What's Past Is Prologue: Precedent In Literature and Law

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On June 29, 1992, the joint opinion of *Planned Parenthood v. Casey*[1] "spectacularly failed to overrule"[2] the holding of *Roe v. Wade*.[3] The writers of the joint opinion suggested that stare decisis, or the legal doctrine mandating that precedent be followed, disciplined their analysis, and that they were bound by *Roe*'s holding regardless of their personal opinions on whether the Constitution protects a woman's choice to have an abortion.[4] Chief Justice Rehnquist's opinion, on the other hand, maintained that stare decisis did not compel upholding *Roe* and asserted that *Roe* should be overruled.[5] The

1. 112 S. Ct. 2791 (1992). At issue in *Casey* were five provisions of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989. The Act (1) required that a provider of abortion services supply a woman with certain information at least 24 hours in advance of an abortion procedure and obtain the woman's informed consent prior to performing the procedure, (2) required that a minor obtain the consent of a parent prior to undergoing an abortion procedure, unless the minor qualified for a judicial bypass of the parental consent requirement; (3) required that a physician, prior to performing an abortion procedure on a married woman, obtain her signed statement that she had notified her husband, (4) defined the parameters of a "medical emergency" that would excuse compliance with the consent and notification requirements; (5) mandated that facilities providing abortion services comply with certain reporting requirements. Before these provisions took effect, petitioners brought a suit challenging the constitutionality of each provision of the Act and seeking declaratory and injunctive relief. 112 S. Ct. at 2803. The district court held all five provisions of the Act unconstitutional and entered a permanent injunction against enforcement. Planned Parenthood v. Casey, 744 F. Supp. 1323 (E.D. Pa. 1990). The court of appeals affirmed in part and reversed in part, upholding all of the provisions except the husband-notification requirement. Planned Parenthood v. Casey, 947 F.2d 682 (3d Cir. 1991).

The Supreme Court issued five opinions. The joint opinion, authored by Justices O'Connor, Kennedy, and Souter, upheld all of the provisions except the husband notification requirement. 112 S. Ct. at 2803–38 (opinion of O'Connor, Kennedy, and Souter, JJ.). The remaining four opinions all concurred in part in and dissented in part from this result. Justice Stevens contended that parts of the first requirement (concerning content-based counseling and the 24-hour waiting period) were unconstitutional and should be struck down, but that the Act was otherwise enforceable. *Id.* at 2838–43 (Stevens, J., concurring in part and dissenting in part). Justice Blackmun argued that all five of the provisions were unconstitutional and should be struck down. *Id.* at 2843–55 (Blackmun, J., concurring in the judgment in part, concurring in part, and dissenting in part). Chief Justice Rehnquist (joined by Justices Scalia, Thomas, and White) argued that all five of the provisions were constitutional and should be upheld. *Id.* at 2855–73 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Justice Scalia (joined by Chief Justice Rehnquist and Justices Thomas and White) advocated the same result. *Id.* at 2873–85 (Scalia, J., concurring in the judgment in part and dissenting in part).

2. Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 24–25 (1992).

3. 410 U.S. 113 (1973).

4. 112 S. Ct. at 2812 (opinion of O'Connor, Kennedy, and Souter, JJ.).

5. *Id.* at 2855 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

Rehnquist opinion further implied that the joint opinion invoked the doctrine of stare decisis as a convenient way of implementing individual Justices' political predilections while allowing those Justices to avoid accountability for their controversial views on abortion.

This Note argues that the law-and-literature movement can shed light on the manner in which the *Casey* opinions treat precedent. Part I provides the theoretical background to a comparison of precedent in law and literature. First, it briefly situates this Note in the law-and-literature movement; second, it outlines two theories concerning the treatment of precedent, one from literature (Harold Bloom's "anxiety of influence"[6]) and one from law (stare decisis); finally, it describes a prior attempt by David Cole to apply the anxiety of influence to the legal field.[7] Part II critiques Cole's theory and shows how the remainder of this Note provides a more precise synthesis of the literary and legal theories. Part III describes two of the subversive strategies developed by Bloom: *apophrades* and *clinamen*. Part IV applies these two strategies to two literary texts: Tom Stoppard's *Rosencrantz and Guildenstern Are Dead*[8] and Aimé Césaire's *Une Tempête*.[9] Part V shows that both of these subversive strategies are applicable, with some qualifications, to the *Casey* opinions. Part VI contrasts the consequences of these strategies in the literary and legal fields.

I. PRECEDENT IN LITERATURE AND LAW

A. *The Law-and-Literature Movement*

The law-and-literature movement has its Anglo-American antecedents in the nineteenth century. In that period, English lawyers wrote about the depiction of the legal system by Shakespeare, Dickens, and other famous writers; Wigmore argued that lawyers should read literature to learn about human nature; and Cardozo analyzed the literary style of judicial opinions.[10] Until the publication in 1973 of James Boyd White's *The Legal Imagination*,[11] however, law and literature did not emerge as a distinct and self-conscious field.[12] Subsequently, Robert Weisberg divided the law-and-literature movement into two branches—law-in-literature and law-as-literature.[13] This distinction has been widely adopted.[14] Law-in-literature

6. HAROLD BLOOM, THE ANXIETY OF INFLUENCE: A THEORY OF POETRY (1973).

7. David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857 (1986).

8. TOM STOPPARD, ROSENCRANTZ AND GUILDENSTERN ARE DEAD (1967).

9. AIMÉ CÉSAIRE, UNE TEMPÊTE (1969).

10. RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 12 (1988).

11. JAMES B. WHITE, THE LEGAL IMAGINATION (1973).

12. POSNER, *supra* note 10, at 12.

13. Robert Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUMAN. 1, 1 (1988).

14. See discussion and sources cited in Gretchen A. Craft, Note, *The Persistence of Dread in Law and Literature*, 102 YALE L.J. 521, 523–24 (1992).

considers literature "about" legal subjects (e.g., Kafka's *The Trial*, Camus' *The Stranger*, or Lee's *To Kill A Mockingbird*) and law "about" literature (e.g., laws concerning defamation, obscenity, or copyright).[15] Law-as-literature, on the other hand, subdivides into two concerns: the study of rhetoric in legal writing and the application of literary theory to the law.[16] For example, White describes how literature's discourse about devices such as metaphor, ambiguity, and irony enhances an understanding of legal argument.[17] Similarly, Dworkin argues that because literary theory is more developed than legal theory, literary theory can offer new insights into legal texts.[18]

Bloom's anxiety of influence, as shown below, is both a taxonomy of rhetorical devices that authors use to subvert precedent, and a theory about the relationship writers have to their predecessors. By considering the applications of this theory to the law, this Note situates itself squarely in the law-as-literature movement.

B. *The Anxiety of Influence and Stare Decisis*

Precedent occupies the literary and legal fields in the form of two different theories: the literary theory of the anxiety of influence and the legal theory of stare decisis. Harold Bloom formulated the anxiety of influence in a tetralogy: *The Anxiety of Influence*,[19] *A Map of Misreading*,[20] *Kabbalah and Criticism*,[21] and *Poetry and Repression*.[22] The theory claims that all poets (writers) grapple with the anxiety that everything they write is influenced by their powerful predecessors. In order to become great, Bloom asserts, poets must break free of this influence by conducting "strong misreadings" of their predecessors—that is, by subverting the meaning of their predecessors' texts in order to make their own contributions. Bloom, misreading Freud, casts the predecessor-poet as the father and the usurping-poet as the "belated son."[23]

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15. *See* Weisberg, *supra* note 13, at 1; *see also* POSNER, *supra* note 10, at 5–6, 18

16. Craft, *supra* note 14, at 524 n.7.

17. WHITE, *supra* note 11, at 56–77; *id.* at 81 ("While the traditional means of controlling a language—by metaphor, irony, and ambiguity—are likely to be of little use to us as lawyers, or of use only in special ways, we may be able to learn much from them . . . "), *see also* POSNER, *supra* note 10, at 272 ("[E]ven in regard to comparatively humble specimens of legal writing such as wills, deeds, indentures, and contracts; there, repetition, and even archaism, may serve to remind the signatories of the gravity of their commitment and to impart emphases that assist interpretation. [Judicial opinions] are unavoidably rhetorical . . . .").

18. RONALD DWORKIN, A MATTER OF PRINCIPLE 148 (1985) ("Not all of the battles within literary criticism are edifying or even comprehensible, but many more theories of interpretation have been defended in literature than in law . . . .").

19. BLOOM, *supra* note 6.

20. HAROLD BLOOM, A MAP OF MISREADING (1975)

21. HAROLD BLOOM, KABBALAH AND CRITICISM (1975)

22. HAROLD BLOOM, POETRY AND REPRESSION: REVISIONISM FROM BLAKE TO STEVENS (1976)

23. In subsequent discussions of Bloom's framework, this Note refers to the usurper as the son and to the precursor as the father to retain the Freudian (and Oedipal) resonances of those terms. The use of these terms is not meant to imply that women cannot occupy either of the roles.

Bloom's theory is a literary theory in that it describes how a poem achieves meaning. Helen Vendler maintains that Bloom's theory allows readers to see poems

> for what they are, part of a perpetual struggling dialogue between generations, temperaments, wills, and perceptions, all couched in a fraternity of shared and contested language, unintelligible unless the common usage of that language, and the problems to which it gives rise, are perceived, weighed, and appreciated. . . . Each poet turns in passing, and makes valedictory utterances toward his predecessors, using and revising the languages they bequeathed to him, while charging successors to take up his language made lucky by the Muse's favor.[24]

As Vendler indicates, Bloom argues that poems achieve meaning by situating themselves in an aesthetic genealogy, providing in turn a history for their successors. The system is simultaneously communal and adversarial: Poets provide each other with context while vying with one another for supremacy.

The anxiety of influence is also a taxonomy of the various rhetorical positions a poet's text can take in relation to that of his predecessor. Bloom outlines six relationships that texts have with their precedents—all of which entail a misreading of what has gone before—that allow the poet to create a place for himself. These "revisionary ratios" include: *clinamen*, or swerving, where the poet seeks to correct an error in the preceding text; *tessera*, or completion, where the successor fills out lacunae in the predecessor's work; *kenosis*, or emptying out, where the iconoclastic son demystifies the godlike father by showing him to be as fallible as the son; *daemonization*, where the successor adopts the antithesis of the precursor; *askesis*, where the poet curtails his gift to truncate the precursor's achievement in a milder form of *kenosis*; and *apophrades*, where the successor so overwhelms the predecessor that he reverses the father-son relationship.[25]

The term and concept of precedent are more comfortably situated in the discourse of law than they are in literature. "Precedent" is a term of art, defined by *Black's Law Dictionary* as:

> An adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising on a similar question of law. Courts attempt to decide cases on the basis of principles established in prior cases. Prior cases which are close in facts or legal principles to the case under consideration are called precedents. A rule of law established for the first time by a

24. HELEN VENDLER, *Defensive Harmonies: On Harold Bloom*, *in* THE MUSIC OF WHAT HAPPENS: POEMS, POETS, CRITICS 49, 56–57 (1988).

25. BLOOM, *supra* note 6, at 14–16.

> court for a particular type of case and thereafter referred to in deciding similar cases.[26]

The doctrine stating that courts must adhere to precedent is called *stare decisis et non quieta movere*,[27] or stare decisis. Unlike the anxiety of influence, the doctrine of stare decisis is prescriptive rather than merely descriptive. Whereas the anxiety of influence merely detects a relationship that already exists, stare decisis invents one by mandating that courts follow previous decisions.

The doctrine of stare decisis developed in the infancy of English common law; "[h]istorians agree that Bracton's *Note Book*, containing one of the first collections of English decisions, gave early impetus to the doctrine."[28] As early as 1454, Chief Justice Priscot stated that precedent should be followed for a particular case, arguing that "[i]f this plea were now adjudged bad . . . it would assuredly be a bad example to the young apprentices who study the *Year Books*, for they would never have confidence in their books if now we were to adjudge the contrary of what has been so often adjudged in the Books."[29] In his *Commentaries* of 1765, Blackstone formally articulated the doctrine, stating that "it is an established rule to abide by former precedents, where the same points come again in litigation."[30] The doctrine was substantially in place by the end of the eighteenth century.[31]

In its developed form in English common law, the doctrine of stare decisis required that precedent be followed by: (1) all lower courts after promulgation by a superior one; (2) the House of Lords after its own prior decisions; (3) the Court of Appeal after its own decisions; and (4) courts after decisions of courts of coordinate authority.[32] The doctrine has historically allowed, however, for certain exceptions. Specifically, precedent need not be followed if: (1) the rule laid down in the previous case was plainly unreasonable and inconvenient; (2) another court of equal authority had handed down a conflicting decision; or (3) the part of the precedent cited was not a principle necessary for the decision of the case.[33]

Following the American Revolution, a major goal of American legal educators was to relieve American judges of the necessity of following English precedents.[34] The doctrine of stare decisis was modified to require strict

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26. BLACK'S LAW DICTIONARY 1176 (6th ed. 1990).

27. "[T]o stand by the decisions and not to disturb settled points . . ." Robert A. Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 31 A B A J 501, 501 (1945).

28. *Id.*

29. Y.B. 33 Hen. 6, pl. 41 (1454), *quoted in* Sprecher, *supra* note 27, at 502

30. 1 WILLIAM BLACKSTONE, COMMENTARIES 69 (Thomas M Cooley ed., Chicago, Callaghan & Co., 3d ed. 1884) (1765), *quoted in* Sprecher, *supra* note 27, at 502.

31. Sprecher, *supra* note 27, at 502.

32. *Id.*

33. *Id.* at 503.

34. CRAIG E. KLAFTER, REASON OVER PRECEDENTS: ORIGINS OF AMERICAN LEGAL THOUGHT 67 (1993).

adherence to precedents established by American courts while permitting English precedents to be questioned.[35] This modification exemplifies the argument that there are two kinds of stare decisis: strict and relaxed.[36] Under the strict form, judges are *obliged* to follow the earlier decisions of certain other courts.[37] The relaxed doctrine, on the other hand, requires only that judges "give some weight to past decisions on the same issue."[38]

Over time, American doctrine has become increasingly relaxed even with regard to American precedents, incorporating two new exceptions to those retained from English doctrine. First, the Supreme Court stated that the decision of whether stare decisis "shall be followed or departed from is a question entirely within the discretion of the court."[39] In exercising this discretion, the Supreme Court has been particularly willing to suspend the requirements of stare decisis in cases involving the U.S. Constitution because correcting errors in constitutional interpretation through legislative action is nearly impossible.[40] Second, the American doctrine of stare decisis came to permit judges to consider the "spirit of the times."[41] Thus, it is accepted under American doctrine that the judge functions as a law maker who can consider social, economic, and political change.[42]

More exceptions were added piecemeal, such that two commentators argued in 1935 that "'the modern and present trend is characterized by the overruling and distinguishing of precedents to an extent that would strike an English judge and lawyer as revolutionary.'"[43] The extent to which the current doctrine of stare decisis compels decisions is a matter of some debate. At one extreme, lower courts have refused to follow precedent set by the Supreme Court, as in a case where District Judge Brevard Hand rejected the Supreme Court's holding that, in the context of school prayer, the First Amendment's Establishment Clause constrains only the federal government and not the states.[44] At the other extreme, courts have adhered to precedent even while criticizing it.[45] Commonly, though, the doctrine of stare decisis is

35. *Id.* at 67–68.

36. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 24 (1986) (recognizing and discussing distinction).

37. *Id.*

38. *Id.* at 25.

39. Hertz v. Woodman, 218 U.S. 205, 212 (1910), *quoted in* Sprecher, *supra* note 27, at 503.

40. Sprecher, *supra* note 27, at 503–04.

41. *Id.* at 504.

42. *Id.*

43. *Id.* at 503 (quoting Albert Kocourek & Harold Koven, *Renovation of the Common Law Through Stare Decisis*, 29 ILL. L. REV. 971, 976 (1935)).

44. Jaffree v. Board of Sch. Comm'rs, 554 F. Supp. 1104, 1128 (S.D. Ala.) ("This Court's independent review of the relevant historical documents . . . convinces it that the United States Supreme Court has erred in its reading of history."), *aff'd in part and rev'd in part sub nom.* Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *cert. denied*, 446 U.S. 926 (1984), *cited in* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 819 (1994).

45. *See* United States v. Childress, 715 F.2d 1313 (8th Cir. 1984) (criticizing but following Swain v. Alabama, 380 U.S. 202 (1965)), *cited in* Caminker, *supra* note 44, at 863.

nullified through less visible subterfuges.[46] As Justice O'Connor has stated, judges "'know how to mouth the correct legal rules with ironic solemnity while avoiding those rules' logical consequences.'"[47]

C. *Cole's Application of the Anxiety of Influence to the Law*

The seminal place occupied by precedent in literature and law invites a comparison of the function of precedent in both fields. The theory of the anxiety of influence was first applied to law by Professor Paul Gewirtz in his article *Remedies and Resistance*.[48] David Cole subsequently explored the theory at greater length in his article *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, which provides the framework critiqued by this Note. Cole first argues that the theory of the anxiety of influence applies to *all* writers, not just to writers of literature:

> Bloom's revisionary ratios need not be limited to poetic relations. The anxiety of influence afflicts all writers who seek to assert a voice or identity. Any act of interpretation, moreover, requires the articulation of a point of view belonging to the individual reader. Bloom's model implies that all points of view are in some sense revisionary and that those individuals whom we consider "great," "strong," or "influential" are those whose views stand out as *most* revisionary.[49]

Since Bloom's revisionary ratios are simply rhetorical devices to overcome precedent, they are not limited to the literary field. Cole's argument finds support in Bloom's statement that his theory of poetic influence represents "part of the larger phenomenon of intellectual revisionism,"[50] which includes "political theory, psychology, theology, *law*, [and] poetics."[51]

Cole further contends that, given the general applicability of the revisionary ratios to all rhetoric, it is not surprising that the six revisionary ratios

> suggest parallels between the poetic and legal functions. The gentle corrective movement [*clinamen*] appears to describe the type of development contemplated by precedential incorporation; the more extreme revision [*apophrades*] describes the moment of victory in the antithetical struggle, precedent overruled. Two methods of misreading

46. Caminker, *supra* note 44, at 819.

47. *Id.* (quoting TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2742 (1993) (O'Connor, J., dissenting)).

48. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 666–67 (1983).

49. Cole, *supra* note 7, at 865; *see also* Gewirtz, *supra* note 48, at 666.

50. BLOOM, *supra* note 6, at 28.

51. *Id.* at 29 (emphasis added).

> which fall between these extremes also have special relevance to the legal model.[52]

Cole recognizes that the rhetorical strategies specified by Bloom have analogues in the law; thus judges as well as poets may apply these ratios.

To say actors in both fields *may* apply the ratios, however, does not mean that they apply them in the same way. Cole points out that judges and poets generally have diametrically opposed relationships to precedent:

> The demands of social stability and legal predictability turn the anxiety of influence on its head; where the poet suffers anxiety at the prospect that he or she will not escape from the precursor's shadow, the judge's immediate anxiety arises from the threat that his or her rulings will not be accepted unless they appear consistent with precedent. The poet's job is to break from the past; the judge's duty is to conform to the past.[53]

Cole thus argues that society makes dissimilar demands on poets and judges that affect their relationships to precedent. Society asks the poet to provide originality, thereby colluding in the poet's pursuit of subversion. On the other hand, society asks the judge for stability through the doctrine of stare decisis, providing a countervailing force to the judge's desire to rule according to her predilections.

Therefore, while the poet need only contend with the anxiety of influence, the judge must contend with both the anxiety of influence and the anxiety of illegitimacy, as raised by the doctrine of stare decisis:

> Because the poet's authority rests explicitly on originality, the poet may seek to evade the inescapable influence of his or her precursors by an overt misreading. The Justice, however, must both misread, in order to make space for his or her contribution, and appear not to misread, in order to draw on the authority of precedent.[54]

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52. Cole, *supra* note 7, at 865. It should be noted that Cole incorrectly implies that Bloom lists the revisionary ratios in ascending order of subversiveness:

> At one extreme, the young poet merely swerves from the line established by his or her precursor; the new text appears as a gentle corrective movement, developing the idea of the precursor along a slightly different line. At the other extreme, the ephebe's misreading is so strong that the precursor's work is viewed thereafter only as an elaboration on it. The new poet recaptures priority over his precursor, so that the precursor's poetry now reads as if it were always already indebted to the new poet's work. The later text so strongly reveals the essence of the prior work that the precursor seems to have imitated the ephebe; the son becomes father to the father.

Id. at 864–65 (footnotes omitted). Nothing in Bloom's analysis suggests that *clinamen*, the first ratio described above, is more "gentle" than *apophrades*, the second ratio listed above, nor that the intervening ratios become more radical as they move away from the former toward the latter. Indeed, as shown below, *clinamen* can be just as radical a strategy of subversion as *apophrades*.

53. *Id.* at 867.

54. *Id.* at 868; *see also* Gewirtz, *supra* note 48, at 667.

Thus, Cole argues that what distinguishes the great judge from the great poet is that, unlike the poet, the judge cannot overtly rebel from his precursors but rather must act covertly.

Finally, Cole contends that society ironically celebrates judges who successfully subvert precedent by overcoming the obstacles society has placed in their path:

> [M]uch as we value order and predictability in the law, we also celebrate those judges whose strong, creative visions eventually capture the allegiance of the legal and social culture. A judge who commands a majority by adopting an interpretation that covers no new ground will probably not be remembered as great; to be great, a judge must both break from precedent and ultimately succeed in having his or her views accepted.[55]

Under this formulation, the judge should care only about social perception of his faithfulness to precedent rather than his actual fidelity to those prior cases: The appearance of legitimacy is fungible with legitimacy itself. The "great" judge is one who acts as law's motor while pretending to be its mirror.

Cole's argument can thus be summarized as follows: The anxiety of influence applies to all writers, and thus applies to judges as well as to poets; because of differing social expectations of their roles, judges are bound by precedent to a greater degree than are poets; great judges, however, must break from precedent in the manner of poets; nevertheless, great judges cannot overtly break from precedent because they must appear to cleave to it. Cole's synthesis is powerful because it shows that the distinction between law and literature is not as sharp as it may have originally appeared.[56] More specifically, in its application of the theory of the anxiety of influence to the law, Cole's analysis shows that Bloom's theory of poetry may accurately characterize the struggle that judges face in dealing with legal precedents.

II. A NEW APPLICATION OF THE ANXIETY OF INFLUENCE TO THE LAW

A. *Critique of Cole's Application*

Any synthesis of theories from two different fields must be careful not to fall into the trap threatening all interdisciplinary studies—that of forcing the two fields closer together or further apart than they actually are. Posner outlines this danger in the context of the law-and-literature movement:

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55. Cole, *supra* note 7, at 867; *see also* Gewirtz, *supra* note 48, at 667.
56. Cole, *supra* note 7, at 858.

> Although some fine scholarship has appeared, the extent to which law and literature have been mutually illuminated is modest. Some practitioners have exaggerated the commonalities between the two fields, paying insufficient heed to the profound differences between law and literature. In their hands literary theory, or particular works of literature, are contorted to make literature seem relevant to law, and law is contorted to make it seem continuous with literature. At the same time, important opportunities for mutual illumination have been overlooked.[57]

Thus, in the law-and-literature movement, as in all interdisciplinary movements, scholars must carefully examine the points at which the distinct disciplines converge and diverge so that the relationship between the two fields is not oversimplified.

While Cole's synthesis is an original, valuable contribution to the law-and-literature movement, it falls victim to both evils noted by Posner. First, Cole overlooks important opportunities for mutual illumination between law and literature by failing to engage in a rigorous comparison of the applications of the anxiety of influence in both fields. Second, Cole exaggerates the similarities between the two fields by transferring the positive connotation subversion possesses in literature to the law without qualification.

Cole's comparison of the anxiety of influence in literature and law lacks rigor because it uses Bloom's theory at an inappropriately high level of generality and because it fails to consider literary texts. Bloom's theory is much more than a general statement about a Freudian relationship between authors and their predecessors: He gives more specific form to the anxiety of influence by describing six revisionary ratios. Cole recognizes the importance of these ratios by considering how they might be applied to the law.[58] Cole fails, however, to apply individual rhetorical strategies to the legal texts; he reverts instead to the general theory of the anxiety of influence.[59] Furthermore, while repeatedly making the argument about the applications of the theory to both law *and* literature,[60] Cole does not apply the anxiety of influence at *any* level of generality to works of literature. Thus readers must

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57. POSNER, *supra* note 10, at 13–14.

58. While Cole's application of the ratios to the law shows the correct analytic instinct in that it attempts to draw parallels between the fields of law and literature, the application is simplistic. For example, Cole argues that *clinamen* appears to describe the type of development contemplated by precedential incorporation, while *apophrades* describes the overruling of precedent. Such one-to-one correspondences, however, do not exist between the two fields. Revisionary ratios are rhetorical strategies that can be used towards various ends in the law. Rehnquist's opinion thus used *clinamen* to advocate overruling precedent, while the joint opinion used *apophrades* to incorporate precedent. *See infra* part V.

59. The reader should be wary of this level of generality, for it is much easier to translate a theory from one field to another if it is expressed in its most general form. Divested of its particularity, Bloom's theory is more easily "contorted to make literature seem relevant to law." POSNER, *supra* note 10, at 13. Indeed, had Cole applied his characterizations of the revisionary ratios to particular texts, he might not have mischaracterized the parallels between the ratios and legal strategies.

60. *See, e.g.*, Cole, *supra* note 7, at 863.

take on faith his contention that the anxiety of influence operates similarly in both fields.

Cole has also fallen prey to the second evil outlined by Posner, that of exaggerating the commonalities between the two fields. Cole incorrectly argues that greatness in both the poetic and judicial realms is predicated on subversive creativity. Cole states that a judge who "commands a majority by adopting an interpretation that covers no new ground will probably not be remembered as great; to be great, a judge must both break from precedent and ultimately succeed in having his or her views accepted."[61] In moving from the first clause of this sentence to the second, Cole equates those judges who are "remembered as great" with those who *are* great. This equation may approximate the truth in literature, where subversion is a precondition of greatness. It is clearly erroneous in the law, however, because a judge's restraint may make him great while not necessarily causing him to be remembered as such.

B. *A Strong Misreading of Cole*

In the Bloomian tradition, this Note's discussion of precedent in literature and law will be a strong misreading of Cole. This Note will attempt to strike a more equitable balance between the two fields of law and literature to show the regions where the fields converge and diverge with respect to precedent. First, this Note applies Bloom's revisionary ratios to both literary and legal works. Rather than simply stating that the anxiety of influence operates similarly in both fields, this Note shows how two of the ratios, *apophrades* and *clinamen*, are similarly employed in two literary texts and in two legal texts.[62] This analysis raises the possibility that the vocabulary developed by Bloom in the literary context could provide a useful way of speaking more generally about legal opinions. To ignore this possibility is to fail to exploit the work Bloom has done to create a taxonomy of rhetorical types.

Based on the results of the close readings, the Note concludes that subversion does not necessarily have the same positive connotations in the law that it has in literature. In other words, while the rhetorical strategies employed in the two fields are the same, the *consequences* of the use of these strategies are different. Greatness in the law is not necessarily the same as greatness in literature, in that restraint in the face of precedent may have value in the former field that it does not have in the latter one.

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61. *Id.* at 867.

62. While other ratios may apply as well, they are beyond the scope of this Note

III. TWO REVISIONARY RATIOS: *APOPHRADES* AND *CLINAMEN*

While all six of Bloom's revisionary ratios apply to the law as well as to literature, this Note focuses on two of those ratios—*apophrades* and *clinamen*—because they accurately describe the two strategies used in the *Casey* opinions.

A. Apophrades

Bloom uses the term *apophrades* to describe the following dynamic:

> *Apophrades*, or the return of the dead; I take the word from the Athenian dismal or unlucky days upon which the dead returned to reinhabit the houses in which they had lived. The later poet, in his own final phase, already burdened by an imaginative solitude that is almost a solipsism, holds his own poem so open again to the precursor's work that at first we might believe the wheel has come full circle, and that we are back in the later poet's flooded apprenticeship, before his strength began to assert itself in the revisionary ratios. But the poem is now *held* open to the precursor, where once it *was* open, and the uncanny effect is that the new poem's achievement makes it seem to us, not as though the precursor were writing it, but as though the later poet himself had written the precursor's characteristic work.[63]

This dynamic consists of three sequential parts. The first phase of *apophrades* involves the poet in his imaginative solitude. That solitude is never complete, however, because Bloom presumes that all writers are continually haunted by the ghosts of their predecessors, that "strong poets keep returning from the dead, and only through the quasi-willing mediumship of other strong poets."[64] This consciousness of the "strong dead" is particularly acute "in poems that quest for a final clarity, that seek to be definitive statements, testaments to what is uniquely the strong poet's gift (or what he wishes us to remember as his unique gift)."[65] In the second phase of *apophrades*, the poet is "flooded" by these ghosts such that the ghosts' achievements overwhelm the poet's. If the poet remains in this phase, he succumbs to the anxiety of influence. That is, if the ghosts "return intact, then the return impoverishes the later poets, dooming them to be remembered—if at all—as having ended in poverty, in an imaginative need they could not themselves gratify."[66] In the third phase, however, the poet can reassert himself, showing that the flooding occurred

63. BLOOM, *supra* note 6, at 15–16.
64. *Id.* at 140–41.
65. *Id.* at 140.
66. *Id.* at 141.

because he deliberately held himself open to his precursors in order to triumph over them. In positive *apophrades*[67] there is a

> grand and final revisionary movement that purifies even this last influx. [Some poets can] achieve a style that captures and oddly retains priority over their precursors, so that the tyranny of time almost is overturned, and one can believe, for startled moments, that they are being *imitated by their ancestors*.[68]

Apophrades is thus a covert dynamic in which a poet appears controlled by his precursor but later reveals that he controls his precursor.

B. Clinamen

The second revisionary ratio, *clinamen*, is described as follows

> *Clinamen*, which is poetic misreading or misprision proper; I take the word from Lucretius, where it means a "swerve" of the atoms so as to make change possible in the universe. A poet swerves away from his precursor, by so reading his precursor's poem as to execute a *clinamen* in relation to it. This appears as a corrective movement in his own poem, which implies that the precursor poem went accurately up to a certain point, but then should have swerved, precisely in the direction that the new poem moves.[69]

Under *clinamen*, the poet "follows received doctrine along to a certain point, and then deviates, insisting that a wrong direction was taken [by his precursor] at just that point, and no other."[70] *Clinamen* is thus a more straightforward form of subversion than *apophrades*, insofar as *clinamen* involves no duplicity. The poet who employs *clinamen*, however, faces a daunting task in that he must show his own movement to be "corrective." He must identify the point at which things went wrong for his predecessor and legitimate his own deviation from precedent.

One way in which *clinamen* can be accomplished is by making the original text, which may have seemed both powerful and normative, appear to be arbitrary:

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67. Bloom distinguishes between positive and negative *apophrades*. In the positive form, the poet enters the third phase and triumphs over his predecessor. In the negative form, the poet holds himself open to the predecessor deliberately, but, rather than overcoming his predecessor, he is overcome. Bloom cites works by Yeats, Stevens, Browning, and Dickinson as examples of positive *apophrades*, and works by Roethke as an example of negative *apophrades*. *Id.* at 141, 142. Absent an indication to the contrary, the term *apophrades* in this Note refers to the positive form.

68. *Id.* at 141.

69. *Id.* at 14.

70. *Id.* at 29.

> The poet so stations his precursor, so swerves his context, that the visionary objects, with their higher intensity, fade into the continuum. The poet has, in regard to the precursor's heterocosm, a shuddering sense of the arbitrary—of the equality, or equal haphazardness, of all objects. This sense is *not reductive*, for it is the continuum, the stationing context, that is reseen, and shaped into the visionary; it is brought up to the intensity of the crucial objects, which then "fade" into it . . . .[71]

In this form of *clinamen*, the belated text robs its precedent of authority by revealing its choices as arbitrary. However, this revelation of arbitrariness cannot lead to a general sense of nihilism, for then the usurping text would be deemed equally arbitrary. Therefore, the poet who employs *clinamen* does not debase the visionary quality of its precursor, but rather endows his text with a visionary quality equal to or greater than that of the precedent. By situating itself in the same context as the precursor, the belated text shows that *temporal* priority (the fact that the precursor came first) does not equal *visionary* priority (the precursor's superior meaning). The belated text thereby engages the precursor in a debate over the merits of the precursor's position.

IV. THE RATIOS APPLIED IN LITERATURE

A. *Revisionist Literature*

Bloom's *apophrades* and *clinamen* can now be exemplified by two literary texts: Tom Stoppard's *Rosencrantz and Guildenstern Are Dead* and Aimé Césaire's *Une Tempête*. These literary texts come from a pool of "revisionist" texts; that is, texts that explicitly allude and respond to canonical precedents. In fiction, such texts include J.M. Coetzee's *Foe*,[72] a rewriting of Daniel Defoe's *Robinson Crusoe*,[73] and Jean Rhys' *Wide Sargasso Sea*,[74] a rewriting of Charlotte Brontë's *Jane Eyre*.[75] In poetry, the revisionist subgenre includes Anthony Hecht's *The Dover Bitch*,[76] which provides the apostrophized beloved's response to Matthew Arnold's *Dover Beach*,[77] and Sir Walter Raleigh's *The Nymph's Reply to the Shepherd*,[78] which does the

71. *Id.* at 42.
72. J.M. COETZEE, FOE (1986).
73. DANIEL DEFOE, ROBINSON CRUSOE (Michael Shinagel ed., Norton 1975) (1719).
74. JEAN RHYS, WIDE SARGASSO SEA (1966).
75. CHARLOTTE BRONTË, JANE EYRE (New York Univ. Press 1977) (1847).
76. ANTHONY HECHT, *The Dover Bitch*, *in* COLLECTED EARLIER POEMS 17 (1990).
77. Matthew Arnold, *Dover Beach*, *in* THE NORTON ANTHOLOGY OF POETRY 794 (Alexander W. Allison et al. eds., 3d ed. 1983) [hereinafter NORTON ANTHOLOGY].
78. Sir Walter Raleigh, *The Nymph's Reply to the Shepherd*, *in* NORTON ANTHOLOGY, *supra* note 77, at 105.

same for Christopher Marlowe's *The Passionate Shepherd to His Love*.[79] Modernist drama has produced compelling revisions of Shakespeare, including those discussed in this Note: Stoppard's *Rosencrantz* (revising *Hamlet*) and Césaire's *Tempête* (revising *The Tempest*).[80]

B. Rosencrantz and Guildenstern Are Dead

Stoppard's *Rosencrantz* exemplifies the revisionary ratio of *apophrades*. The text progresses through all three of the phases discussed above:[81] It begins with an initial uncertainty about its relationship to *Hamlet*; it then is flooded by *Hamlet*, appearing to be nothing more than a parasite on the original play; in the end, however, it conducts a subversion of Shakespeare's play.

1. *Uncertainty and Precedent*

Rosencrantz begins with uncertainty, with two more men waiting for Godot. Rosencrantz and Guildenstern are first seen flipping coins, which keep coming up heads. Defying all laws of probability, the phenomenon of the coins is an emblem of the uncanny. Guildenstern plaintively extrapolates from this phenomenon to their lives:

> GUIL: Practically starting from scratch. . . . An awakening, a man standing on his saddle to bang on the shutters, our names shouted in a certain dawn, a message, a summons. . . . A new record for heads and tails. We have not been . . . picked out . . . simply to be abandoned . . . set loose to find our own way. . . . We are entitled to some direction. . . . I would have thought.[82]

The characters must wrestle with the extent to which precedent provides the direction of which Guildenstern speaks. Despite what Guildenstern says, Rosencrantz and Guildenstern are not "starting from scratch."[83] To the contrary, Shakespeare has already given an account of their lives in *Hamlet*.

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79. Christopher Marlowe, *The Passionate Shepherd to His Love*, *in* NORTON ANTHOLOGY, *supra* note 77, at 185.

80. The revisionist subgenre is useful for the purpose of examining literary modes of subversion because revisionist texts clearly identify and grapple with their predecessors. Bloom argues that all literary texts subvert their predecessors, but revisionist texts by their very nature are more self-consciously subversive than others. While the debts of some authors to their precursors may be questioned, Stoppard's and Césaire's debts to Shakespeare may not. Thus, revisionist texts cannot simply depart from their predecessors; they must confront the anxiety of influence directly. The necessity of this confrontation makes texts in this subgenre most like legal texts, which must also pay heed to precedent because of the doctrine of stare decisis.

81. *See supra* part III.A.

82. STOPPARD, *supra* note 8, at 20.

83. *Id.*

The title of Stoppard's play indicates this connection, and the first scene reveals that the title is more than a simple allusion. *Rosencrantz* thus quickly establishes its faithfulness to certain elements of the original narrative: Stoppard has not only appropriated the names of *Hamlet*'s characters, but its plot as well. For example, in *Hamlet*, Claudius summons Rosencrantz and Guildenstern to divine the nature of Hamlet's malady. As Guildenstern's lines above suggest, Stoppard's characters have also been summoned. The realization that *Rosencrantz* is at least in part faithful to its precedent is an unsettling one, as Rosencrantz and Guildenstern die an unmourned death in *Hamlet*. Complete faithfulness to the original text sounds a death knell for Stoppard's Rosencrantz and Guildenstern. If precedent provides the "direction" the two characters are "entitled to,"[84] that direction is a grim one.

Rosencrantz and Guildenstern are understandably self-conscious about whether precedent binds them. Stoppard cannot logically allow them to address *Hamlet* itself, as *Rosencrantz* occurs with Shakespeare's play—the two worlds exist in the same temporal instant. Thus, rather than having his main characters overtly discuss their precedential burden, Stoppard approaches the issue of precedent obliquely by discussing in more general terms the anxiety of influence in drama. To accomplish this end, Stoppard appropriates the traveling dramatic troupe from *Hamlet*.

> PLAYER: Why, we grow rusty and you catch us at the very point of decadence—by this time tomorrow we might have forgotten everything we ever knew. That's a thought, isn't it? (*He laughs generously.*) We'd be back where we started—improvising.
> ROS: Tumblers, are you?
> PLAYER: We can give you a tumble if that's your taste, and times being what they are. . . . Otherwise, for a jingle of coin we can do you a selection of gory romances, full of fine cadence and corpses, pirated from the Italian . . . .[85]

The player gives Rosencrantz two alternatives—improvisation or plays "pirated from the Italian."[86] Improvisation is equated with decadence, amnesia, and regression. Precedent (the pirating of old stories) is equated with gore (corpses). Clearly, Rosencrantz and Guildenstern must choose not only for the player, but also for themselves. They can either improvise into anarchy or follow precedent into the gore of the deaths scripted for them in *Hamlet*.

Whether Rosencrantz and Guildenstern actually have a choice between these two alternatives is an issue that haunts the play. After the players lose a bet, they offer one member of their troupe, Alfred, as forfeit. Guildenstern's conversation with Alfred broaches the subject of precedent explicitly:

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84. *Id.*
85. *Id.* at 22.
86. *Id.*

GUIL: Do you like being . . . an actor?
ALFRED: No, sir.
GUIL *looks around, at the audience.*
GUIL: You and I, Alfred—we could create a dramatic precedent here.
And ALFRED, *who has been near tears, starts to sniffle.*
Come, come, Alfred, this is no way to fill the theatres of Europe.[87]

The entire play turns on whether Guildenstern will be able to "create dramatic precedent,"[88] rather than simply being created by Shakespeare's dramatic precedent. Guildenstern's hope is not unfounded: After all, Shakespeare himself had few original plots, yet he succeeded in creating precedent rather than being created by it.[89] Still, it is hard not to accept Alfred's sniffling as rational in the face of the odds that confront him. Like Rosencrantz and Guildenstern, he presents himself as an amateur asked to prove himself in "the theatres of Europe."[90]

2. *Precedent Appears To Bind*

Rosencrantz resolves the question of whether precedent binds Rosencrantz and Guildenstern when *Hamlet* as a play erupts into Stoppard's plot. Rosencrantz and Guildenstern attempt to escape the advent of Claudius and Gertrude but cannot:

ROS *and* GUIL *have frozen.* GUIL *unfreezes first. He jumps at* ROS.
GUIL: Come on!

But a flourish—enter CLAUDIUS *and* GERTRUDE, *attended.*
CLAUDIUS: Welcome, dear Rosencrantz . . . (*he raises a hand at* GUIL *while* ROS *bows*—GUIL *bows late and hurriedly*) . . . and Guildenstern.
He raises a hand at ROS *while* GUIL *bows to him*—ROS *is still straightening up from his previous bow and halfway up he bows down again. With his head down, he twists to look at* GUIL, *who is on the way up.*
Moreover that we did much long to see you,
The need we have to use you did provoke
Our hasty sending.
ROS *and* GUIL *still adjusting their clothing for* CLAUDIUS's *presence.*
. . . .
ROS: Both your majesties
Might, by the sovereign power you have of us,

87. *Id.* at 32.
88. *Id.*
89. *See, e.g.*, NARRATIVE AND DRAMATIC SOURCES OF SHAKESPEARE (Geoffrey Bullough ed., 1961).
90. STOPPARD, *supra* note 8, at 32.

Put your dread pleasures more into command
Than to entreaty.
GUIL: But we both obey,
And here give up ourselves in the full bent
To lay our service freely at your feet,
To be commanded.[91]

The lines spoken by Claudius, as well as the responses of Rosencrantz and Guildenstern, are lines taken directly from *Hamlet*.[92] The canonical play speaks through its upstart revision with ventriloquistic violence: Rosencrantz and Guildenstern, who have previously spoken in modern idiom, are forced temporarily into Renaissance dialect. They realize suddenly that they are both scripted and conscripted by *Hamlet*. The fully exploited irony of their first lines in *Hamlet* heightens that effect ("ROS: Both your majesties / might, by the sovereign power you have of us, / Put your dread pleasures more into command / Than to entreaty."[93]). Rosencrantz's obsequious response to the king and queen recognizes that the royals' entreaty could just as well be, and therefore is the functional equivalent of, a command. He recognizes that what once presented itself as a choice may not be a choice at all.

The contemporaneous existence of the worlds of *Rosencrantz* and *Hamlet* is finally made explicit in this scene: When characters exit *Rosencrantz* they enter *Hamlet*, and vice versa. Yet these are not two equal worlds. *Hamlet* is the dominant mode of existence; it presents itself as a procrustean reality to which Rosencrantz and Guildenstern must conform whenever the two plays intersect. Even if their lives in *Rosencrantz* seem to be at center stage, Rosencrantz and Guildenstern are still only experienced as bit players in other people's stories, rather than as heroes of their own. They are filled with the sense that, as Guildenstern says, "All *that*—preceded us."[94] Thus, in this scene, Stoppard appears to be taken back to a state of "flooded apprenticeship,"[95] when he was completely in the thrall of his powerful predecessor.

3. *Subversion*

The fact that Rosencrantz and Guildenstern must cede their own reality to that of *Hamlet* whenever major characters from Shakespeare's play intrude into the world of *Rosencrantz* makes the characters' lives seem as mindlessly repetitive as the results of the coin tosses in the first scene: No matter how

91. *Id.* at 35–36.
92. *Compare id. with* WILLIAM SHAKESPEARE, HAMLET act 2, sc. 2, ll. 1–32 (Harold Jenkins ed., 1982).
93. STOPPARD, *supra* note 8, at 36.
94. *Id.* at 39.
95. BLOOM, *supra* note 6, at 16.

many times the perspective is flipped, it keeps coming up *Hamlet*. Upon closer examination, however, *Rosencrantz* appears to be *deliberately* held open to *Hamlet* so that Stoppard can subvert his precedent. Rosencrantz and Guildenstern subvert precedent both by adding to and eliding elements of the precedential play—they commit sins of commission and omission.

Rosencrantz subverts through commission by extrapolating beyond its precedent, most notably by humanizing Rosencrantz and Guildenstern and altering the tone of its predecessor. These subversions are exemplified below, where Rosencrantz and Guildenstern despair of Claudius' ability to distinguish between them:

> ROS: He [Claudius] wouldn't discriminate between us.
> GUIL: Even if he could.
> ROS: Which he never could.
> GUIL: He couldn't even be sure of mixing us up.
> ROS: Without mixing us up.
> GUIL (*turning on him furiously*): Why don't you say something original! No wonder the whole thing is so stagnant! You don't take me up on anything—you just repeat it in a different order.
> ROS: I can't think of anything original. I'm only good in support.
> GUIL: I'm sick of making the running.
> ROS (*humbly*): It must be your dominant personality.[96]

Here is the ultimate failure in the face of precedent: the weak son (Rosencrantz) collapsing under the weight of his predecessor (Guildenstern). Yet even as Rosencrantz admits his inability to be original because of Guildenstern's dominant personality, the reader realizes she has come to distinguish between the two characters in *Rosencrantz* even if Claudius cannot. The undifferentiated Tweedledum and Tweedledee of *Hamlet* have become distinct human beings in *Rosencrantz*. By giving these characters human dimension, Stoppard rebuts the presumption in *Hamlet* that they were expendable. Furthermore, the ironic tone that pervades these lines and indeed, the entire play, subverts the tragic one of *Hamlet*. While *Rosencrantz* may be dark comedy, it is comedy nonetheless, and alters the tone of Shakespeare's most famous tragedy.

Stoppard subverts his precedent through omission as well. While pretending to be faithful to precedent on the one hand, he carefully chooses what parts of that precedent he will follow. Stoppard omits canonical speeches made by Hamlet, Claudius, and Ophelia, as well as lines spoken by Rosencrantz and Guildenstern.[97] This selective incorporation of precedent is most evident when Rosencrantz and Guildenstern exit for the last time. Horatio

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96. STOPPARD, *supra* note 8, at 104.
97. *See, e.g.*, SHAKESPEARE, *supra* note 92, act 2, sc 2, ll. 224–381

begins the final soliloquy scripted for him in *Hamlet*, but before he can finish, the stage instruction interrupts:

> ROS: All right, then. I don't care. I've had enough. To tell you the truth, I'm relieved.
> *And he disappears from view.* GUIL *does not notice.*
> GUIL: Our names shouted in a certain dawn . . . a message . . . a summons. . . . There must have been a moment, at the beginning, where we could have said—no. But somehow we missed it. (*He looks round and sees he is alone.*)
> Rosen—?
> Guil—?
> *He gathers himself.*
> Well, we'll know better next time. Now you see me, now you—(*and disappears*).
> . . . .
> HORATIO: . . . and, in this upshot, purposes mistook fallen on the inventors' heads: all this can I truly deliver.
> *But during the above speech, the play fades out, overtaken by dark and music.*[98]

Rosencrantz and Guildenstern both exit with a sense of existential despair, but it is a despair tempered by understanding, even relief. There is self-knowledge in Guildenstern's statement that "[t]here must have been a moment, at the beginning, where we could have said—no. But somehow we missed it."[99] That is, even if there had been a point at which Rosencrantz and Guildenstern could have chosen not to be flooded by their precursor, that moment has passed. This does not mean, however, that they are unable to subvert *Hamlet*; *apophrades* provides them with the means of doing so. While the pair appears to succumb to precedent, giving *Hamlet* the last word, Shakespeare's play itself is overtaken by dark and music. The achievement of the original play is truncated by its revision, supporting the ultimate priority of *Rosencrantz*'s reality over *Hamlet*'s.

4. *Conclusion*

The ultimate mark of a successful *apophrades* is that the work of the predecessor (the father) appears to have been written by the author of the revision (the belated son). The reader may well question whether Stoppard succeeded in using this device. Although the reader may be unable to read about Rosencrantz and Guildenstern in *Hamlet* without thinking about the lives scripted for them by Stoppard, she may also question whether Shakespeare can

98. STOPPARD, *supra* note 8, at 125–26.
99. *Id.* at 125.

ever be perceived as being written by anyone other than Shakespeare. Stoppard, like Alfred, Rosencrantz, or Guildenstern, has taken on a task that may be insuperably difficult. Depending on the effectiveness of the sins of commission and omission, the play may be seen as an emblem of "negative" *apophrades*.[100]

Given the stature of Stoppard's predecessor, the reader may well ask why Stoppard chose to use *apophrades* against *Hamlet*, as opposed to any other device, or as opposed to any other play. *Rosencrantz* supplies one answer to this question. While terrified of precedent, Rosencrantz and Guildenstern also recognize its benefits. Along with its violence, precedent is a source of comfort and order in an otherwise nonsensical world. Thus, when Guildenstern says, "You've only got their word for it,"[101] Rosencrantz responds, "But that's what we depend on."[102] Precedent is not only a burden, but it also provides an established framework in which the characters can safely play out their lives. The comfort of prior words is made explicit when Rosencrantz and Guildenstern encounter a less belated son in the traveling dramatic troupe:

> GUIL: You're evidently a man who knows his way around.
> PLAYER: I've been here before.
> GUIL: We're still finding our feet.
> PLAYER: I should concentrate on not losing your heads.
> GUIL: Do you speak from knowledge?
> PLAYER: Precedent.[103]

The double meanings—dramatic and metadramatic—are rife. Guildenstern is trying to find his feet metrically and emotionally; the player warns them not to lose their heads both metaphorically and physically; most importantly, the player has "been here before" in both *Hamlet* and *Rosencrantz*. Precedent, of course, is a kind of knowledge: Here the player knows from the precedent of *Hamlet* that Rosencrantz and Guildenstern should fear for their heads. While the content of this particular precedent is grim, precedent itself is generally comforting and stabilizing.

Similarly, Stoppard's precedent may also be stabilizing. While Stoppard may be undertaking a losing battle by placing himself in the context of *Hamlet*, the battle is at least against a known and worthy adversary. Stoppard profits from the unparalleled stature of *Hamlet*: Indeed, the reader might well ask if he would be reading *Rosencrantz* if it were not so overtly allied to Shakespeare's play.

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100. *See supra* note 67.
101. STOPPARD, *supra* note 8, at 110.
102. *Id.*
103. *Id.* at 66.

C. Une Tempête

Critics have long recognized that Shakespeare's *The Tempest* reflects Elizabethan England's investment in colonial expansion.[104] In Shakespeare's play, Prospero, the Italian duke, arrives on an island and enslaves its two inhabitants, Ariel and Caliban. While Shakespeare at times presents Caliban in a sympathetic light, many elements of the colonialist paradigm are unchallenged. Césaire's post-colonialist response to *The Tempest* exemplifies the ratio of *clinamen*, in which a text "swerves" away from its predecessor, either by showing that the original was arbitrary, or by correcting an error in the original. *Tempête* employs both strategies, first revealing the colonialist paradigm as arbitrary, and then correcting Shakespeare's representation of it.

1. *Arbitrariness*

Like *Rosencrantz*, *Tempête* begins with uncertainty. When the play begins, it is as if the curtain has risen a moment too early. The audience sees players in an improvisational troupe, not characters. These players are in a state of limbo much like that experienced by Rosencrantz and Guildenstern at the inception of Stoppard's play. In Césaire's play, however, that uncertainty is immediately resolved through the good offices of a Master of Ceremonies.

> *(Ambiance of a psychodrama. The actors enter singly, at random, and each chooses for himself a mask at his leisure.)*
> MASTER OF CEREMONIES Come gentlemen, help yourselves. To each his character, to each character his disguise. Prospero? Why not? He has reserves of character he's not even aware of himself. You want Caliban? Well, that's revealing. Ariel? Fine with me. And what about Stephano, Trinculo? Nobody? Ah, just in time! It takes all kinds to make a world.
>
> . . . Christ, I was forgetting the Gods! Eshu will fit *you* like a glove. As for the other parts, just take what you want and work it out among yourselves. But make up your minds . . . . One part I have to pick out myself: you! It's for the part of the Tempest, and I need a storm to end all storms . . . . I need a really big guy to do the wind. Will you do that? Fine! And then someone strong for Captain of the ship. Good, now let's go. Ready? Begin. Blow, winds! Rain and lightning *ad lib*![105]

104. Paul Brown, *'This thing of darkness I acknowledge mine':* The Tempest *and the Discourse of Colonialism*, *in* POLITICAL SHAKESPEARE 48 (Jonathan Dollimore & Alan Sinfield eds., 1985).

105. CÉSAIRE, *supra* note 9, at 1.

Each player chooses a role from *The Tempest*[106] and plays that character for the remainder of *Tempête*. By showing that the assignation of roles is random, however, *Tempête* hints that many other permutations are possible. Stoppard thus presents his audience with *Une Tempête* rather than *La Tempête—A Tempest* rather than *The Tempest*—with the accompanying implication that *The Tempest* itself may only be a random permutation.

In a later scene, *Tempête* acknowledges and rejects *The Tempest* even more explicitly:

> GONZALO . . . It's obvious: a wondrous land can only contain wonderful creatures.
> ANTONIO Yes! Men whose bodies are wiry and strong[.] And women whose eyes are open and frank . . . . Oh, brave new world, that has such people in it!
> GONZALO Something like that! I see you know your literature.[107]

This interchange shows that Gonzalo in *Tempête* has read *The Tempest*. The line, already appropriated by Aldous Huxley,[108] is Miranda's "O brave new world, / that has such people in 't!"[109] Gonzalo's line positions *Tempête* against its predecessor: Unlike *Rosencrantz*, which occurs simultaneously with *Hamlet*, *Tempête* occurs after *The Tempest*. Therefore, while *Rosencrantz* must be faithful to *Hamlet*, *Tempête* is free to alter its precursor.

2. *Swerving*

Tempête attempts to legitimate its rejection of precedent by elucidating the flaws in the colonialist paradigm presented by its predecessor. Specifically, *Tempête* calls into question *The Tempest*'s portrayal of Caliban's language and religion. By showing how Shakespeare's play distorted history to legitimate colonial rule, Césaire subverts the legitimacy of that rule. Because Césaire employed an overt strategy of subversion, his task appears simpler than Stoppard's covert subversion. Nevertheless, while the usurping text departs from precedent, it cannot disregard it: Shorn of precedent's imprimatur, the usurping text must justify itself.

Prospero's success in his colonialist endeavor is continually shown in *The Tempest* to be predicated on language. His magic, which raises the tempest, frees Ariel, puts Miranda to sleep, and incapacitates Ferdinand, depends on a

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106. The only role chosen by a player that is not a role from *The Tempest* is that of the character Eshu. The inclusion of this new name in the prologue is an early indication that *Tempête* may differ significantly from its precedent.

107. CÉSAIRE, *supra* note 9, at 29.

108. ALDOUS HUXLEY, BRAVE NEW WORLD (Harper & Row 1969) (1932).

109. WILLIAM SHAKESPEARE, THE TEMPEST act 5, sc. 1, ll. 183–84 (Frank Kermode ed., 6th ed. 1958). *Compare id. with* CÉSAIRE, *supra* note 9, at 29.

book of magic, without which, as Caliban tells Stephano and Trinculo, "[h]e's but a sot, as I am, nor hath not / One spirit to command."[110] Although Caliban might be dismissed as an unreliable narrator, this particular testimony is borne out by Prospero himself, who equates the renunciation of magic with the act of drowning his book.[111] Prospero's magic also seems dependent on speech; he must explain the effect his power will have on his listeners before this impact is realized. Ariel does not remember his liberation from a pine until Prospero tenders a vituperative reminder; Miranda must be told that she is "inclin'd to sleep" and that she "canst not choose"[112] before she sleeps; and Ferdinand does not acknowledge Prospero's power over him until the enchanter tells him that his "nerves are in their infancy again."[113]

Tempête dissolves Prospero's linguistic power before he himself renounces it (as he does in Shakespeare's play). In *The Tempest*, Caliban utters the famous lines: "You taught me language; and my profit on't / Is, I know how to curse."[114] Not only has Shakespeare's Caliban profitlessly learned Prospero's language, but he also appears to have forgotten his own. In Césaire's play, however, Caliban retains his indigenous language:

> CALIBAN Uhuru!
> PROSPERO What did you say?
> CALIBAN I said, Uhurù!
> PROSPERO Back to your native language again. I've already told you, I don't like it.[115]

"Uhuru," Swahili for "freedom," was the watchword of the Mau Mau rebellions in Kenya in the 1940's.[116] Caliban's cry thus represents a rebellion against the Prospero of *Tempête*; it also characterizes the rebellion that *Tempête* presents to *The Tempest*. Caliban's "native language" is never heard in *The Tempest*, in which Miranda states that he "gabble[d] like / A thing most brutish."[117] This interchange from *Tempête*, however, deprives her statement of its valuative content. By showing Caliban's native language to be an intelligible one (Swahili), Césaire explores the possibility that Shakespeare's Miranda may have understood Caliban's language as little as he understood hers.[118]

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110. SHAKESPEARE, *supra* note 109, act 3, sc. 2, ll. 91–92.
111. *Id.* act 5, sc. 1, l. 57.
112. *Id.* act 1, sc. 2, ll. 185–86.
113. *Id.* act 1, sc. 2, l. 487.
114. *Id.* act 1, sc. 2, ll. 365–66.
115. CÉSAIRE, *supra* note 9, at 13.
116. JANIS L. PALLISTER, AIMÉ CÉSAIRE 89 (1991).
117. SHAKESPEARE, *supra* note 109, act 1, sc. 2, ll. 358–59.
118. Unlike Stoppard's Rosencrantz and Guildenstern, Césaire's Caliban is never forced into any dialect—Renaissance or otherwise—that is not his own.

The second kind of overt rebellion against the colonialist paradigm encoded in *The Tempest* concerns Caliban's religion. In *The Tempest*, Prospero has already exorcised the island of the power of Caliban's mother, Sycorax. *Tempête* questions whether Prospero truly effected that banishment.

> CALIBAN Dead or alive, she was my mother, and I won't deny her! Anyhow, you only think she's dead because you think the earth itself is dead . . . . Dead, you can walk on it, pollute it, you can tread upon it with the steps of a conqueror. I respect the earth, because I know that it is alive, and I know that Sycorax is alive. . . . Often, in my dreams, she speaks to me and warns me. . . .[119]

Again, *Tempête* invokes a source of power that was repressed in the original play. Vanquishing Sycorax was the predicate for Prospero's dominion over the island in *The Tempest*; resurrecting her calls that dominion into question.

As if the invocation of Sycorax were not enough, Césaire also introduces the new character of Eshu, who appears during the marriage masque. Shakespeare scholars have not found a compelling explanation for the disruption of the masque in Act IV of *The Tempest*, which introduces a jarring note in one of Shakespeare's most structured late plays.[120] In *The Tempest*, Prospero ostensibly disrupts the masque because he remembers Caliban's plot to murder him, although Caliban's threat is so negligible as to be comic. Yet if there is a deeper motivation for his agitation, Prospero does not share it with the other characters or with the audience.

Césaire corrects his precursor by accounting for the unexplained disruption of the masque: He adds the character of Eshu, a revised and more potent form of Caliban's god, Setebos, in *The Tempest*. Eshu uncovers the sexual anxiety of the marriage masque by speaking lewdly to the participants. The goddesses at the feast find him "obscene, disgusting, and intolerable,"[121] and even the attempt to name him disgusts them. When Iris claims that he is like "Liber or Priapus!"[122] Juno declares, "Don't mention that name in my presence!"[123]

3. *Conclusion*

Like *Rosencrantz*, *Tempête* appears to recognize that "[t]here must have been a moment, at the beginning, where we could have said—no."[124] Unlike *Rosencrantz*, however, *Tempête* does not miss this moment. Its choice of

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119. CÉSAIRE, *supra* note 9, at 15.

120. Francis Barker & Peter Hulme, *Nymphs and reapers heavily vanish: The Discursive Con-texts of* The Tempest, *in* ALTERNATIVE SHAKESPEARES 191, 202 (John Drakakis ed., 1985).

121. CÉSAIRE, *supra* note 9, at 54.

122. *Id.*

123. *Id.*

124. STOPPARD, *supra* note 8, at 125.

clinamen rather than *apophrades* as a revisionary ratio means that it refuses to hold itself open to its precedent. The prologue indicates that the original assignation of names in Shakespeare's play may have been arbitrary; the remainder of the play strengthens this implication by attacking points of logical weakness in *The Tempest*, some of which were previously recognized by Shakespeare scholars. By constructing an account that resolves some of these logical difficulties (e.g., providing an alternative account of Caliban's language or of the disrupted masque, or of the abandoned Prospero), *Tempête* evades nihilism.

A text employing *clinamen* appears more free from precedent in that there is no duplicity involved in its rejection of its precursor. In conducting *clinamen*, however, Césaire must isolate the elements of the precedent that made it powerful and show that they were arbitrarily chosen and wrong. In conducting his overt rebellion, Césaire, in his own way, is as attentive to precedent as Stoppard.

V. THE PARADIGMS APPLIED TO LAW

A. Casey *Joint Opinion*

Like *Rosencrantz*, the joint opinion in *Casey* uses *apophrades* to subvert its precursor. The joint opinion also moves through three phases: In the first phase, the joint opinion feels the weight of precedent in the face of its self-conscious uncertainty about the legality of abortion; in the second phase, it appears to be constrained by that precedent; in the third phase, however, the joint opinion covertly subverts its precedent. Throughout the opinion, this movement is complicated by the different position precedent occupies as an institutional norm in the law, as expressed in the doctrine of stare decisis.

1. *Uncertainty and Precedent*

The question presented in *Casey* is whether five provisions of the Pennsylvania Abortion Control Act of 1982 are constitutional.[125] Yet the real question is whether abortion is a fundamental right, a question that has engendered no small amount of uncertainty. As the joint opinion acknowledges:

> Liberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages, that definition of liberty is still questioned. Joining the respondents as *amicus curiae*, the

125. *See supra* note 1.

> United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe*.[126]

It is this doubt that the authors of the joint opinion feel compelled to clarify in *Casey*. Justice Blackmun's opinion calls the joint opinion an "act of personal courage and constitutional principle," contrasting it to previous decisions in which Justices O'Connor and Kennedy postponed reconsideration of *Roe*.[127]

As in *Rosencrantz*, there is little doubt that precedent exists for *Casey*: A mention of *Roe* and the five attempts to overrule it directly follows the question presented. The issue that the joint opinion must decide is whether stare decisis mandates that this "strong ghost"[128] be applied.

> The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law . . . requires such continuity over time that a respect for precedent is, by definition, indispensable. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.[129]

The doctrine of stare decisis is invoked in its relaxed form,[130] one that balances precedent against reason. The relaxed form of the doctrine allows for the possibility that precedent may not bind even if the doctrine of stare decisis is applied. Thus, the question of whether one can choose not to adhere to precedent haunts the authors of the joint opinion in the same way that question haunts Rosencrantz and Guildenstern.

2. *Precedent Appears To Bind*

Theoretically, the crucial difference between the anxiety of influence as it operates in literature and law is the added weight given to precedent in law through the prescriptive mandate of the doctrine of stare decisis. While authors like Stoppard and Césaire can choose to address a particular precursor, judges are ostensibly forced to grapple with particular precedents. As a practical matter, however, the pressure exerted by stare decisis is unclear. In grappling

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126. 112 S. Ct. 2791, 2803 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.) (citation omitted).

127. *Id.* at 2844 (Blackmun, J., concurring in the judgment in part, concurring in part, and dissenting in part).

128. *See supra* text accompanying note 64.

129. 112 S. Ct. at 2808 (opinion of O'Connor, Kennedy, and Souter, JJ.) (citations omitted).

130. *See supra* text accompanying notes 36–38.

with stare decisis, the joint opinion provides a self-conscious account of its own struggle with the doctrine.

In determining whether to adhere to precedent, the joint opinion considers a "series of pragmatic and prudential considerations."[131] Adherence to precedent is required if: (1) the holding of the precedent has not proved unworkable; (2) deviation from the precedent would violate a reliance interest; (3) there has been no doctrinal change since the precedent; and (4) there has been no factual change such that its central holding is no longer justified.[132] The joint opinion discusses each of these factors in the context of *Roe* and concludes that, because each of the conditions exists, stare decisis should be applied. Based on this analysis, the joint opinion concludes that "[w]ithin the bounds of normal *stare decisis* analysis . . . the stronger argument is for affirming *Roe*'s central holding, *with whatever degree of personal reluctance any of us may have*, not for overruling it."[133] This remark is the equivalent of Claudius and Gertrude walking into Stoppard's play for the first time: It shows the dread weight of precedent in the belated text by implying that at least one author of the joint opinion is being bound by stare decisis although his or her personal predilections may have led to a contrary result. By relying on the four "pragmatic" factors, the joint opinion implies that its role is to detect, rather than to invent, the degree to which precedent must prevail.

Considering the composition of the Court, this is a surprising result. A majority of the Court had been nominated by two Republican presidents who were avowedly anti-abortion, giving rise to the assumption that *Casey* would overrule *Roe*.[134] This led one commentator to register his surprise at the joint opinion's decision as follows:

> The doctrine of stare decisis has been of diminishing importance in constitutional adjudication for a number of years. Rhetorically, appeals to precedent remain important features of Supreme Court opinions. However, to a number of observers, it has seemed that no precedent—particularly a precedent dealing with a politically-charged issue—is safe if five Justices disagree with it on the merits.
>
> Given this background, the structure of the analysis in *Planned Parenthood of Southeastern Pennsylvania v. Casey* is surprising. Concluding that the Constitution prohibits states from imposing "undue burdens" on the right of a woman to obtain an abortion, the majority opinion in *Casey* relied heavily on the doctrine of stare decisis in refusing to overrule *Roe v. Wade*. Moreover, there is every indication that for at least some of the Justices, the appeal to

131. 112 S. Ct. at 2808 (opinion of O'Connor, Kennedy, and Souter, JJ.).
132. *Id.* at 2808–09.
133. *Id.* at 2812 (emphasis added).
134. *See* Sullivan, *supra* note 2, at 24–25.

> precedent was more than mere rhetoric, but actually had a substantive impact on their votes.[135]

Under this interpretation, precedent was compelling, not just convenient. It forced the Justices to exercise judicial restraint in a form of negative *apophrades*: The writers of the joint opinion appear to be flooded by *Roe*.

Is this the most plausible reading of the joint opinion? Despite the opinion's reliance on stare decisis, its writers appear reluctant to allow the doctrine altogether to dispose of the case before them. If stare decisis were dispositive, the discussion would have ended with the determination that the four "pragmatic" factors indicated that precedent should be followed; the content of the precedent and the ramifications of its application should have been immaterial. Yet, as the joint opinion's discussion of individual liberty shows, the content of the precedent clearly *does* matter. The joint opinion is careful to state that it rests its affirmation of *Roe* on a consideration of "the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, *and* the rule of *stare decisis*,"[136] rather than on a consideration of stare decisis alone.

The question then becomes how much the decision to affirm *Roe* rests on the doctrine of stare decisis. The joint opinion leaves the answer deliberately ambiguous, at no point ranking the strength of the three arguments (constitutional questions resolved by *Roe*, institutional integrity, and stare decisis). The joint opinion's unwillingness to identify the prominence that stare decisis analysis played in its decisionmaking process forces readers to question if the doctrine was indeed a constraint at all.

3. *Subversion*

The joint opinion plausibly can be read as a case where stare decisis was convenient rather than compelling—an example of positive rather than negative *apophrades*. Just as *Rosencrantz* committed sins of both omission and commission against precedent while pretending to be faithful to it, the joint opinion both adds to and subtracts from the holding of *Roe* while professing to be bound by it.

The joint opinion first commits sins of omission, rejecting the trimester framework and the fundamental rights status of the abortion right. The joint

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135. Earl M. Maltz, *Abortion, Precedent and the Constitution. A Comment on* Planned Parenthood of Southeastern Pennsylvania v. Casey, 68 NOTRE DAME L. REV. 11, 11 (1992) (footnotes omitted)

136. 112 S. Ct. at 2804 (opinion of O'Connor, Kennedy, and Souter, JJ.) (emphasis added). The joint opinion states that "the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given *combined with* the force of *stare decisis*." *Id.* at 2808 (emphasis added).

opinion goes to great lengths to state "at the outset and with clarity"[137] the nature of *Roe*'s holding:

> First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.[138]

Notably absent from this formulation of *Roe*'s holding is the trimester framework, which is arguably an integral component of *Roe*'s central holding.[139] Indeed, the joint opinion only later acknowledges its repudiation of the trimester framework:

> We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*. Measures aimed at ensuring that a woman's choice contemplates the consequences for the fetus do not necessarily interfere with the right recognized in *Roe*, although those measures have been found to be inconsistent with the rigid trimester framework announced . . . . The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life . . . .[140]

Here the joint opinion states that the trimester framework is not part of the central holding of *Roe* without articulating why that framework is any less central than other parts of *Roe*. The joint opinion's statement that the trimester framework is flawed does not distinguish it from other controversial parts of *Roe* that were affirmed. Furthermore, the opinion rejects the framework without considering, much less refuting, the possible benefit of having a bright-line rule such as that provided by the trimester framework.[141]

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137. *Id.* at 2804.

138. *Id.*

139. Justice Scalia's opinion states that "the arbitrary trimester framework, which the Court today discards, was quite as central to *Roe* as the arbitrary viability test, which the Court today retains." *Id.* at 2881 (Scalia, J., concurring in the judgment in part and dissenting in part).

140. *Id.* at 2818 (opinion of O'Connor, Kennedy, and Souter, JJ.) (citations omitted).

141. Justice Scalia's opinion notes that the trimester framework was the only thing that made *Roe* workable. *Id.* at 2881 (Scalia, J., concurring in the judgment in part and dissenting in part). Since workability is one of the stare decisis factors considered by the joint opinion, *id.* at 2808 (opinion of O'Connor, Kennedy, and Souter, JJ.), the joint opinion's silence on this point is surprising.

The joint opinion then rejects the notion that *Roe* ensured abortion as a fundamental right. Unfortunately for the joint opinion, cases after *Roe*, including *Thornburgh v. American College of Obstetricians and Gynecologists*,[142] and *Akron v. Akron Center for Reproductive Health*,[143] had relied upon and reiterated that view. The manner in which the joint opinion withdraws this right is necessarily complicated.

> Any judicial act of line-drawing may seem somewhat arbitrary, but *Roe* was a reasoned statement, elaborated with great care. We have twice reaffirmed it in the face of great opposition. Although we must overrule those parts of *Thornburgh* and [*Akron*] which, in our view, are inconsistent with *Roe*'s statement that the State has a legitimate interest in promoting the life or potential life of the unborn, the central premise of those cases represents an unbroken commitment by this Court to the essential holding of *Roe*. It is that premise which we reaffirm today.[144]

The joint opinion applies the same selective vision to *Thornburgh* and *Akron* as it does to *Roe*. Insofar as *Thornburgh* and *Akron* support the joint opinion's view of abortion, they are affirmed; insofar as they contradict this view, they are rejected. However, the joint opinion's stance toward *Thornburgh* and *Akron* and its stance toward *Roe* differ in that the joint opinion explicitly overrules the parts of *Thornburgh* and *Akron* that do not support its view of abortion. The joint opinion never explicitly overrules any part of *Roe*, for this would undermine its claim that it was bound by stare decisis.

The joint opinion also engages in two sins of commission. First, it adds an undue burden standard as a means of implementing *Roe*, stating that an undue burden exists when "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[145] The undue burden test has no antecedents in the jurisprudence surrounding abortion—as Chief Justice Rehnquist points out, this standard is "created largely out of whole cloth."[146] Second, the joint opinion's discussion of individual liberty rewrites and strengthens *Roe*'s analysis of the abortion right. As Laurence H. Tribe observed, the joint opinion placed "'the right to abortion on a firmer jurisprudential foundation than ever before.'"[147]

Given these additions and elisions, Justice Scalia's argument that the joint opinion did not correctly apply the stare decisis doctrine may have merit:

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142. 476 U.S. 747 (1986).
143. 462 U.S. 416 (1983).
144. 112 S. Ct. at 2816–17 (opinion of O'Connor, Kennedy, and Souter, JJ.) (citations omitted).
145. *Id.* at 2820.
146. *Id.* at 2866 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
147. David J. Garrow, *Justice Souter Emerges*, N.Y. TIMES, Sept. 25, 1994, § 6 (Magazine), at 36, 39 (quoting Laurence H. Tribe).

> It seems to me that *stare decisis* ought to be applied even to the doctrine of *stare decisis*, and I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version. . . . I suppose the Court is entitled to call a "central holding" whatever it wants to call a "central holding"—which is, come to think of it, perhaps one of the difficulties with this modified version of *stare decisis*.[148]

In this view, the joint opinion used stare decisis to excuse it from examining the parts of *Roe* it favored, while not applying the same doctrine to parts it disfavored.

4. *Conclusion*

The mark of a successful *apophrades* is that the belated text appears to rewrite its precursor. Under this standard, the joint opinion was clearly successful—while being ostensibly bound by *Roe*, the opinion has rewritten its precedent.[149] The motivation to use this particular strategy may be the institutional legitimacy that stare decisis lends to a court's decision. The appearance of faithfulness to precedent, whether genuine or not, has far more tangible benefits in law than it does in literature. The joint opinion explicitly recognizes the benefits of precedent:

> As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy . . . .
>
> . . . The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.[150]

Because stare decisis ensures legitimacy, which in turn guarantees power, the Court will always reap benefits from at least appearing to follow precedent. The danger arises when the Court is tempted, as here, to subvert precedent under the guise of faithfulness so that it can have the benefits of adherence while escaping its drawbacks.

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148. 112 S. Ct. at 2881 (Scalia, J., concurring in the judgment in part and dissenting in part).

149. The success is qualified because the joint opinion is only a plurality, and because even Justices Blackmun and Stevens, who join much of it, criticize its reading of *Roe*. *See supra* note 1.

150. 112 S. Ct. at 2814 (opinion of O'Connor, Kennedy, and Souter, JJ.).

B. *Chief Justice Rehnquist's Opinion*

Like *Tempête*, the Rehnquist opinion employs a strategy of direct subversion. Just as Césaire's prologue indicates that precedent will be subverted, the Rehnquist opinion avers at the outset that "authentic principles of *stare decisis* do not require that any portion of the reasoning in *Roe* be kept intact."[151] As in *Tempête*, the Rehnquist opinion both reveals its precedent to be arbitrary and swerves away from its substantive weaknesses.

1. *Arbitrariness*

Tempête's prologue shows *The Tempest* to be arbitrary by raising the curtain on players who have not yet become characters. The device is metadramatic, in that it draws attention to the play as a play rather than pretending, as most dramas do, that it represents reality. Thus, *Tempête* draws self-conscious attention to the way in which theater produces meaning, to the usually submerged workings of the dramatic institution. While *clinamen* does not require such a move, it perhaps suggests it—one way in which to show a text is arbitrary is to begin with the institutional norms that create its meaning. Similarly, Rehnquist's opinion attempts to show that *Roe* is arbitrary by embarking on a metalegal discussion of stare decisis. Rather than simply attacking *Roe* on its merits, the Chief Justice's opinion considers the underlying doctrine of stare decisis that has given *Roe* power over subsequent cases.

Chief Justice Rehnquist argues that *Roe* was arbitrary by comparing it to *Plessy*[152] and *Lochner*,[153] thereby reminding the reader that the Court is not infallible. In doing so, however, the opinion must be careful to stave off the charge that it is advocating that precedent can be overruled whenever a judge disagrees with it. As the joint opinion argues, "[t]he Court's power lies . . . in its legitimacy,"[154] and "frequent overruling would overtax the country's belief in the Court's good faith."[155] Rehnquist's opinion attempts to overcome this objection by arguing that legitimacy is rooted not in public perception but in a reign of reason. First, the opinion insulates its own conception of the Court's legitimacy from public perception, arguing that "it may be doubted that Members of this Court, holding their tenure as they do during constitutional 'good behavior,' are at all likely to be intimidated by . . .

151. *Id.* at 2860–61 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part)

152. Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that legislatively mandated racial segregation in public transportation does not constitute denial of equal protection, and rejecting argument that legislated racial separation treats black race as inferior).

153. Lochner v. New York, 198 U.S. 45 (1905) (imposing substantive limitations on wealth and welfare regulation that restricted economic autonomy).

154. 112 S. Ct. at 2814 (opinion of O'Connor, Kennedy, and Souter, JJ.)

155. *Id.* at 2815.

public protests."[156] Having thus severed legitimacy from public perception, the Rehnquist opinion then roots that legitimacy in principle, arguing that principled overrulings *enhance* the Court's legitimacy. Specifically, the opinion maintains that in *Plessy* and *Lochner*, "the court enhanced its stature by acknowledging and correcting its error, apparently in violation of the joint opinion's 'legitimacy' principle."[157]

Second, the Rehnquist opinion shows that *Casey* followed *Roe* in an arbitrary manner, by showing that stare decisis did not dictate that precedent be followed.[158] The Rehnquist opinion construes the "prudential and pragmatic considerations"[159] differently from the joint opinion. The Rehnquist opinion states that the joint opinion's reliance argument is flawed because: (1) in asserting the importance of reliance interests, the joint opinion makes nothing more than "generalized assertions" that Americans have "ordered their thinking and living around" *Roe*;[160] (2) the joint opinion uproots the trimester framework;[161] and (3) the simple fact that a generation or more had grown accustomed to the rules laid down in major decisions has not prevented the Court from correcting errors in other cases such as *Plessy* or *Lochner*.[162] The Rehnquist opinion then criticizes the joint opinion's invocation of doctrinal change as a factor in determining whether stare decisis should bind, stating that "surely there is no requirement, in considering whether to depart from *stare decisis* in a constitutional case, that a decision be more wrong now than it was at the time it was rendered."[163] Finally, the Rehnquist opinion states that the constant factual underpinnings of *Roe* (women become pregnant, fetuses become viable, women give birth) do not compel the invocation of stare decisis.[164]

2. *Swerving*

In *clinamen*, the poet follows "received doctrine along to a certain point, and then deviates, insisting that a wrong direction was taken at just that point, and no other."[165] *Tempête* swerves from *The Tempest* by stressing

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156. 112 S. Ct. at 2862 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

157. *Id.* at 2863.

158. While *Roe* is the precedent under scrutiny, the Rehnquist opinion also recognizes that the joint opinion will be precedent for future cases. The Rehnquist opinion thus argues not only that *Roe* was wrong, but also that the joint opinion further distorted *Roe*.

159. *Id.* at 2808 (opinion of O'Connor, Kennedy, and Souter, JJ.).

160. *Id.* at 2862 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (quoting opinion of O'Connor, Kennedy, and Souter, JJ., *id.* at 2809). Rehnquist's opinion does not address the issue of workability. Scalia's opinion argues that the only reason *Roe* was workable was its trimester framework, which *Casey* abandoned. *Id.* at 2881 (Scalia, J., concurring in the judgment in part and dissenting in part).

161. *Id.* at 2860 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

162. *Id.* at 2862.

163. *Id.* at 2861.

164. *Id.*

165. BLOOM, *supra* note 6, at 29 (emphasis omitted).

weaknesses in the Shakespearean play, positing that *The Tempest*'s historical account was flawed in its portrayal of Caliban's language and religion (among other things). The Rehnquist opinion employs a similar strategy, arguing that *Roe* was incorrectly situated in national and jurisprudential history. It first points out that the historical traditions of the American people do not support the view that the right to terminate a pregnancy is fundamental. The opinion states:

> The common law which we inherited from England made abortion after "quickening" an offense. At the time of the adoption of the Fourteenth Amendment, statutory prohibitions or restrictions on abortion were commonplace; in 1868, at least 28 of the then-37 States and 8 Territories had statutes banning or limiting abortion. . . . [Twenty-one] of the restrictive abortion laws in effect in 1868 were still in effect in 1973 when *Roe* was decided, and an overwhelming majority of the States prohibited abortion unless necessary to preserve the life or health of the mother.[166]

Second, the Rehnquist opinion suggests that *Roe* was a misbegotten son in the jurisprudential genealogy, tracing the evolution of the construction of the phrase "liberty" in the Due Process Clause of the Fourteenth Amendment. The Rehnquist opinion enumerates the cases predating *Roe* that extended the meaning of that phrase beyond freedom from physical restraint: *Pierce v. Society of Sisters* (right to send child to private school), *Meyer v. Nebraska* (right to teach a foreign language in a parochial school), *Loving v. Virginia* (right to marry), *Skinner v. Oklahoma* (right to procreate), *Griswold v. Connecticut* (right to use contraceptives), and *Eisenstadt v. Baird* (right to use contraceptives).[167] It then distinguishes *Roe* from this extensive list on the ground that "'[u]nlike marriage, procreation and contraception, abortion involves the purposeful termination of potential life.'"[168] It must therefore "'be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy.'"[169] Again, *Roe* is portrayed as an unwarranted departure from an otherwise acceptable genealogy. The Rehnquist opinion thus presents itself as a more viable successor than *Roe* to this genealogy.

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166. 112 S. Ct. at 2859 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (citation omitted).

167. *Id.* (citing Pierce v. Society of Sisters, 268 U.S. 510 (1925), Meyer v. Nebraska, 262 U.S. 390 (1923); Loving v. Virginia, 388 U.S. 1 (1967); Skinner v. Oklahoma, 316 U.S. 535 (1942), Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972)).

168. *Id.* at 2859 (quoting Harris v. McRae, 448 U.S. 297, 325 (1980)).

169. *Id.* (quoting Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 792 (1986) (White, J., dissenting)).

3. *Conclusion*

As in *Tempête*, the Rehnquist opinion both shows the precursor to be arbitrary and exploits its substantive weaknesses. In order to show that *Roe* is arbitrary while avoiding nihilism, the Rehnquist opinion argues that reason provides a better basis for legitimacy than does a slavish adherence to precedent for the sake of public opinion. Then it considers the weakness of the abortion right in both history and constitutional jurisprudence. In both of Chief Justice Rehnquist's rebellions, openness obviates the need to appear to conform to precedent. It does not, however, obviate the need to conform to the precedent's framework of argumentation. As in *Tempête*, this framework must be accepted not in spite of, but rather because of, the overt nature of the subversion.

VI. THE DIVERGENCE OF LITERATURE AND LAW: RECONSIDERING THE *CASEY* JOINT OPINION

Until this point, this Note has argued that law and literature are closer than Cole made them appear, in that rhetorical devices used in the anxiety of influence can be applied, with qualifications, to the law. This Part suggests that the fields of law and literature are further apart than Cole perceived. Specifically, Cole takes the premium placed on individual creativity in literature and transfers it without qualification to the law. Because law and literature vary in their consequences, however, the value of creativity in the law cannot be assessed by literary standards. Opinions that explicitly make use of literary creativity, such as judicial rulings written to parody poetry or film, show that such creativity does not have a presumptively positive value in the law. Quite the contrary, creativity of this sort is strongly disfavored. More subtle forms of creativity, such as that used in the *Casey* joint opinion, can also have negative connotations. While judicial creativity is not per se harmful, it should not be celebrated without qualification. By presenting a biased account of legal creativity, Cole's framework obscures the potential drawbacks of unconstrained innovation.

In Cole's account, all writers, including poets and judges, have egos that drive them to misread their predecessors. Society, however, has independent interests in the roles of judges and poets that shape the degree to which this egotism is permitted expression. Because society particularly values creativity and originality in poets, the expression of an individual's ego is allowed, even encouraged; social and individual expectations of the poet's ego are aligned. Because society values consistency and stability in judges, however, judges experience a tension between social expectation and personal ego.

While Cole accurately characterizes the tension between creativity and legitimacy in the judge's role, he incorrectly implies that creativity should be

uniformly valued over legitimacy. Cole praises "greatness" in its poetic sense, as signifying the artist's soaring above a constraining past, arguing that "greatness requires a break from precedent and an ability to command a following; bowing to authority simply does not fit under any definition of 'greatness'"[170] Cole thus uses "greatness" to describe creativity alone, thereby effectively precluding the achievement of greatness by judges exhibiting any restraint.

Cole might counter that by calling creativity "great" he is simply taking a definition from literature and applying it to its most similar analogue in the law; thus, his use of the word "great" to describe creativity might not mean that creativity is superior to legitimacy. This argument would fail, however, in two ways. First, Bloom presents creativity as the essence of great literature: The term "creativity" cannot be transferred to another field without its powerfully positive connotation. Second, Cole borrows Bloom's terminology to give legal legitimacy a negative connotation, arguing that "the Justice finds legitimacy in a kind of plodding belatedness."[171]

Cole's simple mapping of literary values onto legal values is reductive because it overlooks a fundamental difference in the effects of writers' endeavors in literature and law. Margaret Jane Radin cautions "against any easy metaphorical equation of law and literature, because of its tendency to obscure the violence of the law . . . . Authoritative regulations command, not invite."[172] The distinction appears most clearly on the rare occasions when judges infuse their rulings with the literary variety of creativity, such as a ruling[173] written as a parody in verse of Edgar Allen Poe's *The Raven*,[174] or a ruling[175] that contains lines from the film *Wayne's World*.[176] Unlike literary parodies of literary texts,[177] these legal parodies of literary texts occasion an anxiety specific to the law: the fear that creativity has come at the expense of due process. As if to respond to this anxiety, the judge in *The Raven* case points out that the ruling is favorable to the only party to the bankruptcy proceeding, so that his ruling is comparatively harmless. In the *Wayne's World* case, there were two adversarial parties, thereby ensuring that the ruling would be adverse to one of them. However, the judge protects

170. Cole, *supra* note 7, at 867 n.33.

171. *Id.* at 866.

172. Margaret Jane Radin, *"After the Final No There Comes a Yes": A Law Teacher's Report*, 2 YALE J.L. & HUMAN. 253, 265 (1990), *quoted in* Craft, *supra* note 14, at 525

173. *In re* Love, 61 B.R. 558 (Bankr. S.D. Fla. 1986) ("Now my motion caused me terror / A dismissal would be error. / Upon consideration of § 707 (b) in anguish loud I cried / The court's sua sponte motion to dismiss under § 707 (b) is denied.").

174. EDGAR ALLEN POE, *The Raven*, *in* COMPLETE POEMS AND SELECTED ESSAYS 71 (Richard Gray ed., 1993).

175. Noble v. Bradford Marine, Inc., 789 F. Supp. 395, 397 (S.D. Fla. 1992) (holding that defendant's "most bogus" attempt at removal is "not worthy" and "way improvident," and arguing that the defendant must "party on" in state court).

176. WAYNE'S WORLD (Paramount 1992).

177. *See, e.g.*, HECHT, *supra* note 76.

himself by presenting the issue as a simple statute of limitations question. If a ruling in this genre treated an issue of law that was more ambiguous, such creativity would appear inappropriate, even cruel, as its flippant tone would be out of keeping with the judicial function and the gravity of the situation.

All rulings in this genre, to differing degrees, set the distinctions between literary and legal texts in relief. The distinction is one between literary texts, which are not coercive and which therefore can misread with abandon, and legal texts, which are coercive and which therefore must constrain any misreading. As Gewirtz states:

> When poets misread or distort the past as part of the creative process, moral condemnation is inappropriate, absent outright plagiarism. The poetic result is generally self-justifying; we may be enlightened by understanding the process that produced the result, but the quality of the result usually ratifies the process. Law is different; process counts a great deal. Law involves power, and power is justified and limited by process.[178]

Thus legal texts can never be self-contained and self-justifying in the manner of some literary texts.

The Supreme Court has yet to issue a rhymed opinion; poetry is probably not the kind of creativity the nation need fear from its highest judges. Nevertheless, as the foregoing discussion of *Casey* demonstrated, the Court has used more subtle varieties of legal creativity. The *Casey* joint opinion was an instance of such creativity: Like *Rosencrantz*, the joint opinion both appeared faithful to precedent and subverted it. As in the case of a rhymed parody, *apophrades* has different implications in literature and law. While *Rosencrantz* merely persuaded some readers to view *Hamlet* differently, *Casey* removed protections surrounding abortion previously afforded to an entire country.[179]

Cole recognizes that the pursuit of creativity in the law often encourages a lack of candor, because of the doctrine of stare decisis: "The Justice . . . must both misread, in order to make space for his or her contribution, and appear not to misread, in order to draw on the authority of precedent."[180] As seen above, however, Cole uniformly praises this lack of candor, so long as it is successful. Given the consequences of *Casey*, Cole's celebration of this lack of candor is suspect. As Guido Calabresi states in the context of statutory interpretation:

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178. Gewirtz, *supra* note 48, at 667.

179. While it is beyond the scope of this Note to explore the effects of *Casey*, these effects are clearly powerful and potentially widespread. Where before abortion had been a "fundamental" right, states may now restrict abortion decisions checked only by the very ambiguous "undue burden" standard. Moreover, the bright-line rule of the trimester system has been abandoned.

180. Cole, *supra* note 7, at 868.

> We should not forget . . . that the language of categoricals, of subterfuges, is particularly prone to manipulation. It allows those who are in a position to employ the absolutes to mask what they are doing, to hide whose interests they are trading off. And too often such hiding becomes self-serving or exploitative. If a court denies that it is modifying or forcing review of a statute it deems out of phase, it is usually more able to serve its own ends than a court that must openly admit what it is doing and justify its behavior rationally.[181]

This analysis has clear implications for the joint opinion, which can be seen as using the doctrine of stare decisis to evade accountability for its innovations. This is not to say that the joint opinion's lack of candor was inevitably bad. There may be situations in which candor, or creativity in general, should be traded off against other values: The joint opinion could have rationally sacrificed some candor in order to preserve the legitimacy of the Court.

Cole's analysis is flawed because it prevents the reader from even asking questions about the value of candor in rulings such as the joint opinion. While a judge may not err in being disingenuous, as long as she had correct reasons for being so, an academic surely errs if she does not point out that such a trade-off is being made.[182] The most harmful aspect of Cole's analysis is that it takes the presumptively positive connotation creativity enjoys in literature and applies it to law. This uncritical appropriation obscures creativity's negative ramifications in the law.

CONCLUSION

Precedent occupies a seminal place in both literature and law, as reflected in the theories of the anxiety of influence and of stare decisis. Cole's description of how the anxiety of influence can be used to describe the law is a valuable contribution to the law-as-literature branch of the law-and-literature movement. This Note has sought to refine Cole's analysis in two ways. First, it considered Bloom's six revisionary ratios, as well as Bloom's general Freudian dynamic of misreading. This analysis applied two of the ratios to literary as well as to legal texts, examining how *apophrades* worked in both *Rosencrantz* and in the *Casey* joint opinion, and how *clinamen* functioned in both *Tempête* and in the Rehnquist opinion. Such analysis moves beyond Cole's general observation that similarities between legal and literary treatment of precedent exist, to show that Bloom's theory can work in similar ways in both literature and law. The analysis also suggests that the taxonomy of rhetorical strategies developed by Bloom can provide a vocabulary for

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181. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 179 (1982), *see also* Gewirtz, *supra* note 48, at 667 ("Thus, misreading and other dishonesties in judicial opinions are generally more than craft flaws; candor in judicial reasoning is part of the morality of craft.")

182. *See, e.g.*, CALABRESI, *supra* note 181, at 180.

describing and analyzing legal opinions. Because the law has not developed such a vocabulary on its own, these terms can usefully be employed to identify and discuss rhetorical strategies in the law.

This Note has also sought to distinguish the anxiety of influence as it operates in literature and in law by pointing to the different functions and consequences of texts in the two disciplines. The positive value of creativity in literature cannot be transposed onto the law, where creativity must be balanced against due process. In failing to make this distinction between literature and law, Cole uncritically applauds the lack of candor exhibited by certain judicial opinions. By modifying Cole's framework, this Note has underscored the importance of remaining alert to potential abuses, as well as uses, of precedent.

In a larger sense, this Note has been as much an extension of Cole's analysis as a critique of it. The law-and-literature movement has been criticized for its lack of prescriptive implications. Judge Posner has stated that:

> The relationship between literature and law is less tidy [than that between law and economics], because there is no central theory of literature that can be taken and applied to a body of law; because there is no central programmatic thrust, whether positive or normative, to the law and literature movement . . . .[183]

Although this Note has made necessary adjustments to Cole's framework, it joins Cole in arguing that literary theory has prescriptive implications for an understanding of the law. While certain convergences between law and literature may be little more than adventitious, the rhetorical and theoretical concerns developed by Bloom can help readers identify how cases subvert precedent to achieve meaning. Through such a process, a text—whether literary *or* legal—conducts and invites strong misreadings. This Note has attempted to do the same.

183. POSNER, *supra* note 10, at 1.