many theories indicate that perhaps Millennials are not as literate as previous generations have been. Bohl has suggested that the Millennial generation has had less “rigorous experience in reading and writing” because of shifting academic standards and approaches placed upon individuals in this generation while they were in their formative years.\(^{38}\) Experts who have studied Millennials have made the same observation. For instance, in his studies, Richard Sweeney has noted that “Millennials, disturbingly, are not reading literature or newspapers as much as previous generations of the same age. In fact, reading is down for most age groups but the decline has been greatest among the youngest adult population.”\(^ {39}\) Most famously, the National Endowment of the Arts released its report on literacy skills and trends in 2007 and agreed that reading skills amongst U.S. adults were declining.\(^ {40}\) If all true, this

\(^{38}\) See Bohl, supra n. __, at 786-90.


\(^{40}\) Natl. Endowment for the Arts, To Read or Not to Read: A Question of National Consequence 14,
estimated result that a decline in reading could be troubling for law schools because of the inherent nature of law school and legal profession to engage in difficult texts as a necessity. With the notion that reading for law school and the profession is a highly complex task and that already “[m]ost entering law students do not know how to read complex text,” the Millennial law student with her “just-in-time” learning and “hypertextual mind” may pose a troubling incompatibility with reading and literacy in law school: “When students with this sort of ‘hypertext mind’ enter law school and find themselves thrust into an environment that is primarily


linear, the clash will be significant.”\textsuperscript{42} Thomson predicts this because “there is something special about the law that requires linear progression.”\textsuperscript{43}

Both these observations about Millennial learning and reading behaviors seem to point to the need to introduce and reinforce critical skills of “reading like a lawyer” in the law school classroom, which would invariably include reading rules of law “like a lawyer” as well. Or under Schwartz, Sparrow, and Hess, significant student learning will require teaching rule literacy on a concrete level in order to help students become effective legal problem-solvers. The changing tolerance and learning preferences of students who are Millennials may make less relevant the case method’s idiosyncratic preference for de-emphasizing fundamental skills teaching when we think about effective instruction in the law school setting. Instead, we might be confronted with demands for teaching methodologies that favor clarity. In order to get our students to attain effective problem-solving skills as lawyers, it might be time for law school classrooms to untangle the usual mode of Socratic and casebook methods and instead approach teaching skills frankly and straightforwardly, which

\textsuperscript{42} Thomson, \textit{supra} n. __, at 30.

\textsuperscript{43} \textit{Id.}
would be particularly helpful if the lessons can incorporate the skill’s relevance not only in later practice but also for studying for their present classes and exams.

With that in mind, this Article will subsequently explore approaches for teaching deconstructing rules to first-year law students.

III. THE RULE TO RULE DECONSTRUCTION

A. THE FORMALIST LESSON

Within the early semester weeks of law school, or more likely during their orientation week, most first-year students will have likely encountered an introductory lecture or lesson on the U.S. legal system and specifically from what process the laws in the U.S. are created. Invariably, they learn that the everyday law that attorneys use comes overall from the processes of judicial decisionmaking, legislation, and administrative regulation; and they learn about the backbone of the common-law system, stare decisis. For many students however, the word “law” does not easily separate itself from the other materials they are then immediately given in their required courses—policy discussions in cases, comments in statutory authorities, procedural histories, terms of art, latinate maxims. Even the most capable
students who lack any background in law can feel bombarded with all sorts of concepts being tossed into their minds. This lack of clarity might be a concern if there is no uniform guidance to help move students quickly onto the right path. Millennials who learn with “hypertextual minds” might be lulled into a sense of false security as they filter materials inappropriately and miss catching the linear logic of law. With their only assessment usually as a final examination at the semester’s end, the sooner students can latch onto skills that will help direct them in their learning, the sooner they can start more effective preparation for classes and exams.\footnote{See Paula Lustbader, \textit{Principle 7: Good Practice Respects Diverse Talents and Ways of Learning}, 49 J. Leg. Educ. 448, 453 (1999) ("In law schools, first-year courses should begin with an orientation to the legal system, jurisprudential concepts, and legal methods.").} In this light, showing them how to engage in rules properly should prove helpful.

Lessons on rule deconstruction can dovetail first-year introductions to the sources of law and to the legal system, and can be particularly helpful for entering law students if a lesson can start off on a practical, rather than theoretical front, by picking-up where the introduction left off and asking students pointedly and in a user-friendly way, where can they find the law.
Where can they spot the law in a case opinion? Although statutes are clear and obvious sources of law and certainly more easy to find on a law library shelf (or on Westlaw or Lexis), students can be invited to search for rule statements in their casebooks, which are generally buried in opinions and require more targeted reading to discern. Using an actual case opinion assigned for class, students can then be asked to quickly sort out portions of a case that they may think is not part of a rule statement—i.e., facts, procedural history, dicta, rationale, dissents and concurrences, as examples. Thus, a lesson on deconstructing rules can, in this way, begin more concretely by reinforcing what students learned in the abstract at orientation.

Once students have seen a judicial discussion of the law isolated in a particular case, another practical tip is to show them how to extract an applicable legal rule statement from that discussion. Students, at this point, may believe that just because they are reading a discussion of the law, that the entire section can be used to apply to a set of facts. However, if a case is particularly intricate, a court may also use the rule section to discuss persuasive authority, the history behind a rule, and policy analysis, all of which may not be particularly useful to a client’s case in a straight rule-to-fact application situation. As Professor Wendel addresses to law students
in *Deconstructing Legal Analysis*, “[l]earning to distinguish a rule statement from statements about the rule is an important skill that [a student] need[s] to develop fairly early in [his or her] law school career to be successful in law school, but it one of the more subtle skills.”\(^{45}\) The purpose of teaching students how to extract a rule is so that students can grasp a sense of how a court uses language to craft an actual applicable rule statement and to differentiate this use from what the same court might do to give context to a discussion on the law. Doing so will hopefully allow students to think about how these various statements are phrased—for instance, how a rule statement is constructed differently from a policy analysis that justifies the rule statement. Though they may not have the precise words to characterize the difference, this is acceptable because the

\(^{45}\) Wendel, *Deconstructing Legal Analysis*, supra n. __, at 60.

Professor Wendel notes further the linguistic differences between a rule statement and what he calls, “a statement *about* the rule” by indicating that a rule statement must be a sentence that you can apply to a dispute to resolve the dispute, not just the dispute before the court, but other similar disputes. A rule statement should not have any references to the parties to the dispute. It needs to be worded more generically to permit it to be applied to similar fact patterns in the future. A statement *about* a rule cannot be used to resolve the dispute before the court or other similar fact patterns. *Id.*
focus of the lesson is on practical knowledge at this point rather than any theoretical nomenclature.

After the prior discussion, students might benefit now from some straightforward guidance to distill the rule of law from their assigned cases—again, however, practicality should be stressed. Giving students a “rule of thumb” from which to think about spotting rules might help bring everyone to the same page. In their text, *Demystifying the First Year of Law School*, Professors Albert J. Moore and David A. Binder give suggestions for students on how to spot legal rules in cases. They suggest that students should look “for language in the opinion indicating that the court is defining or clarifying the meaning of a preexisting legal category,” “for language in the opinion describing a test, or conduct that will be required in the future to meet a legal standard,” or “for factors that will be considered in future cases to determine whether or not a legal

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47 *Id.* at 50.

48 *Id.* at 102.

49 *Id.*
standard has been met. If an instructor prefers a more uniform tip to give to students, however, a simpler instruction might suffice. A statement that can give fundamental guidance on spotting legal rules might indicate that, with rules, a practitioner will know if he or she is encountering a rule generally if a statement seems to be instructing on how to find that a particular factual situation could be a legal result—whether an event can be, for instance, a battery or even a component of battery. In other words, a lawyer will have spotted a rule if he or she can use the statement almost instructively to interpret a set of facts in order to find a legal conclusion or result. The use of repetition is deliberate as to allow this observation about rules to sink in with students. And of course, if the professor is not teaching torts, he or she can certainly substitute a more suitable cause of action. In any event, ending a discussion on how to effectively spot rules in cases with a concrete revelation or approach is useful as it gives students a reference point after having them spend a little bit of trial-and-error time articulating what is and is not a rule.

To further demonstrate this observation, examples of rule statements are often used to show the way courts often phrase rules in an instructive

\[\text{Id.}\]
manner for the practitioner. As Professor Ward Farnsworth has observed, “[r]ules tell people in advance what consequences will follow from their acts[.]”\textsuperscript{51} Certain students who have linguistics or extensive writing backgrounds may internalize this quicker, but all students in the law course should at some point hear precisely what legal rules sound like in this context and how they sound differently from a historical discussion of a particular rule or its application to a set of facts. For instance, a series of carefully picked rule statements from their casebooks (ones that are more clearly written) might allow for students to get a sense of a court’s

\textsuperscript{51} Ward Farnsworth, \textit{The Legal Analysis: A Toolkit for Thinking About the Law} 171 (The U. of Chi. Press 2007); \textit{see also} Pierre J. Schlag, \textit{Rules And Standards}, 33 UCLA L. Rev. 379, 381 (1985). In defining rules versus standards, Schlag likens legal rules to directives that ultimately help reach a legal conclusion: “It is possible to look at positive law (constitutions, statutes, judicial opinions, and administrative orders) as a series of directives. The formula for a legal directive is ‘if this, then that.’ A directive thus has two parts: a ‘trigger’ that \textit{identifies some phenomenon} and a ‘response’ that requires or authorizes a legal consequence when that phenomenon is present.” \textit{Id.} (footnote omitted).
particularized tone of voice when pronouncing a legal rule. Usually a rule statement is a very instructive or imperative tone—“In order to find XYZ cause of action” or “For establishing a claim for 123” or “A cause of action for ABC arises”—that can be coupled with imperative phrases—“one must” or “he shall,” or “whether there is.”

Another way to allow students to isolate rule statements in their reading is to convey a brief instruction on policy statements that appear in case decisions—in order to help students further concretize what is not a rule statement. Policy statements justify the existence of a particular rule and so by nature can be more declarative rather than imperative. Such statements generally do not address the “how-to” in establishing a legal result, but rather such statements indicate reasons “why” or “why not” of using a particular rule or precedent.\footnote{See Wendel, Deconstructing Legal Analysis, supra n. __, at 61.} Whether to teach a direct lesson on

\footnote{See Wendel, Deconstructing Legal Analysis, supra n. __, at 61.}

Professor Wendel instructs students specifically that “[a]fter you find the court’s rule statement and put it in your brief, ask yourself ‘why did the court adopt this rule’? That analytical question will take you to the court’s discussion of the relevant public policy considerations.” \textit{Id.} As a particularly relevant observation to this Article’s current discussion,
policy is a pedagogical decision left to an instructor’s discretion, but it could be used here not only to stress its enabling function as justification for a legal rule but also for its textual difference from the way legal rules are phrased. One example could be simply to help students come to the realization that they cannot “apply” policy to a set of facts in order to determine a legal result in the same way that they can with an actual legal rule—that policy statements are not as instructive upon resolving a particular set of facts as rules are. That is fundamentally the function of rules, not policy.

As for demonstrating to students what competent lawyers typically do with a rule that they must master before applying to facts in a case, a proper study should continue to be framed in light of practicality. An instructor can introduce the way to deal critically with rule statements for the new law student through the use of two threshold questions that students can always pose to a rule in order to deconstruct it before beginning a methodical understanding. First, the student can be led to ask, Professor Wendel notes that “[j]ust as a rule statement is of a different nature than a statement of fact, you will find that a public policy statement is of a different nature than a rule statement.” *Id.*
what is the legal result of fulfilling the rule? For instance, if a set of facts can absolutely and successfully meet all the requirements of a rule, legally-speaking what will the rule have shown to exist? Though this appears elementary and apparent, leading students to ask this question reinforces the detail-oriented nature of lawyering, and gives them a firm position always from which they can step into a task of critical understanding of complex rules and statutes by first looking at the end results. In addition, knowing the results that a rule achieves can later help the student understand policy justifications that animate the rule—even critiquing the rule if the result is backed by thin justification or false ideas about policy.\textsuperscript{53}

\textsuperscript{53} See Eric Goldman, \textit{Integrated Contract Drafting Skills and Doctrine}, 12 Leg. Writing 209, 210 (2006). Professor Goldman alludes to the relationship between understanding rules of law and the justifications behind them in his method for teaching contract drafting to law students: Repeated exposure to doctrinal material through skills-building can provide unique insights into the rules’ policy justifications, legal contours, and practical effects. In turn, when students have learned the applicable law, students engaged in skills-building exercises can better understand the importance of precise drafting and the consequences of poor drafting.” Id.
The next question that students can ask after answering what is the legal result of the rule concerns itself with the rule from a linguistic and logical perspective. The second question addresses how the rule is composed structurally. A formal understanding or introduction of linguistics or logic is not necessary here—but rather the student should be pointed to how lawyers react to the grammatical and linguistic structure of rules from a hands-on perspective that focuses more on the practical than the theoretical. Rules are never uniform—they come in different shapes and sizes; some simple, others complex; some broad and some narrow. In order to use a rule effectively, a lawyer should break down the legal rule to its respective components in order to better analyze exactly what is required and what needs to be further researched. Once again, the idea is to give students another methodical step for approaching rules that will help them properly reach an understanding of the meaning of the rule’s component parts in a detailed effort. In this way, the author recommends using the section from Professor Michael Hunter Schwartz’s *Expert Learning for Law Students*[^54] on deconstructing rules to help illuminate the kind of

structural break-down of a rule that can take place before a student dives into trying to understand the rule or learning the rule’s logistical application. Schwartz observes that “[d]econstructing rules involves pattern recognition in the sense that most rules fall within one of the five patterns . . . (or a combination of two or more of those patterns).”\textsuperscript{55} The five patterns Schwartz mentions are delineated quite straightforwardly as (1) simple rule, (2) elemental rule, (3) factor rule, (4) alternative rule, and (5) rule with exceptions.\textsuperscript{56} His text explores deeply to demonstrate from an abstract level what each pattern looks like\textsuperscript{57} (For example, an elemental rule can operate in theory as “If A and B and C, then Z.”\textsuperscript{58}). But the lesson also demonstrates with an actual example of an elemental rule (“Burglary is the nighttime breaking and entering of a dwelling house of another with the intent to commit a felony.”).\textsuperscript{59} Showing this quick dichotomy assists

\textsuperscript{55} Id. at 151.

\textsuperscript{56} See id. at 151-58.

\textsuperscript{57} Id.

\textsuperscript{58} Id. at 159.

\textsuperscript{59} Id. at 153-54.
students in “learning the patterns” needed for their skills at critically reading and dissecting rule statements. Schwartz also includes a short but detailed discussion of each rule pattern as well as offering a chart that helps visually distinguish each pattern.\(^{60}\)

From here, an instructor has a ready-made framework from which to expound on his or her approach to examining the components of a legal rule, whether it is made up of factors or elements or alternatives or a combination. Schwartz makes very thoughtful observations and examples about each pattern, but instructors, at their preference, may rely partly or solely on their own experience and expertise to teach lessons on how to examine rule components. It may be helpful to assimilate the patterns delineated by Schwartz to rules in a particularized course. For instance in a Property course, elemental rules such as the rule for adverse possession can be used to demonstrate how the rule must be broken down into requisite elements and how each element must be met for a methodical and proper rule-to-fact application. Often instructors elaborate on jurisdictional variances on the “hostile” element of adverse possession and thus they can explore this element in a teachable moment by showing how a sub-rule of

\(^{60}\) See id. at 151-59.
adverse possession can have alternative components—perhaps on an exam fact pattern. The same can be done in Torts when some elements, such as that for “intent” in many intentional torts, for example, can be established in alternative ways amongst purpose or desire or knowledge to a substantial certainty or even via transferred intent. Instructors can also implore visual diagrams or charts deconstructing a rule to better help students break rules down.

The other valuable point that Schwartz makes involves how the components of rule statements are linked together grammatically:

“Deconstructing rules also involves language interpretation in the sense that the distinguishing features among the various type of rules, in most instances, are the conjunctions used to connect the requirements (and, or, but) or the use of a ‘signal’ word . . . such as ‘is’ for definitions and ‘weighs’ for what lawyers call ‘factor tests.’ ”61 Students need to be attuned to these attributes within a legal rule in order to be certain that they avoid misreading a rule and misinterpreting how the significant pieces of a rule are strung together. The same kind of reinforcement of this awareness

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61 *Id.* at 151.
can be demonstrated while reading a rule particularized for the specific body of law that the instructor teaches.

Using the common-law rule for inter vivos gift, a summarizing demonstration is delivered in the following to show how the two threshold questions students may use to deconstruct a rule can function in the moment they first encounter a particular rule in a case. Here, we take the rule statement from a familiar case on the law of gifts often taught to first-year Property students. The case is *Gruen v. Gruen* and the facts raise the issue whether a donor can give an inter vivos gift of a personal property while reserving a life estate to himself, but the rule of the case is much more straightforward: “[T]o make a valid inter vivos gift there must exist the intent on the part of the donor to make a present transfer; delivery of the gift, either actual or constructive to the donee; and acceptance by the donee.” Students can be asked first to identify the result of fulfilling the rule—an inter vivos gift transfer—and then to define the components of the rule, by recognizing the rule’s patterned structure and noting its conjunctive nature. At the same time, rule can be visually diagrammed on the

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63 *Id.* at 872.
blackboard but the emphasis here is attuned to efficiency, attention to detail, and practicality. Students can be invited to help suggest what parts might be broken down exactly. For instance, should “intent on the part of the donor to make a present transfer” be broken down further to separate “intent” from “on the part of the donor to make a present transfer”? Why or why not? What would be the value to doing that? And students should keep in mind what further implications about the rule arise once the rule’s requisite parts are isolated. Some of these questions will be dealt with when students read cases and other materials along the course, but students should be alerted to how breaking rules down can create resonating questions about each and every part of a rule, which may lead to further research. It may be helpful for instructors to list student questions on the side to show that these questions might be applicable to other processes that lawyers undertake, such as case reading and research, to obtain further

64 With this rule in particular, students might be asked or ask themselves more probing questions about delivery (e.g., “What do we know about delivery from the rule here on its face?” “Does it have to be strictly from donor to donee or can a mail service be used?” “How do we deliver a gift of land?” “Or do those transfers exist in a different legal category?”).
knowledge about a rule. Then subsequently delving further into the doctrinal material, these questions might be answered.

Additionally, exhibiting this break-down in front of students also helps reinforce this skill alongside individual learning preferences and styles. Visual and spatial students might appreciate seeing the result of the rule and the elements broken cleanly down, while read-write learners may see ways in which rules can be broken-down “in hand.” Kinesthetic learners might appreciate just the example of how an instructor is taking the two threshold questions and walking them through the use of those questions in a simulated demonstration. Auditory learners may appreciate that the two steps in deconstructing rules can be phrased in conversational questions. Certainly other diagram-types and organizational tools can be used based on the instructor’s preference. All in all, the underlying idea to convey is the practicality of this skill and imparting students some useful reference points to effectively dissect any rule they encounter in law school or beyond. From here, the goal of deconstructing a rule is to help students break a rule’s structure down methodically in order for them to subsequently use this deconstruction to understand and organize the rule, but also to do this with clarity and without intent to “hide the ball” so
students can grasp this skill more uniformly and begin proper critical reading and understanding of cases and materials in class. Rather than letting students stumble blindly in order to hopefully capture this skill, setting them up with a formal skills lesson here should facilitate development of their skills more quickly and effectively. And this skill can then be reinforced repeatedly as a course progresses through various other doctrinal rules. If students are able to read rules more critically and think like lawyers sooner, then they have received a problem-solving skill reflective of significant learning.

B. *RULE DECONSTRUCTION AND OUTLINING*

For Millennial students, who seek immediate relevance in their learning, tying this skill of rule deconstruction to effective learning strategies in law school may resonate even more with the value of knowing how to execute this skill as a practitioner. Knowing how to use this skill correctly is beneficial as part of legal problem-solving and enables good lawyering—which links back to the premise of effective teaching. But there are certain advantages that are also apparent that students may more easily apply to their reading of judicial opinions and statutory materials for classes, in their legal writing assignments, and in lectures when professors
give rule statements that can be later used for exams. One less apparent way in which rule deconstruction skills can benefit students is how the skill allows students to take the legal rules they learned in class, break them down methodically, and reorganize them effectively when they create outlines dealing with that specific rule. This way may be less apparent to first-year law students who have never outlined for courses before, especially if this skill is being shown in the beginning weeks of a first-year fall semester. Schwartz finds that in this way deconstructing rules is a “prerequisite strategy for organizing law school materials” and that “[i]f the goal of deconstruction is to break rules into their constituent parts, the goal of outlines is to construct an organization of not only the constituent parts, but also of all the rules in relation to each other. . . . Expert law students use outlines to record and organize the rules and holdings they need to know and be able to use on their law school examinations.” This observation is why an instructor’s visual break-down of a rule should be carefully chosen and executed in class if he or she desires to take a rule deconstruction lesson further to show how it can be relevant for effectively

65 Schwartz, Expert Learning, supra n. __, at 150.

66 Id.
solving problems that the law student may presently have towards class outlining.

Taking the same rule for inter vivos gift, this deconstructed rule is revisited. Here, now, is a demonstration of how a deconstructed rule can then be translated into a skeleton in a law student outline for inter vivos gifts:

I. *Gift Transfers:* To make a valid inter vivos gift there must exist the intent on the part of the donor to make a present transfer; delivery of the gift, either actual or constructive to the donee; and acceptance by the donee. (*Gruen v. Gruen.*)
   A. Donor’s intent: [possible sub-rule from cases]
      I. [Cases, hypos, policy, relevant class discussion on donor’s intent]
   B. Delivery of the gift: [possible sub-rule from cases]
      I. Actual delivery
         a. [Cases, hypos, policy, relevant class notes on actual delivery]
      II. Constructive delivery
         b. [Cases, hypos, policy, relevant class notes on constructive delivery]
   C. Acceptance by the donee.
      I. [Cases, hypos, policy, relevant class discussion on acceptance]

From here, an instructor can suggest that the elements of the rule create categories under which different materials and concepts about these
elements that are encountered in class readings and lectures can be grouped. Relevant hypothetical problems and cases demonstrating “present intent” would likely be less effective beneath another element such as acceptance and vice versa. In addition, clarifying knowledge gleaned from class regarding the different types of delivery (actual, constructive, symbolic), themselves rule-driven, can be organized carefully under the second element of the rule with respective cases or examples.

This discussion on organizing information for learning and retaining the materials leads to a brief observation about types of course outlines based on a student’s learning style preferences that might enhance a student’s course outline as well. Students should be made aware of the different kinds of learning styles and to seek accurate self-diagnosis as part of an overall strategy for their individual learning in law school.  

See Schwartz, Expert Learning, supra n. __, at 55 (“Expert self-regulated learners know themselves well. Not only do they know how to learn and what strategies work best to produce learning, but, also, they know how they personally best learn and how they prefer to learn. . . . [A law student’s] learning style and personality type are significant considerations in evaluating strategy options.”).
variations on learning theory exists but the general break-down of styles include these categories: read/write, visual, and auditory learners. Read-write learners generally prefer printed texts while visual learners may prefer mindmaps and flowcharts as outlines. Auditory learners absorb information through hearing and speaking. A majority of people are “multi-modal,” meaning that they may prefer a combination of learning styles. When broaching the subject of doing outlines, the instructor can also vary the ways in which an outline may appear and discuss subtle nuances to outlining that one individual may prefer more than another based on their learning styles.

For instance, read/write learners may perhaps transfer their preference for texts towards more structured outlines with sections tabbed with sequential markers, such as Roman numerals, while visual learners might prefer an organizational tool that is more visually and pictorially

68 See id. at 63. Schwartz includes a brief list of general different learning styles and preferences.

69 Id.

70 Id.

71 Id.
representative of the concepts they are learning. On the contrary, based on her preference for aurally delivered instruction, an auditory learner may organize outlines more like a series of conversational questions she might ask sequentially about each element of a rule, such as the one below, or organize her outline in a way that resembles talking points, allowing for students to eventually “talk” their way through their outlines. An instructor attuned to this dichotomy may also introduce “visual-learner outlines” that utilize flowcharts, and discuss how the components of a flowchart outlining a rule can translate into functional flashcards. With the use of technology in the classroom, an instructor may even show how flashcards can be incorporated into portable devices such as smart phones through the use of mobile apps so that students can carry their voluminous flashcards conveniently and paperlessly in their pockets or suggest recording their outlines so they can listen to their outlines on MP3 players. Or for auditory learners, the instructor can show how such students can even record the skeleton of a rule using prompts such as “Explain the element of present intent” so that auditory learners can talk back to their outlines to fit their learning and info-retention styles. These are just a few suggestions that easily bridge the skill of rule deconstruction into the study lives of first-year
An instructor may have other helpful creative tips for outlining that could incorporate this skill, but hopefully, a good lesson on rule deconstruction that bridges the class from deciphering legal and judicial texts to class preparation sets up, whether directly or indirectly, the notion of tackling challenges such as learning the law in a comprehensive, concrete, and functional way.

C. RULE DECONSTRUCTION AND EXAM PRACTICE

Of course, if a lesson on rule deconstruction can be extended to an introduction to law school outlining at the beginning of the 1L semester, can this lesson be stretched even farther to show how it can help students prepare for other aspects of law school, such as exams at the end of the term? The answer is yes. Once the rule has been thoroughly deconstructed, organized, outlined, and learned, the deconstructed skeleton can be used to create templates of an exam IRAC analysis. Although revealing this incorporation of the rule deconstruction skill might be better done towards the middle of the semester—perhaps after some exam-writing practice—the
virtues of a lesson on effective exam preparation that incorporates this skill is again to show the immediate relevance of developing critical reading skills towards legal rules both as a lawyer and as a law student, and again to show smart problem-solving skills at work. Utilizing the same inter vivos gift rule, here is an example where an instructor can show how a student might take her outline that was framed within an effectively deconstructed rule and now transform it into an exam template with built-in rule statements and possible rule and case synthesis ready to use on an exam IRAC.

**Gift Transfers:**
To make a valid inter vivos gift there must exist the intent on the part of the donor to make a present transfer; delivery of the gift, either actual or constructive to the donee; and acceptance by the donee. (*Gruen v. Gruen.*)

**Donor’s intent:**
Here, there was/wasn’t donor’s intent because [relevant facts from question].

**Delivery of the gift:**
Here, there was/wasn’t [actual or constructive] delivery because [relevant facts from question].

**Acceptance by the donee:**
Here, there was/wasn’t acceptance by the donee because [relevant facts from question].

In conclusion, based on the above analysis, there was/wasn’t a gift transfer.
The use of templates in exam studies can help students “pre-write” an exam in a situation where time is of the essence and organization counts, so that having pre-written a strategy for an inter vivos gift analysis through rule deconstruction, a student can learn this strategy for intentionally putting forth a clear thoughtful roadmap for analysis, and now focus more effort on how to apply the rules in a deft factual analysis. Additionally, exam preparation from an effective template approach can help create organizationally-sharper and neater-looking IRACs, as well as student awareness for the importance of organization and clarity in legal writing in general. Both of these observations have been noted as important attributes to effective legal analysis. Professor Denise Riebe observes that “[l]egal readers are frequently busy, skeptical, and ‘impatient with delay in getting to the bottom line.’ They appreciate clear organization and road maps.”72 As a result, “[l]aw-trained readers expect the macro-organization of a legal

document to be structured around the overarching, applicable rule.” For this Article’s significance, Riebe’s statement suggests that practitioners will most frequently start with the law in their analysis and bolsters the importance of teaching students how to work with rules. “Once the overarching rule is identified and broken down into its component parts, those components can serve as the backbone for the organizational structure. Those components also provide topics that can be used for headings within a legal document.”

Though such insight might not be helpful in preparing for law school exams that ask a student to discuss underlying policy reasoning for a particular rule, this observation shows how having a method to break-down rules might be helpful for the majority of exams that require thorough IRAC rule-to-fact application. Moreover, not only does this help students better handle law school exam performance, but also for performance hopefully for a bar examination. In Riebe and Schwartz’s collaborative text

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73 Id. at 490 (footnote omitted).

74 Id. (footnote omitted).
on bar preparation, *Pass the Bar!*\textsuperscript{75} the professors’ suggest exam templates as a strategy for essay preparation.\textsuperscript{76} If students are taught this technique early on through a lesson on rule deconstruction and encouraged to create exam templates throughout law school, then hopefully with refinement, they will reuse this technique when faced with bar exam preparation.\textsuperscript{77}

On another note, this structural deconstruction of a rule statement parallels contextualized learning that other scholars have held important in


\textsuperscript{76} *Id.* at 145-46.

\textsuperscript{77} See Riebe, *supra* n. __, at 497-98. Riebe argues that bar exams are highly structured and that “bar exam graders also value clear organization and road maps. Thus, bar takers need to send bar graders instructions for how to pull together the information being communicated. ‘Those instructions are sent mostly by depositing information in the structural locations where the graders will most readily look for it.’ ” *Id.* at 497 (referencing and quoting George D. Gopen, *The Sense of Structure: Writing From the Readers’ Perspective* 155 (Longman Publg. Group 2004)).
law school learning. As Professor Paula Lustbader has noted, in traditional law school classrooms, there is often a disconnect or “disjunction between what teachers mean and how students interpret what is being taught” which she attributes to “why a significant number of law students are not learning or performing at the level of their capabilities. In part the problem is their lack of context.” Lustbader then offers several linked concepts that facilitates contextualized learning that involves interpreting new material, “owning” the material by allowing students to form their own thoughts about the material, and translating it in a conventional context.  

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79 *Id.*

80 *Id.* at 405; see also Dionne L. Koller, *Legal Writing and Academic Support: Timing is Everything*, 53 Clev. St. L. Rev. 51, 70 (2005-2006) ("Contextualized learning remedies [Lustbader’s observed disjunction] by relating the information being taught to the students’ experience and existing knowledge structure or ‘schemata’; helping students ‘own’ what they are learning so that they take it in and form and express their opinions about it; and helping students understand the context in which the material..."
In similar fashion, allowing students to deconstruct rule statement structures and understand each of the components in a rule, to pose questions about the rule through this observation, and learning to master the rule and how to apply the rule to factual situations in order to reach a legal conclusion all amounts to a contextualized learning that develops relevancy. Again, this possibility exhibits the value of teaching rule deconstruction for problem-solving implications. For Millennials especially, this kind of instruction can develop in them a significant connection between using this skill in isolation (in their course readings) and how to learn successfully in law school. For law students in general, seeing the way this skill can be used variously to approach challenges in law school learning functionally can help them likely become more attuned to ways to get through intricate analysis as well—rather than having students struggle through and capturing glimpses of the skill of rule deconstruction throughout their semester’s work. Showing students this skill and how to comprehensively assimilate it into their learning efforts is likely one way of a better start to effective law school teaching. Relevancy is stressed as rule deconstruction arises and the way they will be expected to use what they are learning.” (citing Lustbader, 48 J. Legal Educ. at 409)).
can lead from proper reading and understanding of a legal rule to more effective outlining and the learning of a rule to finally an organized method of applying that rule on an exam.

In Professor Larry O. Natt Gantt’s own deconstructive observations of the phrase, “think like a lawyer,” he posits that one aspect of lawyerly thinking is the ability “to dissect thought and separate ideas into component parts that may or may not relate to one another.” Interestingly, the example of dissecting thought that Gantt finds most observable is when lawyers scrutinize the components parts of a rule. Often those component parts may be clearly defined, such as in well-drafted statutory sections or in well-developed common law rules. Lawyers, however, must be prepared to break down rules even when precedent has not clearly done so. This process of “elementizing” or “deconstructing” rules proceeds as lawyers read the language of a rule and separate into a distinct component each portion of the rule that could become a distinct issue depending on the facts of the case. In this process, the lawyer looks for any word or phrase in a rule

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that may or may not be satisfied by the facts in a given situation.\textsuperscript{82} Gantt adds that “this process of dissecting thought, here in the form of rule elementization, is the first step legal thinkers take as they seek to understand the rule in order to solve the legal problem.”\textsuperscript{83} No doubt that the exploration of how to teach beginning law students to formally deconstruct rules of law can thus be both a helpful and formidable first step to cultivating the kinds of awareness to the language of rules that students will need to develop as effective law students and ultimately a legal problem-solvers. Understanding the linearity and logic within the language of the intricate rules and statutes and their components will require at-\textsuperscript{82}

\textsuperscript{82} Id. at 454 (footnotes omitted). In this passage Gantt’s use of “elementizing” is borrowed from Brian N. Siegel & Lazar Emanuel’s \textit{Siegel’s Essay and Multiple-Choice Questions and Answers: Civil Procedure 1} (Aspen Publishing 1998) and Gantt’s use of “deconstructing” is borrowed from Schwartz’s \textit{Expert Learning for Law Students} 149-56 (1st ed., Carolina Academic Press 2005). \textit{See}Gatt, 29 Campbell L. Rev. at 454 n. 197.

\textsuperscript{83} Id. at 455.
length study and mastery of the forms and functions of the rules encountered in law classes. To show students how to deconstruct rules by breaking down the grammatical structures and substantive components in a formal and methodical manner will enable and hopefully accelerate that study.

IV. THE DECONSTRUCTION IN RULE DECONSTRUCTION

Your books all seem sad on the surface, which is why I like deconstructing them. Underneath they’re happy. You just don’t know it.

—Deconstructing Harry\(^{84}\)

With the use of the word “deconstruction” throughout this Article, it would be hard pressed not to refer more explicitly to the deconstructive practice associated with reading texts critically. After all, the law is especially interconnected with language and so textuality is always an undercurrent of thought when working critically with legal materials. To ignore a discussion of the influence of post-structuralism in the use of the word “deconstruction” in rule deconstruction would be ignoring something whose size is not merely that of an elephant, but more likely of a prehistoric

\(^{84}\) *Deconstructing Harry* (Fine Line Features 1997) (motion picture).
mammoth. Previously, this Article examined a more or less formalist approach to dealing with rules—how to break down rules systematically and practically with the goal that dissection would allow for better understanding of rules and development of a process that eventually students will internalize in their law practice. A shift towards the theoretical aspects of deconstruction can add to this process as well—especially after the previous lesson in which students have been introduced to breaking down a particular rule’s structure and are now better positioned to explore the meaning of the rule, component by component. The lesson can then step into an exploration in which the language of a rule reveals its own uncertainty in ways that could then be used to a practitioner’s advantage. Although framing this linguistic exploration within the lens of deconstruction theory is not necessary and an instructor less familiar with post-structuralism can teach this technique without wearing the deconstruction hat, connecting overtly what students have learned on a practical level with a demonstration of critical theory could pose as an enriching experience that broadens their notion of legal practice and thinking as deconstruction has influenced aspects of American legal thinking in recent decades. Thus, continuing now with the *deconstruction*
in rule deconstruction in this way may serve as a doorway in which the instructor can introduce higher-level theory into what would have been a more “hands-on” teaching in a first-year course.

A. DECONSTRUCTIVE PRACTICE AND THE LAW

To distill what deconstruction necessarily is would be to expose the tendency of deconstruction to avoid a singular, reducible definition.\textsuperscript{85} Classified as a post-structuralist thought, deconstructionist theory arose in the 1960s and 1970s primarily from the works of French philosopher Jacques Derrida and then extenuated by others such as Paul de Man,

\textsuperscript{85} Jacques Derrida, \textit{Letter to A Japanese Friend}, in Derrida and \textit{Différence} 4 (David C. Wood & Robert Bernasconi eds., Nw. U. Press 1985). When asked by a Japanese translator of his works about the definition of “deconstruction,” Derrida responded, “I have no simple and formalizable response to this question. All my essays are attempts to have it out with this formidable question. They are modest symptoms of it, quite as much as tentative interpretations.” \textit{Id.}
Stanley Fish, Barbara Johnson, J. Hillis Miller, and others. Though its perceptions and ideas attempt greater projection, most frequently deconstruction has been characterized as offering a method to analyze and interpret uses of language in texts—particularly with the view that language is slippery, unreliable, and/or ambiguous. Most notably in theory then, deconstruction would easily avail itself to disciplines that utilize

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87 See J.A. Cuddon, *Dictionary of Literary Terms and Literary Theory* 223 (3d ed., Penguin Books 1992) (“Derrida shows that a text (any text—be it polemic, a philosophical treatise, a poem, or, for that matter, an exercise in deconstructive criticism) can be read as saying something quite different from what it appears to be saying, and that it may read as carrying a plurality of significance or as saying many different things which are fundamentally at variance with, contradictory to and subversive of what may be (or may have been) seen by criticism as a single, stable ‘meaning.’”).
language—such as literary studies, linguistics, and law. Indeed, its popularity first leapt from philosophy to literary criticism, where its influence has been indelible since textual and language interpretation is a fundamental exercise of that field. Deconstruction would pose implications of the study and practice of law as well, which also relies heavily on language and which often impose practitioners to draft, construe, and interpret rules and to justify (or overrule) a rule’s existence. After all, part of the livelihood of lawyers is to spot and utilize “gray areas” and to advocate particular shades of gray from such areas that would be most beneficial to their clients or goals. A critical lens that seems to place focus on this aspect of legal thinking in the forefront would rationally seem to have an immediate appeal.

From here, despite the anti-formalism that prevents a unifying definition of deconstruction, and despite Derrida’s emphatic denial that deconstruction is reducible to a method, legal theorists have used deconstruction as a “toolkit” in order “to render deconstruction useful to the academic elaboration of positive law. Since deconstruction had no normative agenda and since law was supposed to be ‘neutral,’ why not

88 See Balkin, supra n. __, at 719-720.
consider deconstruction a kind of all purpose reasoning tool, ready for use to anyone?" According to Professor Jack M. Balkin,

[t]o be adapted to the needs and concerns of the legal academy, deconstruction had to be translated and altered in significant ways, making it more flexible, practical, and attentive to questions of justice and injustice. . . . Its transformation eventually produced a deconstructive practice that emphasizes sensitivity to changes in interpretative context, a pragmatic approach to conceptual distinctions, and careful attention to the role of ideology and social construction in legal thought. But its tailored use in legal studies began a bit more progressively than this when deconstruction first arrived onto the legal academy. Professor Balkin summarizes that, as far as ideological and social aspects of legal criticism,

[legal academics on the left, particularly feminists and members of the Critical Legal Studies (CLS) movement, saw deconstruction as a way of challenging legal orthodoxies. They assumed pretty much without question that they could adapt deconstructive techniques to critique unjust legal doctrines and advocate more just arrangements.]


90 Balkin, supra n. __, at 719.

91 Id. at 720.
Others, such as Professor John E. Murray, have observed more specifically the problem that belies the CLS use of deconstruction: “Since every theory, including CLS theory, can be deconstructed, even the principle of contradiction must be ignored, except when it is used to support the theory.” The use of deconstruction amongst this branch of legal scholars appeared more radical than that of literary critics who sensed that a theory which contends to obliterate the perceived stability of language would be a theory that could eventually swallow a literary text, and thus, literary

criticism tended to adapt a more controlled imprint of deconstruction.\footnote{Id. at 720-21 (‘It is true that many literary deconstructionists identified with the political left. But they were using deconstruction to show the impenetrability, mutability, and conceptual incoherence of all texts, not simply the texts produced by political conservatives. In fact, in the literary world, many people argued that deconstruction was a profoundly conservative movement. The recognition that any text could be deconstructed and that all meanings were unstable might lead to political quiescence. Nevertheless, these warnings did not raise much alarm in legal circles.’); see also Barbara Johnson, The Critical Difference: Essays in the Contemporary Reading of Rhetoric 5 (Johns Hopkins U. Press 1992)}

Indeed, even Derrida’s own comment on deconstructive practice aligns

\footnote{Deconstruction is not synonymous with destruction, however. It is in fact much closer to the original meaning of the word analysis itself, which etymologically means ‘to undo’—a virtual synonym for ‘to de-construct.’ The deconstruction of a text does not proceed by random doubt or arbitrary subversion, but by the careful teaching out of warring forces of signification within the text itself. If anything is destroyed in a deconstructive reading, it is not the text, but the claim to unequivocal
itself towards more restraint and confinement. In contrast, Professor Balkin asserts that

[legal academics began deconstructing left and right, or, more correctly almost exclusively to the left. No attempt was made, at least at first, to consider whether deconstruction had a necessarily or predominately progressive slant, or whether, on the contrary, it was particularly unsuited to political critique because it threatened to undermine any political program or philosophical conception of social justice.]

Domination of one mode of signifying over another. A deconstructive reading is a reading which analyses the specificity of a text’s critical difference from itself.”); see also Cuddon, supra n. __, at 222 (citing Johnson); Abrams, supra n. __, at 229 (also citing Johnson).

Derrida, Of Grammatology 158 (Gayatri Chakravorty Spivak trans., The Johns Hopkins U Press 1976) (A deconstructive reading “must always aim at a certain relationship, unperceived by the writer, between what he commands and what he does not command of the pattern of language that he uses. This relationship is not a certain quantitative distribution of shadow and light, of weakness or of force, but a signifying structure that critical reading should produce.”)

Balkin, supra n. __, at 721.
It seemed as if deconstructive practice in legal studies was enjoying a bit of nascent abandonment or unrestraint.

Two specific problems arose out of this practice that Professor Balkin points out. First, legal scholars used deconstructive practice with normative goals and intentions, which as Balkin asserts, is not a characteristic of deconstruction: “[L]iterary deconstruction spent much of its time showing the ambiguity, uncertainty, and impenetrability of all literary texts, the reversibility of all positions, and the instability of all theoretical conceptions. It did not focus specifically on pointing the way to a more just world.”\(^{96}\) So as a result, deconstruction had to either adapt or be adapted into a normative process and thus would mean something different for lawyers than it would for literary critics and philosophers. Deconstruction would become a series of rhetorical strategies for criticizing certain legal doctrines and legal arguments in order to show that they were unjust, ideologically biased, incomplete, or incoherent. It would necessarily discriminate between better and worse positions and interpretations, and it would state its conclusions in the language of normative prescription.\(^{97}\)

\(^{96}\) Id.

\(^{97}\) Id.
Secondly, scholars would need to curtail the aim of deconstruction at critiquing every legal text and “to distinguish what was deconstructible (everything) from what was unjust, practically incoherent, or practically unworkable (only some things).” Selectivity of a text for deconstructive analysis was then needed, which Professor Balkin argues is a more pragmatic use of deconstruction, a more focused limitation of the theory.

All in all, deconstruction’s emergence in law “revealed more clearly that deconstructive analysis involves a series of repeatable rhetorical devices or tropes that can be adapted to many different problems and situations.” More specifically for the law school classroom, “if deconstruction was to be perpetuated in the next generation of graduate students, these students had to learn how to do it, and this meant that there had to be some set of skills that could be repeated and transmitted from teacher to pupil.” Thus, the paradox arises between theoretical and the practical—as the theory of deconstruction, which (perhaps in the wild)

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98 Id. at 722.

99 Id. (“If it wasn’t broken, one wouldn’t deconstruct it.”).

100 Id.

101 Id.
purports to be difficult to harness and define, is necessarily reduced when “domesticated” within legal studies to “revolve around a relatively small handful of rhetorical techniques that can be learned, adopted, and adapted by other scholars”\textsuperscript{102} and “proved practically repeatable and teachable.”\textsuperscript{103}

Much has been debated and discussed regarding incorporating deconstruction methodologies predominately by CLR scholars and theorists in law school classrooms, especially to critique ideologies in certain areas of the law. Whether appropriate or not, positive or detrimental, better or worse, this plurality of discussion, criticism, and praise demonstrates the significance of deconstruction’s arrival in legal studies. Along this line, law students should be given an exposure to such theories as part of their legal training in order to accommodate a more enriched legal education—whether or not they decide to further explore the theory. In deconstruction’s case, its affinity to language is the place from which to start because it could be used to teach a pragmatic method of critically reading rules that then lays a foundation to more scholarly types of critique later in a student’s career or even for problem-solving legal issues. In this

\textsuperscript{102} Id.

\textsuperscript{103} Id.
way, Professor Adam Todd has more specifically noted deconstruction’s current livelihood in the law school classroom from a linguistics standpoint—whether any instructor is conscious of this or not. From the notion that “[d]econstruction, by questioning authorized meaning, exposes bias and unstated meanings in texts,” Professor Todd argues that deconstruction “is a standard part of readers’ and writers’ thought processes” and that “[a]ny exercise in identifying and resolving ambiguity in legal writing will inevitably draw on deconstructive techniques.” Professor Todd includes, as a demonstration, how a classroom reading of a statute would draw on deconstructive methods:

For example, a professor would have to call on deconstructive tools to explain why a statute entitled, “The Defense of Marriage Act,” precludes certain forms of marriage. Legal meaning of the statute is created by the external social and cultural environment. Additionally, under traditional conceptual hierarchy, the title of a statute is a summary of the statute or an aspirational statement of what the statute hopes to achieve. A deconstructive reading would question this traditional hierarchy and read the title of a statute to be related to mischaracterizing the law encompassed in the act or the

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104 Adam Todd, supra n. __, at 927.
105 Id.
106 Id.
title is the opposite of the aspirations of the act.\textsuperscript{107}

Again, the theory of deconstruction can thus be brought to the forefront for instruction as a focused methodology for spotting the “gray areas” posed by the language used to construct a legal rule in order to further critical understanding of the rule and to produce better lawyering.

B. THE INEXHAUSTIBILITY OF INTERPRETATION: THE LESSON

From the previous teaching on how to disassemble a rule to its components, the lesson could take the same rule that the class has broken-down and now shift the students’ focus towards developing abilities to construe several meanings from a formally deconstructed rule. One pronounced aspect of deconstructive thought is the rejection of any definitive interpretation of a text in favor of an “inexhaustibility of interpretation”\textsuperscript{108}—in other words, that texts (which invariably includes legal texts and rules) are constantly subject to re-reading and

\textsuperscript{107} Id. at 927-28 (footnotes omitted).

reinterpretation. The bigger implication from this notion points to the
instability of a piece of writing after it leaves the author who has written the
writing with a particular intended meaning. Derrida articulates this
instability that allows for multiple interpretations of a text (or what he calls
a “written sign”) by characterizing that a text

“in the usual sense of the word, is therefore a mark which
remains, which is not exhausted in the present of its
inscription, and which can give rise to an iteration both in the
absence of and beyond the presence of the empirically
determined subject who, in a given context, has emitted or
produced it.”

See id. at 20 (“On a deconstructive model of textuality, literary
texts do not still and docilely submit themselves to repeated identical
readings; they can be read and reread, and each reading differs from the last.
Nor are critical interpretations of texts copies of an original ‘meaning’ that
is somehow housed in the original text. Interpretations, readings, differ
from the texts they interpret and from each other; and, having been read,
they require a re-reading of the ‘ordinary’ text.”)

See Crowley, supra n. __, at 14 (quoting Jacques Derrida,
1972)).
With only the text “remaining” once the text has been written and is read, the author’s absence leaves readers to appropriate meaning from the text. From here, textual instability arises because the text is more prone to multiple meanings that deviate from its author’s intentions. Though this concept is rife with linguistic and literary nuances, in a nutshell, to impose a deconstructive attitude towards looking at a text is to assert the possibilities that the writing itself is predisposed to multiple meanings—with some perhaps even antithetical to its author’s original intentions.

At first glance, this way of looking at the instability of texts and writing and the role of the reader to engage in meaning resembles reader-response theory. Though both literary movements support the idea of multiple meanings, the difference is that reader-response theory focuses more heavily on the overall critical response of reader’s engagement of the text while deconstruction requires the reader specifically to examine the language of a text (word choices, certain use of signifiers, etc) to dissect meaning.\footnote{See Terry Eagleton, \textit{Literary Theory: An Introduction} 67 (2d ed., The U. of Minn. Press 1996). Professor Eagleton refers to reader response theory as “reception theory” and notes that with this theory, “[r]eading is
the text that he or she is experiencing exists more at the core of not a straightforward linear movement, a merely cumulative affair: our initial speculations generate a frame of reference within which to interpret what comes next, but what comes next may retrospectively transform our original understanding, highlighting some features of it and backgrounding others.” *Id.* However, Professor Eagleton expresses deconstruction as a theory that depends on investigating hermetically the text itself:

“‘Deconstruction’ is the name given to the critical operation by which [binary oppositions of structuralism] can be partly undermined, or by which they can be shown partly to undermine each other in the process of textual meaning.” *Id.* at 115. Particularly, “Deconstruction tries to show how such oppositions, in order to hold themselves in place, are sometimes betrayed into inverting or collapsing themselves, or need to banish to the text’s margins certain niggling details which can be made to return and plague them. Derrida’s own typical habit of reading is to seize on some apparently peripheral fragment in the work—a footnote, a recurrent minor term or image, a casual allusion—and work it tenaciously through to the point where it threatens to dismantle the oppositions which over the text as a whole.” *Id.* at 115-16.
deconstruction, which more likely parallels a lawyer’s daily linguistic engagement of legal texts in order to understand rules and precedence to resolve legal issues. Reader-response theory too can offer much to legal thinkers in terms of dealing with the critiquing of different readings based on framing the perspectives of the readers. But an exploration of that effect and how it can be taught to students stands beyond this Article’s drawn borders.

Another observation is deconstruction attributes to much instability within a piece of writing—assuming a reader can use the language of a text to expose various meanings—that might pose dangers to legal studies because certain processes within the law relies on authoritative or definitive readings of a text. Essentially, deconstruction’s rejection of authoritative readings for multiple ones could pose a problem for stare decisis. This rejection is also why instituting normative goals in using deconstructionism in the legal academy proved incompatible.  

112 See Schlag, supra n. __, at 741-44. Professor Schlag begins his Article with a tongue-in-cheek pronouncement about the law in a positivist manner that, among other things, the “Law is principally what courts say it is” and that “Law is relatively determinate at the core/center, but there is
reading body (usually a court) to discern or settle a reading of a rule that is definitive and binding towards a legal issue (usually based on previous judicial interpretations) and to follow it. The existence of a definitive reading—even if it can be later overruled in place of another one—limits legal studies’ use of a complete deconstructionist thought. As a result, again, here deconstruction should be tempered in its instructional use—consistent with Balkin’s notion as a method of approaching texts—or else the importance of a definitive reading would be destabilized. A lawyer or

some unvertness/vagueness/indeterminacy at the periphery/penumbra,” all of which he finds “crude” but yet aligned with “the view of law one actually deploys when one is ostensibly doing legal exegesis.” Id. at 741-42 n. 1. He then notes that “[n]ot only were the aesthetics of deconstruction and positive law discordant, but the gestures of deconstruction were utterly askew to the practice of legal thought in the American legal academy. One major problem for the advent of deconstruction in law was a function of deconstruction’s apparent lack of any transparent normative or political content.” Id. at 742.

law student can approach the idea of multiple meanings in a text or a written rule but should keep in mind that all possibilities must exist against an existing precedent (perhaps there is a bit of wiggle-room). Otherwise, deconstructive practice and thought would swallow the judicial process.

With this stated, a brief warm-up demonstration the heightened sensitivity to language required for the kinds of deconstructive multiple readings is shown here using one of the most famous legal maxims in Property law: *First in time, first in right*. The common, plain meaning of this statement indicates whoever claims a piece of property first is the true and rightful owner. But based literally on the short-handed language of this fragment, the above meaning is only true if the reader adopts certain unstated inferences. First, a true owner—some entity—is implied to embody “first in time” characteristics—to have claimed something first—over other owner/claimants. This inference proves to be at the core of the meaning’s initial understanding because otherwise *First in time, first in right* could not meet its intended function of determining paramount property rights. Secondly, the comma between the first and second parts of the phrase serves as an unspoken equal sign that allows the reader to understand that whoever is *first in time* to claim a property is also *first in
right to the property. To destabilize the customary meaning of this maxim in the way it is often phrased, students can be asked what if both inferences were eliminated? In this way, what would First in time, first in right mean? Several alternative meanings could be posed to question the meaning of the maxim. The maxim might become a directional phrase. Does the phrase “in time” mean something similar to “in step”? And the word “right” means “to the right side of something”? Or does the word “right” mean a specific political point-of-view? Or does it mean merely to be “correct”? Also, what happens if a different inference is made about the comma? What if the comma in First in time, first in right is not being used to separate two equal attribute as it is normally done, but mere as a separator between to two usually unconnected phrases? Then the fragmentary characteristic of the phrase would be more apparent as First in time, first in right seems to become a disembodied segment of a larger catalogue of bigger phrase or maybe indicate that “first in right” needs to be separately obtained in order for one to have true ownership. Its meaning becomes much less tangible, in this fashion, as it could be read to mean many things other than indicating paramount property rights.
The goal of this facetious exercise is not to necessarily obtain a clearer meaning of the phrase *First in time, first in right*, but rather to help students keep in mind that language can be more slippery a construction or representation of meaning than it appears and that they always need to keep an open mind (or eye) for reading and for such peculiarity in language—especially when trying to understand legal rules that they will need to use to resolve legal issues. This observation could be likened to how instructors often tell law students to see and include multiple sides of an issue in their analysis of a fact pattern, even if some of the sides will not ultimately prevail. It is the *process* of deciphering that should be cultivated here, and less so a particular meaning or textual *result*. Although the phrase *First in time, first in right* has had a long history and meaning attached to it, a deconstructive analysis helps understand not necessarily the meaning (that someone first to claim an unowned piece of property, prevails in property rights over others) but how that phrase conveys this meaning and what linguistic assumptions and inferences are made to convey that meaning, what other interpretation of the phrase can be reached by breaking away the customary ways of reading *First in time, first in right*.
From this short demonstration, the move to an example of teaching this technique with a rule statement should be easier to convey. But here, it might be helpful to create a lesson in which students are asked to deconstruct in this anti-formalist fashion the same rule they previously deconstructed more formally into components in conjunction with a fact pattern that they will eventually try to apply the rule statement. In this way, the use of a fact hypothetical to which students need to apply a rule serves as example to show how a rule that may seem facially clear can be re-read for its unambiguities. Since this Article used the general rule for gifts in its previous demonstration, for continuity’s sake, a lesson that takes rule deconstruction to this level of practice will involve the same rule. Once again, the rule for gifts from *Gruen v. Gruen* is as follows: “[T]o make a valid inter vivos gift there must exist the intent on the part of the donor to make a present transfer; delivery of the gift, either actual or constructive to the donee; and acceptance by the donee.”

But before the lesson deconstructs the rule, a fact pattern can be given. For illustration, here is one that invokes the law of gifts.

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Don lives in New York City and is a sculpture and wants to give Jake Jones, a friend in a very rural town in upstate New York called Nowheresville that only has 2,000 residents, a small but valuable statute as a gift. Don sends the statute to Jake Jones by mail. However, Don only addresses the package to Jake J. in Nowheresville, NY. No street address is given. Apparently, there are two Jake J.’s in Nowheresville—one who is Jake Jones and the other who is Jake James. The post office delivers the statute to Jake James. Don dies a week later. Jake Jones now claims that the gift should be his. Applying Gruen, who prevails?

To challenge students in the course in reading the rule, the fact pattern is not a variation of the Gruen case but rather a different situation involving gifts that needs to be resolved using the Gruen precedent rule.

From the outset, the lesson is directed at re-reading the Gruen rule in order to deconstruct its useable meaning for this particular set of circumstances. Beginning from Jones’ perspective, students might argue that the Gruen rule is completely on point to allow Jones to get back the valuable object that Don gave because all of the elements appears to favor his case. Don showed the intent to give the valuable object when he decided to mail the gift to Jones. There was actual delivery of the gift through the mail and but for the mix-up at the post office, then Jones would have accepted the gift. Some students might articulate that a certain injustice would befall the failure of the Don’s gift-giving here. After all, Don did not intend to have
the object delivered to James. He may have contributed to the mistake but
the postal office might have taken the time to figure out which Jake J. was
meant to receive the object. Students might even decide that the policy
behind gift-giving in property law—that Don’s ability to transfer wealth—
is not served here if the object fails as a gift.

But showing the students an example of a strict or narrow
construence of a rule, the rule can be deconstructed to be re-read effectively
to exclude Jones from taking the gift. Although Don exhibited his intent to
make a present transfer and such a delivery—arguably—was attempted, the
*Gruen* rule requires delivery and donee’s acceptance. Since delivery was
not made to Jones but rather to James and Jones never accepted anything,
then in effect the rule does not apply to him as the mechanism of gift-giving
literally described by the *Gruen* rule was not correctly completed.

Although this result may seem unjust, the language of the rule permits this
particular reading. The language of the rule, here on its face, does not make
allowances or instructs upon a mistake in transfer. From here, class
discussion could delve into justifying the absence of instruction on mistakes
in transfers or justifying the strict reading of the rule and from there
uncover reasoning behind the law that may or may not be consistent with
the intent behind the rule. Part of deconstructing a text is to define a text presently from what is absent from the text as well. In Jones’ case, what is absent from the *Gruen* rule is either further legal direction on mistake in transfers or an exception in the acceptance element where an allowance might be made for individuals in Jones’ situation who otherwise would have accepted as a donee had a mistake not have occurred. Asking what is missing from this rule might help students understand the limitations of the law of gifts or the failure of how this rule was crafted. How hard would it be to rectify a mistake in transfer? What evidentiary issues would arise if in a failed delivery situation a litigant would be able to claim that he or she would have accepted notwithstanding the mistake? In practice, these questions would also help raise opportunities where Jones’ advocate might decide to further her case research on mistakes in transfers or whether other legal remedies for a failed donee exist. The resulting focus on deconstructing the language of this rule is not a normative function, but rather towards a method to better probe and solve a legal dispute.

Can the *Gruen* rule be read to mean that James prevails and gets to keep the statute? This would lie in what the rule means by “donee.” In this respect, the rule on its face seems to more closely side with James. The
first element of the rule in its phraseology, “intent on the part of the donor to make a present transfer” says nothing about “to whom,” and its emphasis is rather on the donor intending to effect “a present transfer.” The transfer is the focus of that clause and not a specific donee or recipient. Does this mean that the recipient of that transfer is irrelevant? Does this rule tie-in more closely with the policy of gift-giving that encourages transfers of economic wealth and property? Arguably, from a hermetic reading of the first element of the Gruen rule, one could press on this aspect of meaning. Secondly, with the acceptance element, the mention of the donee does not necessarily make things clearer as the donee’s importance could have been read to be de-emphasized from the first element’s focus on transfers than it may appear that with delivery—that both actual or constructive methods will do and that any old donee will do. Absent from this rule statement is any indication of an intended donee. The same connotation could be broadened to the third element, acceptance. The element is so briefly and plainly stated that it could be read that the establishment of this element is not heavily dependent on knowing who the donee is, as long as someone (or some entity) does accept the delivered transfer. If the Gruen rule could be deconstructed and read this way, then James would increase his chances
of prevailing. Dan had an intent to make present transfer, regardless of the recipient. A delivery took place physically through the mail and the statute was sent to a recipient who could be called the donee. And James kept the statute, which shows acceptance of it. Under this reading of the rule, James would be closer to becoming the rightful owner of the statute if the term “donee” is read to be submerged beneath the importance of the transfer itself as the phrasing of the rule might suggest. And the rule itself (devoid of cases and policies offering further explanation) could be taken apart to allow James the ability to argue himself as donee, just by the fact that delivery was to him and he was the one to make the acceptance.

Because the classroom should offer a safety-net arena for practicing law—no litigant in a classroom fact pattern ever loses real money, no one is actually hauled to jail, and no student is ever fined for malpractice—students should be encouraged to develop this sensitivity for language nuances and for reaching different interpretations of a rule, however close or far-fetched the practical meaning. A possible third reading of the Gruen rule would send the statute back to Dan’s estate as a failed gift, as neither the delivery to Jones and his acceptance of the gift ever took place, nor was James ever on Dan’s mind when he intended to make the present transfer of
the statute. Of course, likely this reading of the rule is the most practical, and students can learn that not only does this reading of the rule define more straightforwardly what is a valid gift transfer and implicitly what is a failed one. What appears there in the text and is expressed in the rule also points to what is not expressed and limited by the language.

Students could also be asked to deconstruct a rule by listing all the different possible definitions of a controlling word in a rule in order to broaden and/or narrow it. For instance in the *Gruen* rule, the word “present” in “present transfer” could be defined not merely temporally but also, since this rule governs gift-giving, to mean “gift,” which would produce a slightly different meaning. “Intent to make a present transfer” would be read to mean “gift transfer” as opposed to transfers involving consideration and would bolster the rule as a law governing gift-giving. However, doing so would also inhibit the temporal aspect of gift-giving, which is important in Property law because rules on gifts often depend on when the gift is being given—i.e. gift causa mortis, gift made in a will, future interests, etc. Or the word could mean both in the statute which would broaden the requirements of the intent element. This heightened sensitivity to language and literacy—this ability to deconstruct rules—helps
students see multiple readings of a legal authority that could encourage creative legal thinking and problem-solving.

Various hypotheticals and other rules could be used to demonstrate this close deconstruction technique. The injection of deconstruction into the law school classroom in a lesson such as this serves as a problem-solving method or device for what students can do after a formal breakdown of the rule’s components. The lesson demonstrates how to be creative, peculiar, and critical in reading a rule—whether its wording belies its meaning, whether it succeeds or fails its underlying justification or purpose, what it focuses on particularly. A lawyer who can see this in a rule is better able to build on such observations and have more available options from which he or she can then critically choose as the most viable for his client’s case or for resolving a judicial issue.

Although deconstruction, in this anti-formalist, postmodernist classroom variant, is distilled from a more unbridled process of breaking down expression and ideology to a more practical method, its uses and the innovations that legal scholars continue to make with it have proved its significance in law. Of late, the use of semiotics and linguistics in trademark law is an example of how such postmodern perspectives have
started to change the way that body of law is being “read.”\textsuperscript{115} Despite the prevalence of law and economics points of view in current trademark law, the influence from structuralist and post-structuralist linguistic studies in dealing with trademarks—which relies on language as a system of signs and signifiers in order to convey a business or a brand identity—seems to be firming up in that area of legal studies. The practical side of this still embodies the heightened sensitivity to language that practitioners will continue to need as part of examining and resolving trademark issues—arbitrariness of marks, dilution, likelihood of confusion between two marks in infringement cases, etc. Though not all students of a first-year class will eventually become trademark attorneys, the usefulness of philosophies such as deconstruction poses an encouraging and enriching

\textsuperscript{115} See Bita Amani, \textit{A Penchant for Persian Rugs Over Palatable Products: The Use of Geographic Appellations as Trademark - Part I: A Parthian Attempt to Turn Paddock to Haddock in Trademark Law or the Continued Search for the Philosopher’s Stone?}, 14 Intell. Prop. J. 185, 197-202 (1999-2000) (discussing how one particular vein of deconstruction is where visual images are deconstructed “like language, is equally applicable to the study of trade-marks”).
possibilities for students in their future livelihoods. All in all, introducing this antiformalist rule deconstruction technique to students reinforces the carefulness and detail-oriented perceptiveness of effective lawyerly thinking and problem-solving.

V. CONCLUSION

This Article has tried to focus on one aspect of “thinking like a lawyer”—if one takes a reasonable reading of the phrase—in order to address how to build towards effective law teaching, particularly for the current trend of students and student learning in nationwide law schools. In polling entering first-year law students about what they would hope to accomplish in their time at law school, it would not be a surprise to hear the response, “learning the law.” In fact, for those who have not been remotely initiated into the law school culture, this admonition would predominate over other crucial activities that one would later find equally useful for acquiring success at lawyering—such as knowing how to issue spot, how to analyze facts, how to apply rules to a factual scenario, and others. Here, what this Article has attempted is to introduce one method of teaching students (who presumably have never been engaged in reading cases and
rules) how to “learn the law” methodically with an eye for the language that constructs of the law—how to read case law and rules critically, first in order to understand what a rule requires in order to achieve its legal result, and then secondly in order to have a toolkit for broadening, narrowing, or subverting the language of a rule, a toolkit derived from poststructuralist engagement in language and thought that hopefully allows a lawyer to think creatively about the law that she also practices. The Article has examined both formalist and anti-formalist implications in the word “deconstruction” and created a workable bridge between the two.

In doing so, these recommendations have not slipped away from a student-centered approached but are tailored with the intent that some current law students may lack the kind of literacy skills that might have been present in students from past generations, skills they need to effectively hone their lawyerly ability to read legal texts carefully and critically. As Schwartz, Hess, and Sparrow have collectively noted, “the most common error committed by law professors is assuming their students are like them. In fact, recent studies suggest law professors are more like each other and much less like their students in terms of many of the characteristics that might influence how [one] should design [one’s]
courses." Deliberations are still in motion about whether this is a cardinal sin that has contributed to the kinds of institutional failures of traditional law school teaching methods addressed by the Carnegie Foundation reports and Best Practices. But knowing who one’s students are and what their skill sets encompass is merely good practice in the classroom that hopefully allows an instructor to be a more effective teacher.

In this way, law instructors who put the recommendations from this Article to practice do not have to have endured some extensive training in linguistics or literary theory. After all, it is a law course that is being taught and not a course on Derridean philosophy; after all, encountering a rule statement is not something unfamiliar to a law professor. All that is required is a critical eye on practicality and a fervent to see their students able to master such an engagement with legal language in order to be better legal problem-solvers—and ultimately legal thinkers.

\footnote{116} Schwartz, Sparrow & Hess, *Teaching Law*, supra n. __, at 42.