

**MODELS OF JUDGMENT:
RHETORIC AND THE PUBLIC PHILOSOPHIES OF LAW**

by

Joseph David Sery

Bachelor of Arts (BA), St. John's University, 2005

Master's Degree (MA), University of Pittsburgh, 2008

Submitted to the Graduate Faculty of the
Kenneth P. Dietrich School of Arts and Sciences in partial fulfillment
of the requirements for the degree of
Doctor of Philosophy

University of Pittsburgh

2015

UNIVERSITY OF PITTSBURGH
KENNETH P. DIETRICH SCHOOL OF ARTS AND SCIENCES

This dissertation was presented

by

Joseph David Sery

It was defended on

May 5, 2015

and approved by

Gordon Mitchell, Associate Professor, Department of Communication

John Poulakos, Associate Professor, Department of Communication

Nicholas Rescher, Professor, Department of Philosophy

Dissertation Advisor: John Lyne, Professor, Department of Communication

Copyright © by Joseph David Sery

2015

**MODELS OF JUDGMENT:
RHETORIC AND THE PUBLIC PHILOSOPHIES OF LAW**

Joseph David Sery, Ph.D.

University of Pittsburgh, 2015

This project responds to a need for new theoretical tools for understanding law as a site for the intersection of rhetoric and philosophy. In advancing the concept of “models of judgment” as a meta-theoretical approach to the philosophical rhetoric of jurisprudence, I argue that it provides a unique perspective on the rhetorical commitments undergirding prominent judicial theories. Paragons of good judgment crafted by Richard Posner, Martha Nussbaum, and Cass Sunstein are examined, foregrounding their rhetorical character and function.

TABLE OF CONTENTS

<u>PREFACE.....</u>	<u>vii</u>
<u>1.0 INTRODUCTION.....</u>	<u>1</u>
<u>1.1 RHETORIC AND PRACTICAL REASON.....</u>	<u>11</u>
<u>1.2 OVERVIEW OF RHETORIC AND LAW.....</u>	<u>32</u>
<u>1.3 PUBLIC PHILOSOPHY.....</u>	<u>42</u>
<u>1.4 PREVIEW OF CHAPTERS.....</u>	<u>51</u>
<u>2.0 RICHARD POSNER AND THE ECONOMIC JUDGE.....</u>	<u>60</u>
<u>2.1 THE RHETORICAL POWER OF ECONOMIC OBJECTIVITY.....</u>	<u>65</u>
<u>2.2 BALANCING EXTREMES.....</u>	<u>80</u>
<u>2.3 ECONOMIC COMMON SENSE.....</u>	<u>118</u>
<u>2.4 CONCLUSION.....</u>	<u>142</u>
<u>3.0 MARTHA NUSSBAUM AND THE LITERARY JUDGE.....</u>	<u>143</u>
<u>3.1 LAW AND THE LITERARY IMAGINATION.....</u>	<u>146</u>
<u>3.2 CULTIVATING INTELLIGENT EMOTIONS.....</u>	<u>176</u>
<u>3.3 CONSTITUTING CAPABILITIES.....</u>	<u>204</u>
<u>3.4 CONCLUSION.....</u>	<u>216</u>
<u>4.0 CASS SUNSTEIN AND THE DELIBERATIVE JUDGE.....</u>	<u>217</u>
<u>4.1 DELIBERATION AND DISSENT.....</u>	<u>220</u>
<u>4.2 KNOWING WHEN TO NUDGE.....</u>	<u>239</u>
<u>4.3 LEGAL JUDGMENT AS EQUIPMENT FOR CIVIC LIVING.....</u>	<u>263</u>
<u>4.4 CONCLUSION.....</u>	<u>279</u>

<u>5.0 CONCLUSION.....</u>	<u>281</u>
<u>APPENDIX: A MODEL COURT IN ACTION</u>	<u>294</u>
<u>LEGAL, PUBLIC, AND POLITICAL BACKGROUND.....</u>	<u>295</u>
<u>ORAL ARGUMENTS.....</u>	<u>308</u>
<u>RESPONDENT’S ARGUMENTS.....</u>	<u>308</u>
<u>PETITIONER’S ARGUMENTS.....</u>	<u>317</u>
<u>OPINION OF THE COURT.....</u>	<u>325</u>
<u>BIBLIOGRAPHY.....</u>	<u>342</u>

PREFACE

In *Meditations XVII*, John Donne beautifully wrote: “No man is an Iland, intire of itselfe; every man is a peece of the Continent, a part of the maine.” The pursuit of an advanced degree can be a lonely and isolating experience, which I find particularly true for theorists writing about theory. Yet, following Donne, even the most solitary of theorists is not an island. I would be remiss if I did not offer my profound gratitude to the many individuals who have provided support as I walked down this lonely road.

First, I wish to thank my advisor, John Lyne, for his many years of mentorship and friendship. Hours upon hours of meandering through the streets and parks of Pittsburgh discussing everything from the nature of justice to a 20-year-old *Simpsons* episode (“I’m seein’ double... four Krustys!”) were some of the most subtly formative pedagogical experiences of my life in that they illustrated how a brilliant mind and sharp wit can draw insight from just about anything. Thanks also to John Poulakos, Gordon Mitchell, and Nicholas Rescher for their guidance and support throughout my years in Pittsburgh (and beyond). Each of them introduced me to unique and nuanced insights as a student in their respective courses, and that same intellectual spirit came to bear on this dissertation project in immeasurable ways. Although they were not part of the dissertation committee, I would also like to extend my sincerest gratitude to the rest of the department’s faculty, especially Lester Olson, Brent Malin, and Bill Fusfield, who helped me to become a better thinker and writer, and to the department staff – Mary Hamler, Brandi McClain, and Julie Rosol – who tolerated me despite my incessant absentmindedness.

Thanks to my family for their enduring love and unwavering encouragement; without their bedrock of support, none of this would have been possible. And thanks to the Pitt graduate

students, who I consider family. As I was interviewing at various graduate programs before making a decision, it was the Pitt graduate students who became the deciding factor. A constant theme throughout my time in the program was a rich sense of community. They made my courses more interesting, my writing stronger, my thinking sharper, and my delight in the life of the mind more profound. In particular, I would like to thank my early mentors, Damien Pfister, Steve Llano, Michele Kennerly, Cate Morrison, Carly Woods, and Michelle Gibbons for their guidance and illustrating by example what it means to be a phenomenal scholar and educator. Thanks also to those with whom I had countless conversations and arguments inside and outside of the classroom. John Rief, Matt Brigham, Brent Saindon, Takuzo Konishi, Liangyu Fu, Brita Anderson, David Landes, Josh Beaty, Joe Packer, Tom Dunn, and Matt Gayetsky – you made my experience at Pitt profound and delightful. Special thanks to Katie O’Neill, whose unwavering friendship and encouragement have made my life better in immeasurable ways.

1.0 INTRODUCTION

On July 1, 2005, Justice Sandra Day O'Connor announced her retirement from the United States Supreme Court after 25 years in the robe. Widely considered the court's swing vote on divisive cases, O'Connor's vacancy offered President George W. Bush an opportunity to shape the court for years to come. On July 19, Bush nominated a young, dashing circuit court judge – John Roberts. Following the abrupt death of Chief Justice William Rehnquist, Roberts became Bush's nominee for the esteemed Chief Justice position.¹ Much has been made of the Senate's political handling of the Supreme Court confirmation process, especially after Justice Clarence Thomas' troubled experience. Roberts faced no such trouble. His confirmation was unspectacular, in the best sense of the term. Although the hearing addressed a number of pertinent issues, his especially notable opening remarks merit attention.

After thanking the Senate Judiciary Committee, the President, and his family, Roberts described his view of the judicial role. “Judges and justices are servants of the law,” he argued, “not the other way around.” In a distinctly American metaphorical turn, Roberts made a now famous analogy: “Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire.” He continued, asserting that he has no “agenda” and “will decide every case based on the record, according to the rule of law,

¹ Following Bush's failed nomination of Harriet Myers, Justice Samuel Alito eventually filled O'Connor's position.

without fear or favor, to the best of my ability. And I will remember that it's my job to call balls and strikes, and not to pitch or bat."²

The metaphor is simple yet clever and has been utilized *ad nauseam* ever since the hearing. Upon further reflection, however, a student of law (let alone a fan of baseball) might be given pause by Roberts' comparison. The judge-as-umpire in this scenario purports to know what the law *is* – a collection of rules and statutes (the strike zone) that are applied to a particular case (the pitch/ball). If a case falls within the bounds of the legal strike zone, yer out! The judge-as-umpire calls balls and strikes *as they are*. The rules of the game, in baseball as in law, are already set. The ontological status of the pitch is concrete – the ball was either in the strike zone or it wasn't, there is no middle ground. Like the shrewd judge, the good umpire cultivates a keen and attentive eye that is able to discern between the two and act accordingly.

I am not sure whether Roberts actually watches baseball, but the umpire who claims to call pitches *as they are* is making a bold assertion. Pitches are whizzing toward him³ at upwards of 100 miles per hour. How much time does an umpire have to decide? A fastball traveling at 90 miles per hour reaches the catcher's glove a mere .458 seconds after it leaves the pitcher's hand. That is roughly the same amount of time it takes to blink your eyes. Keep in mind that the home plate umpire is wearing a thick chest protector, full face mask, and helmet as he watches a blurry white orb speeding toward him. Throw into the mix all the other pitches at a pitcher's disposal – cutter, splitter, forkball, curveball, slider, slurve, screwball, changeup, palmball, circle changeup – and the ability to know *with certainty* the location of the ball as it crosses an invisible threshold that

² U.S. Senate, Hearing 109-158: "Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Supreme Court," Washington, DC: GPO (Sept. 12, 2006). Retrieved from <http://www.gpo.gov/fdsys/pkg/CHRG-109shrg23539/content-detail.html>.

³ Bewilderingly, professional baseball has employed precious few women in its history (six, to be precise). None of these women made it to the MLB and only one rose to the triple-A.

changes depending on the size and stature of the batter is nigh impossible. Baseball is also a summer sport, so games may be played in exceptionally hot and humid weather. And we must not forget that every moment outside the timeframe of the pitch builds up the anxiety of the batter, the pitcher, the catcher (who, by the way, may move his glove in an attempt to mislead the umpire into thinking the pitch fell within the strike zone), the other players, the tens of thousands of fans in attendance, and the millions watching from home. Is this really how Roberts conceives of a judge and the process of judgment?

Right before Roberts made his umpire analogy, he spoke of “a certain humility [that] should characterize the judicial role.” I would wager that the umpires who agree would adopt another model of umpiring. Rather than calling them as they are, the second model of umpire is more humble and claims to *call them as he sees them*. Some pitches are obvious and the “right” call is made without question. We see this all the time at the Supreme Court, even in its ideologically divided state. Roughly one third of all Supreme Court cases are unanimous 9-0 decisions.⁴ Some cases are easier to decide, just as some pitches are easier to call. But good pitchers do not throw obvious pitches. If they did, then the batter would know what was coming just as well as the umpire. This is why pitchers “paint the corner” – they want their pitches to barely make it in the strike zone. The most adept pitchers will begin the game by painting the corner and, as the game continues, “stretch the strike zone” by continuing to pitch a little bit closer to the batter or a little bit further out. After seven innings, the strike zone no longer represents the official definition of what it should be, but rather illustrates a tacit negotiation between the pitcher and the umpire. The umpire who calls them as he sees them realizes this, but uses his best

⁴ See Pamela C. Corley, Amy Steigerwalt, and Artemus Ward, *The Puzzle of Unanimity: Consensus on the United States Supreme Court* (Stanford: University of Stanford Press, 2013).

judgment to make an appropriate call. Ultimately, good judgment is a bit of a gamble and bad calls will be made, but time and experience minimize the risk.

The judge who calls them as she sees them is quite similar. She, too, can easily decide simple cases with a “right” decision. Such cases receive little or no attention because they rarely make it beyond the initial trial and to a court of appeals, let alone the Supreme Court. After all, why would simple cases make it so far up the chain? Like the umpire being tested by a skilled pitcher, judges also realize that skilled lawyers, political organizations, and changing public opinion can stretch or shrink a law’s strike zone. The Civil Rights Movement illustrates this phenomenon quite well. The arguments advanced in the early 1900s are significantly different from the arguments advanced in the middle of the century, which are quite different from the arguments made today. Imagine if a contemporary advocate for civil rights made the same arguments 100 years ago. Needless to say, the results would be significantly different. They may share similar general themes of liberty and equality, but the same arguments would not and could not be made at each time period with equal success. Now apply this perspective to *nearly every important legal issue*. Women’s rights, LGBTQ rights, environmental law, privacy, corporate personhood, and even marijuana legislation illustrate the expansion and contraction of legal possibilities.

The Warren Court provides a strong case for the importance of timing. Just as the pitcher cannot get away with a called strike outside of the strike zone until he has sufficiently stretched it out, the judge may struggle to justify a decision unless the context allows it. Consider, for example, some of the decisions made by the Warren Court regarding civil rights. At the time, public opinion was beginning to favor an expanded conception of civil rights and an end to segregation. Some states had already passed legislation to this effect. Although the Warren Court

is usually characterized as “liberal,” “progressive,” and “activist,” it was responding to a particular context that made their arguments fitting. Questioned about his opinion of *stare decisis*, Roberts claimed that *Brown v. Board of Education* did not represent judicial activism because it was righting a wrong. Yet, as Condit and Lucaites aptly note, the *Plessy v. Ferguson* decision represented the pulse of the nation at the time.⁵ It is a precarious position for a judge to claim he is “righting a wrong” while simultaneously claiming *his* decisions are timelessly correct.

Furthermore, the inherent ambiguity of language makes the exactness of the “call-it-as-it-is” approach extremely complicated if not impossible. Justice Potter Stewart captured this sentiment well in his famous description of pornography: “I know it when I see it.”⁶ Can the same be said for what Kenneth Burke described as the “generalized wishes” of the Constitution?⁷ Do we know liberty when we see it? Or equality? What about privacy, which has been *read into* the Constitution but does not appear in the text? One of Laurence Tribe’s most recent books, *The Invisible Constitution*, makes a strong case for a number of these “invisible” influences that are part and parcel of any judicial decision.⁸ Roberts’ conception of judgment is looking a little shaky.

A third, more controversial model of umpiring exists as well, which parallels the legal realist movement that was prominent in the United States throughout the early 20th century (and, depending on whom you ask, continues to linger). This model of umpire asserts that *a pitch isn’t anything until he calls it*. For any fan of baseball that has disagreed with an umpire’s call, this may be a harsh reality. Egregious calls are made every once in a while, but, much like egregious

⁵ Celeste Michelle Condit and John Louis Lucaites, *Crafting Equality: America’s Anglo-African Word* (Chicago: University of Chicago Press, 1993).

⁶ *Jacobellis v. Ohio*, 378 U.S. 184 (1964). Stewart would later remark that he feared this phrase would be etched into his tombstone.

⁷ See Kenneth Burke, *A Grammar of Motives*, 2d ed (Berkeley: University of California Press, 1969), particularly Part III, Chapter I: “The Dialectic of Constitutions.”

⁸ Laurence H. Tribe, *The Invisible Constitution* (Oxford: Oxford University Press, 2008).

judicial decisions, there is little recourse unless foul play or gross ineptitude is suspected.⁹ In the judicial world, this type of judgment is often associated with the aforementioned school of legal realism. Rather than understanding law as an autonomous and objective set of rules that can be applied in a given case, the legal realist views law as inherently subjective. Most scholars cite Oliver Wendell Holmes, Jr.'s germane contribution to American jurisprudence, *The Common Law*, and subsequent essays such as "The Path of Law" as the spark that would eventually ignite the legal realist movement in the 20th century. In 1921, Benjamin Cardozo authored *The Nature of the Judicial Process* wherein he accepts that "judge-made law as one of the existing realities of life."¹⁰ An appeals court judge during the book's initial publication and eventual successor of Holmes' Supreme Court seat, Cardozo believed that legal terms like liberty and equality were "fluid and dynamic." Consequently, the most important elements of law did not and could not crystallize until a judge applied his "creative energy" to a decision, thus giving abstract ideas a particular shape and form. "Much must be left to that deftness in the use of tools which the practice of an art develops," writes Cardozo. "A few hints, a few suggestions, the rest must be trusted to the feeling of the artist."¹¹ As an artist using a diverse set of tools – first and foremost experience – the judge must not only interpret, but she must also *create*. This creative act is at the heart of legal realism. The extreme form of legal realism is largely untenable, but at its best, legal realism affords the judge enough creativity to clarify and give meaning to vague language and an ever-changing political and legal climate.

Yet, the *quality* of decisions is not the focus of scholars who subscribe to the legal realist perspective because, they argue, it only serves to *describe* how the law *actually* works. A judge

⁹ Only eight federal judges have been successfully impeached in the history of the United States.

¹⁰ Benjamin N. Cardozo, *The Nature of the Judicial Process* (Lexington, KY: Feather Trail Press, 2009).

¹¹ *Ibid.*, 13.

can have a bad case of the Mondays just like any of us. As academics grading qualitative essays, can we honestly say that our mood *never* influences any grade we have ever given, even if it was to a student's benefit? The great worry, captured by Karl Llewellyn's 1940 essay "On Reading and Using the Newer Jurisprudence," lies in something as insignificant as what a judge ate for breakfast becoming the determining factor in a case.¹²

Whereas legal realism includes a degree of rhetorical creativity, Roberts' "call-it-as-it-is" approach seems confined to two bases for judgment: the law (including the Constitution, statutes, precedents, etc.) and the facts of the case. This stark view of the judge and his process of judgment might envision these two resources as a Venn diagram: when the two overlap, legal intervention is warranted. At first glance, this idea of law seems quite appealing. X committed Y act. A city ordinance exists that prohibits Y act. X is guilty. This is the judge's "limited role" that Roberts referenced in his opening remarks. Interestingly, the act of judgment is hardly present in Roberts' depiction of law. The judge is not really judging, but *sorting*.

But is it so simple? More importantly, should it be so simple? Extraneous circumstances arise all of the time and greatly affect the outcome of legal decisions. What about mercy? If it is the role of the judge to simply apply the rules, then mercy would have no place in our legal world, yet that is certainly not the case. Does a judge's political ideology matter? Even a glance at the landmark decisions of the past 50 years suggests that judges often have a political agenda even if they are tethered to the Constitution, statutes, and precedent. Does public opinion matter? Although judges and justices like to consider themselves above such petty issues as popularity, the cases they decide to hear and the manner by which they craft their decisions suggest otherwise.

¹² Karl N. Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Chicago: University of Chicago Press, 1962). See also Alex Kozinski, "What I Ate for Breakfast and Other Mysteries of Judicial Decision Making," *Loyola of Los Angeles Law Review* 26 (1993), 993-999.

The phrase “a government of laws, and not of men” is bandied about as if the law could be detached from the vicissitudes of human judgment, but that is not the case. Of course, questions like these generally remain unanswered in Supreme Court confirmation hearings as judges deftly evade questions about their legal philosophies. Roberts’ analogy nonetheless underscores the fact that a judge’s decision-making process carries with it a particular conception of judgment that operates within an overarching model of justice. Different models of justice and of judgment rely upon different judicial resources and, consequently, a different set of rhetorical appeals.

My attention has been trained on judges and justices, but legal judgment is not reserved for the privileged few who don the black robe. Public culture is consumed with issues of justice. During the summer of 2012, the country awaited the Supreme Court’s decision regarding President Obama’s health care legislation. Stephen Colbert’s ingenious creation of his own Super-PAC parodied the *Citizens United* decision, which allows unlimited corporate donations to political campaigns, and captured widespread media attention and public engagement. So much so, in fact, that the Annenberg Public Policy Center claims that he “is doing a better job than other news sources at teaching people about campaign financing.”¹³ Currently, the country is abuzz an array of upcoming cases concerning same-sex marriage, another challenge to the Affordable Care Act, and “true threats” and digital expression. People are thinking and talking about Constitutional law, even though the discussions may not include nuanced technical arguments.

The content of film and television also help to shape the public’s conception of law. The television program *24*, for example, portrays a protagonist, Jack Bauer, who uses torture to derive immediate life-saving information. Characterized as the “Jack Bauer Syndrome,” public

¹³ Bruce Hardy, “Stephen Colbert’s Civics Lesson: Or, How a TV Humorist Taught America about Campaign Finance,” *The Annenberg Public Policy Center* (June 2, 2014), retrieved from http://www.annenbergpublicpolicycenter.org/wp-content/uploads/Stephen-Colberts-Civics-Lesson_release_6-02-14_Final.pdf

conceptions of torture and national security issues have been shaped by the show.¹⁴ The program's reach is alarmingly far. Steven Keslowitz notes, "Justice Antonin Scalia referenced fictional super-agent Jack Bauer from the television show *24* when debating the legal defensibility of torture with a group of judges in Ottawa, Canada in June 2007."¹⁵ Judicial decisions are no doubt important to public conceptions of justice, especially those at the Supreme Court level, but the public does not wait for judges to tell them what justice is.

As legal and political theorist Mary Ann Glendon argues, "Legal discourse has not only become the single most important tributary to political discourse, but it has crept into the languages that Americans employ around the kitchen table, in the neighborhood, and in their diverse communities of memory and mutual aid."¹⁶ Law, for good or ill, has been infused into contemporary discourse and goes well beyond its disciplinary bounds, but with different parameters of accountability. Law may be a technical discourse, but it faces non-technical resistance when it enters a changing, contingent public discussion.

This all leads to one question that has been driving this project from the beginning: what constitutes good legal judgment? Such a question can be approached from any number of angles. The philosopher might attempt to discern the right and good and true model of judgment. The sociologist may look at the systemic social issues that give rise to particular legal problems and decisions. The economist could juxtapose the various costs of the legal system against their outcomes. The neurobiologist might map the various electrical charges emitted by the brain in an

¹⁴ See Tung Yin, "Jack Bauer Syndrome: Hollywood's Depiction of National Security Law," *Southern California Interdisciplinary Law Journal* 17 (2009), 279-300; and John Downing, "Terrorism, Torture and Television: "24" in Its Context," *Democratic Communication* 21.2 (2007), 62-82.

¹⁵ Stephen Keslowitz, "The Simpsons, 24, and the Law: How Homer Simpson and Jack Bauer Influence Congressional Lawmaking and Judicial Reasoning," *Cardozo Law Review* (2008), 2788.

¹⁶ Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991), 3.

attempt to measure the level of compassion or logic a judge exhibits when making a decision. The law can be interpreted from different perspectives. As a rhetorician, I am interested not only in how these different perspective play out but also in the rhetorical investments that direct a judge toward one disposition rather than another. “To conceive of law as a rhetorical and social system,” writes the legal scholar, James Boyd White, “a way in which we use an inherited language to talk to each other and to maintain a community, suggests in a new way that the heart of law is what we always knew it was: an open hearing in which one point of view, one construction of language and reality, is tested against another.”¹⁷ Legal theorists attempt to convince their readers – be they fellow academics, sitting judges, practicing lawyers, law school students, politicians, or the lay public – that their perspective of law is superior. In doing so they must delineate good legal judgment from bad legal judgment, and they must be able to articulate how one can arrive at the former and avoid the latter.

Recognizing the multitude of rhetorical resources available when responding to challenging legal issues, the goal of this project is to understand how competing conceptions of legal judgment shape and are shaped by philosophers contributing to academic and public discussions on important legal issues. In order to do so, I advance the “models of judgment” approach and use it to analyze the legal philosophies of three prominent philosophers of law: Richard Posner, Martha Nussbaum, and Cass Sunstein. By “models of judgment,” I mean the idealized judge who embodies the jurisprudence advanced by the author. Approaching their respective philosophies in such a way provides a unique perspective and serves to illustrate the rhetorical commitments undergirding their theories. Posner, Nussbaum, and Sunstein provide compelling case studies because their legal theories are distinct, yet emerge in relationship to one

¹⁷ James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (Chicago: University of Chicago Press, 2004), 273.

another. In addition to serving as faculty members at the University of Chicago School of Law (at times co-teaching courses), they are prominent public intellectuals and respond to one another's work in their scholarship. Unlike previous scholarship on the rhetoric of law, which tends to focus on particular cases (often Supreme Court cases) or legal issues, my contribution fills a noticeable gap by addressing the philosophy of law and the rhetoric therein. I hope the "models of judgment" approach provides a new theoretical resource for understanding law as a site for the intersection of rhetoric and philosophy that can be applied to other legal philosophers.

The United States is in many ways a legal culture, but one that does not have any single, guiding philosophy. Law is an important, if not the most prominent, way in which the public and philosophers engage one another. Complex legal cases beget complex philosophical problems, which affect and are affected by public discourse. Their rhetorical constructions and discursive turns are not born of immaculate conception, but emerge from, respond to, and transform a long, ongoing tradition of philosophical explication and negotiation. The public philosophers addressed offer distinct argumentative discourses that help to shape how readers understand good legal judgment; but to isolate one and label it our fixed star ignores the many ways in which it is situated in a greater constellation. By addressing the ways in which these philosophers use rhetorical strategies to situate and promote their philosophies, particularly the ways in which they construct rhetorical tropes to direct attention one way rather than other, their conceptions of good judgment come into better view.

1.1 RHETORIC AND PRACTICAL REASON

Rhetoricians have been concerned with the idea of good judgment as long as rhetoric has been theorized. Moreover, the connection between legal theory and rhetoric turns (in part) on the idea

of practical reason, a particularly important concept that enjoys a rich history in law and rhetoric. Aristotle argues in the *Rhetoric* that judgment is a distinctly rhetorical concept. Because judgment requires the weighing of competing arguments, he reasons, it must deal with uncertainty and *that which can be otherwise*. Whereas philosophy is traditionally characterized as the pursuit for truth, rhetoric is often characterized by the negotiation of probabilities and contingencies. As Aristotle aptly notes, “there is no further need of speech on subjects that we know and have already judged.”¹⁸ In so far as truth is available and known, on this view, then there is no need for rhetoric or for judgment. What, then, creates the need for rhetorical judgment, and how is it constituted? For this would appear to hold the key to understanding legal rhetoric, which most (perhaps even Justice Roberts when in another setting) would regard as not simply a matter of announcing what is “true.”

Arguably the most robust and richly nuanced aspect of rhetorical and legal judgment, practical reason has been featured prominently in philosophy, rhetoric, and law for as long as they have been around. At its most basic, practical reason concerns the process by which an individual determines how to decide in a given situation where there can be significant ramifications. Because it operates within contingencies and considerations of timeliness, rhetoric has been closely associated with practical reason rather than theoretical reason. Rhetoric requires one to act without complete knowledge while facing pressures that fall beyond the scope of most logical inquiries including, but not limited to, one’s emotional state and the emotions of others, reputation, social expectations, credibility, perceptions and beliefs, ideology, complexity of ideas, experience, intentions, and, of course, factual data.

¹⁸ Aristotle, *On Rhetoric: A Theory of Civic Discourse*, trans. by George A. Kennedy (Oxford: Oxford University Press, 1991), 1391b.

Aristotle was the first philosopher of note to expound systematically upon the difference between these two realms of thought and utilized legal examples to illustrate their similarities and differences. Whereas Plato prized the theoretical over the practical, Aristotle found value in both. In the *Nicomachean Ethics*, Aristotle offers a compelling argument for and defense of practical reason. Noting the gradual cultivation of practical reason (*phronésis*) through experience, reflection, and habit,¹⁹ Aristotle claims that, unlike theoretical reason (*sophia*), practical reason is concerned with particulars *as well as* universals. An individual utilizing sound practical reason will be able to assess a given situation and act accordingly in order to produce particular desired ends that also fall under the auspices of *eudaimonia* (the “flourishing life”). Aristotle’s characterization of practical reason closely parallels his characterization of rhetoric, the latter defined as the ability to understand the available means of persuasion in a given situation.²⁰ Like rhetoric, practical reason is knowledge and experience in action and interaction. It is never quite settled, nor is it moving so quickly that we cannot see where it is or where it is going.

Importantly, rhetoric and law are not only concerned with an individual’s practical reason, but with the judgments of audiences. As Thomas Farrell argues,

Rhetoric is the only art which evokes the capacity for practical reason from a situated audience. Therefore, alone among the arts, it presents a public audience with the possibility of becoming, for a time, an accountable moral agent. The process of elaborating the equalities of a developed rhetorical ethic also allows us to underscore certain norms for

¹⁹ Aristotle *Nicomachean Ethics*, trans. by Terence Irwin (Indianapolis: Hackett Publishing, 1999), 1142a.

²⁰ For a more detailed analysis of Aristotelian practical reason, see Joseph Raz, ed., *Practical Reasoning* (Oxford: University of Oxford Press, 1978); David Charles, *Aristotle’s Philosophy of Action* (London: Duckworth Press, 1984); Norman O. Dahl, *Practical Reason, Aristotle, and Weakness of the Will* (Minneapolis: University of Minnesota Press, 1984); Donald Davidson, *Essays on Actions and Events* (Oxford: Oxford University Press, 1980); and Michael E. Bratman, *Intentions, Plans, and Practical Reason* (Cambridge: Center for the Study of Language and Information, 1999).

rhetorical competence: chiefly those aspects of *ethos*, agency, practical reason, and civic friendship which help to foster reciprocal measures of responsibility and belonging in the advocates and audiences of civic life.²¹

For Aristotle, the rhetorical inducement to judgment must be guided by prudence. Aristotelian scholar Terence Irwin notes that “The ‘prudence’ in ‘jurisprudence’ comes closer to Aristotle’s definition of *phronésis*. ”²² Such prudence includes thoughtful deliberation about what *might* be the case and realizing that no true, all-encompassing answer is ascertainable. A jury’s deliberation, for example, requires good practical reasoning, especially in cases wherein both the prosecution and defense have provided compelling arguments. A jury weighs these arguments against one another, deliberating about what is possible rather than what is true. Only in the movies will a guilty defendant go through a trial, only to break down at the last minute and confess to everything. And only in television will a crooked cop see the error of his ways and confess to setting up the defendant to take the fall. Alas, real life is not like *Perry Mason*.

The early Stoics were fairly rigid in their depiction of practical reason and embraced a model of action more closely associated with Plato than with Aristotle. Later Stoics, such as Cicero and Seneca, were more sympathetic to the ebb and flow of human experience. Seneca’s articulation of the stoic judge who embodies “wise moderation” provides a paradigm of the practical reasoning required for a judge issuing a judgment. In an ill-fated attempt to advise Nero, Seneca’s *De Clementia* articulates the need for mercy by juxtaposing blind rigidity and mindful flexibility. Whereas the stern judge will follow the letter of the law (as opposed to the spirit of the law), the wise judge acknowledges the inevitability of wrongful acts. “We have all sinned,” notes the wise judge, “and not only have we done wrong, but we shall go on doing wrong to the very

²¹ Thomas B. Farrell, *Norms of Rhetorical Culture* (New Haven: Yale University Press, 1993), 10.

²² Terence Irwin, ed. and trans., *Nicomachean Ethics*, 345.

end of life. Even if there is any one who has so thoroughly cleansed his mind that nothing can any more confound him and betray him, yet it is by sinning that he has reached the sinless state."²³

Unlike the stern judge, who is unlikely to “escape conviction under the very law which they cite for the inquisition,”²⁴ the wise judge recognizes the process of moral growth and development.

Mercy is not required in every occasion, but given the circumstances and offending party, “there are a great many people who might be turned back to the path of virtue if [they are released from punishment].”²⁵ Instead of rigidity, Seneca urges wise moderation – an anthem shared by Aristotle.

This balancing act is far from an exact science with explicit rules for when and how to be merciful; instead, it requires a kind of artistry. Like the ideas of balance and proportionality, the act of judging hard cases requires a keen sensitivity to contextual nuances while still embracing measured reason. Judgment in an official capacity not only requires a thorough knowledge of the particular case at hand, but also the ramifications the decision could produce. In our own time, James Boyd White argues that such acts of judgment select particular discourses from which a community constitutes (and reconstitutes) itself and encourages certain actions.²⁶ An especially harsh decision may inspire revolt, whereas a merciful decision may encourage cooperation. Seneca’s wise judge, an emblem in the Stoic “progressor,” makes that line of argument public and possible.

²³ Seneca, *De Clementia*, in *Seneca: Moral Essays*, v. I, trans. John W. Basore (Cambridge: Harvard University Press, 1979), 1.6.3-4.

²⁴ *Ibid.*, 1.6.3.

²⁵ *Ibid.*, 1.2.2.

²⁶ See James Boyd White, *When Words Lose their Meaning*. White makes similar arguments in many of his other works, including *Justice in Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990) and *Heracles’ Bow: Essays on the Rhetoric and Poetics of the Law* (Madison: University of Wisconsin Press, 1989).

Seneca's idea of "wise moderation" and the gradual and conscientious cultivation of the good habits essential for good practical reason carries on the Aristotelian tradition and illustrates its vital place in law. Several medieval philosophers also make important contributions in this regard, most notably Thomas Aquinas, who builds on Augustine's weaving together of Aristotelian virtue ethics and Christian doctrine.²⁷ With the advent of the Age of Reason and the Enlightenment, however, practical reason and rhetoric have faced great pressure at the hands of scientific reasoning. Demanding precision and certainty, analytic philosophy since Descartes has had a complicated relationship with practical reason, with rhetoric sharing a similar fate. Immanuel Kant's *Critique of Practical Reason* offered some room for *phronésis* to breathe, but still held it to rigid standards with the categorical imperative.²⁸

At present, practical reason, like rhetoric, is enjoying a revival in interest. Alisdair MacIntyre's *After Virtue*, a significant contribution to ethical judgment, sets practical reason as a cornerstone of his theory.²⁹ Stephen Toulmin has written about the *uses* of argument and their variance according to fields.³⁰ Contemporary rhetoricians have similarly contributed to our understanding of practical reason, especially its relationship to expertise.³¹ Given the exigencies

²⁷ See, for example, Ralph McInerny, "Thomistic Natural Law and Aristotelian Philosophy," in *St. Thomas Aquinas and the Natural Law Tradition: Contemporary Perspectives*, eds. J. Goyette, et al. (Washington, D.C.: The Catholic University of America Press, 2004), 25–42; Daniel Westberg, *Right Practical Reason: Aristotle, Action, Prudence in Aquinas* (Oxford: Clarendon Press, 1994).

²⁸ His famous statement that one must *never* lie was and continues to be a highly contested area of disagreement among moral philosophers. For all its intrigue, the categorical imperative fits the Platonic model of practical reason more than the Aristotelian model. His *Critique of Judgment* is more sympathetic to a rhetorical understanding of practical reason, but he limits such judgments to aesthetics and not ethics or law.

²⁹ Alisdair MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame: University of Notre Dame Press, 1981). Subsequent works, most notably *Whose Justice? Which Rationality?*, take an unnecessary turn toward Christian dogma that, in my opinion, undermine his humanistic revival of virtue ethics found in *After Virtue*.

³⁰ Stephen Toulmin, *The Uses of Argument* (Cambridge: Cambridge University Press, 1958).

³¹ For example, see Michael Calvin McGee and John Lyne, "What are Nice Folks Like You Doing in a Place Like This?: Some Entailments of Treating Knowledge Claims Rhetorically," in *The Rhetoric of the Human Sciences: Language and Argument in Scholarship and Public Affairs*, ed. John S. Nelson, Allan

that arise out of contemporary problems – be they related to public policy, governmental research funding, or legal cases – there exists an imperative to decide and act, which can never assume absolute, complete, unanimous knowledge. Experts are often asked to contribute their nuanced perspectives, but they operate in contingent situations and must negotiate amongst fellow experts proposing competing, sometimes antithetical arguments. Like science and economics, law is a bastion of such experts offering their arguments on the proper course of action. “Credible experts,” write McGee and Lyne, “on the rhetorical model of authority, *must facilitate the act of judgment* – that is, they must speak that language of knowledge which translates easily into the language of action and promotes a fusion of the two.”³²

As this project stresses, public philosophers of law offer an array of expert arguments that are culturally grounded and emerge from similar resources of judgment (e.g. the Constitution, statutes, precedent, an ever-changing public, etc.). I argue that legal philosophers do not necessarily differ regarding *which* resources are used, but rather *how* they are used. Sometimes these differences are specific, such as the incorporation of literature in legal education and judgment, whereas others are differences in definition and perception, such as the idea of common sense. At the end of the day, philosophers of law construct different ways of viewing the world, which necessarily means different ways of judging the world, and this is especially prominent in authors who write for a broader, public audience.

Consider, for example, two extralegal elements of legal judgment that must be negotiated by sitting judges: context and audience. Given practical reason’s attention to the normative and

Megill, and Donald N. McCloskey (Madison: University of Wisconsin Press, 1987); the special issue of *Social Epistemology* (3) 2011, which spotlighted “Rhetorics and Expertise,” ed. Damien Pfister; E. Johanna Hartelius, *The Rhetoric of Expertise* (Lanham, MD: Lexington Books, 2010); and Harry Collins and Robert Evans, *Rethinking Expertise* (Chicago: University of Chicago Press, 2007).

³² McGee and Lyne, 391.

ever-changing elements of human experience, context plays a vital role in judgment, especially when legal issues are involved. They become especially clear in times of war. One compelling example is in the history of the sedition in the United States. As legal scholar Geoffrey Stone notes, the most significant cases have arisen during “perilous times.”³³ The first great breach of First Amendment rights occurred during the notorious “XYZ Affair” and led to the Alien and Sedition Acts of 1798 (only seven years after the Bill of Rights was ratified!). Abraham Lincoln’s suspension of *habeas corpus* during the Civil War had notable ramifications for free speech. Woodrow Wilson and a supporting congress passed another round of acts criminalizing sedition during World War I (which are still in place and have recently been used as the legal grounding to pursue Edward Snowden). Franklin Delano Roosevelt instituted notorious internment camps. Throughout the Cold War, numerous individuals were penalized, fired from their jobs, and imprisoned due to their “communist tendencies.” During the Vietnam War, a number of news agencies opted for self-censorship in fear of governmental retribution. Most recently, the so-called “war on terror” has instigated the much-debated Patriot Act and a number of executive orders that have curbed expression. “Free speech zones,” which are basically fenced corrals often stationed well offsite during large political gatherings like national political conventions and international economic summits, are now commonplace and egregious acts like wearing a “give peace a chance” T-shirt can get an individual evicted from a shopping mall.³⁴

Although some commentators on the First Amendment claim that times of war require the *most* freedom to criticize the government, our history tells another story. Unlike times of peace,

³³ Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (New York: W.W. Norton & Company, 2004).

³⁴ See Kembrew McLeod, *Freedom of Expression ®: Overzealous Copyright Bozos and Other Enemies of Creativity* (New York: Doubleday, 2005); John Durham Peters, *Courting the Abyss: Free Speech and the Liberal Tradition* (Chicago: University of Chicago Press, 2005).

the liberty to speak freely and the issues of security raised in times of war come into open conflict with the latter often winning out. Kenneth Burke described the aspirations toward liberty and security as “generalized wishes,” which would also include such prized political aspirations as equality and privacy.³⁵ Although we may subscribe to all of them and be willing to defend them at any given moment, they nonetheless come into conflict depending on the context in which one is making an argument. Judges have a far easier time appealing to safety in times of war than they do to liberty or privacy or even equality, as *Korematsu* sadly illustrates. The same socio-political context can elicit distinct and nuanced rhetorical approaches depending on how practical reason blends with legal judgment.

Public philosophers of law recognize the importance of context and the ever-changing landscape of contingency. As they craft their different models of judgment, each must rhetorically situate an approach that is flexible enough to respond to different contexts and contingencies, while also maintaining a certain level of consistency (after all, what good is a model of justice if nobody knows how it will play out?). To borrow from Jean de La Fontaine, “*Je plie, mais je ne romps pas*” – these approaches must bend, but not break, in order to maintain relevance in the public and legal spheres.

Context also involves another important rhetorical concept present in law: timeliness (*kairos*). Like practical reason, one cultivates an ability to acknowledge and respond to an opportune moment. Although Aristotle notes the importance of *kairos* in the *Rhetoric*, Isocrates’ treatment of the idea is arguably more robust and useful. A key element of his approach to education (*paidea*) and central to his overall rhetorical model of philosophy (*philosophia*), Isocrates envisions the virtuous orator as able to address an audience at the most opportune time. Regarding

³⁵ See Burke, *A Grammar of Motives*, particularly part three, “On Dialectic.”

Isocrates and *kairos*, Haskins argues, “The impulse to speak is therefore both external and internal. It is external insofar one perceives in a situation the compelling force of necessity (*ananke*); it is internal insofar one has a grasp of discourses that are fit to address the situation in question.”³⁶ A *kairotic* moment, when virtuous oratory is needed to respond to an immediate problem, requires an individual skilled enough to bide her time when others would act too quickly, yet not be numbed into inaction. For the sitting judge, timeliness comes in a number of forms. The Sixth Amendment in the U.S. Bill of Rights highlights one of the most recognized forms, given “the accused enjoys the right to a *speedy* and public trial.” Unnecessarily dragging out a case places added pressure on the legal system and often creates an undue burden for defendants, especially if they are spending time in jail awaiting the conclusion of a case.

As we climb up the legal ladder to the Supreme Court, timeliness continues to be important but takes a markedly different and noticeably political form. In order to have a case heard by the Supreme Court, it must be raised in conference by the justices and receive at least four votes supporting its hearing (colloquially known as the “rule of four”). The Supreme Court receives upwards of 10,000 or more petitions per year. Of these petitions, roughly 100-150 cases will be heard.³⁷ I am no statistician, but even I can tell those are terrible odds. What, then, determines whether or not a case is heard? Sometimes the Supreme Court is rectifying the gross negligence of a lower court or tending to an issue of immediate concern. Quite often, however, the justices choose high profile cases based on the political and ideological climate, even though the court pretends to be above or beyond politics. One sometimes hears it said that the court was “waiting for a case like this,” meaning that the timing and extra-legal circumstances happened to be ripe for

³⁶ Ekaterina Haskins, *Logos and Power in Isocrates and Aristotle* (Columbia, SC: University of South Carolina Press, 2004), 73.

³⁷ For detailed statistics on the Supreme Court’s process of granting *certiorari*, see their webpage: <http://www.supremecourt.gov/>.

the picking. The most noticeable examples can be found in landmark decisions that overturn precedent.

Brown v. Board of Education's overturning of *Plessy v. Ferguson* did not just happen; it was part of a long process by which advocates for racial equality slowly built up enough support to make the decision possible. The political and ideological landscape needed to be amenable to desegregation. If *Plessy* was simply a poor decision, the court would have overturned it in 1899 when it heard *Cumming v. Richmond County Board of Education*,³⁸ but the Supreme Court upheld segregation unanimously. Several social, cultural, and political elements needed to be in line before the Court would eventually overturn *Plessy*. For example, the National Association for the Advancement of Colored People created a strategy for legally challenging school segregation in the mid-1930s, which continued to gain political force. Following World War II, the Court also struggled to justify segregation after battling for equality half way around the world. These historical events created a larger and more formidable set of rhetorical resources that were available to the court. The opportunity for the court to make its arguments in *Brown v. Board of Education* and have those arguments resonate with the American public became increasingly appropriate.

Another element of contingency and timeliness involves the changing composition of the court, which greatly influences the judgments issued and the arguments offered therein. Chief Justice Earl Warren was set on expanding civil rights from the beginning of his appointment.³⁹ Along with fellow justices such as Hugo Black, William Douglas, and Tom Clark,⁴⁰ the court had

³⁸ *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899)

³⁹ President Dwight Eisenhower lamented that appointing Warren was "the biggest damned-fool mistake I ever made."

⁴⁰ Presidents seem to have a tradition of regretting their judicial appointments. Regarding Clark, President Harry Truman once remarked, "It's not that he's a bad man; it's just that he's the dumbest sonofabitch I ever met."

a solid liberal bloc, which would garner even more power with the appointment of William Brennan and, at the very end of Warren's tenure, Thurgood Marshall. With these elements in play, the *kairotic* moment had arrived and Warren was able to jump at the opportunity to overturn the (now) notorious *Plessy* decision.

The aforementioned elements of context involve events that occur at particular times and lead to particular ramifications. In his description of the rhetorical situation, Lloyd Bitzer notes that various forms of restraint (and, correspondingly, possibility) mark such events. Unlike timeless theoretical reason, practical reason and the judgments that issue forth are greatly influenced by human agents. In other words, audience matters – a running theme in rhetoric. Depending on the backgrounds and expectations of audience members, a rhetor must sculpt a message accordingly.

Audience serves as a central concern for rhetoric, but has also been one of its most significant points of contention with philosophy and science. Plato's caustic criticisms of rhetoric, most notably in the *Gorgias*, *Protagoras*, and *Pheadrus*, stress the speciousness of catering to an audience. In the *Gorgias*, Plato claims this amounts to flattery. Tell the audience what they want to hear, rather than what they *should* hear, and you will be a successful, if unjust, orator. Rhetoric, under this characterization, manipulates the soul. Plato's ancient criticism continues to hold sway against rhetoric, as popular contemporary usage of the term still carries a pejorative connotation. Seedy politicians use "mere rhetoric" to obfuscate and distort, whereas intrepid journalists channel Nietzsche and speak "truth to power."

Isocrates and Aristotle respond to Plato's denunciation of rhetoric by pointing out that real-life judgments are not so easy. Much like Seneca, Isocrates offers advice to the powerful elite in Greece and the surrounding areas. In a letter to the Macedonian King Phillip, Isocrates needs to

adeptly navigate the ego of a powerful ruler while still getting his message across. Whether we like it or not, people have interests, experiences, and biases that sculpt their perspectives. This connects rhetoric to practical reason because it asserts that an audience as an amalgamation of different, sometimes conflicting perspectives that must be adeptly navigated in order to produce the desired outcome. The people composing an audience may share much in common, but none of them look at a speaker (or an idea or an issue) with an unclouded view. The job of the skilled (and hopefully virtuous) rhetor is to guide individuals through the haze *together*. Against Plato's loftiest hopes, she cannot act the part of the sun and burn the fog away to show how things *really* are.

Aristotle more succinctly characterizes the importance of an audience for the rhetor. Depending on the type of speech - epideictic, deliberative, or judicial – a rhetor needs to sculpt the message in a particular way in order to be most effective. Imagine that a man is on trial for animal abuse and his defense attorney is trying to build his case. Would not a jury composed of pet-owning animal lovers merit a different rhetorical approach than that of a jury composed of citizens who endured traumatic experiences with animals? Consider a different case involving a defendant with a history of drug abuse. A jury composed of holier-than-thou teetotalers would certainly require a different set of arguments than one with citizens who had similarly struggled with drug addiction or witnessed a close friend or relative experience such addiction. Even in an ideal world, would we want to be able to make the same arguments to markedly different audiences that elicit the same response? Can we simply set aside our own experiences?

The U.S. court system, especially the Supreme Court, carries with it a mythical notion of apoliticism. Although this impression of the court is fading, the expectation that the courts will decide cases based on *the law* and that judges will check their political ideologies at the door out

of respect and integrity for the institution continues to exist. As a recent poll by the *New York Times* indicates, “Just 44% of Americans approve of the job the Supreme Court is doing and three-quarters say the justices’ decisions are sometimes influenced by their personal or political views.”⁴¹ Citing *Bush v. Gore* and *Citizens United*, in addition to a growing distrust in U.S. governmental institutions across the board, the authors note that criticisms of the court span the ideological spectrum. Yet, when asked what constitutes a good judge, the response is often that “they will do their job within the parameters of the law.” At the very least, people are still *upset with* the Supreme Court when they believe a decision was made on political grounds because they still *expect* the court to be apolitical.

In *The New Rhetoric*, Perelman and Olbrechts-Tyteca reproach analytic reasoning in favor of practical reasoning, arguing that “it is in terms of an audience that an argumentation develops.”⁴² Expanding upon the Ancient Greek and Roman preoccupation with oratory to include all manner of argumentation, Perelman and Olbrechts-Tyteca remain attentive to the effects an audience has on argumentative structure and judgment. Noting that audiences are “almost infinite in their variety”⁴³ yet still hold to a number of general characteristics, they theorize a “universal audience.” They are not asserting that there exists some all-encompassing, purely rational audience, which they claim philosophers tend to do. Rather, the universal audience exists as a fiction created by the rhetor to help facilitate the construction of arguments, which, in turn, shape the judgments of the rhetor and the audience. “Everyone constitutes the universal audience from what he knows of his fellow men, in such a way as to transcend the few oppositions he is aware

⁴¹ Adam Liptak and Allison Kopicki, “Approval Rating for Justices Hits Just 44% in New Poll,” *The New York Times* (June 7, 2012), retrieved from <http://www.nytimes.com/2012/06/08/us/politics/44-percent-of-americans-approve-of-supreme-court-in-new-poll.html>.

⁴² Chaïm Perelman and L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, trans. John Wilkinson and Purcell Weaver (Notre Dame: University of Notre Dame Press, 1971), 5.

⁴³ *Ibid.*, 26.

of,” argue Perelman and Olbrechts-Tyteca. “Each individual, each culture, has thus its own conception of the universal audience.”⁴⁴

Unlike scholars writing for fellow scholars, judges address a wide, ever-changing audience. Judges are certainly writing for a legal culture that carries certain expectations and limitations, but the higher up the court food chain one goes, the more public attention and criticism a judge’s decision will elicit. Major decisions are headline stories and garner significant, sometimes incessant, media attention. The most adept judges and justices create a universal audience that includes legal experts and the lay public, law professors and law transgressors.

Given the judge’s position, she must address the particular audience of a particular case, while also attending to the universal audience she constructs while crafting a decision that will enter the public sphere. Consequently, both particular and universal audiences influence judgment. Consider, for example, Plato’s legitimate charge against rhetorical flattery and pandering. Returning to Chief Justice Roberts’ testimony before Congress, it is clear that he was catering his responses to his audiences – both the members of Congress sitting before him and the general public watching at home (with bated breath, no doubt). Neither liberals nor conservatives want an over-reaching judge. Neither liberals nor conservatives want a “legislator in robes.” Like all of the Supreme Court nominees since at least Robert Bork, Roberts chose his words very carefully in order to appeal to multiple constituencies. Anticipating questions about the role of precedent in the judiciary, which is often a thinly veiled way to ask about *Roe v. Wade*, Roberts claimed that judges must “operate within a system of precedent, shaped by other judges equally striving to live up to the judicial oath.”⁴⁵ He claimed that a Roberts court would be dedicated to narrow decisions and avoid stepping beyond the previously established bounds of the judiciary. We can never know

⁴⁴ Ibid., 33.

⁴⁵ U.S Senate, Hearing 109-158.

the earnestness of these assertions, but we do know that this is what the Senate Judiciary Committee and Congress want to hear, not to mention the majority of the American public.

Furthermore, his metaphor of choice, comparing judges to umpires, bespeaks of a desire to appease a general public that remains disinterested in technical legal jargon. He could have rattled off a long list of judges whom he admires or decisions he thought were particularly adept (or inept). Instead, he chose baseball: “America’s pastime.” He could have just as easily compared judging to baking an apple pie: you need to follow the instructions closely, you need to mix all of the ingredients together well, and you need to be mindful of the oven because once in a while you might get burned.

A second important way in which an audience shapes legal judgment has already been addressed, albeit tangentially. Timeliness, when a case gets heard and a decision issued, is of great importance because the characteristics of the American public change. Condit and Lucaites make a strong argument for the slow, methodical expanse of equality as an ideograph.⁴⁶ If the history of American public address is any indication, the *idea* of equality has gone through significant change in the short history of the United States. Condit and Lucaites note that the early arguments for equality were few and far between⁴⁷ and were mostly focused on equal representation and equal property rights for white, propertied men.⁴⁸ Even after the Revolution and during the creation of the Constitution the term equality was rarely associated with the expansive, humanistic definition traditionally used today. Rather, equality in early American political oratory and essays was more attentive to the equality between states, between the branches of government, and merit

⁴⁶ See Condit and Lucaites, *Crafting Equality*.

⁴⁷ Notably, Stephen Lucas’ *Portents of Rebellion* hardly addresses the arguments for equality. See Stephen E. Lucas, *Portents of Rebellion: Rhetoric and Revolution in Philadelphia, 1765-76* (Philadelphia: Temple University Press, 1976).

⁴⁸ This conception of equality parallels Aristotle’s notion of equity as articulated in the *Rhetoric*, *Nicomachean Ethics*, and *Politics*.

based equality between citizens (again, “citizens” being confined to only one part of the population). Even though several authors and statesmen lamented the existence of slavery, most hoped for its *natural* nullification. They thought it would go away on its own because it would no longer be *economically* viable, which was thwarted, to a certain extent, by the invention of the cotton gin.

Not until orators and activists like Frederick Douglass, Angelina and Sarah Grimke, Elizabeth Stanton, Susan B. Anthony, Lucretia Mott, Booker T. Washington, and W.E.B. DuBois did equality rhetorically shift closer to our contemporary understanding. And this took decades of work and did not gain broad popular support until well into the 20th century. The arguments made in *Brown v. Board of Education* could not have been made with much, if any, success until the idea of equality had expanded.⁴⁹ In other words, the audience needed to be ready to accept the arguments issued in the decision. This does not undermine the moral outrage that was felt before the *Plessy* decision was overturned, but instead emphasizes the idea that judges must be attentive to the American public *as an audience*.

The audience also plays a role in deciding which justice will author a decision. A somewhat cyclical process for authorship no doubt exists, ensuring that no justice authors a substantial or insubstantial amount of the decisions being issued in a given term. In important cases, however, the choice often responds to the needs or demands of the general public. Consider the 1919 First Amendment cases. Until his dissent in *Abrams v. U.S.*, Justice Oliver Wendell Holmes, Jr. was asked to write every single decision upholding prosecution. Why? Was Holmes the most adept First Amendment scholar of the group? Was he somehow more qualified than his

⁴⁹ Michael Calvin McGee argues that social change is best understood through these shifts in meaning (“movement as meaning”) as opposed to, say, new legislation (“movement as phenomena”). See “‘Social Movement’: Phenomenon or Meaning?” in *Readings on the Rhetoric of Social Protest*, ed. Charles E. Morris, III and Stephen H. Brown (State College: Strata, 2001), 125-136.

peers? (Rarely humble, Holmes would have likely said, “Yes,” to both of these questions.) Holmes authored the decisions in *Schenck*, *Frohwerk*, and *Debs* not because he had a particularly acute interest in these cases; rather, Chief Justice Edward White selected him because he was the *most sympathetic* to the defendants and the protection of sedition. The Court hoped that opposition to the decisions would be subdued because even Holmes, a purported ally, remained unconvinced of the defendants’ innocence.⁵⁰ Just as a liberal critiquing liberalism or a conservative critiquing conservatism carries more rhetorical force, so too does a judge sympathetic to a cause.

Not too long ago, the Supreme Court issued their much-anticipated decision regarding the Affordable Care Act. In the 5-4 decision, was a bleeding heart liberal justice asked to author the opinion? No. Chief Justice John Roberts took it upon himself to write the monumental decision. Speculation abounds regarding the “true” reasons behind the choice and we may not know the full details until Roberts’ notes and papers are released decades from now. Perhaps we will never know. I believe, however, that Roberts chose to write the decision because it would be more persuasive to the conservatives who had been lambasting the bill for the previous two years. If everything about the decision was exactly the same, but the author had been Justice Ginsberg or Justice Breyer instead of Chief Justice Roberts, the political fallout could have been devastating.

Finally, we must also consider the important role that the public opinion of a judge can play in their decision-making process. Again, we like to consider judges as beyond the petty vicissitudes of public opinion. We do not like to think that judges hold their positions because they are popular, but rather because they are adept legal scholars.⁵¹ Alas, judges have egos, too, and

⁵⁰ Confiding to friends, most notably Harold Laski, Holmes would later claim that he regretted writing the *Debs* decision. See Mark DeWolfe Howe (ed.), *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski 1916-1935* (Harvard: Harvard University Press, 1953).

⁵¹ This belief has met significant resistance in recent years, as judges are being voted out of their positions due to unpopular decisions, rather than the merit of their arguments in the confines of law. Only two years ago during the 2010 midterm elections, Iowans ousted three Supreme Court justices who joined in the

they want to leave the bench with a favorable legacy. The two previous examples involving Holmes and Roberts help to illustrate this point as well. In the interim between the *Schenck*, *Frohwerk*, and *Debs* cases and the *Abrams* case wherein he issued a landmark dissent, Holmes had a serendipitous encounter with Judge Learned Hand.⁵² Considered the “tenth Justice of the Supreme Court,” Hand was a highly regarded second circuit appeals court judge and influential progressive jurist. Two years before *Abrams*, Hand issued his most famous decision in *Masses Publishing Co. v. Patten*. The case involved the publication of articles and cartoons that were highly critical of the United States’ involvement in World War I. After the postmaster of New York City refused to deliver the publication to its subscribers, *Masses* sought an injunction. Authoring the court’s decision, Hand defended the right of *Masses* to distribute their publication and famously crafted the “incitement test,” which would serve as benchmark for future cases.

By sheer happenstance, Hand and Holmes were aboard the same train traveling between Boston and New York City. They were familiar with and admired one another’s work and struck up a conversation about the limits of sedition in times of war.⁵³ A few short months later, Holmes (with Justice Louis Brandeis concurring) issued his famous dissent in *Abrams v. United States*. Yet one meeting, the exact details of which remain lost to history, does not constitute a noteworthy pressure from public opinion. Several scholars, however, have argued that this event along with the criticisms he faced by such noted legal contemporaries such as Zachariah Chafee and Holmes’ desire to maintain popularity with fawning young progressives weighed on his ego.⁵⁴

unanimous decision to legalize same-sex marriage. Here we see the conflict between the wariness of “legislators in robes” and the need for an independent judiciary.

⁵² See Erin Rahne Kidwell, “The Paths of the Law: Historical Consciousness, Creative Democracy, and Judicial Review,” *Albany Law Review* 62.1998 (2001), 91-146.

⁵³ G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (Oxford: Oxford University Press, 1993), 424.

⁵⁴ See White, *Justice Oliver Wendell Holmes*; G. Edward White, “Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension,” *California Law Review* 80.391 (1992): 391-467;

Holmes may be a special case as his vast correspondence has been preserved and indicates the importance he invested in his legacy. But who in such an honored position does *not* think about his or her legacy? Even people with more humble lots in life care about how they will be remembered. Judges respond to their public just as the public responds to judges.

Arguably, Chief Justice Roberts serves as a contemporary example of this phenomenon. Again, we will not know whether this argument carries its weight for a number of years, but I do not think it is too far reaching. When Roberts was undergoing congressional scrutiny before his appointment, he repeatedly defended a restrained judiciary. He advocated for narrow decisions and was wary of intervening in the acts of Congress. Subsequently, campaign finance reform and affirmative action cases have undermined this position and as a result he has experienced intense backlash. Branded a judicial legislator in most liberal circles, and even some moderate circles as well, Roberts' legacy has been shrouded by his more boisterous conservative colleagues. When Roberts had the choice to side with the conservative wing and strike down the entire Affordable Care Act, which is the most significant contribution to U.S. health care policy since Medicare nearly 50 years ago, or side with the liberal wing in upholding the politically charged law, he opted for the latter. Surely a significant element of the decision was the legality of the policy within the confines of constitutional law and historic precedent. And there was room for the act to survive within these confines, which Roberts articulated through the federal government's ability to tax. But judges are conscientious of their influence on public culture. A student of history,

William W. Fisher, "Interpreting Holmes," *Harvard Law Review* 110.1010 (1997): 1010-1012; Mark DeWolfe Howe, "The Positivism of Mr. Justice Holmes," *Harvard Law Review* 64.4 (1951): 529-546; Erin Rahne Kidwell, "The Paths of the Law: Historical Consciousness, Creative Democracy, and Judicial Review," *Albany Law Review* 62.1998 (2001): 91-146; Frederic R. Kellogg, "Holmes, Pragmatism, and the Deconstruction of Utilitarianism," *Transactions of the Charles S. Peirce Society* 23.1 (Winter 1987): 99-120; Joseph A. Russomanno, "'The Firebrand of My Youth': Holmes, Emerson and Freedom of Expression," *Communication Law & Policy* 33.5 (2000): 33-59; Geoffrey R. Stone, *Perilous Times*.

Roberts knew the long road it took to reach the landmark act and likely realized that to strike down the law in its entirety would inevitably delay a governmental response to the crisis that is U.S. health care. His decision highlighted his belief that this is not a *good* law, but it is adequate for the time being. Countless members of the public, his audience, had suffered through nightmarish experiences with an insufficient and expensive health care system. The tragic anecdotes of pregnant women and sick children being denied coverage kept stacking up. Sensitive to the situation, Roberts responded. As a result, he was being portrayed as an essential fulcrum balancing between the conservatives and the liberals. Only time will tell what Roberts will do in his newly granted spotlight, although I don't think we should hold our breath.

As James Boyd White aptly notes, "Every legal speech is made from a defined position, to a defined audience, in a defined language. The law always assumes a speaker and audience located in the context it defines. This is how it makes a world and makes it real."⁵⁵ Yet, these arguments never remain in the realm of the particular for very long. Perhaps the most miraculous and compelling element of the rhetorical function of legal culture is its ability to constantly fluctuate between the particular and the general, rooted in the moment yet always poised to transcend it. Again, James Boyd White captures this notion beautifully:

[I]t is the constitution of a world by the distribution of authority within it; it establishes the terms on which its actors may talk in conflict or cooperation among themselves. The law establishes roles and relations and voices, positions from which and audiences to which one may speak, and it gives us speakers the materials and methods of a discourse. It is a way of creating a rhetorical community over time. It is this discourse, working in the social

⁵⁵ White, *When Words Lose Their Meanings*, 266.

context of its own creation, this language in the fullest sense of the term, that *is* the law. It makes us members of a common world.⁵⁶

The process of judgment involves particular audiences as well as universal audiences, both of which require rhetorical insight and nuance in order to be successful. Public philosophers of law argue in a manner similar to judges, although they are much more overt in their attempts to influence the public. An article for *Harper's* or *The New Republic* carries a different set of expectations than an article written for the *American Journal of Philology* or the *Journal of Law & Economics*. Given the demographics of readership, the ability for a story to get picked up by a less sympathetic organization, and the significant cultural, economic, religious, political, and ideological differences within the American populace (not to mention global readership), these authors must create an audience in their mind's eye that shares some common generalizations. To argue to and for a narrow, particular audience would only preach to the choir and these philosophers are more interested in spreading the good word. They are less pastors and more proselytizers.

1.2 OVERVIEW OF RHETORIC AND LAW

Surprisingly, there is not much research examining the rhetoric of contemporary jurisprudence, even though there has been a swelling interest in the interdisciplinary study of law. Contemporary rhetoricians, including Clarke Rountree, Omar Swartz, Marouf Hasian, Sean O'Rourke, and James Aune, have made insightful contributions to the rhetoric of law, but the vast majority of their work and that of others roughly falls into one of four categories: 1) the rhetoric within legal opinions (e.g. *Citizens United*); 2) the rhetoric of a judge or justice (e.g. Chief Justice John Marshall); 3) the

⁵⁶ Ibid., 266.

rhetoric surrounding particular legal issues (e.g. “free speech” or “privacy”); and 4) tracing a rhetorical trope, figure, or concept as it is used across cases and issues (e.g. enthymemes). As one would expect, the growing body of literature does not fit so neatly into these categories, as some work dabbles in two, three, or all four of these areas. Nonetheless, this loose categorization will serve as an overview of what scholarship has been produced and where my contribution fits into the mix.

By focusing on landmark opinions or unearthing long-forgotten yet rhetorically significant decisions, rhetoricians of law working within the first category highlight the ways in which decisions are stylistically crafted, catered toward particular audiences, and invested with rhetorical impact. Examples abound in rhetoric scholarship and each scholar brings in her or his distinct approach. As one would expect, particularly significant and rhetorically robust landmark cases get the most attention and are returned to repeatedly with each scholar attempting a new take on established piece of American public culture. *Marbury v. Madison*,⁵⁷ *Dred Scott v. Sandford*,⁵⁸

⁵⁷ See Bjorn F. Stillion Southard, “Prudential Argumentation and John Marshall’s Opinion in *Marbury v. Madison* (1803),” *Argumentation & Advocacy* 44.1 (Summer 2007), 1-17; William L. Benoit and J. Michael D’Agonstine, ““The Case of The Midnight Judges” and Multiple Audience Discourse: Chief Justice Marshall and *Marbury v. Madison*,” *Southern Communication Journal* 59 (Winter 1994), 89-96; and Per Fjelstad, “Legal Judgment and Cultural Motivation: Enthymematic Form in *Marbury v. Madison*,” *Southern Communication Journal* 60 (Fall 1994), 22-32.

⁵⁸ See Todd F. McDormon, “History, Collective Memory, and the Supreme Court: Debating ‘the People’ through the Dred Scott Controversy,” *Southern Communication Journal* 71.3 (Sept. 2006), 213-234; David Zarefsky, “Turning Points in the Galesburg Debate,” *Argumentation & Advocacy* 46.3 (Winter 2010), 140-149; Condit and Lucaites, *Crafting Equality*.

Brown v. Board of Education,⁵⁹ and *Roe v. Wade*⁶⁰ represent the tip of the iceberg within the field of Communication, not to mention the significantly larger body of literature present within legal studies. Although scholars continue to return to landmark decisions, they often introduce a distinct rhetorical lens through which to view a number of cases spanning numerous areas of law. Clarke Rountree, for example, often utilizes a Burkean framework to understand landmark cases, including *Korematsu v. United States*,⁶¹ *Brown v. Board of Education*,⁶² and his expansive analysis of *Bush v. Gore*.⁶³ This attention to landmark Supreme Court cases is often a point of criticism used against the academic community,⁶⁴ but that should not be used to minimize the important contribution this type of research continues to produce. After all, landmark cases are particularly noteworthy for the very reason we call them “landmark” cases – they represent a distinct rhetorical moment in legal and public culture. One of the great benefits to emerge from

⁵⁹ See Martin A. Bartness, “Achieving Unanimity in *Brown v. Board of Education*,” *Journal of the Northwest Communication Association*, 24 (Spring 1996), 49-61; James M. Jones, “From Racial Inequality to Social Justice: The Legacy of *Brown v. Board* and Lessons from South Africa,” *Journal of Social Issues* 62.4 (Dec. 2006), 885-909; David B. Strother, “Polemics and the Reversal of the ‘Separate but Equal’ Doctrine,” *Quarterly Journal of Speech* 49.1 (Feb. 1963), 50-56; Susan Weill, “Conserving Racial Segregation in 1954: *Brown v. Board of Education* and the Mississippi Daily Press,” *American Journalism* 16.4 (Fall 1999), 77-99; David M. Hunsaker, “The Rhetoric of *Brown v. Board of Education*: Paradigm for Contemporary Social Protest,” 43 (Winter 1978), 91-109; Clarke Rountree, ed., *Brown v. Board of Education at Fifty: A Rhetorical Perspective* (Oxford: Lexington Books, 2005).

⁶⁰ See Katie L. Gibson, “The Rhetoric of *Roe v. Wade*: When the (Male) Doctor Knows Best,” *Southern Communication Journal* 73.4 (Sept. 2008), 312-331; Mary Ziegler, “The Framing of a Right to Choose: *Roe v. Wade* and the Changing Debate on Abortion Law,” *Law & History Review* 27.2 (Summer 2009), 281-330; Mary M. Lay, “Midwifery on Trial: Balancing Privacy Rights and Health Concerns after *Roe v. Wade*,” *Quarterly Journal of Speech* 89.1 (Feb. 2003), 60-77; Michael R. Hagan, “*Roe v. Wade*: The Rhetoric of Fetal Life,” *Central States Speech Journal* 27.3 (Fall 1976), 192-199; Edward Schiappa, “Analyzing Argumentative Discourse from a Rhetorical Perspective: Defining ‘Person’ and ‘Human Life’ in Constitutional Disputes over Abortion,” *Argumentation* 14.3 (Aug. 2000), 315-332.

⁶¹ Clarke Rountree, “Instantiating ‘The Law’ and its Dissents in *Korematsu v. United States*: A Dramatistic Analysis of Judicial Discourse,” *Quarterly Journal of Speech* 87.1 (Feb. 2001), 1-24.

⁶² Clarke Rountree, “Setting the Stage for *Brown v. Board of Education*: The NAACP’s Litigation Campaign against the “Separate but Equal” Doctrine,” in *Brown v. Board of Education at Fifty: A Rhetorical Perspective*, ed. Clarke Rountree (Oxford: Lexington Books, 2004).

⁶³ Clarke Rountree, *Judging the Supreme Court: Constructions of Motives in Bush v. Gore* (East Lansing: Michigan State University Press, 2007).

⁶⁴ This argument will be elaborated upon in the following chapter focused on Richard Posner’s jurisprudence.

such analyses is the ease with which they bridge the gap between rhetoric and legal studies, a seemingly obvious relationship yet one that had nonetheless faded away with the growing success of social scientific approaches to law. Within the legal community, Francis Mootz and others argue that there has been a growing interest in the rhetorical tradition within law schools and law journals.⁶⁵ Although “interdisciplinary” has become an increasingly popular buzzword used by university administrators, one must not shrug off the strengthened ties between legal studies and rhetoric as a mere fad. The connection has always been there, only now is it slowly coming out of hiding. Scholars have also resurrected neglected or forgotten decisions in order to underscore their rhetorical significance and historical/cultural importance. Recent examples include *Romer v. Evans*,⁶⁶ *United States v. Amistad*,⁶⁷ *Modrovich v. Allegheny Country*,⁶⁸ and *Commonwealth v.*

⁶⁵ Mootz has made numerous contributions to this argument, most notably Francis J. Mootz III, *Law, Hermeneutics and Rhetoric* (London: Ashgate Publishing, 2010); “The Irrelevance of Contemporary Academic Philosophy for Law: Recovering the Rhetorical Tradition,” in *On Philosophy in American Law*, Francis J. Mootz III, ed. (Cambridge: Cambridge University Press, 2009); and *Rhetorical Knowledge in Legal Practice and Critical Legal Theory* (Tuscaloosa: University of Alabama Press, 2006). See also Kate O’Neill, “Rhetoric Counts: What We Should Teach When We Teach Posner,” *Seton Hall Law Review* 39 (2009), 507-557; Jack L. Sammons, “Reflections on Legal Writing: Legal Writing Scholarship, Making Strange, and the Aesthetics of Legal Rhetoric,” *Mercer Law Review* (Spring 2010), 925-942; Stephanie A. Vaughan, “Persuasion Is An Art . . . But It Is Also an Invaluable Tool in Advocacy,” *Baylor Law Review* 61 (Spring 2009), 635-682; Kristen Konrad Robbins, “Philosophy v. Rhetoric in Legal Education: Understanding the Schism Between Doctrinal and Legal Writing Faculty,” *Journal of the Association of Legal Writing Directors* 3 (Fall 2006), 108-128.

⁶⁶ Marouf Hasian, Jr. and Trevor Parr-Giles, “‘A Stranger to its Laws’: Freedom, Civil Rights, and the Legal Ambiguity of *Romer v. Evans*,” *Argumentation & Advocacy* 34.1 (Summer 1997), 27-42; and Sean O’Rourke and Laura K. Lee Dellinger, “*Romer v. Evans*: The Centerpiece of the American Gay-Rights Debate,” in *Anti-Gay Rights: Assessing Voter Initiatives*, ed. Stephanie L. Witt and Suzanne McCorkle (Santa Barbara: Praeger, 1997), 133-140.

⁶⁷ Sean O’Rourke, “Cultivating the ‘Higher Law’ in American Jurisprudence: John Quincy Adams, Neo-Classical Rhetoric, and the *Amistad* Case,” *Southern Communication Journal* 60 (1994), 33-43.

⁶⁸ Ann Sinsheimer, “The Ten Commandments as a Secular Historic Artifact or Sacred Religious Text: Using *Modrovich v. Allegheny Country* to Illustrate How Words Create Reality,” *University of Maryland Law Journal of Race, Religion, Gender, and Class* 5 (Fall 2005), 325-349.

Pullis.⁶⁹ A smaller subset ignores judicial opinions in favor of the arguments delivered during the trial or the public rhetoric surrounding a particular case or person.⁷⁰

Closely connected to yet distinct from the first category, the second area of rhetoric and law turns away from specific opinions and toward the individuals writing these opinions. The history of the Supreme Court has had many luminaries, some of whom have garnered reputations of mythical proportion. (Case in point: Justice Oliver Wendell Holmes, Jr. was dubbed the “Yankee from Olympus” – only Ronald Dworkin’s fictional judge “Hercules” could compete with such a title.) James Aune’s work represents some of the best scholarship in this area. In addition to analyzing the rhetoric of historic justices such as Hugo Black⁷¹ and the aforementioned Oliver Wendell Holmes, Jr.,⁷² Aune’s attention has also focused on contemporary judges like Richard Posner.⁷³ Much like the first category, scholars are eager to focus on widely known figures, such as the judicial firebrand Justice Antonin Scalia,⁷⁴ as well as reviving the long forgotten like Judge

⁶⁹ Omar Swartz, “Defending Labor in *Commonwealth v. Pullis*: Contemporary Implications for Rethinking Community,” *Holy Cross Journal of Law and Public Policy* 8 (2004), 79-94.

⁷⁰ See, for example, Marouf Hasian, Jr. “Cultural Amnesia and Legal Rhetoric: Remember the 1862 United States-Dakota War and the Need for Military Commission,” *American Indian Culture and Research Journal* 27.1 (2003), 91-117; Marouf Hasian, Jr. and Lisa Flores, “Mass Mediated Representations of the Susan Smith Trial,” *Howard Journal of Communications* 11.3 (Jul-Sep. 2000), 163-178; Marouf Hasian, Jr. “O.J. Simpson and the Rhetoric of Law,” *Review of Communication* 3.1 (Jan. 2003), 60-63; Kathryn Palmer and Stephen E. Lucas, “On Trial: Conflicting Versions of Emma Goldman’s Address to the Jury,” *Rhetoric & Public Affairs* 11 (Spring 2008), 47-88; Angela G. Ray and Cindy Koenig Richards, “Inventing Citizens, Imagining Gender Justice: The Suffrage Rhetoric of Virginia and Francis Minor,” *Quarterly Journal of Speech* (2007), 375-402; and Marouf Hasian, Jr. “Canadian Civil Liberties, Holocaust Denial, and the Zundel Trials,” *Communications & the Law* 21.3 (Sep. 1999), 43-56.

⁷¹ Martin Carcasson and James Arnt Aune, “Klansman on the Court: Justice Hugo Black’s 1937 Radio Address to the Nation,” *Quarterly Journal of Speech* 89.2 (May 2003), 154-170.

⁷² James Arnt Aune, “Justice Holmes’s Rhetoric and the Progressive Path of the Law,” in *Rhetoric and Reform in the Progressive Era: A Rhetorical History of the United States, Volume VI*, ed. J. Michael Hogan (East Lansing: Michigan State University Press, 2002), 145-184.

⁷³ James Arnt Aune, “On the Rhetorical Criticism of Judge Posner,” *Hastings Constitutional Law Quarterly* 23.3 (Spring 1996), 658-670.

⁷⁴ See Jeffrey M. Shaman, “Justice Scalia and the Art of Rhetoric,” *Constitutional Commentary* 28.2 (Fall 2012), 287-292; and Stephen A. Newman, “Political Advocacy on the Supreme Court: The Damaging Rhetoric of Antonin Scalia,” *New York Law School Law Review* 51.4 (2006/2007), 907-926.

Miles Welton Lord.⁷⁵ Even Judge Judy (yes, *that* Judge Judy) has had her day in rhetorical court.⁷⁶ Although the judicial figures addressed and rhetorical lenses utilized run the gamut, the research in this scholarly vein shares a similar goal: illuminating the rhetoric used by people who like to think of themselves as arhetorical.

The third area of rhetoric and law focuses less on particular legal cases and more on particular legal *issues*. This is arguably the most robust site of rhetorical scholarship as it allows for those less well versed in the particulars of legal argumentation to contribute to the literature. This comment is not a slight against those writing on legal issues without an expertise in law *qua* law. Quite the contrary, in fact - these contributions often shed light upon problems and possibilities a legal framework habitually neglects or (erroneously) considers irrelevant. These studies may be contemporary or historic, or combine the two in order to connect the rhetorical dots so as to arrive upon our present rhetorical situation. A survey of recent literature reveals an abundance of work examining the rhetoric of broad legal issues including, but certainly not limited

⁷⁵ See Verna C. Corgan, "Controversy, Courts, and Community: The Rhetoric of Judge Miles Welton Lord," *Contributions in Legal Studies* 79 (1995), 175-196.

⁷⁶ Christina R. Foust, "A Return to Feminine Public Virtue: Judge Judy and the Myth of the Tough Mother," *Women's Studies in Communication* 27.3 (Fall 2004), 269-293.

to, affirmative action,⁷⁷ personhood,⁷⁸ same-sex marriage,⁷⁹ freedom of speech and the press,⁸⁰ and judicial activism.⁸¹ Scholars often follow the pulse of the public sphere as each of these issues plays a prominent role in contemporary public discourse. The insights they advance are not necessarily the introduction of something altogether new, but rather new takes on ideas that continuously resurface. Take personhood, for example. *Roe v. Wade* highlighted the immensely

⁷⁷ See David G. Holmes, "Affirmative Reaction: Kennedy, Nixon, King, and the Evolution of Color-Blind Rhetoric," *Rhetoric Review* 26.1 (2007), 25-41; Christopher A. Bracey, "The Cul de Sac of Race Preference Discourse," *Southern California Law Review* 79 (Sept. 2006), 1231-1325; Cecil J. Hunt II, "The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence," *Michigan Journal of Race & Law* 11 (Spring 2006), 477-555; Marouf Hasian, Jr., "The Aesthetics of Legal Rhetoric: The Ambiguities of Race in *Adarand v. Peña* and the Beginning of the End of Affirmative Action," *Howard Journal of Communications* (1997), 113-127; and Lolita Buckner Inniss, "A Critical Legal Rhetoric Approach to African-American Slave Descendants Litigation," *St. John's Journal of Legal Commentary* 24.4 (Summer 2010), 649-96.

⁷⁸ See Chris Kaposy, "Proof and Persuasion in the Philosophical Debate about Abortion," *Philosophy and Rhetoric* 43 (2010), 139-162; Glen A. Halva-Neubauer and Sara L. Zeigler, "Promoting Fetal Personhood: The Rhetorical and Legislative Strategies of the Pro-Life Movement after *Planned Parenthood v. Casey*," *Feminist Formations* 22 (Summer 2010), 101-123; Terri Beth Miller, "'Reading' the Body of Terri Schiavo: Inscriptions of Power in Medical and Legal Discourse," *Literature and Medicine* 28 (2009), 33-54.

⁷⁹ See Allison L. Collins, "'I Will Not Pronounce You Husband and Husband': Justice and the Justice of the Peace," *Alabama Law Review* 61 (2010), 847-867; Amy L. Brandzel, "Queering Citizenship? Same-Sex Marriage and the State," *GLQ: A Journal of Lesbian and Gay Studies* 11 (2005): 171-204; Debra L. DeLaet and Rachel Paine Caufield, "Gay Marriage as a Religious Right: Reframing the Legal Debate Over Gay Marriage in the United States," *Polity* 40 (2008): 297-320; Kenneth K. Hsu, "Why the Politics of Marriage Matter: Evaluating Legal and Strategic Approaches on Both Sides of the Debate on Same-Sex Marriages," *BYU Journal of Public Law* 20.2 (2006), 275-312.

⁸⁰ Free speech and its related topics (e.g. free press, copyright) is almost certainly the legal issue that has received the most attention by rhetoric and communication scholars. It is the only specific legal issue to have its own dedicated division and journal (*Free Speech Yearbook*) within the National Communication Association, even though its popularity is waning. Recent contributions include Clay Calvert and Robert D. Richards, "Gay Pornography and the First Amendment: Unique First-Person Perspectives on Free Expression, Sexual Censorship, and Cultural Images," *American University Journal of Gender, Social Policy & the Law* 15 (2007), 687-731; McLeod, *Freedom of Expression*; Peters, *Courting the Abyss*; Jack L. Sammons, "A Rhetorician's View of Religious Speech in Civic Argument," *Seattle University Law Review* 32 (Winter 2009), 367-387; Nadine Strossen, et al., "Left Out in the Cold? The Chilling of Speech, Association, and the Press in Post-9/11 America: A Symposium," *American University Law Review* 57 (June 2008), 1203-1271; Ronald Kahn, "The Meaning of Liberalism/Conservatism on the Mature Rehnquist Court: First Amendment Absolutism and a Muted Social Construction Process," *The Good Society* 14 (2005): 50-58.

⁸¹ See Neil S. Siegel, "Interring the Rhetoric of Judicial Activism," *DePaul Law Review* (Winter 2010), 555-599; Craig Green, "An Intellectual History of Judicial Activism," *Emory Law Journal* 58.5 (May 2009): 1195-1263.

complicated and politically treacherous territory of defining fetal personhood in 1973. The prolonged legal battle surrounding Terri Schiavo that eventually ended in 2005 underscored the challenges posed to personhood in relation to brain function and “death with dignity.” (Belgium’s recent introduction of child euthanasia will likely stoke this fire.) Most recently, *Citizens United* and *Hobby Lobby* have reintroduced the problems and possibilities associated with corporate personhood, ensuring the public debate on the topic rages on for years to come. These new elements of a legal issue are introduced at the same time as advances in rhetorical theory and criticism develop new frameworks for viewing and interpreting the world.

The fourth dimension of the rhetoric of law attends to particular rhetorical concepts and traces them through anything from a single decision to the entire institution of law. Anyone with a passing knowledge of rhetorical terminology knows that it does not suffer from a lack of specificity. Rhetoricians have a name for every rhetorical trick in the book, from *accumulatio* to *zeugma* and everything in between. Some of this work is descriptive, pointing out the use of a particular device,⁸² whereas other scholarship uses an example in law to expand our theoretical understanding.⁸³ Narrative has been especially popular⁸³ given the story-telling component at the heart of law in addition to the emergence of the “law and literature” movement sparked by James Boyd White.⁸⁴

⁸² See David S. Caudill, "On the Rhetorical Invention of a Failed Project: A Critical Response to Skeel's Assessment of Christian Legal Scholarship," *Seton Hall Law Review* 40. 3 (2010), 971-90; Victoria Wohl, "A Tragic Case of Poisoning: Intention Between Tragedy and the Law," *Transactions of the American Philological Association* 140 (Spring 2010), 33-70.

⁸³ See Nancy Struever, "Rhetorical Definition: A French Initiative," *Philosophy and Rhetoric* 42 (2009), 401-423; Mitchell Gordon, "Adjusting the Rear-view Mirror: Rethinking the Use of History in Supreme Court Jurisprudence," *Marquette Law Review* 89 (Spring 2006), 475-540; Brian Pinaire, "The Essential Kafka: Definition Distention, and Dilution in Legal Rhetoric" *University of Louisville Law Review* 46.1 (Fall 2007), 115-156.

⁸⁴ The law and literature movement and the role that narrative plays therein will be examined in greater detail in the chapter on Martha Nussbaum.

There exists a fifth category, however, which includes rhetoricians examining the rhetorical dimensions at play within jurisprudence. Some of Marouf Hasian's work stands out as a good example of such scholarship. One of the precious few legal rhetoric scholars to address the work of the philosophers I will be analyzing throughout the coming chapters,⁸⁵ Hasian has developed a rhetorical framework that borrows from Critical Legal Studies (CLS) and Critical Race Theory (CRT), projects advanced in the 1990s by Richard Delgado, Andrea Dworkin, and Catherine MacKinnon, to name a few. In short, Hasian's approach peels back the veneer of the objectivity of law (e.g. Chief Justice Robert's "call-them-as-they-are" umpire) in order to underscore the vagaries of race, class, and gender in legal theory. His book length project, *Legal Memories and Amnesias in America's Rhetorical Culture*, expands upon the growing literature in collective memory scholarship and examines the rhetorical figures at play in the strategic forgetting that accompanies a lot of legal history, both its theory and its practice.⁸⁶ He is also wont to analyze specific legal theories, such as the aforementioned law and economics approach, natural law theory,⁸⁷ and even his own CLS framework and the rhetoric therein.⁸⁸ Perhaps his most

⁸⁵ See Edward M. Panetta and Marouf Hasian, Jr., "Anti-Rhetoric as Rhetoric: The Law and Economics Movement," *Communication Quarterly* 42.1 (Winter 1994), 57-74. I will examine and build upon the arguments articulated in the article in the chapter on Richard Posner.

⁸⁶ Marouf Hasian, Jr. *Legal Memories and Amnesias in America's Rhetorical Culture* (Boulder: Westview Press, 2000). See also "The Advent of Critical Memory Studies and the Future of Legal Argumentation," *Argumentation & Advocacy* 38.1 (Summer 2001), 40-45; "The Domestication of Legal Argumentation: A Case Study of the Formalism of the Legal Realists," *Communication Quarterly* 46.4 (Fall 1998), 430-445; "Remembering and Forgetting: A Postmodern Interpretation of the Origins of the 'Right of Privacy,'" *Journal of Communication Inquiry* 19.2 (July 1995), 33-49; "Judicial Rhetoric in a Fragmentary World: 'Character' and Storytelling in the Leo Frank Case," *Communication Monographs* 64.3 (Sep. 1997), 250-269; "Legal Argumentation in the Godwin-Malthus Debates," *Argumentation & Advocacy* 37.4 (Spring 2001), 184-97; Marouf Hasian, Jr., "Critical Memories of Crafted Virtues: The Cadbury Chocolate Scandals, Mediated Reputations, and Modern Globalized Slavery," *Journal of Communication Inquiry* 32.3 (July 2008): 249-270.

⁸⁷ Marouf Hasian, Jr., "Jurisprudence as Performance: John Brown's Enactment of Natural Law at Harper's Ferry," *Quarterly Journal of Speech* 86.2 (May 2000), 190-214.

⁸⁸ Marouf Hasian, Jr. "Critical Legal Theorizing, Rhetorical Intersectionalities, and the Multiple Transgressions of the 'Tragic Mullata,' Anastasie Deserzant," *Women's Studies in Communication* 27.2 (Summer 2004), 119-148; "Myth and Ideology in Legal Discourse: Moving from Critical Legal Studies

important contribution is the way in which he articulates the *performativity* that happens throughout law – from individual cases being argued by attorneys, judges, and the press to the broad level of legal theory. The arguments and analyses I articulate in the subsequent chapters take a page from Hasian’s playbook in that I similarly approach jurisprudence as a public performance. Where I differ, however, is by articulating and examining the “models of judgment” that serve as symbolic avatars for different legal theories.

Although Hasian is one of the most prolific scholars of legal rhetoric, he is certainly not the only scholar to address the rhetoric within jurisprudence. Omar Swartz has similarly turned a critical rhetorical eye toward legal theory in his analysis of positive law.⁸⁹ This work similarly explores an element of performativity; namely, the use of “persona” as it was (ab)used in North Carolina’s slavery laws. Positive law and natural law theories are the most frequent targets of rhetoric scholars,⁹⁰ perhaps because these do not tend to play nicely with the rhetorician’s interest in the contingencies of context and audience. Even law journals are beginning to pay more attention to the rhetoric of legal theory, although most of this work is directed at the constitutional jurisprudence of Supreme Court justices, thus blending with the second category discussed earlier.⁹¹

toward Rhetorical Consciousness,” *Legal Studies Forum* (1993-1994), 347-363; Marouf Hasian, Jr. and Earl Croasmun, “The Legitimizing Function of Judicial Rhetoric in the Eugenics Controversy,” *Argumentation & Advocacy* 28.3 (Winter 1992), 122-133.

Celeste Michelle Condit, John Louis Lucaites, and Marouf Hasian, Jr., “The Rhetorical Boundaries of ‘the Law’: A Consideration of the Rhetorical Culture of Legal Practice and the Case of the ‘Separate But Equal’ Doctrine,” *Quarterly Journal of Speech* 82.4 (Nov. 1996), 323-342.

⁸⁹ Omar Swartz, “Codifying the Law of Slavery in North Carolina: Positive Law and the Slave Persona,” *Thurgood Marshall Law Review* 285 (2003-2004), 285-310.

⁹⁰ For example, see Jeffrey J. Maciejewski, “Justice as a Nexus of Natural Law and Rhetoric,” *Philosophy and Rhetoric* 41 (2008), 72-9; Francis J. Mootz III, “Perelman’s Theory of Argumentation and Natural Law,” *Philosophy and Rhetoric* 43.4 (2010), 383-402

⁹¹ For example, see Wilson Ray Huhn, “The Constitutional Jurisprudence of Sandra Day O’Connor: A Refusal to ‘Foreclose the Unanticipated,’” *Akron Law Review* 39 (2006), 373-414; Jesús Rodríguez-Velasco, “Theorizing the Language of Law,” *Diacritics* 36 (Fall-Winter 2006), 64-86.

The preceding taxonomy does not do justice to the compelling and important work produced by scholars of rhetoric and law, but, then again, taxonomies are often the enemy of nuance. Rather than distilling their work into single categories, this overview of contemporary contributions to legal rhetoric is better understood as a means to situate my own work. Much like the aforementioned scholars, I do not believe my work can fall squarely in one category or another, but when push comes to shove I like to think of it as mostly concerned with the final category (the rhetoric of jurisprudence) approached by way of the third (the rhetorical tropes and figures used in law). Whereas the scholarship in this final category focuses on an entire theory, such as natural law, or the jurisprudence of a particular judge as deduced from opinions and dissents, my contribution hopes to fill a gap by tending to particular leading theorists who have been driving the public conversation. In doing so, I am attempting to address some important elements of law that have not received sufficient attention, especially considering the impact that public philosophers of law are trying to have through their theories. My emphasis on *public* philosophers of law is not intended to minimize the work of legal theorists writing for fellow legal theorists (and others “in the know”), but rather stresses the significant role that law has in shaping public culture.

1.3 PUBLIC PHILOSOPHY

Up to this point, I have been utilizing a phrase that merit further explanation: “public philosophy.” Although attempts have been made to distance the philosopher from the social context wherein s/he is writing, practical philosophies are always wedded to their cultural and intellectual environments, especially when such philosophies bear on the questions of law. Discussion of public philosophies must inevitably engage the problems and possibilities of public sphere theory.

Jürgen Habermas serves as a useful starting point given the prominence of his project and the many responses it has elicited. Tracing the history of “publicness” from its feudal origins⁹² and the subsequent transformation initiated by “the *traffic in commodities and news* created by early capitalist long-distance trade,”⁹³ Habermas argues that greater access to and distribution of political and social information by the bourgeois “reading public” cultivated an increased awareness of one’s place in the socio-political stratum.⁹⁴ Citing the late 17th through early 18th centuries as the high tide of the public sphere (manifested in its purest form by the French *salon*), a key feature of Habermas’ ideal public sphere is the “public use of reason.”⁹⁵ Habermas later summarizes what this idealized version must entail: “A domain of our social life where such a thing as public opinion can be formed [where] citizens... deal with matters of general interest without being subject to coercion... [to] express and publicize their views.”⁹⁶ Alas, the existing public sphere is far from ideal (a fairly obvious point to which opponents of Habermas’ theory continually give voice). Expanding mass culture and state power, argues Habermas, have limited the capabilities of the public sphere, mutating it into a vulgar imitation.

The decline of the public sphere is a common theme amongst contemporary scholars. Alan McKee notes five specific lines of argument that have been charged against the public sphere: trivialization, commercialization, spectacle, fragmentation, and apathy.⁹⁷ Rhetoricians have been

⁹² Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge: MIT Press, 1989). Habermas argues, “This *publicness* (or *publicity*) of *representation* was not constituted as a social realm, that is, as a public sphere; rather, it was something like a status attribute, if this term may be permitted. In itself the status of the manorial lord, on whatever level, was neutral in relation to the criteria of ‘public’ and ‘private’; but its incumbent represented it publicly” (7).

⁹³ *Ibid.*, 15.

⁹⁴ *Ibid.*, 23.

⁹⁵ *Ibid.*, 32-43.

⁹⁶ Jürgen Habermas, “The Public Sphere,” in Robert E. Goodin and Philip Pettit, ed., *Contemporary Political Philosophy: An Anthology* (Oxford: Blackwell Publishers, 1997), 105, as cited in Alan McKee, *The Public Sphere: An Introduction* (Cambridge: Cambridge University Press, 2005), 4.

⁹⁷ Alan McKee, *The Public Sphere: An Introduction* (Cambridge: Cambridge University Press, 2005). McKee defines the crux of these arguments in the following ways: 1) Trivial – “[S]ome people worry that

quick to take up these issues and others as they investigate this purported decline. David Levasseur and Diana Carlin cite a predominance of egocentric arguments as the most significant contributing factor to a deficient public sphere.⁹⁸ Contrasting such pessimism, some rhetorical scholars are also quick to promote the hopeful possibilities of the public. Gerald Hauser, for example, acknowledges such civic potential in *Vernacular Voices: The Rhetoric of Publics and Public Spheres* and cites both the discursive shifts that have occurred and also the possibility for extended engagement regarding contemporary issues.⁹⁹ The public may be lost, but that does not presuppose it cannot be found. Lying dormant in the citizenry resides neither an unwieldy leviathan nor a timid shrew, but rather a healthy and resilient pride.

The discussion of public sphere scholarship thus far presumes that there is a singular sphere for social and political engagement, that there is *the* public sphere. Several scholars have argued, however, that there are a plurality of publics and counterpublics coming in and out of existence. Their arguments nonetheless rely upon similar discursive turns and argumentative structures, suggesting publics and counterpublics share a common rhetorical grounding. Michael Warner describes counterpublics as emerging in response to and often in spite of dominant publics

the public sphere is currently too full of trivia. Consumers, they suggest, are more interested in unimportant news about celebrities, diets, and sex tips than about really important, serious political issues,” (2); 2) Commercial – “[T]here’s a concern that the media don’t care about the quality of material in the public sphere. They simply want to make money, and so dumb down to the lowest common denominator,” (2); 3) Spectacle – “Audiences have short attention spans. They only want flashy visuals and superficial distractions – not serious, in-depth discussions about important issues. People do not read enough – they are passive couch potatoes in front of the media,” (2); 4) Fragmented – “Niche audiences and the demands of various identity groups are breaking up the common national cultures that we once enjoyed. We can no longer be confident that everybody will be interested in, and informed about, the same things,” (3); 5) Apathetic – “Citizens no longer want to engage with politics or their own governance. They become lazy and passive. They don’t care about issues any more” (3). McKee’s book is an attempt to respond to these five critiques and restore the public sphere, or rather the *view* of the public sphere, to good health.

⁹⁸ David G. Levasseur and Diana B. Carlin, “Egocentric Argument and the Public Sphere: Citizen Deliberations on Public Policy and Policymakers”, *Rhetoric & Public Affairs* 4.3 (Fall 2001), 407-431.

⁹⁹ Gerald Hauser, *Vernacular Voices: The Rhetoric of Publics and Public Spheres* (Columbia: University of South Carolina Press, 1999).

and are keenly aware of their own “subordinate status.”¹⁰⁰ In attempting to “supply different ways of imagining stranger sociability and its reflexivity”¹⁰¹ they “will be transformative, not replicative merely.”¹⁰² Contrasting Nancy Fraser’s “subaltern counterpublics,”¹⁰³ Warner’s counterpublic “enables a horizon of opinion and exchange; its exchanges remain distinct from authority and can have a critical relation to power; its extent is in principle indefinite, because it is not based on a precise demography but mediated by print, theater, diffuse networks of talk, commerce, and the like.”¹⁰⁴

If taken at face value, the opinions and exchanges within counterpublics are seemingly incompatible with conscientious, democratic discussion across such a vast political landscape. Yet, publics and counterpublics share a common and vital component in their origins: they are rhetorically created and maintained. Warner aptly describes the process:

There is no speech or performance addressed to a public that does not try to specify in advance, in countless highly condensed ways, the lifeworld of its circulation: not just through its discursive claims – of the kind that can be said to be oriented to understanding – but through the pragmatics of its speech genres, idioms, stylistic markers, address, temporality, mise-en-scène, citational field, interlocutory protocols, lexicon, and so on. Its circulatory fate is the realization of that world. Public discourse says not only “Let the public exist” but “Let it have this character, speak this way, see the world in this way.” It then goes in search of confirmation that such a public exists, with greater or lesser success

¹⁰⁰ Michael Warner, *Publics and Counterpublics* (New York: Zone Books, 2005), 119.

¹⁰¹ *Ibid.*, 121-2.

¹⁰² *Ibid.*, 122.

¹⁰³ *Ibid.*, 118-9. See Nancy Fraser, “Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy,” in Craig Calhoun, ed., *Habermas and the Public Sphere* (Cambridge: MIT Press, 1992), 109-142.

¹⁰⁴ *Ibid.*, 56-7.

– success being further attempts to cite, circulate, and realize the world understanding it articulates. Run it up the flagpole and see who salutes. Put on a show and see who shows up.¹⁰⁵

Echoing Hannah Arendt’s notion of the public as a world-making endeavor,¹⁰⁶ Warner captures the truly rhetorical process of making and remaking a public. It is this notion of discursive world making that my project seeks to illumine, albeit oriented toward the legal aspects and implications. Each of the public philosophers and their philosophies attempt to create a rhetorical world they wish others to enter. Their endeavors, however, are not done in solitude. A counterpublic approach is one way of framing some of the issues and complexities that go on in a pluralistic culture. By acknowledging the rhetorical constitution of both publics and counterpublics, one must also acknowledge a point at which the public is a rhetorical space with various aspects that are up for grabs.

Acknowledging, implicitly or explicitly, that they cannot simply rely on expertise alone, public philosophies are inevitably altered when they enter the public discourse. “Once the public sphere is entered,” argues G. Thomas Goodnight, “the private and technical dimensions of [a] disagreement become relevant only insofar as they are made congruent with the practices of public forums.”¹⁰⁷ Law may be a technical discourse, but it faces resistance when the technical becomes imbued with the philosophical and enters a changing, contingent public discussion. Public philosophers are entering ongoing conversations not only with the past, but also reflect on the present, hoping to direct others toward a particular future. Highlighting the rhetorical function of

¹⁰⁵ Ibid., 114.

¹⁰⁶ See Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958).

¹⁰⁷ G. Thomas Goodnight, “The Personal, Technical, and Public Spheres of Argument: A Speculative Inquiry into the Art of Public Deliberation,” in *Contemporary Rhetorical Theory: A Reader*, ed. John Luis Lucaites, Celeste Michelle Condit, and Sally Caudill (New York: Guilford Press, 1999), 255.

public-making, Michael Calvin McGee argues that “the people” are created in a speech act: “When ‘one man stands up as the proclaimer of a general will,’ what he says, *at the time he originally says it*, is a fiction, for it is his personal interpretation of his ‘people’s’ history. Though he warrants his argument with abundant examples, he creates, not a description of *reality*, but rather a political *myth*.”¹⁰⁸ By first articulating and then legislating a moral perspective, a document like the U.S. Constitution creates a distinct “people.” Thus, the idea of a public sphere wherein a public intellectual advocates for a particular public philosophy must acknowledge the important of place law as a tool for creating and recreating a public.

The rhetorical dimensions of public sphere theory illuminate the distinction between, on the one hand, academic philosophies that address questions pertaining to the public and its characteristics and problems, and, on the other hand, the discourses of public intellectual work that move within broader, non-academic publics and provides, following Isocrates, philosophical “equipment for civic life.”¹⁰⁹ Interestingly, some of the most interesting writers on the public philosophy of law resist disciplinary containment. The three figures I will be examining qualify as members in good standing of the first category; but they all cross the disciplinary lines that separate philosophy from other fields, and all have readership and followings inside and outside the academy. And, significantly, each aspires to influence public understanding and discourse

¹⁰⁸ Michael Calvin McGee, “In Search of ‘the People’: A Rhetorical Alternative,” in *Contemporary Rhetorical Theory: A Reader*, ed. John Luis Lucaites, Celeste Michelle Condit, and Sally Caudill (New York: Guilford Press, 1999), 344.

¹⁰⁹ Takis Poulakos, “Isocrates’ Civic Education and the Question of *Doxa*,” in *Isocrates and Civic Education*, ed. Takis Poulakos and David Depew (Austin: University of Texas Press, 2004), 45. One may be reminded of Kenneth Burke’s description of literary works and rhetoric as “equipment for living,” which parallels the *philosophia* of Isocrates. See *The Philosophy of Literary Form: Studies in Symbolic Action*. 2d ed. (Berkeley: University of California Press, 1967) and *Attitudes Toward History*. 3d ed. (Berkeley: University of California Press, 1984).

about what law is and what law should be, which then influences how the public comes to understand it.

There has been a burgeoning academic interest regarding public philosophy, and in this literature one finds an assortment of definitions, orientations, and aspirations. Drawing from traditional philosophical areas, including ethics, political philosophy, jurisprudence, and epistemology, as well as from the fields of sociology, economics, history, medicine, political science, cultural studies, literature, and, of course, rhetoric, the expanse of public philosophy continues to swell. Although the thrust of this project is primarily concerned with public philosophers' relationship with rhetoric and law, other contributions and movements are important in understanding the various philosophers and philosophies. Importantly, the idea of a public philosophy is rhetorically expanded and contracted by public intellectuals in response to their respective exigencies. For example, my analysis will begin with Richard Posner and his creation of and contributions to law and economics. Why? Because the law and economics "movement" has been one of the most powerful forces in contemporary legal theory. It is taught in virtually every law school across the nation unlike, say, law and literature or critical legal studies. As such, other scholars tend to situate their work in relation to Posner's in order to illustrate the inadequacies of law and economics while simultaneously proposing their own approach as superior. Moreover, the economization of non-economic discourses can be seen across virtually every discipline.

The public intellectual has a social and rhetorical obligation to his or her community, an obligation that encourages thoughtful reflection on public affairs, insightful commentary on social problems, and the ability to guide one's fellow citizens rather than retreating to the Ivory Tower

and chastising the public for their stupidity without seeking to effect change.¹¹⁰ There is an assumed obligation for the scholar to reflect upon, contribute to, and often criticize issues and ideas that impact the citizenry, especially when one's research interests are concerned with social issues. Their contributions, however, must not be totalizing; instead, following McGee and Lyne, they must both express and cultivate *phronésis*, which is “more respectful of faith and power than *episteme*, more stable and reliable than *doxa*.”¹¹¹

The role of a public intellectual is, at its very core, a highly rhetorical endeavor. Addressing the rhetorical disposition necessary for the public intellectual, Nathan Crick astutely argues for a well balanced blend of *techné*, *episteme*, and *praxis* as a way to “move beyond the form/content distinction that continues to separate theory from practice, thought from action, intelligence from passion, and philosophy from rhetoric.”¹¹² He continues,

This redefinition neither collapses the important distinctions between the varied disciplines, nor claims that there is no difference between those who publish in obscure academic journals and those who actively engage public audiences. Rather, it rejects the notion that directly engaging in public audiences is what makes one a public intellectual. It forces us to consider that while intellectual work may be *intellectual*, it is nonetheless *work* – it is an effort to change the world through the transformative power of ideas.¹¹³

Although I am not prepared to disregard the relationship between the public intellectual and the public, I recognize Crick's important argument regarding the *material production* of the public intellectual. One need not be working the beat or hitting the streets to be an effective and

¹¹⁰ For an extensive treatment of Dewey's public philosophy, see Alan Ryan, *John Dewey and the High Tide of American Liberalism* (New York: W.W. Norton & Co., 1997).

¹¹¹ McGee and Lyne, 395.

¹¹² Nathan Crick, “Rhetoric, Philosophy, and the Public Intellectual,” *Philosophy and Rhetoric* 39.2 (2006), 127.

¹¹³ *Ibid.*, 127.

influential public intellectual; philosophical impact can come from anywhere. I do argue, however, that public intellectuals are to a large extent tethered to their nuanced contextual situations and, as a result, often speak to/on the prevailing ideas of the time with particular audiences in mind.

For those whom I am characterizing as public philosophers *of law*, discursive shifts must address the present moment, while still connecting it to such historically elaborated concepts as dignity, personhood, equality, liberty, autonomy, and the limits of reason. And here it is important to note that concepts such as these have ideological and political, as well as philosophical, histories.¹¹⁴ Public philosophers of law seek to persuade with limited resources and amidst competing rhetorics. They must be able to translate their ideas such that particular audiences can follow without feeling alienated or patronized. Given their various juridical perspectives, disciplinary loyalties, and intellectual heritages, the way in which they conceive of themselves as public philosophers of law will likely bear on the rhetorical strategies they employ and the various audiences they are attempting to influence.

Important to note, the most interesting thing I came to realize is that these theories are not separate from the rhetorical choices made by their respective authors. Legal theorists must make rhetorical choices about how they structure their arguments, just as anyone making any argument must. As I will argue throughout the rest of this dissertation, the most important rhetorical turns are part and parcel with their ideas. To remove these appeals is to alter their theories. Rhetoric is not just the medium, but also an important part of the substance of their ideas. In particular, prolific authors tend to congeal around a particular set of rhetorical faculties and figures. As a result, they articulate different models of legal reasoning that rhetorically shape and reshape

¹¹⁴ Michael Calvin McGee's germane work on the "ideograph" highlights the rhetorical connections of such broad, yet potent terminology. See Michael Calvin McGee, "The 'Ideograph': A Link Between Rhetoric and Ideology," *Quarterly Journal of Speech* 66.1 (Feb. 1980): 1-16.

judgment. These models may come from an array of sources, but I am most interested in those produced by contemporary public philosophers of law – namely, Richard Posner, Martha Nussbaum, and Cass Sunstein. Ultimately, I hope to offer a compelling and useful way to approach and analyze legal theory through a rhetorical lens. Much has been written on the relationship between rhetoric and law given their longstanding and intimate connection, yet the vast majority of this work overlooks the *philosophy* of law and the rhetoric therein.

1.4 PREVIEW OF CHAPTERS

As I will argue, each of the public philosophers of law I address must negotiate a range of issues that are at play when constructing a legal theory, especially one intended both for professional and lay audiences. Richard Posner’s economic model of judgment, for example, treats the context of law quite differently than does Martha Nussbaum’s literary approach. Similarly, Cass Sunstein’s deliberative model utilizes the same legal resources as the other two, but the *rhetorical* resources and framing techniques they use differ greatly. But this is true of every philosopher of law, so what makes these theorists different or worthy of special attention? One reason is that they often write for and speak to the general public. True, they are all well published in academic journals, but these works rarely get exposure beyond a select group of learned scholars. These three scholars strive to go beyond nuanced journals and esoteric arguments in order to influence individuals beyond academia. Cass Sunstein’s popular books are often short, clearly written, and tap into current popular public interests, such as the Internet and the “blogosphere.” Until recently, he was also a member of the Obama administration, which means the force of his ideas and arguments had a more immediate impact than the vast majority of his peers. Richard Posner and Martha Nussbaum are both tapped for public interviews quite often and both are regularly listed in

the top 100 public intellectuals. Until Gary Becker's passing, Posner regularly contributed to a popular blog, "The Becker-Posner Blog." Although she does not host a blog, Nussbaum remains active in public deliberations. Like Sunstein, she writes books intended for popular audiences that are often distillations of her more nuanced philosophical arguments.¹¹⁵ Nussbaum was also a research advisor for the World Institute for Development Economics Research in Helsinki, playing an important role in countries such as India. More importantly, these three *want* to inform and influence public deliberation. The random person on the street may not know their names, but that is not due to a lack of effort on the scholars' parts.

These three are notably active in the public sphere, but they go beyond mere participation in their attempts to project an embodied idea(l) of judgment. This is the distinctive rhetorical process that will be the main focus of my argument. Each of these theorists rhetorically frame what constitutes good judgment. What differentiates them, and what gives each approach a distinctive rhetorical force, are their respective attempts to invoke and rhetorically embody a model judge. These public philosophers of law are attempting to convey to a general audience what it means to have sound legal judgment and what resources such judgment requires; and toward that end they help us imagine not just rules and other legal considerations, but *the kind of person rendering judgment*. The ideal of good judgment becomes in that sense an embodied one, such that precedents, principles, considerations of context, and so on, converge in the judging intelligence. As Seneca sought to personify judgment in the form of the wise Stoic judge, so too these philosophers have turned to conceptions of what the good judge might be. As we will see, these rhetorical models may be looking at the same processes, yet reaching very different

¹¹⁵ *Not for Profit: Why Democracy Needs the Humanities*, for example, distills many arguments found in the longer and more complex *Cultivating Humanity: A Classical Defense of Reform in Liberal Education*, and *Creating Capabilities: The Human Development Approach* does something quite similar to *Woman and Human Development: The Capabilities Approach* and *Sex and Social Justice*.

conclusions. By training our attention to how the exercise of legal judgment is envisioned, we are better able to see how different public philosophers of law are able to construct competing models of legal judgment and the rhetorical faculties they ascribe to their respective avatars.

Given Richard Posner's dominating presence in legal studies since the 1970s and the fact that subsequent scholars have had to respond to his work, either directly or indirectly, my analysis will begin with his model: the *economic judge*. Posner's most significant contribution to jurisprudence has been under the auspices of the "science" of economics as he promotes "wealth maximization" as the most viable rubric for understanding how legal decisions ought to be made. As a theorist who also works in the day-to-day world of law as a judge in the U.S. Court of Appeals for the Seventh Circuit, Posner wants to advance the clearest and most efficient process for deciding cases. If the economic model can be more fully understood, legal reasoning will be more stable and, following his jurisprudential hero Holmes, more people will be able to know how judges will (and ought) to decide cases.

There is much rhetorical work needed to make his position viable, which he has been developing through voluminous writing and through others by proxy (he's the most cited contemporary legal philosopher). In order to make headway, Posner relies on "pragmatism" to do some of the heavy lifting. But this isn't your grandfather's pragmatism. Posner goes to great lengths to distance himself from his philosophical forefathers (Holmes aside) and position his perspective as "everyday" pragmatism, which is primarily passionate about the practical. He stresses facts and consequences, which offer what he describes as an "unillusioned" view of human nature. In the public sphere, his bare-bones pragmatism can get traction with his American audience given the long history of pragmatic thought defining the intellectual landscape (whether explicitly or implicitly).

With a judicial interpretation of economics and his everyday pragmatism in tow, Posner's economic judge is invested with a number of rhetorical faculties that set him apart from competing models. Drawing from Posner's considerable scholarship, I contend that the defining characteristics of this judge are a sense of economic objectivity, the ability to find balance amongst competing legal interests, and common sense adjudication. These rhetorical faculties work in concert with traditional legal resources such as statutes and precedent as the economic judge strives for wealth maximization. A significant aspect of the economic judge's rhetorical allure is his ability to make economic adjudication seem natural and feel inevitable. Through his public scholarship, including general-audience books, public lectures, and other various engagements with the public, Posner attempts to convince everyone from legal practitioners to the lay public that his model of judgment is not only superior, but what good judgment is *supposed* to be. After all, who doesn't value the kind of objectivity that science has to offer? Who doesn't want a judge to issue well-balanced decisions? And who is going to be against common sense? Posner weaves these rhetorical appeals throughout his vast work as he describes what constitutes good judgment and how the economic judge succeeds where others fail. Yet, as I will argue, each of these rhetorical faculties is refracted through an economic discourse that ultimately ignores important elements of law and adjudication. Posner advances a particular *kind* of objectivity, balance, and common sense that are predisposed toward economic judgment.

Set in stark contrast to Posner's economic judge, Martha Nussbaum advances the *literary judge*. As a way of seeing the world and the resources it offers for legal judgment, the economic judge neglects the fragility of human experience that Nussbaum finds essential to *eudaimonia* – the flourishing life. It is this life that law must understand, defend, and actively cultivate. Law's priority is not about the *standards* of judgment, as with the economic judge, but rather the

outcomes of judgment. Nussbaum's conceptions of law and justice are deep and broad. Unlike many of her contemporaries, she will eagerly draw ideas from Cicero and Rawls in the same breath, or apply Aristotelian virtues as they pertain to modern legal quandaries. The sweeping nature of her writing certainly has disadvantages when it comes to public reception, but her expansive interests also allow her to notice consistent gaps in intellectual history – in particular, the relationship between capabilities and disabilities. Critiquing Rawls' contractarian approach (as well as his predecessors - Hobbes, Locke, and Rousseau), Nussbaum asks, "Who decides the standards of justice? Who participates in the construction of law?" As it turns out, most philosophies start with a preconceived notion of normalcy that excludes issues pertaining to women, the LGBTQ community, those with disabilities, and just about every other group that is marginalized based on their difference (which are, as a result, used to mark them "abnormal").

The literary judge gives voice to the voiceless. Instead of speaking for others, she is dedicated to providing the means by which others can speak for themselves. Viewing law as a corrective and progressive force in society, the literary judge has a duty to ensure citizens are able to cultivate robust, value-laden lives - especially the traditionally marginalized and disenfranchised. Whereas Posner's economic judge relies on the rhetorical strategies of balance, Nussbaum's literary judge invests in the power of a *literary imagination* and its ability to refine rhetorical invention. Whereas the economic judge has an economically imbued common sense, the literary judge has an attuned *emotional intelligence* that can navigate through perils of unintelligent emotions like shame and disgust in order to arrive upon compassionate judgment. Whereas the economic judge seeks wealth maximization, the literary judge utilizes the *constitutive power of law* to advance human capabilities. As Nussbaum describes them, these resources of legal judgment provide a textured response to the social and cultural realities at play. This

demands a sensitivity to the lived reality of others. One turns to great literature and drama, as well as to philosophical traditions to develop the requisite sensitivities. Affirming social justice does not equate with ratifying what a majority of citizens may think is just; rather, it requires an active engagement with prevailing social practices in order to detect blind spots caused by ungrounded emotions, prejudices, and the unawareness of the lives of those different from us. All of this is not to say that the literary judge lacks standards just as the economic judge is not entirely blind to outcomes. The ultimate goal of judgment, however, is not standardized uniformity but an aspirational *telos* that demands that all citizens have the means to cultivate their capabilities in order to live a flourishing life.

Rounding out the trio of contemporary public philosophers of law is Cass Sunstein and his avatar: the *deliberative judge*. Unlike the contrast between Posner's economic judge and Nussbaum's literary judge, Sunstein's deliberative judge is not markedly in conflict with the other two. In fact, the ideal deliberative judge forges many of the same rhetorical alignments, including the economic judge's application of cost-benefit analysis to Constitutional law, and the literary judge's insistence on inventive imagination. Yet, the deliberative judge is wary of any single perspective dominating the decision-making process, because civic discourse embraces many perspectives. Based on Sunstein's extensive writings, I contend that the defining features of this judge are public engagement, open deliberation, and a keenly attuned sense of *kairos*.

In line with the sensibility of civic attentiveness, the deliberative judge must also consider the impact of his or her decisions and the ways in which they can shape public discourse. In this model, the judge's role is not just to be a spectator of public discourse; rather, there is some responsibility to think proactively about how decisions might affect that discourse, and to render judgments with that in mind. At his or her best, the deliberative judge *knows when to nudge*.

Accordingly, there is a timeliness to court decisions, and a corresponding sense of the appropriate that reflects the realities of the surrounding socio-political climate. On this model, good decisions are not good simply because they were arrived upon through open deliberation. They are not good because they follow an algorithm for “wealth maximization,” nor because they cultivate the flourishing life. Good decisions consider these elements, to be sure; but – more importantly – good decisions arrive at just the right time and adjudicate in a way that fits the particular discursive environment so as to take steps, not leaps, forward.

A good is useless if it cannot be put into practice, a point of agreement between Posner, Nussbaum, and Sunstein. Their agreement, however, is short lived. As an appendix illustrates, the rhetorical faculties of each judge draw forth different elements from a given situation. The economic judge views a case through the lens of wealth maximization, seeks balance amidst competing legal interests, and utilizes a common sense notion of economic adjudication. Antagonistic to the economic judge, the literary judge finds the translation of incommensurable ideas a dangerous practice. Instead, the literary judge draw upon her literary imagination to refine the process of rhetorical invention by offering an opportunity to experience the “other.” A literary attitude also expands the literary judge’s capacity for emotional sensitivity and works toward minimizing the influence of anti-rhetorical emotions, a central concern for the literary judge but of little interest to her economically minded counterpart. The deliberative judge acknowledge the benefits to be gained from open deliberation and frank engagement with their peers. The deliberative judge attempts to negotiate the interests of the state, which invokes a form of the precautionary principle, and the interests of the citizenry, who deserve to be informed.

Although each chapter offers various examples illustrating how the model judges approach and decide cases, there is little overlap in the cases addressed by the aforementioned philosophers

of law save a handful of landmark decisions. Given their different orientations to law, each scholar focuses on different types of cases in order to frame their respective positions in the best light. In order to avoid imbalanced attention in their scholarship and yet another analysis of *Brown v. Board* or *Roe v. Wade* or *Citizen's United*, an appendix will apply the different models of judgment to a fictitious, yet not unlikely case: *Concerned Citizens v. NSA*. As the American public grows increasingly concerned over the ongoing wiretapping and data mining by the National Security Association, a three-member federal court agrees to hear the case. Composing the panel, the economic judge, the literary judge, and the deliberative judge must decide whether or not the expansive NSA wiretapping unveiled in 2013 violates the Fourth or Fifth Amendments. The judges draw from the same legal resources – the amendments, legal precedent, statutes like the Patriot Act, the checks and balances outlined in the Constitution – but their rhetorical faculties bring forth markedly different concerns, arguments, and conclusions.

Overall, this project does not seek to advocate a particular philosophical worldview, even though I may be partial to certain interpretations of the Constitution and the legal philosophies underlying such arguments. Rather, my goal is to develop the idea of models of judgment as a useful and insightful lens that allows legal philosophers, rhetorical theorists and critics, and the lay public a robust, nuanced way in which to engage jurisprudence. The United States is in many ways a legal culture, but one that does not have any single, guiding philosophy. Law is an important way in which the public and philosophers engage one another. Complex legal cases beget complex philosophical problems, which affect and are affected by public discourse. The public philosophers addressed in this work offer distinct argumentative discourses that help to shape how a public views itself in relation to law; but to detach them from one another ignores the many ways in which they interact. By addressing the ways in which these philosophers use

rhetorical strategies to situate and promote their philosophies, specifically the ways in which they establish rhetorical capacities embodied by model judges that direct attention one way rather than other, such interactions become clearer and more salient.

2.0 RICHARD POSNER AND THE ECONOMIC JUDGE

“Science is the great antidote to the poison of enthusiasm and superstition.”

-Adam Smith, *A Wealth of Nations*

In 1961 Guido Calabresi and Ronald Coase published two articles that would reshape the landscape of American jurisprudence. Both Calabresi’s “Some Thoughts on Risk Distribution and the Law of Torts”¹ and Coase’s “The Problem of Social Cost”² introduced an intimate relationship between law and economics, suggesting the latter as the most useful and efficient means by which to analyze the former.³ Their seminal work, however, failed to catch the attention of the legal academy writ large. With the 1973 publication of *Economic Analysis of Law*, Richard Posner succeeded where they had not as he brought law and economics to the forefront of legal theory and legal education.⁴ Emerging out of the highly influential “Chicago School,” Posner’s casebook, now in its eighth edition, is mainstay in law schools across the country, educating future lawyers and judges in the ways of economic adjudication for over 40 years. Drawing insights from sources old and new, including classic economists such as Adam Smith as well as fellow Chicago School economist Gary Becker’s Nobel Prize winning application of economics to non-market behavior,⁵ Posner’s sweeping work covers everything

¹ Guido Calabresi, “Some Thoughts on Risk Distribution on the Law of Torts,” *Yale Law Journal* 70 (1961), 499-553.

² Ronald Coase, “The Problem of Social Cost,” *Journal of Law and Economics* 3 (1961), 1-44.

³ Although Calabresi and Coase are often cited as the earliest advocates for law and economics, prototypical arguments can be traced as far back as John R. Commons’ 1924 publication *Legal Foundations of Capitalism* (New York: MacMillan, 1924) and Robert Hale’s *Freedom Through Law: Public Control of Private Governing Power* (New York: Columbia University Press, 1952).

⁴ Richard A. Posner, *Economic Analysis of Law* (Boston: Little Brown, 1973).

⁵ See, for example, Gary S. Becker, *The Economics of Discrimination* (Chicago: University of Chicago Press, 1957); Gary S. Becker, *Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education* (Chicago: University of Chicago Press, 1964); Gary S. Becker, “A Theory of the

from eminent domain to traffic congestion to surrogate motherhood to pay television. Rather than limit the economic analysis of law to traditionally economic issues (market regulation, for example), Posner argues that the entirety of law can be viewed, analyzed, and assessed through an economic lens.

Since the law and economics movement began, Posner has been the leading figure in the burgeoning field, authoring dozens of books, hundreds of articles, and thousands of cases. In keeping with the common law tradition of his hero, Justice Oliver Wendell Holmes, Jr., Posner's blend of neo-classical economics and "everyday" pragmatism eschews traditional theories of judgment in favor of a practical approach that values "efficiency" and "wealth maximization." Along with the great success Posner and the law and economics movement enjoys, he has also garnered significant criticism. Liberals question the value of wealth and efficiency as the guiding principles of law,⁶ radicals challenge the strength of neo-classical economics on which the law and economics approach is built,⁷ communitarians worry about the disruption that incentivizing individualism and consumption to the detriment of society writ large,⁸ and legal realists remain skeptical of the reality of his claims.⁹

Despite the criticisms, Posner's influence has been far-reaching (according to the *Journal of Legal Studies*, he is the most cited legal theorist *ever*¹⁰). For Posner and his fellow law and economics advocates, the tools of economics prove invaluable for a judge. With proven methods

Allocation of Time," *Economic Journal* 75 (1965), 493-517; Gary S. Becker, "Crime and Punishment: An Economic Approach," *The Journal of Political Economy* 76 (1965), 169-217; and Gary S. Becker, *The Economic Approach to Human Behavior* (Chicago: University of Chicago Press, 1976).

⁶ Ronald Dworkin, "Is Wealth a Value?," *Journal of Legal Studies* 9.2 (Mar. 1980), 191-226. See also *Law's Empire* (Cambridge: Harvard University Press, 1986).

⁷ Mark Kelman, "Legal Economists and Normative Social Theory," from *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press, 1987), 114-150.

⁸ Steven Kelman, "Ethical Theory and the Case for Concern about Charges," from *What Price Incentives? Economists and the Environment* (Boston: Auburn House, 1981), 27-91.

⁹ Arthur Alan Leff, "Economic Analysis of Law: Some Realism about Some Nominalism," *Virginia Law Review* 60 (1974), 451-482.

¹⁰ Fred R. Shapiro, "The Most-Cited Legal Scholars," *Journal of Legal Studies* 29.1 (2000), 409-426.

such as the *Pareto Criteria* and *Kaldor-Hicks Efficiency*, judges would have an easier time issuing better judgments if they follow the guidelines set out by economics. In addition to the legal and economic resources available, Posner also utilizes an array of rhetorical appeals that give character to his judicial approach. I believe that in order to understand how Posner's economic analysis of law conceives of judgment is to advance the notion of the "economic judge."

Dedicated to economic objectivity, balance, and common sense adjudication, the economic judge draws inspiration from the growing expanse of economic theory as the most efficient and effective way to render good legal judgment. Working toward "wealth maximization," the economic judge clothes his arguments in the science of economics to make his arguments appear natural and inevitable. In constructing an economic model of adjudication, Posner attempts to elevate the prestige of law and economics by making it appear anti-rhetorical (or, at the very least *arhetorical*). Building on Edward Panetta and Marouf Hasian's adept study of Posner's jurisprudence, I argue that even though Posner has a more nuanced notion of rhetoric than they suggest, he nonetheless clothes his arguments in the "scientific" discourse of economics. In order to do so, the economic judge translates the complicated discourse of law into economic formulae, which serves two key rhetorical purposes: 1) gaining credibility by making subjective choices as to which elements of law translate into economic formulae *appear* to be objective; and 2) eschewing responsibility for decisions by deferring to an economic process, in effect claiming "my hands are tied" by the process.

The second section articulates the ways in which economic judgment is promoted as a balance between seemingly dichotomous legal problems. Focusing on three important legal binaries that Posner addresses throughout his work – legality and morality, theory and practice, and past and future orientations – the economic judge is positioned as a necessary fulcrum that

takes the useful elements of each while abandoning that which is deemed useless, misguided, or harmful. Posner strategically places the economic model of judgment as distinct from but nonetheless related to an array of legal theories. Much like his more general “everyday” pragmatism, Posner’s rhetorical savvy emerges as he characterizes competing arguments by positing them as extreme binaries to which he offers a balanced middle way.

Third, as he frames his theoretical appeals as pragmatic and economic, Posner positions his project as the most reasonable, the most useful, and the most efficient approach to law. In order to do so, Posner articulates a connection between economics and common sense, suggesting the former is simply a codified version of the latter. Good judgment requires common sense, which *is* economic judgment by his definition. In addition, Posner is able to counter arguments that admonish common sense for being anti-scientific or hegemonic by drawing on the quasi-scientific *ethos* that comes with economics.

The economic judge wields common sense in an interesting way. In addition to adjudicating cases with it, common sense is also used to defend economic judgment from criticism. His economically imbued notion of jurisprudence allows him to “call down” academics for their abstract and impractical ideas about legal judgment. Common sense is used to admonish abstract legal theory, particularly those that differ from and disagree with the economic model of judgment. At the same time he “calls down” academics, he also uses common sense to “call up” the general public. *Legal* common sense comes after years of proper training and experience. When the public gets upset with a decision, especially one issued by the economic judge, they lack the common sense necessary to understand the decision as it functions

in the legal world. Whereas academics are called down with appeals to common sense because of their hubris, the public is called up with common sense because of their obtuseness.¹¹

My turn toward the embodied ideal of economic judgment is certainly not unique, as the “rational man” worldview has played a pivotal role in economic analysis, utilized by advocates and detractors alike. Specific attention has also been paid to Posner’s contributions, which Arthur Allen Leff likened to a “picaresque novel” like *Tom Jones* or *Don Quixote*. “Richard Posner’s hero is also eponymous,” claims Leff.

He is Economic Analysis. In the book we watch him ride out into the world of law, encountering one after another almost all of the ambiguous villains of legal thought from the fire-spewing choo-choo dragon to the multi-headed ogre who imprisons fair Efficiency in his castle keep for stupid and selfish reasons. In each case economic (I suppose we can be so familiar) brings to bear his single-minded self, and the Evil Ones (who like most in the literature are in reality mere chimeras of some mad or wrong-headed magician) dissolve, one after another.¹²

Yet, precious little attention has been given to the *rhetorical* elements of his jurisprudence. Given the success of the law and economics movement in and Richard Posner specifically, the following chapter is an attempt to unearth the rhetorical attributes of Posner’s hero, the economic judge.

¹¹ I must give due credit to John Lyne for the idea that common sense can be used to “call up” and “call down,” which emerged from our many conversations. Lyne’s approach, however, stresses the *tone* of the speaker, asking how the voice is used differently when calling up or down. My approach differs in that I am interested in rhetorical *position*, instead asking how the rhetor crafts a particular niche that allows them to call up or call down groups.

¹² Arthur Allen Leff, 452.

2.1 THE RHETORICAL POWER OF ECONOMIC OBJECTIVITY

Unlike the vast majority of his contemporaries, Richard Posner specifically addresses the idea of rhetoric and its role in judgment. In a generous reading of his work, the economic judge negotiates between the greatest hopes of rhetoric, including conscientious deliberation, honest persuasion, and mutual understanding, and the greatest fears of rhetoric, including manipulation, deceit, and the perversion of truth. In a less generous reading, the economic judge is – for lack of a better term – slippery. Posner is quick to disparage rhetoric and rhetorical scholarship, but then considers himself and other similarly minded judges sympathetic to rhetoric. He readily describes the “mereness” of rhetoric and brushes it aside in favor of economic logic, but then praises the force with which it can crystallize and reinforce an idea. He often adopts Plato’s arguments against rhetoric, but then defends the sophists and Aristotle. In short, he acknowledges the prevalence of rhetoric and positions the economic lens as capable of reflecting away bad rhetoric and focusing the power of good rhetoric.

Panetta and Hasian argue that this is indicative of the “economic man’s” anti-rhetorical posture, an effective rhetorical turn in the legal and public spheres alike. Their argument is apt but incomplete. Since the 1994 publication of their article, Posner has published an array of articles and chapters that carve out a space for judicial rhetoric, even in economic judgment. The economic judge is *undoubtedly* rhetorical, but a conception of rhetoric that is limited to Posner’s narrow definition. Whereas numerous rhetorical scholars articulate the role that rhetoric plays throughout the entire process of judgment (including the idea of judgment itself), Posner limits the scope of good, useful rhetoric to composition and its criticism. Economics is the method of judgment. Rhetoric is employed afterward as a way to increase its impact. In doing so, Posner ignores the various ways in which the economic judge makes rhetorical choices at the outset of judgment, even before a specific case crosses the bench.

In *Overcoming Law*, Posner dedicates an entire chapter to rhetoric and its implications with and impact on legal reasoning. Characterizing contemporary rhetorical scholarship as “of limited variety and low average quality compared to the literature of its traditional rival, philosophy,”¹³ Posner claims that little progress has been made since Aristotle’s *Rhetoric*. If he were to tell the tale, rhetoric started with the sophists, met its greatest challenger in Plato, and was reconciled by Aristotle. Subsequent years have been filled with quibbles about Ancient Greek arguments or, worse yet, pretentious deviations.¹⁴

His trivialization of contemporary rhetoric and rhetorical scholarship is by no means limited to *Overcoming Law*. In *Law, Pragmatism, and Democracy*, Posner associates rhetoric with “highfalutin” language, implicitly arguing it is empty and caters to the whimsy of an audience.¹⁵ In the same work he notes rhetoric as deception,¹⁶ unnecessarily flowery,¹⁷ inflated,¹⁸ and nonsubstantive sugarcoating.¹⁹ Stressing his pragmatically minded economic interpretation of law, Posner offers a glimmer of hope by hinting at an appreciation for rhetorical perspectivism. He claims that formalism and pragmatism have their own rhetorics, which is more balanced than blanket statements castigating rhetoric writ large.²⁰ However, he is quick to label

¹³ Richard A. Posner, *Overcoming Law* (Cambridge: Harvard University Press, 1996), 499. To support his argument, he offers his reader little more than his word, which, given the target audience, most readers are willing to accept and move on. Granted, I have a vested interest in rhetoric, especially the various twists and turns it has taken in the 20th century, but to suggest that no substantial contributions have been made since Aristotle illustrates either Posner’s naïveté or his ineptitude. Nowhere does he cite Kenneth Burke and dramatism; nowhere does he cite Michael Calvin McGee and the ideograph; nowhere does he cite Karlyn Kohrs Campbell and feminist rhetoric. Nowhere does he cite any “contemporary” rhetorician. Although he addresses some of the literary arguments that have crept into law, the few citations he provides suggest a lack of knowledge rather than a strong argument.

¹⁴ This chapter would undoubtedly qualify as a pretentious deviation by Posner’s standards.

¹⁵ Richard A. Posner, *Pragmatism, Law, and Democracy* (Cambridge: Harvard University Press, 2005), 12.

¹⁶ *Ibid.*, 221.

¹⁷ *Ibid.*, 222.

¹⁸ *Ibid.*, 67.

¹⁹ *Ibid.*, 49.

²⁰ *Ibid.*, 19.

his approach a “strategy rather than merely a rhetoric.”²¹ A strategy possesses a specific plan with an expected outcome. “Mere” rhetoric is the opposite, or at the very least a less efficient process than a Posnerian strategy. Method, efficiency, and outcome are key for Posner, whereas the “mere” rhetoric surrounding these core ideas often serves as a diversion.²²

Other works contain similar charges against rhetoric. In one of his more recent books, *How Judges Think*, Posner again acknowledges rhetoric’s “mereness”²³ and likens it to superficial window dressing.²⁴ One can be “taken in by it,” he claims, recognizing its ever-present danger and allure.²⁵ In *The Problems of Jurisprudence*, he distances rhetoric from “cool reasoning,” again suggesting rhetoric deals with unwieldy passions, not rational agents.²⁶ Citing the impact of the law and economics movement in legal scholarship, he differentiates rhetorical “flourish” from quantifiable, objective data.²⁷ “We have a better understanding of the legal system as a result of economics than we used to have,” which is a marked improvement over the “most superficial, rhetorical level” that preceded the introduction of economics to law.²⁸ A recurring theme is developing: rhetoric is a danger, one in which many are susceptible, even the most learned judges and scholars.²⁹

It is this conception of rhetoric that inspires Panetta and Hasian’s criticism of Posner’s law and economics movement. One of the few rhetorical examinations of law and economics

²¹ *Ibid.*, 49.

²² *Ibid.*, 86.

²³ Richard A. Posner, *How Judges Think* (Cambridge: Harvard University Press, 2010), 226.

²⁴ *Ibid.*, 250.

²⁵ *Ibid.*, 104.

²⁶ Richard A. Posner, *The Problems of Jurisprudence* (Cambridge: Harvard University Press, 1993), 149.

²⁷ William M. Landes and Richard A. Posner, “The Influence of Economics on Law: A Quantitative Study,” *Journal of Law and Economics* 36.1, Part 2 (Apr. 1993), 385-424.

²⁸ Richard A. Posner, “The Future of Law and Economics: Looking Forward,” *University of Chicago Law Review* 64.4 (Autumn 1997), 1146.

²⁹ Posner’s disparaging commentary on rhetoric is by no means limited to the books and articles cited at length. See also Anthony Niblett, Richard A. Posner, and Andrei Shleifer, “The Evolution of a Legal Rule,” *The Journal of Legal Studies* 39.2 (June 2010), 350.

generally and Posner's jurisprudence specifically, Panetta and Hasian argue that his economic analysis of law postures as "anti-rhetorical" in order to gain credibility and appear efficiently impartial. Describing an anti-rhetorical stance as "any foundational quest for truth that privileges itself as *the* only or primary 'rational,' 'objective,' and 'neutral' means of acquiring epistemic knowledge,"³⁰ they contend that "anti-rhetorical appeals are woven into our discursive social fabrics and occupy the attention of both academics and citizens in the public sphere."³¹ Focusing on "the rule of law" and "wealth maximization" as Posner's guiding rhetorical appeals, Panetta and Hasian claim that he has constructed a theoretical perspective that attempts to eschew rhetoric while simultaneously benefitting from it.

Framing efficiency as "wealth maximization," Posner argues that decisions must yield the greatest increase to the aggregate wealth of society.³² Attempting to distance himself from utilitarianism and its focus on happiness, Posner claims that wealth maximization offers a "blend" of utilitarianism's attention to the collective and Kantianism's protection of individual autonomy³³ that offers "a more defensible moral principle" on which to ground adjudication compared to competing legal theories.³⁴ Guided by wealth maximization, law "alter[s] incentives," utilizes a "rational structure," is "public," and "ascertain[s] the facts necessary [for the] correct application of the law."³⁵ As Posner depicts wealth maximization, it is something that everyone desires (or *should* desire) and it is "out there" to be systematically achieved.

³⁰ Panetta and Hasian, 58. Given Posner's vested interest in pragmatism, one must not characterize his conception of objectivity as akin to Plato's. Posner defines objectivity in a third, "conversational" sense, "as merely reasonable – that is, as not willful, not personal, not (narrowly) political, not utterly indeterminate though not determinate in the ontological or scientific sense, but as amenable to and accompanied by persuasive though not necessarily convincing explanation" (*The Problems of Jurisprudence*, 7).

³¹ *Ibid.*, 59.

³² Richard A. Posner, *The Economics of Justice*, (Cambridge: Harvard University Press, 1981), 61.

³³ *Ibid.*, 63-4.

³⁴ *Ibid.*, 69.

³⁵ *Ibid.*, 75.

In her germane contribution to the rhetoric of inquiry, Dierdre McCloskey begins *The Rhetoric of Economics* by analyzing Posner's arguments defending efficiency and wealth maximization. "Posner," she writes, "is urging us to see the common law as economically efficient. That's the philosophical way of reading the passage, seeing through. But look at the surface, the rhetoric."³⁶ She goes on to critique his economic discourse, which attempts "to evoke Scientific power, to claim precision without necessarily using it."³⁷ Her brief analysis concludes, "Posner wants us to read philosophically, which is good. But he does not want us to read rhetorically, which is bad."³⁸ The economic judge utilizes this "scientific power" in order to make economic judgment appear objective, natural, and *a*-rhetorical, but not necessarily *anti*-rhetorical.

Whereas Panetta and Hasian cite efficiency as one of Posner's rhetorical masks, legal scholar Michael Murray inverts their position and argues that efficiency is an important contribution from the law and economics movement to the contemporary field of rhetoric. An element of the "four rhetorical canons of Law and Economics," efficiency draws from the classical rhetorical canons of invention, arrangement, and style. Murray argues,

Law and economics advocates elegance and efficiency in the form, structure, and composition of economic discourse. This lesson from the canons of Law and Economics teaches legal authors to follow a prescription to make their discourse clear, concise, succinct, and elegant in form. The formal use of the term efficiency benefits clarity and promotes comprehension of meaning over confusion and frustration.³⁹

³⁶ Dierdre N. McCloskey, *The Rhetoric of Economics*, 2nd ed. (Madison: University of Wisconsin Press, 1998), 3.

³⁷ *Ibid.*

³⁸ *Ibid.*, 4.

³⁹ Michael D. Murray, "Law and Economics as a Rhetorical Perspective in Law," *Law Faculty Publications* (2011), Paper 8.

In Murray's sympathetic analysis of law and economics, the bulk of its rhetorical force comes from the efficiency it espouses.

Although Murray makes an interesting argument for the rhetorical possibilities of law and economics, Posner is not wont to label his approach as *inherently* rhetorical. It uses rhetoric – it must – but it is not in and of itself rhetorical. Responding to the growing interest in the rhetoric of inquiry, which includes the rhetoric of economics, Posner acknowledges and casts aside a broad understanding of the rhetoric of economics. Describing Dierdre McCloskey's scholarship as "exaggerated," Posner claims that McCloskey "is too much an 'everything is rhetoric' person for my taste, and is particularly unconvincing when arguing that economics would improve if only economists would recognize that they are really rhetoricians."⁴⁰ The implicit challenge is that if rhetoric is everywhere, it is nowhere. Dilip Goankar wages a similar attack arguing that rhetorical theory possesses a "thin" vocabulary and the "globalization" of rhetoric into an ever-expanding array of other disciplines (including law, economics, and the sciences) "*severely undermines rhetoric's self-representation as a situated practical art.*"⁴¹ Posner and Goankar share a similar concern about the proliferation of rhetoric *ad infinitum*.

Responding to Goankar (and, implicitly, Posner), McCloskey simply asks, "If most speech has a persuasive perlocutionary force, 'mere' rhetoric, what exactly is the problem? So what?"⁴² Big rhetoric – or that which makes McCloskey an "everything is rhetoric" person – need not be a mark of failure, but rather one of success. Posner, however, argues such breadth ultimately undermines rhetoric's "distinctness and utility."⁴³ Citing Thomas Cole's *The Origins*

⁴⁰ Posner, *Overcoming Law*, 525.

⁴¹ Dilip Parameshwar Goankar, "The Idea of Rhetoric in the Rhetoric of Science," in *Rhetorical Hermeneutics: Invention and Interpretation in the Age of Science*, Alan G. Gross and William M. Keith, eds. (Albany: State University of New York Press, 1996), 25-88.

⁴² Dierdre N. McCloskey, "Big Rhetoric, Little Rhetoric: Gaonkar on the Rhetoric of Science," in *Rhetorical Hermeneutics: Invention and Interpretation in the Age of Science*, Alan G. Gross and William M. Keith, eds. (Albany: State University of New York Press, 1996), 107.

⁴³ Posner, *Overcoming Law*, 503.

of *Rhetoric in Ancient Greece*, Posner calls into question “neorhetoricians” such as Burke and Perelman as representative examples of rhetoric gone awry. “The average scientific paper is less ‘rhetorical,’ in a perfectly intelligible sense of that word, than the average political address or the average closing argument to a jury.”⁴⁴ According to Posner, the highly subjective concerns of politics share little in common with the sturdy objectivity of science. The latter produces evidence, not argument.

This is a common theme in economic discourse. Economists align themselves with science in order to gain credibility from the latter’s values, including, as economist Arjo Klamer asserts, “quantification, empirical testing, and rigorous formulation, preferably in mathematical symbols, and believe that only economists, among all the social scientists, can live up to these values.”⁴⁵ Economists claim to describe that which motivates human judgment, and this is made all the easier when economics is viewed as a branch of the natural sciences. By borrowing from (and attempting to participate in) a pseudo-scientific discourse, economics presents its assumptions as inherent drives, natural dispositions that can be documented and analyzed in order to yield predictions about future scenarios. Yet, the act of description carries with it a number of assumptions whether it is done by a physicist, an economist, a psychiatrist, or a poet.

Arguably the most important assumption for the economist is the extent to which people can and should pursue their own interests, which is embodied by the “economic man” - *homo economicus*. What the economists tend to ignore – save McCloskey, Klamer, and other rhetoric-sympathetic economists – is the fact that economic discourse *creates* a conception of human drives while it describes them. Neo-classical economists begin with the shaky premise that all

⁴⁴ Ibid.

⁴⁵ Arjo Klamer, “As If Economists and Their Subject Were Rational,” in *Rhetoric and the Human Science: Language and Argument in Scholarship and Public Affairs*, ed. John S. Nelson, Allan Megill, and Donald N. McCloskey (Madison: University of Wisconsin Press, 1987), 166.

people want to and will act in their own self interests as a means to maximize their wealth. In societies that value individualism, such as the United States, such a premise goes relatively unchallenged. Doing so ignores the vagaries of different human cultures and the myriad of individual experiences that eventually shape a decision. From the “objective” standpoint of the economist, these differences have little if any impact on the conclusion that *should* be reached in a given scenario. Such a perspective, however, removes the depth and vibrancy that animate each individual. By shirking the more complicated social and psychological dimensions of human experience, including emotions and the desire/capacity for altruism, economists present human agents as “one-dimensional” and “solipsistic.”⁴⁶ “One of the preconditions for economizing,” argues Richard Harvey Brown, “is that different ends are seen as comparable alternatives. The universalization of economizing therefore requires in practice the elimination of cultural barriers to the comparability of ends.”⁴⁷

Given Posner’s penchant for legal realism, denouncing rhetoric writ large and supporting a complete and absolute *science* of law does him more harm than good. Just when you think you have Posner pegged as a rhetoric-hating, Plato-loving absolutist, he goes and defends the sophists and Aristotle. Describing legal pragmatism – an approach he finds more or less synonymous with law and economics – Posner claims that it “is sympathetic to the sophistic and Aristotelian conception of rhetoric as a mode of reasoning.”⁴⁸ Never mind that he conflates the sophists and Aristotle, he extends an olive branch to rhetoric in his law and economics approach. Rhetoric, in this positive, Aristotelian connotation, serves as a mode of discursive engagement that provides a necessary, practical, and limited function. For better or worse, one must learn to

⁴⁶ *Ibid.*, 179.

⁴⁷ Richard Harvey Brown, “Reason as Rhetorical: On Relations among Epistemology, Discourse, and Practice,” in *Rhetoric and the Human Science: Language and Argument in Scholarship and Public Affairs*, ed. John S. Nelson, Allan Megill, and Donald N. McCloskey (Madison: University of Wisconsin Press, 1987), 190.

⁴⁸ Posner, *Pragmatism, Law, and Democracy*, 60. He makes similar comments on pages 83 and 85.

play by a particular set of rules in a given situation in order to be effective.⁴⁹ Effectiveness and the efficient means by which it is produced are the key ideas here, which serve as the vital point of reconciliation between his economic approach to law, his “everyday” pragmatism, and classical rhetoric. Rhetoric, in this narrow formulation, has little to do with the *method* of judgment – that contribution comes from economics. Instead, the economic judge turns to rhetoric after the economic process has already produced a conclusion. Rhetoric-as-composition satisfies a necessary, practical, and limited function. Under Posner’s characterization, rhetoric is ornamentation for economic judgment.

As a result, Posner is able to detach the decision-making process from the decision-writing process. Under his characterization, rhetoric – which is more-or-less synonymous with “style”⁵⁰ – is distinct from the “conceptual content” of a judicial opinion. Whereas the former reflects the individual voices and characters populating the court, the latter constitutes an opinion’s “paraphrasable content, the part of the opinion’s meaning that is not lost when it is put into different words from those employed by the author.”⁵¹ According to this perspective, there exist certain absolutes that cannot be altered or diminished unless as the result of gross negligence or misrepresentation. This is the economic side of a judgment: it provides a method for collecting the conceptual content of a particular case and interpreting the “data” into an economic formula in order to achieve wealth maximization. In doing so, the economic judge attempts to place method out of reach for non-economic interrogation. Panetta and Hasian claim that economic judgment is anti-rhetorical, which is true in part. The *method* of judgment is distinctly anti-rhetorical, but its articulation is not.

⁴⁹ *Ibid.*, 67.

⁵⁰ Richard A. Posner, *Law and Literature*, 3rd ed. (Cambridge: Harvard University Press, 2009), 331. See also James Arnt Aune, “On the Rhetorical Criticism of Judge Posner,” *Hastings Constitutional Law Quarterly* 23.3 (Spring 1996), 658-670.

⁵¹ Posner, *Law and Literature*, 331.

As McCloskey notes, Posner attempts to mask the rhetorical appeals operating within his work with a scientific discourse.⁵² This is most evident when Posner turns to cost-benefit analysis and economic formulae to help the economic judge make good decisions. Drawing from neo-classical economic concepts such as the Coase Theorem and Pareto Efficiency, Posner constructs a number of formulae in order to achieve wealth maximization. Articulating an economic approach to copyright law, for example, Posner advances the “optimal level of copyright protection”⁵³ as $W = f(N)w - E(N, z)$, where wealth maximization (W) is achieved through a function that considers the total cost of creating works (E), the number of works created (N), the consumer and producer surplus per work before deducting the cost of creating the work (w), and the index of copyright protection (z). To the lay audience – or even an astute yet not economically minded group of legal experts – this formula appears to be no more than chicken scratches. Certainly elements such as the cost of creating a product (a movie, for example) and its availability are important considerations, but can they be quantified so easily? Moreover, can one quantify the impact such copyright protections will have on future works? If Kembrew McLeod’s scholarship is any indication, copyright has run amok in large part due to the impossibility of quantifying creativity and imagination.⁵⁴

Copyright law is by no means an exception; Posner advances similar formulae for nearly every field of law including the law of evidence,⁵⁵ legal rulemaking,⁵⁶ product liability,⁵⁷ legal

⁵² See McCloskey, *The Rhetoric of Economics*.

⁵³ William M. Landes and Richard A. Posner, “An Economic Analysis of Copyright Law,” *The Journal of Legal Studies* 18.2 (Jun., 1989), 341-343.

⁵⁴ McLeod, *Freedom of Expression*.

⁵⁵ Richard A. Posner, “An Economic Approach to the Law of Evidence,” *Stanford Law Review* 51.6 (Jul, 1999), 1477-1546.

⁵⁶ Isaac Ehrlich and Richard A. Posner, “An Economic Analysis of Legal Rulemaking,” *The Journal of Legal Studies* 3.1 (Jan., 1974), 257-286.

⁵⁷ William M. Landes and Richard A. Posner, “A Positive Economic Analysis of Products Liability,” *The Journal of Legal Studies* (Dec., 1985), 535-567.

procedure and judicial administration,⁵⁸ criminal law,⁵⁹ religious freedom,⁶⁰ sexual discrimination,⁶¹ and just about everything in between. Posner even advances formulae in order to understand non-legal issues. Not even rhetoric is outside the scope of economic analysis. Claiming that “selling an idea to selling a good,” Posner argues that persuasion boils down to $EU_j = (1 - p)B_j - pL_j$. According to Posner, persuasion amounts to this formula. Allow me to decode: EU_j : “the expected utility of good j ”; B : “the benefit to the buyer of the good works,” wherein the “‘good’ might be an idea”; L : “the loss if [the good] fails”; p : “the probability that [the good] was a false or bad idea.” Prioritizing the “costs of information” as a primary concern for rhetoric,⁶² Posner argues that arguments contain an implicit recognition of the “economic structure of the problem of persuasion.”⁶³ Claiming that rhetoricians have reached too far beyond their discipline, he asserts that “the economic approach to rhetoric implies that a speaker will appeal to his listener’s self-interest.”⁶⁴ Yet, when applied, is the formula useful? For example, let’s say the “good” (j) is the idea of unrestricted free speech. Already we face some obstacles. The “expected utility” of such a “good” is highly subjective. A random collection of citizens would likely contain a group that finds it highly valuable, another that finds it highly harmful, and yet another indifferent to either argument. Ought we average these opinions? I can only imagine the horrible survey that would come out: “On a scale from 1 through 10, one being the lowest and ten being the highest, how useful is unrestricted free speech?” Ought we consult

⁵⁸ Richard A. Posner, “An Economic Approach to Legal Procedure and Judicial Administration,” *The Journal of Legal Studies* 2.2 (Jun., 1973), 399-458.

⁵⁹ Richard A. Posner, “An Economic Theory of the Criminal Law,” *Columbia Law Review* 85.6 (Oct., 1985), 1193-1231.

⁶⁰ Richard A. Posner, “An Economic Approach to Issues of Religious Freedom,” *The University of Chicago Law Review* 56.1 (Winter, 1989), 1-60.

⁶¹ Richard A. Posner, “An Economic Analysis of Sex Discrimination Laws,” *The University of Chicago Law Review* 56.4 (Autumn, 1989), 1311-1335.

⁶² Posner, *Overcoming Law*, 502.

⁶³ *Ibid.* Posner uses no less than the proposition “God exists” to illustrate his point.

⁶⁴ *Ibid.*, 504.

actuary tables? Ought we cater each formulation to a particular individual? What constitutes a benefit? A loss? A bad idea? These are highly flexible concepts that are subject to any number of extraneous factors. Furthermore, Posner offers little insight into the footwork of rhetoric. The hope is that the formula will guide the way as realism takes a backseat to method.

In an attempt to comprehend the economics of homosexuality in *Overcoming Law*, he claims that “a homosexual act will be chosen over a heterosexual one if $(B_1 - C_1) > 0$, $(B_1 - C_1) > (B_2 - C_2)$ where B_1 and B_2 are the benefits of the homosexual and the heterosexual act, respectively, to a particular person and C_1 and C_2 are the respective costs to him.”⁶⁵ Granted, Posner has a few years on me, but I have not met anyone – homosexual, heterosexual, bisexual, or transsexual – who approaches his or her sexuality in such a detached, almost sanitized manner. More alarming is his economic deconstruction of rape:

Suppose a rapist derives extra pleasure from the coercive character of his act. Then there would be no market substitute for rape and it could be argued therefore that rape is not a pure coercive transfer and should not be punished criminally. But the argument would be weak: (a) . . . The prevention of rape is essential to protect the marriage market . . . and more generally to secure property rights in women's persons. Allowing rape would be the equivalent of communalizing property rights in women. . . . (b) Allowing rape would lead to heavy expenditures on protecting women, as well as expenditures on overcoming those protections. The expenditures would be largely offsetting, and to that extent socially wasted. (c) Given the economist's definition of value . . . the fact that the rapist cannot find a consensual substitute does not mean that he values the rape more than the victim disvalues it.

⁶⁵ Ibid., 557.

Asserting that economists like to think about the “unthinkable,”⁶⁶ it is no wonder why his critics consider him “bloodless and ultimately cruel.”⁶⁷ As Robin West notes, Posner’s view of rape ignores the roles of power and subordination. “Rape,” according to Posner, “is simply a substitute for consensual sex, engaged in by normal...heterosexuals for whom the cost of consensual heterosex is simply too high.”⁶⁸ With his sights set on efficiency and wealth maximization, one wonders what Posner is leaving out of the equation.

Whether one buys into the formulae or not is beside the point; of present concern is the rhetorical turn Posner takes to justify his position. With the introduction of these formulae, the economic judge is engaging in the act of rhetorical translation. Steeped in economic discourse, he translates legal statutes, homosexual desires, rape, rhetoric and just about everything else into economic terminology. In doing so, he necessarily narrows these issues down to easily interchangeable data that can be represented by a symbol. Unlike James Boyd White’s conception of translation, which accepts the impossibility of a universal meaning in law,⁶⁹ Posner translates from one expert discourse (law) into another (economics) and back again without reservation. Moreover, he posits these formulaic translations as distilled versions of how things *are*, not simply what they appear to be. Expectedly, the translation favors his own

⁶⁶ See John J. Donohue III and Ian Ayres, “Posner’s Symphony No. 3: Thinking about the Unthinkable,” *Stanford Law Review* 39 (1986), 791-812.

⁶⁷ Dahlia Lithwick, “Richard Posner: A Human Pentium Processor has been Assigned to settle the Microsoft Case,” *Slate* (Nov. 24, 1999), retrieved from http://www.slate.com/articles/news_and_politics/assessment/1999/11/richard_posner.html.

⁶⁸ Robin West, “Sex, Reason, and a Taste for the Absurd,” *Georgetown Law Journal* 81 (1993), 2421.

⁶⁹ See James Boyd White, “‘Meanings Can Never Be the Same’: Reflections on Language and Law,” *Rhetoric Society Quarterly* 21.3 (Summer 1991), 68-77. White argues, “For me the importance of translation is that this activity highlights and makes obvious elements of our experience that are features of all language use. It is not just a statement in another language that I cannot translate perfectly into my own words, but any verbal utterance or gesture, including those that take place in what I think of as ‘my’ language. Our meanings can never be the same” (73). See also Joseph W. Dellapenna and Kathleen Farrell, “Law and the Language of Community: On the Contributions of James Boyd White,” *Rhetoric Society Quarterly* 21.3 (Summer, 1991), 38-58.

discourse of law and economics because, like translating one language to another, there is no one-to-one ratio and choices must be made.

Addressing the rhetoric of translation, Peter France notes that translation imposes “a variety of constraints” in order to “perform all kinds of ‘unnatural’ operations” in order to yield their desired result.⁷⁰ Consequently, translation “is not a scientific procedure but a personal initiative akin to that of the orator situated between a subject and a public.”⁷¹ The translator carries with him or her a wealth of personal experiences and a perspective that ultimately shapes one discourse or language as it is translated into another.⁷² Those who are sympathetic to Posner’s formulae may claim that it provides an efficient means of understanding how law functions (or ought to function) in society. For those less sympathetic, the math does not add up as some issues and concepts are incommensurable. Certainly, the economic judge *can* translate rape into economic terminology and doing so would probably make the law more efficient in terms of expediency. The complex, emotionally draining elements that surround rape are either pushed aside or quantified. Yet, the overriding question is whether or not the economic judge *should* do so. What happens as a result? What is left out? What is added? By prioritizing method and establishing the *telos* of law as wealth maximization, Posner ignores what his economic discourse does to our conceptions of law when we think in these terms. Rather than serving an entirely *descriptive* function, we must ask what sort of perspective is law and economics *creating*. What happens to our conceptions of the law when we think in these terms? At the very least, we must be cognizant of the fact that words work on us as much as we work on them.

⁷⁰ Peter France, “The Rhetoric of Translation,” *The Modern Language Review* 100 (2005), 257.

⁷¹ *Ibid.*, 261. See also Claudia Carlos, “Translation as Rhetoric: Edward Jerningham’s ‘Impenitence’ (1800),” *Rhetoric Review* 28.4 (2009), 335-51; Naomi Janowitz, “The Rhetoric of Translation: Three Early Perspectives on Translating Torah,” *The Harvard Theological Review* 84.2 (Apr., 1991), 129-140; and John Logie, “Lost in Translation: The Influence of 20th Century Literary Theory on Plato’s Texts,” *Rhetoric Society Quarterly* 34.1 (Winter 2004), 47-71.

⁷² See Jacques Derrida, *The Ear of the Other: Otobiography, Transference, Translation* (Schocken: New York, 1982).

Posner insulates his position against criticisms by claiming one must thoroughly understand *both* legal discourse *and* economic discourse before one has the requisite expertise necessary to critique economic adjudication.⁷³ Ignoring the fact that Posner regularly criticizes scholarship well beyond the scope of law or economics, there is some merit to his argument. One should seek to understand an idea before criticizing it, but that does not mean one must be an economist or a judge in order to criticize them. Admittedly, some of Posner's more advanced formulae confuse me almost as much as Hegel's "inverted world" or the appeal of the Kardashians. As such, my criticisms could be brushed aside as the ramblings of a rhetorician with an axe to grind. As Arjo Klamer notes, this is part of the "tribalism" that takes place within economics (and arguably legal studies). "Becoming an economist implies more than making a choice for a particular subject; it signifies the adoption of a 'cultural frame that defines a great part of one's life.'" ⁷⁴ Every field falls prey to such tribalism and rhetoric is certainly no exception. The danger lies in remaining uncritical of your tribe's assumptions. Posner characterizes economics as "the instrumental human science par excellence" ⁷⁵ and capable of "furnish[ing] the indispensable theoretical framework for the empirical research that law so badly needs." ⁷⁶ If one takes a step back and views law and economics as a *discourse* rather than as an *methodology*, then its anti-rhetorical/a-rhetorical posturing and formulaic translations become more than a tools for the economic judge. The belief that law can be understood in neoclassical economic terminology changes one's *attitude* about the role and power of adjudication. By aligning himself with economic objectivity, Posner is able to present the economic judge as a

⁷³ See, for example, Posner, *The Problems of Jurisprudence*, 362-87, and *Overcoming Law*, 444-467.

⁷⁴ Klamer, 165.

⁷⁵ Posner, *Overcoming Law*, 15.

⁷⁶ *Ibid.*, 17.

neutral figure applying descriptions of natural human motivations. The neutrality that Posner espouses is also a key element of the economic judge's second rhetorical faculty: balance.

2.2 BALANCING EXTREMES

Balance has long been an important concept for law. Lady Justice, holding a sword in one hand and a scale balancing truth and fairness in the other, is an iconic figure representing honor, mercy, retribution, and, above all, integrity. The Eighth Amendment makes illegal the disproportionate or exaggerated forms of punishment. Judges and juries are implored to ensure “the punishment fits the crime.” Old Testament justice encourages “an eye for an eye.” Even on the international political scene, the United States often advocates a “proportionate response” to hostile attacks. In one of his very own decisions, Posner asserts proportionality as a “cornerstone” of rational law.⁷⁷

Important for his balancing strategy, Posner suggests law and economics is neutral and natural, a default position with no influence on the scales of justice. The economic judge's balancing act is most easily seen in relation to the legal binaries Posner advances throughout his work. After more than forty years, absolute consistency is a figment of the imagination. Nonetheless, I will attempt to reign in his expansive *oeuvre* by focusing attention on three guiding binaries in Posner's characterization of legal theory and the role that economic judgment plays therein. The first, the divide between legality and morality, is as longstanding as the idea of law itself. The second, theory and practice, stresses the divide between academic treatments of law and the everyday decision-making process of judges. Finally, law's debt to the past (backward-looking) and its obligation to the future (forward-looking) form the third binary.

⁷⁷ *Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*, 980 F.2d 449, 455 (7th Cir. 1992).

These three binaries illustrate how Posner frames the economic judge as a healthy, balanced, middle way between extremes.

The idea of balance in rhetoric is as old and ubiquitous as the idea of law, with historians noting its presence as early as the Ancient Egyptians.⁷⁸ Contemporary rhetorical research recognizes balance in a diverse array of interests, including organizational communication,⁷⁹ presidential rhetoric,⁸⁰ sermonic oratory,⁸¹ as a unifying point for prudence and decorum,⁸² and design and aesthetics.⁸³ Star Muir argues balance is a key term for Kenneth Burke and “reflects his distress at the industrial ‘habits’ exceeding the limits of ecological capacity, and it also reflects Burke’s concern with the rigidity of linguistic and philosophical perspectives that cannot mediate between realms, or even recognize the vitality of ambiguity in human symbolism.”⁸⁴ In *The New Rhetoric*, Perelman and Olbrecht-Tyteca cite balance as a sign of impartiality.⁸⁵ Still others have noted an implicit call for balance within existing rhetorical scholarship.⁸⁶

⁷⁸ See David Hutto, “Ancient Egyptian Rhetoric in the Old and Middle Kingdoms,” *Rhetorica: A Journal of the History of Rhetoric* 20.3 (Summer 2002), 213-233.

⁷⁹ Josh Boyd and Melissa Stahley, “Communitas/Corporatas Tensions in Organizational Rhetoric: Finding a Balance in Sports Public Relations,” *Journal of Public Relations Research* 20 (2008), 251-270.

⁸⁰ David A. Frank and Mark Lawrence McPhail, “Barack Obama’s Address to the 2004 Democratic National Convention: Trauma, Compromise, Consilience, and the (Im)Possibility of Racial Reconciliation,” *Rhetoric & Public Affairs* 8.4 (2005), 571-594.

⁸¹ Russel Hirst, “Austin Pehlps’s Theory of Balance in Homilectic Style,” *The Journal of Communication and Religion* 18.2 (1995), 17-27. The connection between rhetoric and religion has been addressed in other capacities. See, for example, Rhys H. Williams and Susan M. Alexander, “Religious Rhetoric in American Populism: Civil Religion as Movement Ideology,” *Journal for the Scientific Study of Religion* 33.1 (Mar. 1994), 1-15.

⁸² Robert Terrill, “Protest, Prophecy, and Prudence in the Rhetoric of Malcolm X,” *Rhetoric & Public Affairs* 4.1 (2001), 34.

⁸³ Richard Buchanan, “Design and the New Rhetoric: Productive Arts in the Philosophy of Culture,” *Philosophy and Rhetoric* 34.3 (2001), 183-206.

⁸⁴ Star A. Muir, “Toward an Ecology of Language,” in *Kenneth Burke and the 21st Century*, ed. Bernard L. Brock (Albany: State University of New York Press, 1999), 38-9.

⁸⁵ Perelman and Olbrechts-Tyteca, 60.

⁸⁶ See, for example, Jeffrey W. Murray, “Kenneth Burke: A Dialogue of Motives,” *Philosophy and Rhetoric* 35.1 (2002), 22-49. Regarding Burke’s sweeping project, Murray argues, “The task is to balance a rhetoric of motives that seeks symbolic merger with a dialogue of motives that tolerates difference” (39).

As a rhetorical strategy, the notion of balance should not be taken lightly. For example, Robert Patterson and Ronald Lee note the substantive, strategic use of balance in environmental rhetoric, arguing that balance serves as a god-term that runs rampant throughout American political discourse: “Yet, like all condensation symbols, the potent affect and cognitive ambiguity of ‘balance’ are the sources of its rhetorical power. ‘Balance’ evokes the powerful American value of pluralism without designating any mechanism for weighing competing claims.”⁸⁷ Balance, whether real or constructed, serves as a powerful rhetorical appeal and draws from longstanding American ideals, making its allure in the legal world all the more enticing.

Addressing the rhetorical strategy behind balance, Sharon Downey argues that it is an inherent element of feminist dialectical tension. Negotiating between “feminist reconstructionism” and “gender diversity,” Downey argues that an either/or approach sacrifices too much. Her “dialectical feminist perspective” takes a both/and approach that negotiates spaced between these competing ideas. “This idea of rhetoric as a balancing act does not negate rhetoric as persuasion, violence, or invitation because just as surely as balance is possible (most likely through invitation or persuasion), so too can it spiral out of whack (most likely through coercion or violence).”⁸⁸ Here understood, balance is a precarious yet highly sought position. Balance is a consequence of conscientious rhetorical engagement, a dialectic that finds equilibrium. In the legal setting, mediation represents this type of balance well. At its best, two parties, mediated by a legal representative, articulate their concerns and work toward agreement. As Posner responds to competing legal theories, he positions himself as the mediator looking for

⁸⁷ Robert Patterson and Ronald Lee, “The Environmental Rhetoric of ‘Balance’: A Case Study of Regulatory Discourse and the Colonization of the Public,” *Technical Communication Quarterly* 6.1 (Winter 1997), 26.

⁸⁸ Sharon D. Downey, “Rhetoric as Balance: A Dialectical Feminist Perspective,” *Women’s Studies in Communication* 20.2 (Fall 1997), 147.

common ground between two antagonistic sides that are reluctant to budge. Conveniently, economic judgment just so happens to represent the delicate balancing point.

The first of our binaries, morality and legality, is arguably the most long standing and the most divisive. The line between the two has always been blurry and it serves as a constant point of contention for theorists, practitioners, and the lay public. Do laws convey a moral standard? Should moral norms become law? Or is legality separate and distinct from morality? Murder, for example, carries with it a powerful moral justification for punishment, but we nonetheless recognize various degrees of severity when it comes to murder. Furthermore, punishing murder is tautological in that murder is morally and legally wrong, but killing in the name of self-defense is not. One can also imagine scenarios in which a murderer elicits public sympathy. The grieving parent of a raped and murdered child who takes revenge and shoots the perpetrator outside of the courtroom will likely have a number of supporters. Or the abused wife who flees her violent husband only to return and kill him in his sleep is, technically, committing murder, but may receive a lighter legal penalty (if any penalty at all).

Laws concerning self-regarding or consensual acts underscore the blurred line between legality and morality. Presently, marijuana prohibition and same-sex marriage are hot topics in legislatures, courtrooms, and around office water coolers. Laws regarding these issues often exist in a swirl in moral arguments, especially same-sex marriage. Before issuing his scathing dissent in *Windsor v. United States*, Justice Scalia was questioned about his views on same-sex marriage. “Homosexual sodomy?” he questioned, “Come on. For 200 years, it was criminal in every state.” Later questioned about the implications of such a position, Scalia responded with questions of his own: “If we cannot have moral feelings against homosexuality, can we have it

against murder? Can we have it against other things?”⁸⁹ For those who want to include moral justifications as legitimate legal appeals, the struggle lies in *which* appeals make the cut. But how far are we willing to offer moral justifications for laws? Pro-life groups argue that abortion is a grievous moral wrong meriting legislation or the intervention of the Supreme Court. Pro-choice groups claim that the more pressing moral obligation is to the impregnated woman, especially when a pregnancy is the result of rape or incest or when the life of the woman is at risk. What about less heated issues? Littering? Jaywalking? Leaving shopping carts in the middle of a parking lot when the cart corral is only ten feet away?

Utilizing Sophocles’ great tragedy *Antigone* as a paradigm example, Posner argues that a dichotomous divide between morality and legality has always been present in legal theory.⁹⁰ Ought we follow our moral conscience, like Antigone, or follow the written law, like Creon?⁹¹ Two of the most prominent and contested legal theories represent the poles of these competing notions of justice: natural law and legal positivism. Many natural law theorists argue that there exists a set of guidelines that supersede human conventions or beliefs. Roman Catholic doctrine serves as a prime example. God, not man, deems that which is morally good and, consequently, legal. Such a position, when argued in a contemporary context, is likely to receive little if any broad acceptance (although Germain Grisez makes an interesting case⁹²). Yet, natural law is embedded in the Declaration of Independence (“We hold these truths to be self evident...”) and the Bill of Rights. Natural law also has a prestigious philosophical pedigree with supporters ranging from ancient philosophy (Plato, Aristotle, Cicero) to modern philosophy (Hobbes,

⁸⁹ Amanda Marcotte, “Justice Scalia Compares Sodomy to Murder,” *Slate* (Dec. 11, 2012). Retrieved from http://www.slate.com/blogs/xx_factor/2012/12/11/scalia_compares_sodomy_to_murder_why_because_he_says_so.html

⁹⁰ Posner, *The Problems of Jurisprudence*, 9.

⁹¹ Posner also likens Agamemnon and Pontious Pilate to the “politically corrupt” judge. See *Law and Literature*, 124-133.

⁹² See Germain Gabriel Grisez, *Way of the Lord Jesus* (St. Bonaventure, NY: Franciscan Institute Publications, 1997).

Locke) to contemporary philosophy (Ronald Dworkin, Robert George, John Finnis). Although not legally binding, the Universal Declaration of Human Rights and other international charters and covenants also reflect natural rights theory. Even the American common law tradition is rooted in a rich history of morality wedded to law as articulated in William Blackstone's *Commentaries on the Laws of England*.⁹³

The opposing perspective is legal positivism, which views law as the product of governmental processes that produce rules backed by the power of the state. Early critics of natural law such as Jeremy Bentham and Edmund Burke highlighted the logical inconsistencies behind so-called natural or inalienable rights. John Austin, Hans Kelsen, and H.L.A. Hart refined these criticisms in the construction of their positivist theories of law. According to the positivistic view, law emerges from social agreements, which may echo moral concerns, but those moral concerns are not the *source* of law. Whether murder, rape, theft and the like are moral wrongs is certainly important, but it should have little to do with how a law is adopted, implemented, and upheld. The legal penalties against littering, for example, are the result of a human process that is not guided by moral intervention.

For Posner, the natural law position falters because it cannot stand on fact.⁹⁴ In *The Problematics of Moral and Legal Theory*, Posner's lengthiest treatment of the morality/legality binary, he claims that contemporary appeals to natural law are thinly connected to metaphysical moral realism. Natural law, he argues, is a difficult position to hold in a heterogeneous society, instead rooting their moral claims in an ethical tradition.⁹⁵ Laws coming out of strict religious groups serve as cultural markers *for those groups*, but non-group members are difficult to

⁹³ See William Blackstone, *Commentaries on the Laws of England*, ed. Wayne Morrison (London: Cavendish Publishing, 2001).

⁹⁴ Richard A. Posner, *The Problematics of Moral and Legal Theory* (Cambridge: Belknap Press, 1999), 10.

⁹⁵ *Ibid.*, 17.

persuade because they lack a similar cultural tradition. As a result, natural law can only work in a small, homogeneous society and even then it is susceptible to numerous challenges.⁹⁶

Even deontological moral justifications face a number of problems when transitioning into the legal realm. Kantian moral philosophy, which was revived in its political and legal form in large part due to John Rawls' seminal *A Theory of Justice*, roots morality in human dignity, not God's will. As ambitious and influential as Rawls' project was, Posner notes that law *inherently* treats people as objects of social control rather than ends in themselves.⁹⁷ Even if one was to adopt a Kantian perspective – or *any* established moral theory – Posner claims that they cannot adequately respond to specific legal problems or difficult cases.⁹⁸ Such theories are, for better or worse, too abstract for law.⁹⁹

Few, however, subscribe to such a severe version of natural law and Posner recognizes its “strong” and “weak” formulations. Describing Ronald Dworkin as the most prominent and prolific “weak” natural law theorists given his position that even the most complicated legal problems have a “right answer,”¹⁰⁰ Posner is critical of any position that attempts to claim moral certitude. He argues that Dworkin's principled approach “take[s] the place of the Form of Justice or the law of God.”¹⁰¹ Consequently, Dworkin “has created a rich vocabulary for masking discretionary, political decision making by judges.”¹⁰² According to Posner, appeals to morality such as Dworkin's rely on a particular *vocabulary*, but this vocabulary is a façade obscuring the fact that judges must use their personal discretion from time to time. Sanctioning these

⁹⁶ Posner stresses this point in *The Problems of Jurisprudence*, arguing, “For without either nature, or a political, social, and moral community so monolithic that the prevailing legal norms are ‘natural’ in the sense of taken for granted, natural law can be but a shadow of its former self – can be but a name for the considerations that influence law even though not prescribed by a legislative or other official body” (23).

⁹⁷ *Ibid.*, 176.

⁹⁸ *Ibid.*, 447

⁹⁹ *Ibid.*, 329.

¹⁰⁰ Posner, *The Problematics of Moral and Legal Theory*, 96.

¹⁰¹ Posner, *The Problems of Jurisprudence*, 21-2.

¹⁰² *Ibid.*, 22.

judgments as morally correct, natural law judges attempt to avoid charges that they are “legislating from the bench.” But whereas natural law judges don a mask to cover their true intentions (even from themselves), the economic judge shows his or her face to the world. Although Posner would not deny that the economic judge also relies upon a particular vocabulary, it is a vocabulary that recognizes ethical traditions without adopting them wholesale.

Due to the ambiguity of moral arguments and the diversity of moral positions, Posner is skeptical of morality’s place in law, but acknowledges that it is an inevitable presence in a practice that deals with regulating societies. Ever the economist, Posner realizes that if efforts to root out morality from law are inevitably futile, then moral assertions must be put to good use. In a critique of “The Path of Law,” Oliver Wendell Holmes, Jr.’s landmark essay in legal realism that attempted to separate the moral from the legal, Posner claims that Holmes missed the mark in two important regards:

The first is that the more law conforms to prevalent moral opinions, including the moral opinions of relevant subcultures such as the commercial community, the easier it is to understand and comply with it just by acting the part of well-socialized members of their community. The second point...is that the maintenance of a moral veneer in the law’s dealing with the people subject to it, especially the antisocial people subject to it, offers a first line of defense against excesses of official violence.¹⁰³

Rather than embrace morality in law as an end in itself, Posner positions morality in the service of efficiency and wealth maximization. He resigns himself to a legal world wherein moral justifications are inevitable, yet such claims need not be entirely useless or distracting. They are, in many ways, instinctual and tacit,¹⁰⁴ an unavoidable part of the legal process.¹⁰⁵ The goal is not

¹⁰³ Richard A. Posner, “The Path Away from Law,” *Harvard Law Review* 110.5 (Mar., 1997), 1042.

¹⁰⁴ Posner, *The Problems of Jurisprudence*, 5

¹⁰⁵ *Ibid.*, 239.

to be at the mercy of an all-encompassing moral theory or moral intuitions, but one must not (and cannot) simply ignore them. They serve as additional resources to be considered when deciding a case in the courts of law and public opinion.

Although Posner is indignant toward academic moral theorizing, he suggests the impetus behind general moral beliefs provides a bulwark against the dangerous elements in legal positivism, particularly its oft-criticized lack of humanity. Posner turns to Nazi law to illustrate his point. Throughout the Nuremberg Trials and in endless discussions, articles, and books since, a driving question about the Nazi regime has been, “Was Nazi law legitimate?” From a strict legal positivist position, the answer is a reluctant, “Yes.” Morally imbued legal theory, even if it is *weakly* imbued, succeeds where legal positivism fails in its ability to delegitimize the idea of Nazi law by connecting law to a set of human desires and expectations that go beyond a mere set of rules established by a state. True, moral claims are subject to a litany of criticisms, which Posner discusses throughout his various works, but they can also unite a people around a shared concern for humanity. Indicative of Posner’s rhetoric of balance, moral claims, such as those advocated by natural law theorists, allow for a flexibility often lacking in positive law.¹⁰⁶ For Posner, morality is important for law because it gives his economic judge a heart (even if, following Nussbaum’s criticism, it is a cold and mechanical one). Moral criticism also offers a type of critical lens that legal positivism lacks. “It helps us spot the weaknesses in ambitious social theories that might be used to generate or validate or overthrow legal obligations, and thus it reinforces the lesson of skepticism.”¹⁰⁷ Ill-fated projects such as early eugenics initiatives may have been conceived with good intention, but the implementation of such initiatives tended to marginalize minorities, the poor, and women.

¹⁰⁶ Ibid., 238

¹⁰⁷ Ibid., 348.

Posner's interest in "moral intuition" is another attempt to preserve morality in law, although a notion of morality that continues to work toward his benefit. Recognizing the impossible task of deciding difficult cases solely based on written law (i.e. statutes and precedents), the economic judge does not believe every case can be decided on the original intent or language of lawmakers. When the law does not provide the necessary and sufficient information for deciding a case, Posner claims that the economic judge must rely on moral intuitions, such as empathy. Stressing the importance of empathy, which he suggests is an important facet of law and economics,¹⁰⁸ Posner claims that law cannot be an entirely rational, logically regulated institution.¹⁰⁹ Depending on the facts of the case, judges, juries, lawyers, and the lay public may feel particularly strongly for a plaintiff or a defendant.

In 2007, for example, Ben Odierno was acquitted of second-degree murder charges after he had stabbed his wife to death. The defense positioned Odierno's actions as the result of a "decade-long period of psychological warfare"¹¹⁰ and attempted to have the jury empathize with his emotional distress. Post verdict interviews indicate that these appeals had a lasting effect for many jurors. "Putting him on the stand was a big, big, big factor," claimed juror Joanne McGrath, "because he turned out to be a likable guy."¹¹¹ Another juror, Miri Samuel, echoed the empathic likability of Odierno: "He was a simple, decent man who tried to live a simple, happy life."¹¹² Emotional appeals also play a significant role in sentencing hearings, particularly in victim impact statements. Victims of crimes (or their families, if the victim is deceased) are

¹⁰⁸ Richard A. Posner, *Frontiers of Legal Theory* (Cambridge: Harvard University Press, 2001), 242-4.

¹⁰⁹ *Ibid.*, 237.

¹¹⁰ Anemona Hartocollis, "Man Who Stabbed Wife is Acquitted," *New York Times*, (Feb 14, 2007), retrieved from <http://www.nytimes.com/2007/02/14/nyregion/14landlord.html>.

¹¹¹ Cassi Feldman, "Jurors Find More Sympathy for Defendant," *New York Times* (Feb 14, 2007), retrieved from <http://www.nytimes.com/2007/02/14/nyregion/14jurors.html>.

¹¹² *Ibid.*

offered an opportunity to address the court prior to sentencing but after the defendant has been found guilty¹¹³ - a key moment in the decision-making process.

On first glance, Posner's defense of empathy reverberates with Martha Nussbaum's legal philosophy. Both support empathy in judicial decision-making, but their similarities end there. Whereas Posner acknowledges emotion as unavoidable and thus obligates a judge to acknowledge its presence, Nussbaum wants it to hold a place of privileged esteem. Posner also wants to turn to emotions that Nussbaum argues are more detrimental than helpful. For example, Posner offers a series of arguments that encourage the use of disgust and shame in the law.¹¹⁴ Nussbaum highlights the dangers of relying on such emotions, even if they are prominent in human development. Her book length treatment of the subject, *Hiding from Humanity: Shame, Disgust, and the Law*, stresses the many ways in which arguments from disgust and shame have been used against vulnerable populations and disenfranchised groups (a point that will be elaborated upon in the next chapter).¹¹⁵ Posner, conversely, sees disgust and shame as similar to any other emotional intuition (e.g. fear, anger) used to decide or justify a case, stressing the broad public support for disgust.¹¹⁶

Legal positivists and originalists pressure Posner's defense of emotion and moral intuition, arguing that emotional detachment is a hallmark trait of sound adjudication. Similar to challenges issued against early 20th century legal realists, opponents fear decisions may pivot on the whim of a judge or justice when moral intuition is granted a place in the process. Rekindling an old adage, they worry that when judges are not sufficiently detached from their judgments, something as simple as what they ate for breakfast may sway their decision. When the demand is

¹¹³ Indiana and Texas also allow victim impact statements to go on record *after* sentencing has take place.

¹¹⁴ Posner, *Frontiers of Legal Theory*, 236, 239.

¹¹⁵ Her arguments will be addressed in greater detail in the chapter dedicated to her legal theorizing.

¹¹⁶ Posner, *Frontiers of Legal Theory*, Chapter 9.

for a “government of law and not men,” the moral intuition of a judge can be a cause for concern. While acknowledging these worries, Posner believes they are blown out of proportion. Immersed in a well-established professional history and illustrating concern for their reputations, judges are not likely to be so haphazard with their judgments. Even the liberal Warren Court sought to ground their decisions in long-standing precedent rather than solely relying upon morality. Again illustrating his desire for balance, Posner claims judicial detachment and emotions like empathy are not mutually exclusive and need not be in tension.¹¹⁷

Throughout his work, Posner chastises the morality-saturated natural law and the morality-absent legal positivism, recognizing a place for both arguments without wholly subscribing to either. Such a balancing act places Posner in an interesting rhetorical position. He is able to call out the extremes of both poles, which he often represents as Ronald Dworkin and Martha Nussbaum on the moral end and H.L.A. Hart on the amoral end. In effect, he is playing academic extremes against one another and offering a seemingly moderate center as the reasonable alternative. “In the view I am expounding,” argues Posner,

the masculine outlook is that of legal positivism, the feminine that of natural law. At the “masculine” end of the spectrum of legal conceptions, law is monstrous, inhuman; this is a common layperson’s conception of law and one well represented in imaginative literature. At the “feminine” end, law turns into the anarchy of “popular justice,” symbolized by the trial of Socrates and by the kangaroo courts of totalitarian regimes, such as Mao’s “people’s courts. *A mature legal system rejects both extremes* in favor of a mixture of rules and discretion, law and equity, rule and standard, positive laws and

¹¹⁷ Ibid., 245.

ethical principles (corresponding to natural law), logic and practical reason, professional judges and lay judges, objectivity and subjectivity.¹¹⁸

By playing off the extremes on both sides of his binary, Posner is able to simultaneously delegitimize those positions and portray the economic judge as the reasonable, balanced middle way.

The different rhetorical situations represented by academics and acting judges move us to the second major binary Posner attempts to balance: theory and practice. Evident in his treatment of academic moralism, Posner is irked by theorists more interested in discerning and arguing for a legal ideal without giving due consideration to the practical, real-life implementation of their ideals. Consider Plato's highly ambitious ideal city articulated in his *Republic*. Whether or not the city would unfold as he argues is moot because it would be impossible to implement. Kant's moral theory serves as another example. Are we really not allowed to lie? Even if the Kantian moral life is good, is it *possible*? Contemporary theories are not in the clear, either. John Rawls' *A Theory of Justice* attempts to establish the requirements necessary to ensure a fair and just society. Even if his germane thought experiment, the veil of ignorance, introduces a set of issues society *ought* to address, it provides little insight regarding implementation.

Much like the morality/legality binary, Posner weaves commentary regarding theory and practice throughout most of his book length works. Recently, he has written a work focused precisely on this issue, *How Judges Think*, which serves as a useful starting point for addressing the balance Posner hopes to strike. Setting the tone of his contribution early in the work, his argument "emphasizes positive rather than normative analysis – what judges do, not what they should do."¹¹⁹ Posner's bare bones emphasis on everyday judicial decisions extends to his

¹¹⁸ Posner, *The Problems of Jurisprudence*, 405.

¹¹⁹ Posner, *How Judges Think*, 6.

broader concept of law: “‘Law’ in a judicial setting is simply the material, in the broadest sense, out of which judges fashion their decisions.”¹²⁰ Theoretical pursuits, such as those articulated and advocated by academic scholars, tend to focus on an ideal and not the day-to-day legal process. “My complaint,” Posner argues, “is that the current academic critique of the judiciary is unrealistic about judges, unhelpful to them, and indeed rather uninterested in them unless they happen to be Supreme Court Justices.”¹²¹ But what does Posner’s attention toward the day-to-day have to offer? What contribution does it make amongst competing arguments? Let us consider Posner’s arguments against the prioritization of theory over practice.

One of Posner’s main targets is the academic popularity of “legalism,” which Posner defines broadly as theories “[hypothesizing] that judicial decisions are determined ‘by law,’ conceived of as a body of preexisting rules found stated in canonical legal materials, such as constitutional and statutory texts and previous decisions of the same or a higher court, or derivable from those materials by logical operations.”¹²² Painting with such broad strokes allows him to group seemingly disparate theorists like Scalia and his fellow conservative originalists, liberal “right answer” theorists like Dworkin, and the Marxist school of Critical Legal Studies. Posner continues, characterizing the “ideal legalist decision [as] the product of a syllogism in which a rule of law supplies the major premise, the facts of the case supply the minor one, and the decision is the conclusion.”¹²³ Such rules may be derived from the “original intent” of the Constitution, humanistic moral appeals, citizenship, or an ephemeral notion of the “flourishing life.” Although the substance of these approaches may be different, their forms are quite similar: they are all driven by an abstract set of rules that serve to guide the decision-making process.

¹²⁰ Ibid., 9.

¹²¹ Ibid., 12.

¹²² Ibid., 41

¹²³ Ibid.

While legalist claims are abundant amongst academic theorists,¹²⁴ Posner considers such positions, whether liberal or conservative, indicative of legal theory's systemic woes.¹²⁵ Their penchant for abstraction removes the practical act of judgment and the character of the individual judge. Consequently, "Academic critique thus perpetuates a false notion of judicial behavior."¹²⁶ He continues,

Academic lawyers are terrific at taking apart the formal grounds of a judicial decision, and those are the grounds that take up most of the space in most opinions. But the academics have (or express) little understanding of how cases are actually decided, where the judges who decided a case were coming from, and what *really* made them alter existing doctrine as distinct from what they said made them change it.¹²⁷

Not only is the judge detached from the decision, but the law student or newly minted lawyer learning to brief and argue cases is also at a disadvantage. The scholarly process of pouring over a case and examining it from every angle may illuminate a nuanced, perhaps previously unaddressed issue, but such a process is markedly different than the judge making a decision with a limited amount of time, a growing caseload, and the fact that lives will be directly effected.

Even if a judge is sympathetic to academic arguments, the impossibly high standards of such arguments make them useless in adjudication. Consider, for example, the arguments supporting a strict constructionist interpretation of the Constitution. Robert Bork and Antonin Scalia, the theory's most prominent and vocal proponents, advocate against the "living Constitution" and "judicial policy-making," but Posner suggests that they cannot meet their own

¹²⁴ Although Scalia is not an academic per se, his approach is closely akin to his academic peers in its scope and orientation.

¹²⁵ Posner, *Overcoming Law*, 294.

¹²⁶ Posner, *How Judges Think*, 219.

¹²⁷ *Ibid.*

standards.¹²⁸ When put into practice, idealistic theories can never be sustained. Posner also asserts that Critical Legal Studies, a more recent addition to the theoretical scene, is similarly misguided by holding judges to a standard that no judge could ever satisfy adequately.¹²⁹

Posner notes an important rhetorical element behind the detachment of the academic and judicial spheres: the roles of their respective audiences.¹³⁰ Academics writing for fellow academics are able to abstract *ad nauseum*, which is celebrated in many circles. Scholars deconstruct and reconstruct every element of landmark cases such as *Dred Scott v. Sanford*, *Plessy v. Ferguson*, *Brown v. Board of Education*, *Roe v. Wade*, and *Bush v. Gore*. Certainly these cases serve as important cultural markers, but Posner believes the attention given to them distracts from more pertinent, contemporary, and practical concerns. In Posner's judge-oriented framework, judges have neither the time nor resources to dig as deeply as academics insist.¹³¹ Consider, for example, the definition of personhood. In Howard Fineman's *The Thirteen American Arguments: Enduring Debates that Define and Inspire Our Country*, he lists this problem as one of the most crucial issues in the whole span of American history.¹³² There are certainly important points when the debate over personhood reaches a fever pitch, most notably slavery, the civil rights movement, the several waves of women's rights, and abortion rights. The debate, however, has never come to a conclusion and even the most optimistic theorist would likely see no end in sight. With a host of new aspects of personhood coming to the fore, including advances in genetic testing, "death with dignity," and corporate personhood, Posner

¹²⁸ Posner, *Overcoming Law*, 230. Posner claims, "There has never been a time when the courts of the United States, state or federal, behaved consistently in accordance with [the strict constructionist] ideal. Nor could they, for reasons rooted in the nature of law and legal institutions, in the limitations of human knowledge, and in the character of a political system."

¹²⁹ Posner, *How Judges Think*, 209.

¹³⁰ *Ibid.*, 219.

¹³¹ In *Overcoming Law*, Posner claims academic legalism is "too deep" for the actual legal world, but his economic approach avoids such excessive depth (21-2).

¹³² See Howard Fineman, *The Thirteen American Arguments: Enduring Debates that Define and Inspire Our Country* (New York: Random House, 2009).

encourages his readers to ask a simple question: Can we really expect judges to be the final arbiters on highly complicated, culturally influenced, and ever changing metaphysical and moral problems?

Judges and lawyers, Posner stresses, do not enjoy the same luxuries as their academic counterparts. Their audiences consist not of academics with the time and resources to spend years working on an argument. Rather, judges and lawyers deal with defendants, prosecutors, juries, families, and law enforcement, all of whom seek swift justice in one way or another. Spending a significant amount of time on one case means spending less on others. With cases piling up and prisons bursting at their concrete seams, Posner views increased attention to an individual case as indicative of the law of diminishing returns: judgment will not become remarkably more accurate when a judge has three years to decide a case rather than three months.

Posner argues that law has been divided into two separate discourses that rarely overlap one another in any meaningful way. Academic law clothes itself in abstractions and high-minded legal theory. Courtroom law, while still adopting an esoteric “legalese,” nonetheless orients itself toward practicality and efficiency. While the practitioners and advocates of academic, theoretical discourse are aware of their practical counterparts, Posner suggests that they infrequently attempt to *understand* the other. As new legal theories emerge and attempt to define what the law is (or ought to be), judges and lawyers carry on. Posner laments, “Each generation succumbs to the siren song of abstraction.”¹³³ Rather than building up a useful framework that judges can utilize, Posner bemoans academics who swap abstractions in and out, thus creating theories that are of little use to a judge.¹³⁴

¹³³ Posner, *Overcoming Law*, 279.

¹³⁴ *Ibid.*, 281.

While these differing audiences and discourses are problematic, perhaps the most regrettable element of academic legalism's orientation toward unrealistic idealism is, for Posner, the way in which it makes the best the enemy of the good. Abstract theories distract from good (but not perfect) ideas. Given the multitude of competing theories, Posner attempts to bolster his balancing act by suggesting "good enough" ought to be sufficient for the courts, a task in which his pragmatic, economic analysis of law is proficient.¹³⁵ This notion of good-but-not-perfect is a popular rhetorical characterization;¹³⁶ it grants him the ability to recognize errors without placing direct or significant blame on the decision-makers (provided they follow Posner's guidelines). Typical of his economic approach, Posner uses cost-benefit analysis to ascertain an adequate balance between the two. Illustrating this balancing act between costs and benefits, Posner likens adjudication to safety measures taken by a company. "If the judge knows whether the case is nearer the left [i.e. more beneficial than costly] or the right [i.e. more costly than beneficial], he knows which party has the better case. He does not have to be able to determine the optimal level of precaution in order to make a correct decision."¹³⁷ This act of translating legal ideas into economic terminology is vital to Posner's rhetorical project and places law and economics in a privileged position. Competing legalist theories do not and cannot adequately capture the realistic limitations that are placed on acting judges as Posner describes them.

Building on his arguments against academic legal theory's unrealistic and utopian expectations, Posner's second strike at legalism concerns the process of decision-making. To subscribe to and follow a legalist theory places "unrealistic demands on judges."¹³⁸ Even if one were to subscribe to a theory, Posner argues that such a theory provides no practical solutions

¹³⁵ Posner, *How Judges Think*, 241. Posner argues, "Although pragmatic adjudication rarely generates enough to enable a decision that produces a social optimum, often it produces an approximation that is good enough for the law's purposes."

¹³⁶ Posner uses it elsewhere. For example, see *Overcoming Law*, 398.

¹³⁷ Posner, *How Judges Think*, 241-2.

¹³⁸ *Ibid.*, 249,

and cultivates no useful skills necessary for deciding difficult cases. “[J]udicial philosophies have little causal efficacy,” writes Posner, stressing the ineffectiveness and unproductiveness of legal theory.¹³⁹ Because we live in a pluralistic society, any theoretical argument is inevitably dissatisfying because it cannot settle disagreements in difficult cases.¹⁴⁰ Consequently, “much of what these first-rate interdisciplinary scholars do makes no contribution to the work of a judge or a practitioner.”¹⁴¹ Academic legalism is akin to a book about how to be funny. You can list all the necessary requirements – audience, timing, topic choice, vocal inflection, pacing, appropriateness, optimal whoopee cushion inflation levels, etc. – but no book could ever guide the drab to the fab, the boring to the soaring, and the bland to the grand in a single attempt. Humor and law are more akin to geology in this regard: they require persistence and time.

Even the most robust theory with deep roots in logic tend to be impractical to the economic judge. “Logic will not decide the most difficult cases,” argues Posner. “Logic the destroyer is not logic the creator. To show that an opinion is illogical is not to show that the outcome is incorrect – a particularly pertinent observation when both the majority and the dissenting opinions in a case are illogical.”¹⁴² Again, Posner is indicating the need to accept “good enough” as a necessary and justifiable position. The highly contested decision in *Citizens United* may be interpreted in any number of ways depending on the theoretical lens through which one views the case. The logics of originalists, “right answer” theorists, civic republicans, Critical Legal Theorists, and feminists legal scholars may all reach a different conclusion, or, at

¹³⁹ Ibid., 346. He claims, “They do not weaken the force of political preferences. They supply not ‘actionable’ reasons but rationalizations for actions taken on other grounds, though a fuller test of this proposition would require comparing judges who have similar judicial philosophies but different political leanings (Such as Justices Scalia and Ginsburg – both legalists), and asking whether their decisions tend to converge or, as I predict, diverge.”

¹⁴⁰ Posner, *Overcoming Law*, 36.

¹⁴¹ Ibid., 99.

¹⁴² Posner, *The Problems of Jurisprudence*, 55.

the very least, different justifications. For Posner, such arguments are ineffective and unproductive.¹⁴³

Posner claims that one of the important reasons why academic legalism is so out of touch with actual adjudication is the “compartmentalization of knowledge,” which he labels “so conspicuous a feature of the modern world” that it “may have condemned philosophy to irrelevance at the level of practice.”¹⁴⁴ “Compartmentalization of knowledge” can more easily be read as “specialization.” As academia continues to grow, scholars tend to focus on narrower interests. Psychology, for example, contains specialties focused on clinical, community, counseling, developmental, educational, environmental, experimental, family, forensic, geriatric, health, organizational, physical, positive, psychometric, psycho-analytic, rehabilitative, social, sport, and therapeutic psychology, just to name a few. Within these areas one may seek further specialization. Psychology is not unique in its multiplicity. English, Philosophy, Economics, History, Communication, and even natural sciences like Biology, Chemistry, and Physics all contain highly specialized areas wherein scholars may spend most if not all of their careers. By secluding themselves within such finely nuanced, highly esoteric spheres, their contribution to law cannot be appropriated by practicing judges.

Posner utilizes Robin West’s feminist jurisprudence as one such ineffective approach. A leading advocate within Critical Legal Studies, he cites her earnest defense of women’s rights and the need for the legal profession, broadly understood, to “at least *try* to understand women’s distinctive experience, just as they should try to understand the experiences of blacks or Jews, Asians or Mormons.”¹⁴⁵ Noting her call to have empathy serve as a “guiding light” for

¹⁴³ For his part, Posner claims *Citizen’s United* has created a political system that is “pervasively corrupt” in which “wealthy people essentially bribe legislators.” See Bill Moyers and Michael Winship, “Presto! The DISCLOSE Act Disappears,” *Huffington Post* (July 17, 2012), retrieved from http://www.huffingtonpost.com/bill-moyers/presto-the-disclose-act-d_b_1679743.html.

¹⁴⁴ Posner, *Overcoming Law*, 446.

¹⁴⁵ Posner, *The Problems of Jurisprudence*, 411-2.

individuals “affected by judicial decisions,” Posner’s criticism is one of practicality: “judges lack the time and emotional energy to enter deeply into the feelings of the litigants, let alone others who might be affected by the judge’s rulings.”¹⁴⁶ Telling a judge to be more empathic toward those affected by a ruling gives her little guidance on *how* one goes about the process, let alone doing it adequately.

Moreover, Posner claims that such academics are “self-popularizing” and “own-field policy proposing.”¹⁴⁷ Rebuking Martha Nussbaum’s contribution to law and literature, Posner claims her work is a “distraction”¹⁴⁸ that evokes a rhetorical jeremiad to advance her own brand of social reform.¹⁴⁹ Her call to incorporate literature in legal education (well, *all* education, but she makes a special point of citing legal education in *Poetic Justice*) serves her own ideological ends, which she asserts “without qualification.”¹⁵⁰ Posner agrees with Morris Dickstein’s review of her work as “bracingly utopian and immensely heartening... *Poetic Justice* is less of a study in literature than a lay sermon for beleaguered liberals.”¹⁵¹ Even if her approach were adopted, Posner fears, “Literature has too feeble a grip on the modern mind...and the specific values of cosmopolitan egalitarianism that Nussbaum propagates are too rigorist to be effectively inculcated.”¹⁵²

Elsewhere Posner is much more direct in his criticisms of academia’s interest in legal theory:

Academic lawyers are terrific at taking apart the formal grounds of a judicial decision, and those are the grounds that take up most of the space in most opinions. But the

¹⁴⁶ Ibid, 412.

¹⁴⁷ Richard A. Posner, *Public Intellectuals: A Study of Decline* (Cambridge: Harvard University Press, 2002), 40, 173.

¹⁴⁸ Ibid., 10.

¹⁴⁹ Ibid., 39-40.

¹⁵⁰ Ibid., 234.

¹⁵¹ Ibid., 234-5.

¹⁵² Ibid., 236.

academics have (or express) little understanding of how cases are actually decided, where the judges who decided a case were coming from, and what *really* made them alter existing doctrine as distinct from what they said made them change it. The academic emphasis on the formal grounds of a decision conveys to law students and the bar the impression that every judge is a thoroughgoing legalist who can therefore be “reached” only by ceaseless iteration of legalist slogans such as “plain meaning” and by barrages of case citations.¹⁵³

Again, we see the idea of two mutually exclusive legal discourses creeping in. One emerges from academics in an endless array of disciplines and specialties, the other is the day-to-day discourse utilized by judges. The former is highly critical, often deconstructive, whereas the latter must operate within time constraints and amidst uncertainty, but is nonetheless productive.

As a result of the unrealistic expectations from legalist theories and the lack of practical advice they offer, academia continues to have little influence on judges, much to academia’s chagrin. The criticisms that academics lay on the judiciary (and there are many) are more or less ignored. Posner notes two reasons why: “One is that although judges indeed care about whether they are doing and are thought by certain others (other judges, for example) to be doing a good job, they do not care greatly what law professors think of them.”¹⁵⁴ No matter the field, a significant part of academic scholarship is criticizing the work of others. Within a given discipline, these criticisms can greatly affect one’s prestige within the field, making or breaking a career. For someone *outside* of the field, such as a sitting judge or justice, these criticisms have little if any effect on their own work or ego. I’m sure Chief Justice John Roberts could care less

¹⁵³ Posner, *How Judges Think*, 219.

¹⁵⁴ *Ibid.*, 205.

about the arguments I've produced that criticize his decisions. Posner wouldn't even bat an eye at this entire chapter of my dissertation. Why? Because my criticisms do not matter to them.

“The other reason,” Posner continues, “is that law professors are not much interested in evaluating individual judges, except Supreme Court justices – who are the last judges to care about how they are thought of in the groves of academe.”¹⁵⁵ A quick look at scholarly treatments of law, especially those from outside of law journals, will verify Posner's claim. We are, for better or worse, enamored with the Supreme Court: the justices and their eccentric characteristics,¹⁵⁶ the fascinating history behind the “least dangerous branch” of government, and the immense *gravitas* carried by Supreme Court decisions. Posner's criticism acknowledges at least two flaws resulting from the academic focus on the Supreme Court. First, the bulk of judicial decision-making is made in the lower courts. Presently, there are 13 judicial circuits, each with their own court of appeals, and more than 90 federal district courts. Whereas the Supreme Court hears roughly 75 cases a year (only 1-2% of the number submitted for review), appellate and federal courts hear *hundreds of thousands* of cases per year. Solely focusing on the Supreme Court may allow scholars to sink their intellectual teeth into theoretically nuanced issues, but simultaneously neglects the exponentially larger scope of the U.S. judicial system. By focusing on the Supreme Court, one is also implicitly hoping that interesting and important cases make it through the immensely difficult process of being heard. I'm no mathematician, but the Supreme Court to lower court ratio of 75 to 300,000 does not provide much hope. The Supreme Court can easily ignore cases and the justices may choose to ignore a particular issue until other circumstances change (including the ideological composition of the court, shifting public

¹⁵⁵ Ibid., Posner makes this claim elsewhere, too. See *Overcoming Law*, 208.

¹⁵⁶ Consider, for example, some of the most recent Justices. Chief Justice Rehnquist added the gold bars to the Chief Justice robe because, as the story goes, he was such a big fan of Gilbert and Sullivan musicals. Justice Ginsberg and Scalia participated in an opera. Justice O'Connor would compel her staff and law clerks to participate in her morning exercise ritual. Justice Thomas holds the record for longest amount of time passing before uttering a word in oral arguments.

opinion, or even the sitting president/composition of congress). “The irony,” writes Posner, “is that Supreme Court Justices pay even less attention to academic criticism than lower-court judges do, though more to the reactions of legislators, the general public, and the media.”¹⁵⁷

The second major flaw can be summarized as an error in timeliness. “[S]cholarly interest in the issues rarely perks up until the issue has not only reached the Supreme Court but been decided by it,” writes Posner. “So mesmerized are constitutional scholars by the Supreme Court – which is to say by power, because few constitutional scholars have an inflated opinion of Supreme Court Justices – that often they delay too long in writing to have a chance of having an impact on constitutional law. By the time they reach the battlefield, the battle is over.”¹⁵⁸

Rhetoricians will recognize Posner’s criticism as academia’s failure to acknowledge and respond to a *kairotic* moment. By waiting for the Supreme Court to decide a case, the ability to affect change has already passed, at least for the moment. The Court rarely hears a case of a similar kind shortly after making a decision. If they do, they are also much more likely to follow the precedent previously established unless the composition of the court has shifted or public opinion has swung in the other direction. Posner’s reproach of academia’s *ex post facto* response to Supreme Court decisions leaves little room for timely intervention. He notes that academics occasionally submit amicus briefs to the Supreme Court, such as Yale’s response to the Solomon Amendment.¹⁵⁹ Nonetheless, Posner finds such attempts to influence the Supreme Court as ultimately futile. Again, he returns to the detachment of academics from the practice of law and the disconnect between theory and practice.¹⁶⁰ What, then, can rescue the legal mind from the trappings of legalist rhetoric and the abyss of unrealistic, unattainable theory?

¹⁵⁷ Posner, *How Judges Think*, 146.

¹⁵⁸ Posner, *Overcoming Law*, 214.

¹⁵⁹ Posner, *How Judges Think*, 226.

¹⁶⁰ *Ibid.*, 227. Posner argues, “These law professors, the cream of the current crop, seem to have no clue as to how to help a court decide a case. Their idea of a persuasive brief is one that bludgeons the judges

Posner claims that we ought to look at the practice of judges rather than any systematic, all-encompassing legal theory. Paying attention to what judges do when they decide cases may provide insights into improving the process and remedying the problems produced by abstract theory. Generally, Posner's arguments for practice over theory attempt to cultivate a realistic perspective that considers the entire spectrum of law (although significantly downplaying the academic), allows for flexibility in decision-making, and is an inevitable consequence given temporal limitations and the imperative to act.

Unlike theoretical legalisms, Posner claims that the practice of judges must cater to realistic expectations both for the judges and the decisions they issue. However, his focus on the reality of practice serves as another way in which he can situate his economic, pragmatic position as the default position of balance. "Pragmatists," argues Posner, referring to his own brand of "everyday" pragmatism and not philosophical, academic pragmatism, "want the law to be more empirical, more realistic, more attuned to the real needs of real people."¹⁶¹ Rhetorically, Posner's argument for "realistic" practice is antagonistic to theory. Theorists, under his characterization, are inherently unrealistic and, even worse, do not care about the needs of real people.

Perhaps disheartening to the individual who wants to view judges as heroic protectors of law, Posner argues that judges want to make their professional lives easier.¹⁶² "Our judges are strongly motivated to adhere to precedent," writes Posner, "not only because they want to encourage adherence to the precedents they create, but also – and this is more important to most judges – because they want to limit their workloads."¹⁶³ The economic judge wants to lessen his workload and make the entire work process more efficient. Following the implicit norms of

with precedents that though inapt contain some general language helpful to the cause. They think that the only rhetoric that is effective in the Supreme Court is a legalist rhetoric."

¹⁶¹ Posner, *Overcoming Law*, 19.

¹⁶² *Ibid.*, Chapter 3: What Do Judges Maximize?

¹⁶³ Posner, *How Judges Think*, 145.

judging, loosely guided by precedent, a judge's decision is less likely to be reversed by a higher court.¹⁶⁴ Rhetorically, Posner's attention toward the realistic elements of judicial decision-making allows him to return the discussion to economic terminology. Posner's attention to workload, efficiency, and consequences reframes the idea of a judge away from the stoic defender of justice and toward the labor-market participant.

Generally, judges "are laboring to be *good* judges,"¹⁶⁵ but "good" is frustratingly ambiguous. Whether we like it or not, Posner suggests, judges operate on a "judicial utility function." In *Overcoming Law*, Posner highlights six factors that affect a judges' decision-making process beyond the particularities of individual cases.¹⁶⁶ These factors include popularity, prestige, public interest, avoiding reversal, reputation, and voting. These are the professional characteristics judges attempt to "maximize" throughout their careers. Falling back on his default economic position, Posner describes the economic judge as one who weighs the costs and benefits of her position and chooses to act according to the greatest potential for wealth maximization. Wealth, however, must not be viewed in entirely monetary terms, but rather the aforementioned utility functions. Being highly regarded in the field increases one's "wealth," which "requires conformity to the accepted norms of judging."¹⁶⁷ Often, being a trailblazer does not pay, at least not in one's lifetime.¹⁶⁸

The comfort of detachment allows scholars to criticize from afar without the pressures of actually deciding cases and facing public and political scrutiny. Consider, for example, the recent upheaval in the Iowa Supreme Court. Responding to the 2009 decision in *Varnum v. Brien*, which unanimously struck down a ban against same-sex marriage as unconstitutional, the voting

¹⁶⁴ Ibid., 45.

¹⁶⁵ Ibid., 62, emphasis added.

¹⁶⁶ Posner, *Overcoming Law*, 117-123.

¹⁶⁷ Posner, *How Judges Think*, 61.

¹⁶⁸ Posner reinforces this idea by comparing judges to artists. See *How Judges Think*, 62.

public ousted three justices associated with the decision. Charges of “judicial activism” aside, Posner would draw attention to the *consequences* judges face in their professional lives.

One may argue against Posner’s focus on the hard reality of judicial decision-making, especially the desire to follow implicit judicial norms, by highlighting the progressive Warren Court. Known for its role in expanding civil rights, police arrest procedure, freedom of speech and of the press, and the separation of church and state, the Court arguably broke new judicial ground. True, rights and liberties were significantly expanded and defended, but the way in which the Warren Court articulated their arguments fell in line with the legal tradition. Citing precedent, rooting arguments in the Constitution, paying attention to the ebb and flow of public opinion, and building off of legislation all take a similar *form* of judicial opinions. Examined through a Posnerian lens, the decisions produced by the Warren Court were quite similar to their predecessors. The only difference is the strength of their arguments (he finds many of them weak) and the conclusions reached.

By paying more attention to the realistic practice of judges rather than an abstract, unrealistic theoretical aspiration, the decision-making process of judges and even the law itself becomes more accessible to those outside the judicial sphere. Illustrating his desire to balance seemingly disparate groups, Posner writes, “My hope is to make [legal theory] more accessible and useful to practitioners, students, judges, and the interdisciplinarians themselves, and to bridge the conventional academic boundaries that have made legal theory sometimes seem a kaleidoscope or even a heap of fragments rather than a unified quest for a better understanding of the law.”¹⁶⁹ Posner suggests that a realistic (read: economic) approach to law will succeed where so many previous iterations of legal theory have failed - namely, fostering a stasis point amongst an array of competing perspectives.

¹⁶⁹ Posner, *Frontiers of Legal Theory*, 14.

Building off of the arguments for realistic expectations, Posner's second major point supporting pragmatic practice over abstract theory stresses the inevitability of the former. When push comes to shove, every judge will stray from his or her theory if the situation necessitates a break. Posner cites the originalist's arguments in *Atlantic Corp. v. Twombly*, a 2007 antitrust decision wherein Justice Scalia and his ilk failed to follow their own legalist creed. "Right or wrong," Posner concludes, "the decision in *Bell Atlantic* was pragmatic rather than legalist."¹⁷⁰ He similarly exposes Bork to be an "uncertain" pragmatist, citing the ways in which he strayed from his own dogma.¹⁷¹ Under Posner's reading, originalism and other academic legalisms are less a methodical legal theory and more of a malleable rhetorical position.¹⁷² Whether you are a practicing judge or a scholarly theorist, Posner earnestly believes you will inevitably succumb to his brand of pragmatic, economic adjudication. In concluding *How Judges Think*, he claims, "Legalists are closeted pragmatists."¹⁷³ Judicial legislation is an unavoidable consequence of the legislative and judicial processes,¹⁷⁴ but enough constitutional provisions and professional norms exist to prevent a judge from going rogue.¹⁷⁵ Try as they might, judges cannot completely detach themselves from their respective ideologies¹⁷⁶ or emotional investments¹⁷⁷ in particular cases or issues. Again, the default position is an economically imbued pragmatism, which just so happens to be Posner's stance.

One of the important factors catering to Posner's balancing act is his dual role as theorist and judge. A prolific writer, Posner has been arguing for his law and economics theory since the

¹⁷⁰ Posner, *How Judges Think*, 54.

¹⁷¹ Posner, *Overcoming Law*, 252-3.

¹⁷² *Ibid.*, 251.

¹⁷³ Posner, *How Judges Think*, 371. In other words, the self-described pragmatist claims that everyone is a pragmatist (how convenient!)

¹⁷⁴ Posner, *Overcoming Law*, 234.

¹⁷⁵ Posner, *How Judges Think*, 156.

¹⁷⁶ *Ibid.*, 46.

¹⁷⁷ *Ibid.*, 97.

1970s. However, unlike the majority of his academic competition, he has been a circuit court judge for nearly three decades. This unique rhetorical position allows him to make judgments about theory and professional practice with a degree of authenticity few others possess. Consequently, the former lets him extend his arguments, often quite broadly, whereas the latter prevents intrusion from outsiders. In other words, Posner is able to wax philosophic on his theory and the inadequacies of competing theories, but then criticize others for doing the same because they are not part of the judge club. His arguments for balance gain an air of legitimacy given his dual roles.

The final binary Posner constructs and strikes a balance between concerns law's relationships with history. How much of the past ought to be used to determine present cases? Does the law have an obligation to cultivate a better future? While we are warned against being ruled by the "dead hand of the past," we must nonetheless know history lest we are doomed to repeat it. Some theories, such as originalism, are deeply invested in history. Others, such as critical legal studies and some forms of radical feminist jurisprudence, argue that all law is inherently political, thus changes need to take place in order to ensure future equality and fairness. Furthermore, *stare decisis* continues to be a central tenet in the American common law tradition. As with the previous two binaries, Posner strikes down the extremes on both ends and proposes his economic perspective as an appropriate balance between the two. In *The Frontiers of Legal Theory*, Posner offers his most extensive treatment of the subject, which serves as a useful starting point.

Rather than beginning his discussion of the past/future binary by introducing legal instantiations, Posner starts with the root of the problem: the study and use of history itself. Wary of Foucault's critical-cultural project, which he believes "breeds a cynicism that is quietistic,

even paralyzing,”¹⁷⁸ Posner uses Nietzsche to frame a critique against arguments from history. If these two appear to be strange bedfellows, Posner considers the great cultural antagonist’s “On the Uses and Disadvantages of History for Life” to be “a founding document of pragmatism.”¹⁷⁹ Posner advances three arguments: first, academic history is disillusioning and sometimes we need illusions; second, history breeds complacency; finally, significant attention to the past belittles the present.¹⁸⁰ These three general critiques help establish Posner’s economic analysis of history and law.

The most prominent intersection between history and law is the use of precedent to decide cases. In every judicial confirmation hearing in the last 40 years, the candidate is inevitably questioned on his or her stance on *stare decisis*. How much influence ought past decisions have when deciding present cases, which inevitably produce future ramifications? In many ways, questions about precedent in such hearings are thinly veiled inquiries into controversial landmark cases, *Roe v. Wade* being the most prominent. Posner, however, wants to step back and question the *usefulness* of precedent rather than its coding for political ideology. From their uselessness in writing an opinion that will “survive” to the non-legal reasons why a judge may follow or break from precedent, Posner considers a system deeply rooted in *stare decisis* produces an imbalance between the consideration of the past and the future.¹⁸¹

One of the great dangers of arguments from history, Posner claims, is their malleability. The past can be worked and reworked to defend just about any position. “Judges rewrite

¹⁷⁸ Posner, *Frontiers of Legal Theory*, 147.

¹⁷⁹ *Ibid.*, 145.

¹⁸⁰ *Ibid.*, 147-8.

¹⁸¹ Posner, *The Problems of Jurisprudence*, 118. Posner’s most poignant points recognize the motives behind precedent: “[A] case can accrete authority over time regardless of its merit or even the judges’ desire for stability and economy in decision making. It can do this by engendering reliance the protection which is more important than getting the law just right, or by fostering the organization of an interest group that has sufficient political muscle to prevent the case from being overruled. These possibilities, especially the second, bring to the fore a serious objection to the test of time: its failure to distinguish among methods of creating consensus.”

history,” writes Posner, “like commissars.”¹⁸² As a result, “Much of what passes for constitution law is a modern construct, but is defended by reference to ancient (as Americans measure historical time) texts to which it is tenuously and often only opportunistically linked.”¹⁸³ After over 200 years of judicial decisions, American jurists are not lacking in material to craft just about any argument within reason (and sometimes without it). History, as law uses it, does not shine an illuminating beacon of light; instead, law’s use of history is a rhetorical “disguise.”¹⁸⁴

The *rhetorical* use of history is a key feature of Posner’s deprecation of rooting arguments on the edicts of the past. Philosophers like Ronald Dworkin, a long-time theoretical sparring partner, and even scholars with whom Posner has some affinity, such as Cass Sunstein, all create an “historical pedigree” for rhetorical effect. Even more blatant are the originalists, a group he chastises for promoting historical argumentation when they suffer from the same flaws as their antioriginalist opposition: “But let us be clear that what they are doing is indeed rhetoric, and not historiography.”¹⁸⁵ The danger is not that history is taking a rhetorical posture, but the fact that the theorists and judges using history in their arguments are deifying it. If the Constitution is the defining document in our civil religion, as Robert Bork advocated, to go against it is heresy. Describing history as a rhetorical flair rather than the substance of jurisprudence allows Posner to recognize its presence in legal scholarship and judicial-decision making, but still retain the more prestigious argumentative *form* for his law and economics model.

Law’s rhetorical use of history, however, is only half of the problem; Posner also tends to the problem of history’s use of law. Bruce Ackerman’s germane scholarship on American history

¹⁸² Posner, *Frontiers of Legal Theory*, 152.

¹⁸³ *Ibid.*, 153.

¹⁸⁴ *Ibid.*, 154. Posner makes a similar statement later in his argument and includes the entire spectrum of legal professionals: “We have seen that when American lawyers and judges, and even law professors, invoke history, it is usually for rhetorical effect” (197).

¹⁸⁵ *Ibid.*, 155.

and its relationship to law (especially the Constitution) serves as Posner's example of the past/future scale getting out of balance. Dividing the political-legal process into two distinct forms, ordinary politics and revolutionary politics, Ackerman's project attempts to articulate how and why the Constitution has gone through significant changes in seemingly disparate eras. While Posner applauds the motivation behind Ackerman's work, he nonetheless finds it flawed. Much like the law's use of history, Posner charges Ackerman with crafting historical pedigree to build up his argument, which Posner finds inadequate.¹⁸⁶ Furthermore, Posner echoes one of his strongest arguments against theory over practice; namely, to view and use history the way in which Ackerman does would "place upon the courts the unsupportable burden of identifying constitutional 'moments' and determining which aspects of them should be deemed of constitutional dignity."¹⁸⁷ To follow a historicist line of argument is ultimately impractical and, thus, an irrelevant addition to the law. Ackerman's work is history and ought to be evaluated on those terms.¹⁸⁸

One of the interesting turns Posner takes against Ackerman's model of historical argumentation is a critique against its purported naturalness, which is, ironically, an argument he utilizes to characterize his own approach. After describing Ackerman's work as a "radical proposal," Posner attempts to peel back the layers and show his readers what is *really* going on: "Ackerman does not believe that the past is normative or want to return us to the original understanding of the Constitution-amending process. *His aim is to make his radical proposal seem natural by presenting historical analogies to it and desirable by identifying historical*

¹⁸⁶ Ibid., 173.

¹⁸⁷ Ibid., 176.

¹⁸⁸ Ibid., 177. Posner even speculates on the quality of Ackerman's history scholarship: "The body of primary and secondary materials relevant to an understanding of the three historical periods that Ackerman studies is vast; only a historian can evaluate Ackerman's selection from and interpretation of it. Ackerman is not a historian, and historical research is only a part of his academic work. History, like most academic fields, is increasingly specialized. The more specialized the field; the more 'amateurism' becomes a danger and a deserved reproach" (177).

*crises that might have been averted had something like his proposal been in effect.*¹⁸⁹ Again attacking the rhetorical form over substance, Posner is wary of rhetorics in which a position is deemed “natural.” Yet, throughout his characterizations (and deprecations) of other legal theories, he continuously posits his brand of economic pragmatism as a default, natural position.

In the subsequent chapter after Posner criticizes Ackerman, he characterizes American lawyers and jurists as possessing a natural bent toward pragmatic adjudication.¹⁹⁰ American legal pragmatism, which is almost indistinguishable from law and economics as Posner describes them, is something lawyers and judges inevitably *are*. As it applies to Posner’s attempt to balance between extreme and unappealing binaries, proposing a single perspective as “natural” attempts to set the scale to zero. Other theorists add weight to one side of the scale or the other, throwing the scale of in their favor. They add a few ounces to one side of the three binaries. While Posner takes off the weight put on other legal theories, he engages in a rhetorical slight-of-hand to keep the balance tipped in his favor. While the scale reads 0.0, we must look to see if Posner’s thumb is on it while he points out the flaws of other theories with his other hand.

Ever the pragmatist, Posner does not disregard arguments from history out of hand; they are simply inadequate on their own. After all, sometimes a pragmatist needs to be a formalist in order to be a pragmatist.¹⁹¹ At their best, historic analogies can serve as a useful frame and limitation for present decisions, yet “do not dictate...the outcome of today’s cases.”¹⁹² The past, through this view, is a tool in the judge’s toolbox. Sometimes it will be the right tool for the job and sometimes it won’t. Most of the time it will play its role while other tools play theirs until together they have crafted a decision.

¹⁸⁹ Ibid., 180, emphasis added.

¹⁹⁰ Ibid., 197-198.

¹⁹¹ For this bit of jurisprudential inception, see *Frontiers of Legal Theory*, 178. Posner claims, “Formalist readers of Ackerman may come away with their faith strengthened, and pragmatists may be forced to acknowledge that formalism has a legitimately pragmatic role to play in law.”

¹⁹² Ibid., 154.

History-as-tool helps illuminate another point Posner makes supporting historic arguments: they must be used to *create* something.¹⁹³ Again borrowing from Nietzsche, Posner advocates a view of history that is fluid and moving, as opposed to a stagnant “truth.” History does not just exist; it is used to make and remake identities. These identities may be at the individual level or on the much grander national stage, such as the identity of the Constitution. Importantly, history may play this role *in absentia*. A key element of Nietzsche’s essay is strategic forgetting. Sometimes it is not helpful to remember everything. “Truth is good,” Posner writes, “but there are other goods, which forgetting or even forging the historical record might promote.”¹⁹⁴ Although he does not cite any particular cases that ought to be forgotten, Posner notes the meteoric expanse of privacy rights and freedom of speech in the mid-20th century as examples of strategically forgetting history in order to produce decisions with a particular outcome.¹⁹⁵

Even without the idea of history as one tool amongst many, Posner acknowledges the strong pull such arguments have with the general public.

Commitment, reliance, information, even inertia are reasons for standing by decisions made in the past. But to call the past itself normative is a mystification. It might be an indispensable mystification if the general public believed it, because then the legitimacy of judicial decision might depend upon the judges’ accepting the yoke of history. The general public believes something *like* this, that decisions must be “rooted” in authoritative sources of law, but is pretty casual about the sources. Uninterested in and uninformed about history, the public is unlikely to demand that modern cases be decided

¹⁹³ Ibid., 150.

¹⁹⁴ Ibid., 152.

¹⁹⁵ Ibid., 153-4.

consistently with ancient texts and precedents. Otherwise Robert Bork would have been confirmed as a Supreme Court Justice.¹⁹⁶

Posner's claim addresses at least two important points. First, one cannot simply disregard the public's conception of law. What the capricious and ill-informed public believes and advocates may not be systematic, but it is a powerful force nonetheless. Ignoring them is a dangerous gamble that failed Supreme Court nominee Bork knows all too well. Second, although the public wants some connection with dated authorities, they are quite relaxed in their expectations. Why? Unlike theorists who want a systematic theory to encapsulate the entirety of law, most people just want to know what will get them into trouble, they want to know how the law will effect them in their day-to-day routine. If there is a history of a particular act going unpunished for a number of years and all of the sudden a previously unenforced law is being used against citizens, their will likely be a public outlash. Posner wants as much history in law as citizens do: just enough to get by.

Finally, arguments from history, as flawed as they may be, nonetheless cultivate *stability*, a vital element in any healthy judicial system.¹⁹⁷ When a citizenry does not know how courts are going to decide cases, problems ensue. True, legislators create statutes, which are public record, but a) these laws may be implemented without the knowledge of citizens (last I checked, C-SPAN's ratings were not topping the charts), and b) these laws may be vague, over-reaching, or inapplicable to highly complicated cases. As a result, such laws may produce a chilling effect wherein citizens do not engage in acts that are legal because they believe they might be illegal. The paradigmatic goody-goody, Ned Flanders, exhibits this position well. When suffering a series of personal tragedies a la the biblical Job, Flanders pleads with God and asks

¹⁹⁶ Ibid., 161.

¹⁹⁷ Posner, *The Problems of Jurisprudence*, 119.

why he's being punished: "Why me, Lord? Where have I gone wrong? I've always been nice to people. I don't drink or dance or swear. I've even kept Kosher just to be on the safe side. I've done everything the bible says, even the stuff that contradicts the other stuff." Unpredictable courts may lead to an unnecessarily restrained citizenry full of worrisome Neds. Yet, the opposite is also possible: when courts are unpredictable, chaos and upheaval may result.

Balancing on the other end of the spectrum opposite the past is, of course, the future. Similar to the theory/practice binary, on the surface Posner appears to greatly favor a future-oriented legal theory. Once again calling upon his judicial hero, Oliver Wendell Holmes, Jr., Posner associates pragmatism with forward-looking, progressive law.¹⁹⁸ "For Holmes," Posner writes fondly, "the best legal thought is modern, because only a modern thinker can come to grips with modern problems."¹⁹⁹ This does not mean the past is irrelevant, just not useful in isolation. Posner continues, "[Holmes] is a legal paleontologist, identifying doctrines and practices that exist in modern law not because they are functional but because the struggle for survival that powers evolution has somehow failed to weed them out."²⁰⁰ At its worst, precedent inhibits the evolutionary progress of law and preserves statutes to the detriment of present and future societies.

Posner's economic judge embraces change as long as it marks improvement or a more adept response to contemporary problems, both of which he frames as forms of wealth maximization. Statutes are no longer unwavering dicta, but rather "resource[s] for coping with the problems of the present, which is to say the statute's future."²⁰¹ In this regard, Posner aligns closely with "living constitution" advocates: statutes are not written in stone, they must be

¹⁹⁸ Posner, *Frontiers of Legal Theory*, 200.

¹⁹⁹ *Ibid.*, 206.

²⁰⁰ *Ibid.*

²⁰¹ Posner, *The Problems of Jurisprudence*, 270.

flexible enough to deal with unforeseeable problems. Proponents of the living constitution, however, lack a sound method and are subject to the ebb and flow of political ideology. Posner places himself in a compelling rhetorical position by criticizing the formalists for their naïve view of language and interpretation while also distancing himself from living constitutionalists by criticizing their methodology. The economic judge is able to fill the void he creates by embracing a future-oriented jurisprudence while still promoting a supposedly stable methodological framework.

But why so much attention to the future? One of the main reasons is the economic focus on consequences: the *consequences* of a law or statute have little to do with the past. Consequences occur in the present and their ramifications echo into the future. Citing the normative element of law and economics, Posner argues “it also tries to improve law by pointing out respects in which existing or proposed laws have unintended or undesirable consequences and by proposing practical reforms.”²⁰² Nonetheless, too much attention to the future has its problems as well. Critical Legal Studies, for example, deems all law and judicial decision-making as political. They also want to acknowledge and respond to consequences, but for different reasons. Unlike law and economics, CLS promotes a much more activist, sometimes radical, posture. As Posner characterizes their position, if judges across the country were to adopt a CLS attitude, stability would be forfeited. Attempting to craft a particular future is one thing, but to do so with swift and sweeping changes in the courts is a recipe for political and social disaster. Law and economics succeeds where CLS and other future-minded theories fail by tending to the past and keeping decisions narrowly focused. Again, Posner’s law and economics attempts to function as the balance between the deification of the past and the overzealous preoccupation with the future.

²⁰² Posner, *Frontiers of Legal Theory*, 35.

With these three binaries now described, we must step back and ask: what is the economic judge's balancing act *doing*? I have already noted several implications. First, the posture of balance carries with it significant sway in American ideology. We like the idea of balance. It presumes harmony amidst strife and an ability to set aside cultural and political allegiances to find a middle way. As Robert Patterson and Ronald Lee aptly note, balance functions as a god-term.²⁰³ Nobody wants to be against it and it is terribly difficult to pin down. But balance is not a thing to be discovered; rather, it is rhetorically constructed and deployed. Those individuals able to define the balanced position for any given idea hold a formidable advantage over their competition. This is especially potent in law where balance is already reinforced as a point of integrity.

Second, balance is stable. A well-balanced legal philosophy, much like a well-balanced breakfast, has a little bit of everything and leaves you full and satisfied. Posner rightly argues that stability is important for law. By characterizing competing legal philosophies as falling into a set of dichotomous positions, Posner is able to imply that subscribing to them would yield chaos and catastrophe.

Third, balance is neutral. Although Posner claims he is skeptical of any legal philosophy that describes itself as neutral, he nonetheless characterizes his own law and economics project in such terms. Posner presents his philosophy as a zeroed-out scale with the philosophy adding no pressure to the ultimate decision.

Finally, balance is natural. Consider, for example, the typical description of an ecosystem. Aside from human intervention, ecosystems are often described as thriving in a delicate balance. If one element increases, (e.g. predators), the rest of the ecosystem responds

²⁰³ See Robert Patterson and Ronald Lee, "The Environmental Rhetoric of 'Balance': A Case Study of Regulatory Discourse and the Colonization of the Public," *Technical Communication Quarterly* 6 (1997): 25-40.

accordingly and adjusts the system to keep an even keel. Economic adjudication provides homeostasis wherein all the cogs of the judicial system are working together to yield efficient, effective, wealth maximizing judgments. These benefits of balance – harmony, stability, neutrality, and naturalness – reinforce the second faculty of judgment touted by Posner: common sense.

2.3 ECONOMIC COMMON SENSE

Throughout Posner’s work, he imbues law and economics with a vague, yet powerful notion of common sense. In doing so, the economic judge holds a privileged position between out-of-touch legal academics and the legally ignorant *hoi poloi*. The economic judge is situated in a rhetorical position that allows him or her to “call down” academics from the Ivory Tower, arguing that their theories that are too detached from the realities of adjudication. Their lack of common sense might be summed up as being “too smart for their own good.” While criticizing “high theory” for its obtuseness and irrelevancy, the economic judge also “calls up” the general public who remain uneducated about the scope, procedure, and purpose of law. They may have the “street-smarts” that academics tend to lack, but they lack the sufficient “book-smarts” required for sound judgment. By aligning the idea of common sense with the process of economic rationalization, the judgments rendered by the economic judge are *de facto* common sense judgments.

With all of this talk of common sense, a question remains: what *is* common sense? Perhaps the best characterization parallels Justice Potter Stewart’s famous description of pornography: “I know it when I see it.”²⁰⁴ Some scholars are reluctant to define common sense even if they utilize the concept in their work, instead assuming it is something “out there” that

²⁰⁴ *Jacobellis v. Ohio*, 378 U.S. 184 (1964)

can legitimate or undermine arguments.²⁰⁵ There are many historic definitions and uses of common sense and these definitions tend to snowball on to one another rather than replace previous definitions. This is not to suggest that judgments rendered from common sense would take the same form in different time periods. What constitutes common sense today is markedly different than 1950s common sense, or 1850s common sense, or 50s common sense. One of the reasons why common sense is so rhetorically appealing is its ephemerality; all the definitions of common sense are accurate in some way or another. Although it is neither my goal nor my intention to offer an all-encompassing definition of common sense, the historic definitions underscore some shared assumptions about what common sense “is,” why it is useful (or harmful), and how it is rhetorically effective.

Historically, there have been a number of different invocations of common sense for various reasons. Whereas many scholars point to the Aberdeen Philosophical Society as the origin of a systematic and engaged common sense philosophy, others note that the tradition reaches as far back as Aristotle. They stress Aristotle’s response to Platonic idealism and note the former’s attention to the physical senses (e.g. sight, touch, taste) as the means by which humans gain a shared knowledge of their surroundings.²⁰⁶ Emanating from Aristotle’s work in the natural

²⁰⁵ See, for example, Cynthia MacDonald, “Theories of Mind and ‘The Commonsense View,’” *Mind & Language* 17.5 (Nov. 2002), 467-488; Hallvard Lillehammer, “Analytical Dispositionalism and Practical Reason,” *Ethical Theory and Moral Practice* 2.2 (Jun. 1999), 117-133; Dorothy M. Mansfield, “Abigail S. Duniway: Suffragette with Not-so-common Sense,” *Western Speech* (Winter 1971), 24-29; Stephen J. Pullum, “Common Sense Religion for America: The Rhetoric of the Jewish Televangelist Jan Bresky,” *The Journal of Communication and Religion* 15.1 (1992), 43-54; Donna Scimia, “A Common Sense Approach to Reducing Liability in Today’s Workplace,” *Employee Relations Law Journal* 33.2 (Autumn 2007), 23-29; Mike Wallace and Alison Wray, “The Fall and Rise of Linguists in Education Policy-making: From ‘Common Sense’ to Common Ground,” *Language Policy* 1 (2002), 75-98. These articles from disparate disciplines share a common theme: all of them utilize common sense but offer little if any definition or description of it. Their arguments cite common sense as if it is a discernible and established set of ideas.

²⁰⁶ See Frederick Copleston, *A History of Philosophy, Volume I: Greece and Rome, Part II* (Garden City: Image Books, 1946), 115, and David Knowles, *The Evolution of Medieval Thought* (New York: Vintage, 1962), 15. Rhetoricians have taken these claims and drawn comparisons to the Scottish common sense tradition. See Wayne N. Thompson, “Aristotle as a Predecessor to Reid’s ‘Common Sense,’” *Speech*

sciences, this characterization represents a *physical* definition of common sense. The Scottish Enlightenment would adopt, in part, a similar definition responding to philosophical skepticism and the subjectiveness of human experience. In addition, Aristotle's *Rhetoric* suggests another notion of common sense in the rhetorical *topoi*.²⁰⁷ Drawing from Aristotle's *Topics*, Perelman and Olbrechts-Tyteca note that

Common sense admits the existence of unquestioned and unquestionable truths; it admits that certain rules are "beyond discussion," and that certain suggestions "do not deserve discussion." An established fact, a self-evident truth, an absolute rule, carry in themselves the affirmation of their unquestionable character, excluding the possibility of pro and con argumentation. Unanimous agreement on particular propositions can make it very difficult to question them.²⁰⁸

The *topoi* – or commonplaces – constitute an array of general argumentative appeals that are effective with all audiences. Unlike the "special" *topoi*, which focus on the commonplace arguments available in forensic, epideictic, and deliberative rhetorics, common sense is a one of the "general" *topoi* that can be deployed in virtually any rhetorical situation. Herein, we have the definition of common sense as a rhetorical trope.

Cicero's conception of common sense builds off of Aristotle's second characterization and runs closer to its contemporary use. A vital element for the successful orator, *sensus communis* is composed of two distinct yet connected formulations. The first is the ability to know the general disposition of the crowd – how they think and what they think about. What sort of language caters to all (or at least most) of them? What sort of cultural influences have they

Monographs 42 (Aug. 1975), 209-220, and Agnew, "The 'Perplexity' of George Campbell's Rhetoric: The Epistemic Function of Common Sense," *Rhetorica: A Journal of the History of Rhetoric* 18.1 (Winter 2000), 79-101.

²⁰⁷ Aristotle, *On Rhetoric*.

²⁰⁸ Perelman and Olbrechts-Tyteca, *The New Rhetoric*, 57.

had? This element of *sensus communis* concerns the persuasive power of shared discourses and experiences when a *specific* audience has them in common and a rhetor deploys them effectively.²⁰⁹ The second form is much more general and cosmopolitan. Echoing Aristotle's *topoi*, this formulation situates *sensus communis* as a natural process of judgment that *any* audience would find appealing.²¹⁰ For the successful orator, possessing both forms is necessary for effective persuasion.

These classical notions of common sense were reintroduced and built upon in two key periods in the Enlightenment, one at the beginning and one at the end. The first was Vico's incorporation of *sensus communis* in his humanist response to the growing influence of scientific reason and discourse.²¹¹ For Vico, *sensus communis* was not only a type of shrewd knowledge characteristic of Aristotle's *topoi* and Cicero's two formulations, but also an *objective* to pursue through rhetoric. Vico saw scientific reason intruding on civic life, undermining the common beliefs and values that unite society. A humanist, Vico argued that human history and poetic narratives grounded and maintained a healthy society, which is one of the reasons he celebrates rhetoric throughout his work. For Vico, rhetoric is the art that cultivates and maintains *sensus communis* while also working toward it.

More prominent, however, are the philosophical and political uses of common sense that emerged in the late 18th century, including the Scottish common sense tradition, Kant's *Critique of Judgment*, and Thomas Paine's revolutionary *Common Sense*. Scottish common sense philosophy emerged, in part, as a response to Hume's skepticism and his (in)famous argument to

²⁰⁹ Cicero, *On the Orator*, Book I, trans. E. W. Sutton and H. Rackham (Cambridge: Harvard University Press, 1942), 3.12.

²¹⁰ Cicero, *On the Orator*, Book III, trans. H. Rackham (Cambridge: Harvard University Press, 1942), 50.195

²¹¹ See Giambattista Vico, *The First New Science*, ed. Leon Pompa (Cambridge: Cambridge University Press, 2002).

debunk causality.²¹² Unwilling to accept such an upheaval of practical and philosophical thought, the members of the Aberdeen Philosophical Society, including Thomas Reid, George Campbell, and James Beattie responded with arguments grounded in a “universally accessible”²¹³ common sense. Reid claimed that common sense is an imperative and inevitable element of inquiry, not a base or suspect form of knowledge. Instead of focusing on the abstractions of philosophy, common sense tends to the everyday resources of judgment.²¹⁴ “I despise Philosophy, and renounce its guidance” proclaims Reid, “let my soul dwell with Common Sense.”²¹⁵ Arguably more influential, was George Campbell and his treatment of common sense and rhetoric.

²¹² David Hume, *An Enquiry Concerning Human Understanding and Other Writings*, ed. Stephen Buckle (Cambridge: Cambridge University Press, 2007), 26.

²¹³ For example, see Thomas Reid, *Essays on the Intellectual Powers of Man*, ed. Derek Brooks (University Park: Pennsylvania State University Press, 2002), 26-27: “A philosopher is, no doubt, entitled to examine even those distinctions that are to be found in the structure of all languages; and, if he is able to shew that there is no foundation for them in the nature of the things distinguished; if he can point out some prejudice common to mankind which has led them to distinguish things which are not really different; in that case, such a distinction may be imputed to a vulgar error, which ought to be corrected in philosophy. But when, in the first setting out, he takes it for granted without proof, that distinctions found in the structure of all languages, have no foundation in nature; this surely is too fastidious a way of treating the common sense of mankind. James Beattie echoes Reid’s defense of common sense, claiming, “[T]hat power of the mind which perceives truth, or commands belief, not by progressive argumentation, but by an instantaneous, instinctive, and irresistible impulse; derived neither from education nor from habit, but from nature; acting independently on our will, whenever its object is presented, according to an established law, and therefore properly called Sense; and acting in a similar manner upon all, or at least upon a great majority of mankind, and therefore properly called *Common Sense*.” See James Beattie, *An Essay on the Nature and Immutability of Truth, in Opposition to Sophistry and Scepticism* (Edinburgh: A. Kincaid and J. Bell, 1770), 40.

²¹⁴ Ibid. Stressing Reid’s orientation to the practical and everyday, Lois Agnew claims that he “emphasizes the notion that common sense restores to philosophy the discussion of questions that are important in the lives of ordinary individuals.” See Lois Agnew, “The ‘Perplexity’ of George Campbell’s Rhetoric: The Epistemic Function of Common Sense,” *Rhetorica: A Journal of the History of Rhetoric* 18.1 (Winter 2000), 81.

²¹⁵ Thomas Reid, *An Inquiry into the Human Mind, on the Principles of Common Sense*” in *The Works of Thomas Reid, D.D., Vol. I*, 8th ed. (Edinburgh: James Thin, 1985), 101, as cited in Lois Agnew, “The ‘Perplexity’ of George Campbell’s Rhetoric: The Epistemic Function of Common Sense,” *Rhetorica: A Journal of the History of Rhetoric* 18.1 (Winter 2000), 81. The influence of Reid’s ideas is particularly important for the history of rhetoric. Terence Morrow argues, for example, that Reid’s common sense philosophy in tandem with Ciceronian rhetoric was a formative element of James Madison’s deliberative model of government. See Terence S. Morrow, “Common Sense Deliberative Practice: John Witherspoon, James Madison, and the U.S. Constitution,” *Rhetoric Society Quarterly* 29.1 (Winter 1999), 25-47.

Campbell argued in *Philosophy of Rhetoric* that common sense is a necessary element for any knowledge acquisition, expression, or judgment, and is also key feature of rhetoric.²¹⁶

Whereas Reid and Campbell turned to epistemological common sense, Flavio Comim argues that Adam Smith incorporated a psychological notion of common sense that ran throughout his economic theories “which works as a first principle of analysis.”²¹⁷ Citing Smith’s appeals to “sympathy,” the “plain man,” and his characterization of the “impartial spectator,” Comim claims that Smith’s economic theory maintains a basic assumption of a psychological common sense in order to function well.²¹⁸ If one wants to understand and predict how the Scottish people will behave – a pretty important question for a Scottish economist – then one needs to know the habits and norms that frame their judgments.

Immanuel Kant similarly united judgment and rhetorical appeal in common sense, particularly in judgments of taste. Unlike his first two *Critiques*, Kant’s *Critique of Judgment* is exhibits a humanistic tendency within which common sense serves as an argumentative

²¹⁶ George Campbell, *Philosophy of Rhetoric, Vol. 1* (London: W. Strahan, 1776), 114. Contemporary scholarship has gone back and forth regarding Campbell’s historic place in rhetoric. Some argue that George Campbell’s common sense was not, in fact, a rebuttal of David Hume’s skepticism and that, to the contrary, the influence of Hume’s philosophy can be seen throughout Campbell’s work (Lloyd F. Bitzer, “Hume’s Philosophy in George Campbell’s ‘Philosophy of Rhetoric,’” *Philosophy and Rhetoric* 2 (1969), 139-166.) Several scholars were quick to defend Campbell’s common sense philosophy as intrinsically anti-Humean. Dennis Bormann, for example, claims that Bitzer blows the similarities between Campbell and Hume out of proportion. Instead, Bormann aligns Campbell with Reid (Dennis. R. Bormann, “Some ‘Common Sense’ about Campbell, Hume, and Reid: The Extrinsic Evidence,” *Quarterly Journal of Speech* 71.4 (Nov. 1985), 395-421). Similarly, Lois Agnew argues that Campbell’s interest in rhetorical theory works in concert with common sense philosophy and is central to his practical epistemology. According to Agnew, Campbell acknowledged the importance of context, the problem of uncertainty, and the imperative to act – all of which are central to rhetoric. (Lois Agnew, “The ‘Perplexity’ of George Campbell’s Rhetoric: The Epistemic Function of Common Sense,” *Rhetorica: A Journal of the History of Rhetoric* 18.1 (Winter 2000), 79-101.) The divide between interpretations notwithstanding, Campbell’s rhetorical and philosophical legacy remains influential as both camps acknowledge his longstanding contribution.

²¹⁷ Flavio Comim, “The Scottish Tradition in Economics and the Role of Common Sense in Adam Smith’s Thought,” *Review of Political Economy* 14.1 (2002), 108.

²¹⁸ *Ibid.*, 109-112.

groundwork for aesthetic judgment.²¹⁹ In many ways, Kant's use of common sense is the application of Cicero's notion but limited to the aesthetic world, as common sense here construed functions as a form of social knowledge and a vital element of rhetorical engagement.

The most recognizable American contribution to the rhetoric of common sense was Thomas Paine's famous and appropriately-titled pamphlet, *Common Sense*. Unlike the aforementioned philosophical treatises, Paine was not interested in defining common sense or explicating its epistemological functions. Rather, Paine tapped into its rhetorical power as a trope and used it to stir revolution. Much has been made of the rhetorical merits of Paine's work and rightfully so. Stephen Lucas cites *Common Sense* as the argument that tipped the scales in favor of colonial revolution.²²⁰ In part due to the rhetorical style²²¹ and charisma²²² of Paine's argument, *Common Sense* received unprecedented recognition. With "enormously fortuitous timing"²²³ and "published in just the right place,"²²⁴ Paine balanced a "literary style that combined the rough poetry of the public house with the righteous zeal and vivid imagery of a preacher, and that set out a grand political vision in familiar words and elegantly simple sentences."²²⁵ Important for our discussion is the way in which Paine's articulation of common

²¹⁹ Addressing the rhetorical dimensions of Kant's philosophy, John Poulakos argues, "In the idea of common sense Kant locates not only the principle of judgments of taste but also the necessary condition for universal communication. According to him, all judgments of taste and all attempts to communicate such judgments presuppose a common sense, an abstract and intangible fund of sensibilities in which all people participate by virtue of their communal status." See John Poulakos, "From the Depths of Rhetoric: The Emergence of Aesthetics as a Discipline," *Philosophy and Rhetoric* 40.4 (2007), 347.

²²⁰ Stephen E. Lucas, *Portents of Rebellion: Rhetoric and Revolution in Philadelphia, 1765-1776* (Washington, D.C.: Library of Congress, 1973). See also, Bernard Bailyn, "Common Sense," in *Fundamental Testaments of the American Revolution* (Washington, D.C.: Library of Congress, 1973).

²²¹ See Lee Sigelman, Colin Martindale, and Dean McKenzie, "The Common Style of *Common Sense*," *Computers and the Humanities* 30 (1997), 373-379.

²²² See J. Michael Hogan and Glen Williams, "Republican Charisma and the American Revolution: The Textual Persona of Thomas Paine's *Common Sense*," *Quarterly Journal of Speech* 86.1 (2000), 1-18.

²²³ David C. Hoffman, "Paine and Prejudice: Rhetorical Leadership through Perceptual Framing in *Common Sense*," *Rhetoric & Public Affairs* 9.3 (2006), 377.

²²⁴ *Ibid.*, 378.

²²⁵ *Ibid.*, 380. See also Michele Kennerly, "Getting Carried Away: How Rhetorical Transport Gets Judgment Going," *Rhetoric Society Quarterly* 40.3 (Summer 2010), 269-291, wherein she argues that Paine's *Common Sense* uses "civic phantasia" to hasten the judgment on revolution.

sense was immensely persuasive and was able to speak to seemingly disparate groups within the colonies. He does not define common sense explicitly, for to do so minimizes its rhetorical power. Instead, Paine makes a set of arguments that allow individual readers to bring in their personal experiences, to graft *their* notions of common sense onto Paine's arguments, thus joining speaker and audience. In doing so, Paine illustrates its enthymematic potential.

These philosophical and rhetorical invocations of common sense during the 18th century stress what Michael Billig calls the concept's two forms: "There is an anthropological, or restricted, sense which confines particular versions of common-sense to particular communities or audiences. Then there is an unrestricted use, which implies that there is a common-sense to which all audiences subscribe."²²⁶ Billig notes how the 18th century invocations of common sense, such as George Campbell's *Philosophy of Rhetoric*, draw on the unrestricted form: common sense as universal and accessible to everyone. The unrestricted form, however, neglects the many ways in which culture contributes to common sense. The rhetorical tradition often opts for the restricted use: "Each community possess its own common-sense, expressed in common-place, but nevertheless potent, symbols. It is these common-places which the orator is advised to invoke, even when seeking to criticize the audience."²²⁷ Nonetheless, the restricted appeal to common sense rarely *acknowledges* it as such. A rhetor is unlikely to implore an audience to act based on *their* common sense; rather, she or he will use a restricted notion of common sense, but deploy it in unrestricted terminology.

John Brewer stresses this often unrecognized element, noting that individuals share a similar process by which they construct common sense, but the results can differ significantly. Yet, individuals *perceive* a shared stock of common knowledge. "In short," Brewer argues, "the

²²⁶ Billig, *Arguing and Thinking*, 231.

²²⁷ *Ibid.*

social world becomes ‘real’ and ‘factual’ not because of shared or common stocks of beliefs, maxims, ideas and types but because of the assumption of shared and common beliefs, maxims, ideas and types. The assumption of their universality and actual universality are two completely different things.”²²⁸ Brewer’s analysis suggests that “common sense” constitutes an important “ideograph.” Defining the ideograph as “a high-order abstraction representing collective commitment to a particular but equivocal and ill-defined normative goal,”²²⁹ Michael Calvin McGee suggests words like “liberty” and “equality” (and, I propose, “common sense”) are culture-bound and have the ability to affect social consciousness.²³⁰ Furthermore, the only way to understand such abstract concepts is to address how they are used,²³¹ which reflect upon historically situated collectivities.²³² McGee references “popular history” (i.e. film, current events, literature, music, etc.) as points at which ideographs may be implemented and, as a result, traced.²³³ In addition to its 2500-year-old philosophical and rhetorical history, common sense currently holds a prized place in rhetoric and social knowledge. One quick search of “common sense” brings countless news results citing the need for, presence of, or noticeable lack of common sense, yet offer little indication as to what constitutes the common sense from which they are composing their arguments. Gun laws, immigration, environmental legislation, and firework regulation inspire common sense responses – all of which invoke a vague notion of common sense used to justify their position. As a result, groups with competing interests vie to be on the side of common sense. The way in which different groups, such as Intelligent Design and evolution, assert that common sense is on their side highlights its paradoxical yet powerful

²²⁸ John D. Brewer, “Competing Understandings of Common Sense: A Brief Comment on ‘Common Sense Racism,’” *The British Journal of Sociology* 35.1 (Mar. 1984), 70.

²²⁹ McGee, “Ideograph,” 435.

²³⁰ *Ibid.*, 428.

²³¹ *Ibid.*, 431.

²³² Condit and Lucaities, *Crafting Equality*, xii.

²³³ McGee, “Ideograph,” 432.

use. Returning to Michael Billig, he notes how two mutually exclusive arguments attempt to stake their claim, such as the prosecution and defense in a trial.²³⁴ Each contends that their side reflects common sense whereas the opposition clouds the issue. Rather than being problematic, the paradoxical invocation of common sense is useful for the rhetor:

Both logoi and anti-logoi are presumed to co-exist within common-sense, and we can assume this state to be quite normal and not associated with the presumed *angst* of cognitive dissonance... The ordinary person, whose mind is filled with the contrary tendencies of common-sense, will resemble the desk-bound orator: each possesses contrary common-places, which are lurking within the mind, awaiting the call to be to be used in one-sided advocacy.²³⁵

Because common sense functions as an ideograph rather than a logic, it lends itself to all manner of invocations and interpretations, all of which are beneficial to the rhetor.

Billig's approach to common sense suggests a practical orientation that examines how the concept is used and he avoids arguing about its intrinsic merits. Critics in sociology and cultural studies are not so sympathetic. Drawing inspiration from Gramsci's critique of hegemony, sociologists and cultural studies scholars lament what they consider to be part of an oppressive ideology. "For Gramsci," writes Daniel Linger, "hegemony springs not only from the explicit ideological, moral, and philosophical underpinnings of power but also from less fully conscious, transparent realms of thought - the experientially insistent world of common sense."²³⁶ Common sense serves as an understated yet extremely powerful mode of ideological maintenance, creating a false sense of normalcy amidst socio-political power imbalances. Linger continues, "This taken-for-granted portion of culture, the fragmented "spontaneous philosophy" of the

²³⁴ Billig, 233.

²³⁵ Ibid., 234.

²³⁶ Daniel T. Linger, "The Hegemony of Discontent," *American Ethnologist* 20.1 (Feb. 1993), 3.

multitude', muddies perceptions of injustice, inducing political passivity. In short, common sense makes revolution hard to think."²³⁷ John Brewer adds, "[Gramsci] argued that ideologies percolate down to common sense and that 'official meanings' became a part of common sense."²³⁸ This hegemonic conception of common sense suggests it is an unreflective form of social knowledge that is easily susceptible to exploitation.

One of the important aspects of common sense's hegemonic power comes from its appearance of constancy, which Stuart Hall argues makes it "a site of struggle (between competing definitions) and a stake - a prize to be won - in the conduct of particular struggles."²³⁹ For rhetoricians, this notion of common sense as a struggle over definition is particularly important. Noting the potential dangers of losing this battle, Errol Lawrence characterized "common sense racism" as a set of taken-for-granted assumptions legitimated by personal experiences, social relations, and a belief system that presumes permanence.²⁴⁰ Although common sense itself is not bad or manipulative, it can be used to reinforce and maintain skewed and socially damaging perspectives.

Pierre Bourdieu shares a similar skepticism of common sense. Describing Bourdieu's characterization of common sense, Richard Terdiman writes,

For inevitably it reproduces precisely the common assumptions and understandings... whose misperceptions and inadequacies any in- depth research seeks to uncover. In putting this common sense to the test by challenging its fundamental assertions and presuppositions, writing like Bourdieu's also tests and challenges plain, "common-sense" writing styles because they tacitly assume precisely what Bourdieu wants to call into

²³⁷ Ibid.

²³⁸ Brewer, 68.

²³⁹ Stuart Hall, "The Rediscovery of 'Ideology': Return of the Repressed in Media Studies," in *Culture, Society and the Media*, ed. Michael Gurevitch, et al. (London and New York: Methuen, 1982), 70.

²⁴⁰ Brewer, 67.

question: that reader and writer share a comfortable and unproblematical understanding of the meaning of words, of categories, and of social practices themselves, that we *already* know the truth about the very things which on the contrary Bourdieu claims need to be brought to light.²⁴¹

Again, we see the recurring theme of common sense as an untested set of principles that often reinforces an overpowering status quo. Even the commonality of language comes into question because of the different experiences each individual brings to bear on a given idea.

The contemporary relationship between common sense and sociology can be equally inhospitable. Examining the various ways common sense is addressed in sociology, particularly introductory textbooks, James Mathisen notes that a running theme characterizes common sense as an unreflective and often dangerous form of social knowledge. Listing negative depictions in rapid succession, Mathisen calls attention to the invocation of science.²⁴² The author's of several textbooks attempt to distinguish common sense from science and then align sociology with the latter. Because it has not gone through intense scrutiny (and would presumably falter if it were scrutinized), common sense lacks the legitimacy necessary to advance quality arguments. "The 'remedy' for common sense in many texts," writes Mathisen, "apparently is a positivistic scientism in which students place their trust."²⁴³ The problem, Mathisen later notes, is that "students are urged to trade in their commonsense myths for various myths of how sociology as a science operates."²⁴⁴ As we will see, Posner attempts to avoid the friction between common sense and science by reframing common sense as an economic science.

²⁴¹ Richard Terdiman, "Translator's Introduction," in "The Force of Law: Toward a Sociology of the Juridical Field," *Hastings Law Journal* 38 (Jul. 1987), 810.

²⁴² James A. Mathisen, "A Further Look at 'Common Sense' in Introductory Sociology," *Teaching Sociology* 17.3 (Jul. 1989), 308.

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*, 310.

These arguments against common sense have done little to impact its role in the public sphere. Public audiences are less likely to have the time and resources needed to scrutinize arguments. Instead, they utilize their own experiences to tell whether or not a common sense argumentation is really all that common and makes any sense. The economic judge is able to tap into the rhetorical wealth of common sense by distancing him or herself from academic philosophy and reframing economic judgment as a form of common sense. At least since Paine's pamphlet, common sense has played a prominent role in American political and philosophical history, including what has been described as the only truly American philosophy: pragmatism. The role of common sense in pragmatism is especially important given our attention to Richard Posner, who continuously aligns himself with the pragmatist tradition. Charles Sanders Peirce, often cited as the father of pragmatism, advocated a "critical common-sensism," which imbued Thomas Reid's approach with Kant's critical project.²⁴⁵ William James was similarly interested in the relationship between common sense and science, although adopts a less critical edge. Dividing knowledge into three spheres – common sense, science, and philosophy – James writes, "Common sense is BETTER for one sphere of life, science for another, philosophic criticism for a third; but whether either be TRUER absolutely, Heaven only knows."²⁴⁶ He encourages suspicion of common sense, but nonetheless recognizes its prominent place. Not to be left out, John Dewey also addressed science and common sense, arguing that neither can survive on their

²⁴⁵ Charles S. Peirce, *Philosophical Writings of Peirce*, ed. Justus Buchler (New York: Dover, 1955), 290-301. For extended discussion of Peirce's critical common-sensism, see Christopher Hookway, "Critical Common-Sensism and Rational Self-Control," *Noûs* 24 (1990), 397-412 and Susan Haack, "Reflections of a Critical Common-Sensist," *Transactions of the Charles S. Peirce Society* 32.3 (Summer 1996), 359-373.

²⁴⁶ See William James, "Pragmatism: A New Name for Some Old Ways of Thinking," in *Writings 1902-1910* (New York: Library of America, 1988).

own. Rather they are frames of reference, two ways of looking at the world that can benefit one another.²⁴⁷

Posner breaks from his pragmatic lineage by connecting good and useful common sense as inherently economic and rooted in cost-benefit analysis. Common sense *without* an economic mindfulness for consequences suffers from the same challenges sociologists and cultural studies theorists have also posed – it is ideological and unreflective. “[C]ommon-sense does not provide a unitary discourse,” warns Posner, “for it overflows with numerous bits and pieces, creating and recreating endless ‘ideological dilemmas.’”²⁴⁸ “[P]olitics shades into ideology,” he argues elsewhere, “which in turn shades into common sense, moral insight, notions of sound policy, and other common ineradicable elements of judicial decision making.”²⁴⁹ Posner’s suggests that economics quells these fears by being a neutral analytic tool.

Posner blends common sense into economics by stressing what he considers to be their points of intersection: cost/benefit analysis and practical usefulness. For example, discussing the law of evidence, Posner argues that Rule 201 of the Federal Rules of Evidence, which deals with incontestable facts, is “obviously sound as a matter of economics as well as common sense” as determined by the cost-benefit ratio.²⁵⁰ Later in the same article he links common sense with economic usefulness.²⁵¹ Similar themes appear in his analyses of consumer commerce,²⁵²

²⁴⁷ John Dewey, “Common Sense and Science: Their Respective Frames of Reference,” *Journal of Philosophy* 45.8 (Apr. 1948), 197-208.

²⁴⁸ Billig, 15.

²⁴⁹ Posner, *How Judges Think*, 73.

²⁵⁰ Posner, “An Economic Approach to the Law of Evidence,” 1516.

²⁵¹ *Ibid.*, 1520.

²⁵² Richard A. Posner, “The Federal Trade Commission,” *The University of Chicago Law Review*, 37.1 (Autumn 1969), 47-89.

negligence,²⁵³ religious freedom,²⁵⁴ and antitrust law.²⁵⁵ Economics becomes the standard by which the *quality* of common sense is determined by imbuing it with a scientific method and resisting political or ideological influence. As a result, Posner presents the economic judge as a paradigm example of *good* common sense.

Distancing the economic judge from academic pragmatism and offering his own “everyday” pragmatism in its stead serves as the first of his rhetorical constructions and grants him the ability to call academics down from their Ivory Tower. Under this view, the aforementioned academic “legalist” theories focus too much on complicated abstractions and advocate for legal idea(l)s that simply cannot be put into practice. Moreover, they are written for a narrow academic audience, making their application all the more difficult for sitting judges. Common sense serves as a bulwark against endless and often specious theorizing. In many ways, Posner’s characterization of academia echoes Aristophanes’ early criticism of philosophy. In *Clouds*, Aristophanes caricatures the paralyzing assiduousness of Platonic philosophy, labeling Socrates a “priest of pedantic prattle.”²⁵⁶ In his desire to learn “philosophy,” the character Strepsiades vehemently protests against an interest in practical affairs: “No, no, no! I’m not interested in politics and carrying on in the assembly.”²⁵⁷ Depicted here, philosophy is not simply hair spitting, but also a harmful disassociation from the world of everyday experience.

Posner, too, characterizes academic philosophers as overscrupulous, countering their persnickety disposition with common sense: “To practical people, however, including judges and lawyers and even many law professors, philosophy is an exasperating subject. Philosophers seem

²⁵³ Richard A. Posner, “A Theory of Negligence,” *The Journal of Legal Studies* 1.1 (Jan. 1972), 29-96.

²⁵⁴ Richard A. Posner, “An Economic Approach to Issues of Religious Freedom,” *The University of Chicago Law Review* 56.1 (Winter 1989), 1-60.

²⁵⁵ Richard A. Posner, “A Program for the Antitrust Division,” *The University of Chicago Law Review* 38.3 (Spring 1971), 500-536.

²⁵⁶ Aristophanes, *Clouds*, trans. Peter Meineck (Indianapolis: Hackett, 2000), 359.

²⁵⁷ *Ibid.*, 432.

preoccupied with questions that no one with a modicum of common sense and a living to earn would waste a minute on.”²⁵⁸ Notice how Posner characterizes philosophers (and, implicitly, other theorists) as consumed by irrelevant problems that have nothing to do with how “real” people live their lives. Although common sense remains vague and undefined, he situates it as a useful source of practical knowledge that can call these highfalutin’ thinkers down from the clouds.

Much like Aristophanes’ acerbic portrayal of Ancient Greek philosophers, Posner’s prioritization of common sense serves an important rhetorical function by associating his perspective with the lay public. Posner is less interested in getting in picking a fight with academics about the nature of law and more interested in convincing an audience of his judicial peers and the learned public that good adjudication is economic. Building broad appeal, Posner claims that common sense emanates from the general public and serves as a useful bulwark against bad policies: “The people are the repository of common sense, which, dull though it is, is a barrier to the mad schemes, whether of social engineering or foreign adventures, hatched by specialists and intellectuals.”²⁵⁹ This characterization of common sense serves at least three rhetorical purposes. First, Posner is able to gain broad public support by praising the nebulous “people” as sage guides, in effect calling them into being. Their collective intuition serves as an adequate tool used to discern good from bad, right from wrong, and useful from useless. Do they know specialized, technical, and nuanced arguments for a particular policy or law? No, but their naïveté is actually a strength:

People don’t want to be lectured to by their intellectual superiors about needing to become informed about esoteric political issues, to participate actively in political and

²⁵⁸ Posner, *The Problems of Jurisprudence*, 3.

²⁵⁹ Posner, *Law, Pragmatism, and Democracy*, 168.

ideological deliberation, to subordinate their interests to some abstract public interest, and to allocate previous time to the political arena. But they do want to be heard concerning their interests by those who have power to do anything to protect or advance those interests.²⁶⁰

By praising the enduring wisdom of the people, Posner's rhetorical strategy is not to *describe* the public, but instead *call a particular public into being as audience*.²⁶¹ It is a way of constituting a particular audience that is predisposed toward his economic interpretation of law. Labeling his view "everyday," Posner is simultaneously calling into question other legal theories (he considers most of them vacuous) while also positioning the economic judge as the voice of common sense, as "of the people." In many ways, Posner is telling the people who they are: rational deliberators capable of sound decisions.

Second, Posner strategically ignores both the many ways in which public opinion is grossly under/misinformed and the many instances of their "intellectual superiors" initiating a positive social cascade. A 2005 study illustrated the staggeringly low aptitude Americans have for basic scientific information.²⁶² History and politics fare little better. Americans are more than twice as likely to know two family members from the television show *The Simpsons* than two of the five freedoms guaranteed by the First Amendment.²⁶³ Consider also the growing number of citizens who believe President Obama is a Muslim (18%)²⁶⁴ and believe he was probably born

²⁶⁰ Ibid., 168.

²⁶¹ See McGee, "In Search of 'The People.'"

²⁶² See Cordelia Dean, "Scientific Savvy? In U.S., Not so Much," *New York Times* (Aug. 30, 2005), retrieved from <http://www.nytimes.com/2005/08/30/science/30profile.html>.

²⁶³ Rick Shenkman, "Ignorant America: Just How Stupid are We," *Alternet* (July 1, 2008), retrieved from http://www.alternet.org/story/90161/ignorant_america%3A_just_how_stupid_are_we.

²⁶⁴ Pew Research Center, "Growing Number of Americans Say Obama is a Muslim," (August 19, 2010), retrieved from <http://www.pewforum.org/2010/08/18/growing-number-of-americans-say-obama-is-a-muslim/>.

out of the country (26%).²⁶⁵ The people, to which Posner ascribes a sage-like common sense, are less of a barrier against “mad schemes” than they are siphons channeling it into public discourse.

Finally, and most importantly, Posner is able to cast doubt on scholars and recast the legal system, particularly judges, as bastions of common sense wisdom set to protect the lay public from intellectual elitism. Rather than “slumming” it with common sense discourse as John Lyne suspects scientists must do,²⁶⁶ Posner embraces the discourse as a way to garner rhetorical appeal with his two target audiences – the legal community (judges, lawyers, etc.) and the lay public. Theorists and critics from other disciplines (philosophy, rhetoric, sociology, political science, history, literary studies, etc.) are outsiders looking in, many of whom serve as a distraction from the practice of law. Common sense lets Posner call down the academics to a level of reasonableness his audiences already understand. As I will argue, Posner plays a similar trick but in the other direction, instead aligning common sense with expertise in order to call up the lay public.

By associating law and the lay public by way of common sense, Posner is able to build up the *publicness* of his philosophy. His appeal may be most effective because of the many ways in which people talk the language of law in their everyday discourse. U. S. discourse is brimming with legalisms. Noting Tocqueville’s early recognition of such American discursive habits,²⁶⁷ Mary Ann Glendon argues that legal vocabulary has become increasingly influential for the citizenry: “This ‘legalization’ of popular culture is both cause and consequence of our increasing tendency to look to law as an expression and carrier of the few values that are widely shared in

²⁶⁵ Shannon Travis, “CNN Poll: Quarter Doubt Obama Was Born in U.S.,” (August 4, 2010), retrieved from <http://politicalticker.blogs.cnn.com/2010/08/04/cnn-poll-quarter-doubt-president-was-born-in-u-s/>.

²⁶⁶ John R. Lyne, “Science Controversy, Common Sense, and the Third Culture,” *Argumentation and Advocacy* 42 (Summer 2005), 39.

²⁶⁷ Glendon, 1-2. Tracing the history of the “rights-bearing” individual to the contemporary state of “no compromise,” Glendon laments the adoption of rights without a reciprocal notion of obligation. See also Jean Bethke Elshtain, *Democracy on Trial* (New York: Basic Books, 1995).

our society: liberty, equality, and the ideal of justice under law.”²⁶⁸ She continues, “Legal discourse has not only become the single most important tributary to political discourse, but it has crept into the languages that Americans employ around the kitchen table, in the neighborhood, and in their diverse communities of memory and mutual aid.”²⁶⁹ Law, for good or ill, has infused itself with contemporary discourse and goes well beyond its disciplinary bounds. As a result, the ways in which the public philosophizes about itself are similarly imbued with law. By positioning his economic judge as synonymous with (or, at the very least, sympathetic to) the common sense of the public, Posner is drawing on the public’s already present discursive tendencies.

To rely on the public’s amorphous common sense, however, is a dangerous gamble. Unwilling to put all his chips on calling down academics in favor of the people, Posner relies equally on a *cultivated* common sense and the need to call up the uninformed public. Posner recognizes the dual roles of common sense, noting its public and judicial manifestations:

Common sense is what ‘everybody knows’ without having to think hard about the subject. So it is elliptical, like intuition. And it is culturally specific. But within a culture it is a valid though flawed source of knowledge. It operates in judicial decision making as a set of policy judgments that everyone agrees on and so are not thought political at all. A lawyer’s position in a case in the open area that violates common sense is a strong candidate for rejection. The doctrine that a literal reading of statute is to be rejected when it would lead to an absurd result illustrates the use of common sense as judicial technique.²⁷⁰

²⁶⁸ Ibid., 3.

²⁶⁹ Ibid.

²⁷⁰ Posner, *How Judges Think*, 116-7.

Here marks the tipping point where Posner recognizes many of the attributes of common sense addressed by Billig while simultaneously etching a special form of common sense for the economic judge. Throughout much of Posner's extensive work, he speaks as an experienced judge and attempts to characterize law as what judges do. As we saw earlier, he uses this position to call down philosophers and other academics. But common sense as public opinion is a poor guide. Consequently, he must cultivate a refined conception of common sense that caters to the sitting judge, one that reinforces the common law tradition as a special (and necessary) kind of common sense.

Justice Oliver Wendell, Jr. began his seminal book *The Common Law* by flipping the idea of law on its head. "The life of the law has not been logic; it has been experience... The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."²⁷¹ The experience to which Holmes is referring concerns judges who must deal with ill-defined laws, a socially evolving society, and unexpected nuances present in the most difficult cases. The common law, as Holmes characterized it, is a *narrative*; an unfinished story that grows within a culture. In many ways, judges serve as the chief storytellers. They must sculpt decisions that define and redefine the culture, but their decisions are only moments in an enduring chain. Some of these moments are lost or forgotten (and rightfully so), whereas others serve as pivotal points that are constantly brought into the nation's grander narrative. *Marbury v. Madison*, *Dred Scot v. Sanford*, *Plessy v. Ferguson*, *Gitlow v. New York*, *Brown v. Board of Education*, *Gideon v. Wainwright*, *Griswold v. Connecticut*, *Roe v. Wade*, *Bush v. Gore*, *Citizens United v. FCC* – these cases mark important moments in our judicial and national narrative. All, however, are subject to alteration. Through their experience in the judiciary, judges become better storytellers,

²⁷¹ Oliver Wendell Holmes, Jr., *The Common Law* (New York: Dover, 1992), 1.

which suggests a growing rhetorical acumen. Yet, their role utilizes a particular discourse and set of experiences that is unique to them. It is this privileged position that Posner taps into when he attempts to call the public up.

Characterizing the law as a distinct discourse, Posner objects to lay common sense within adjudication. In *Overcoming Law*, he claims, “It soon becomes clear that one of the most important duties of judges is to resist the pull of common sense and laymen’s justice. Even a lay person should be able to understand that judges have not been given a blank check on which to write their personal and political preferences and call them the Constitution.”²⁷² Here, a particular type of common sense is criticized in favor of the cultivated sense of duty and obligation associated with the role of judge. Recall Billig’s discussion of the paradox of common sense. Whereas his discussion highlights two distinct and competing sides, Posner is embodying both and deploying their arguments at key moments. This Janus approach allows him to cater particular messages to particular audiences.

Common sense, under this interpretation, must be cultivated and blended with other forms of knowledge in order to be useful to the judge. After all, common sense tells us that the world is flat. Although critical of some elements of legal education, Posner nonetheless considers it an essential part of the judge’s refined common sense. Building off of Holmes’ arguments regarding law and experience, Posner notes that “one had to know something about society to be able to understand, criticize, and improve law.” That “something,” Posner continues, is an amalgam of “a good general education and common sense,” but could also be developed through “the legal texts themselves... or, failing these sources of insight, would acquire naturally in a few years of practicing law.”²⁷³ As it applies to law, common sense is no longer unrestricted and

²⁷² Posner, *Overcoming Law*, 71.

²⁷³ Posner, *The Problems of Jurisprudence*, 425.

egalitarian. Rather, legal common sense is developed over time in association with the legal culture. As Posner characterizes legal common sense this way, he must pull up the lay public to his level so they can understand how and why his common sense decisions differs from theirs.

Part of a legal specialization stresses the long and complicated history of law in the United States (and beyond). In large part due to *stare decisis*, cases are not always decided by the contemporary social and political landscape alone. Judges often reach back in history, sometimes centuries, in order to justify their positions. Posner argues, “The legal core is not a body of principles validated by scientific method or by robust common sense; it is a set of policy decisions, some made long ago under different social conditions.”²⁷⁴ Not only are legal training and experience necessary, but also a sense of history and timeliness are required. The standards for Posner’s common sense are becoming increasingly uncommon.

In *How Judges Think*, he notes how “intuition” is vital to the decision-making process, “along with its cousins common sense and good judgment.”²⁷⁵ The judge’s ability to balance competing interests and act with practical wisdom is reinforced later in the same text:

The judge is wont to ask himself in such a case what outcome would be the more reasonable, the more sensible, bearing in mind the range of admissible considerations in deciding a case, which include but are not exhausted by statutory language, precedents, and other conventional materials of judicial decision making, but also include common sense, policy preferences, and often much else besides.²⁷⁶

Sound judgment is marked by its ability to negotiate a multitude of perspectives and discourses, ultimately arriving upon a good decision. As Posner notes, this includes the materials of law, politics, and common sense. Given the distinct role judges play, law and politics help shape and

²⁷⁴ *Ibid.*, 81.

²⁷⁵ Posner, *How Judges Think*, 98.

²⁷⁶ *Ibid.*, 207.

refine an otherwise clumsy and cursory common sense. Unlike his aforementioned charges against academia, he is now trying to position himself above the rabble, holding court in law and public opinion. Posner reinforces this point in one of his own decisions. In *Schmidt v. Sullivan*,²⁷⁷ a fairly hum-drum case concerning social security medical benefits, Posner claims, “Common sense can mislead,” especially when “lay institutions” attempt to contest the arguments from experts.

Reinforcing the idea that the economic judge must mediate an array of legal, political, and social forces, Posner claims:

The weighting is the result of a complicated interaction – mysterious, personal to every judge – of modes of reasoning (analysis, intuition, emotion, common sense, judgment), political and ideological inclinations, personality traits, other personal characteristics, personal and professional experiences, and the constraints implicit in the rules of the judicial “game.”²⁷⁸

This defense of practical wisdom and the specialized common sense of the judiciary are found throughout numerous works. In *The Problems of Jurisprudence*, Posner asserts that a judge’s practical reason is a “grab bag that includes anecdote, introspection, imagination, common sense, empathy, imputation of motives, speaker’s authority, metaphor, analogy, precedent, custom, memory, ‘experience,’ intuition, and induction (the expectation of regularities, a disposition related both to intuition and to analogy).”²⁷⁹ Again we see the invocation of common sense but in concert with an array of other “modes of reasoning,” which the economic judge alone can balance and act upon.

²⁷⁷ *Schmidt v. Sullivan*, 914 F.2d 117, 118 (7th Cir. 1990).

²⁷⁸ Posner, *How Judges Think*, 376.

²⁷⁹ Posner, *The Problems of Jurisprudence*, 73.

Noted earlier, Posner wants to split his bet between calling down academics and calling up the lay public. Yet, he takes one more crucial step when he invokes common sense. Posner attempts to differentiate between the *quality* of different common senses and associate good and useful common sense with a scientific, economic model. One step in this process is to criticize the many ways in which common sense has failed, often due to its lack of a scientific method. In *The Problems of Jurisprudence*, Posner makes notes that “[c]ommon sense and intuition support the discredited geocentric theory.”²⁸⁰ Common sense defenses that have turned out to be completely off the mark are numerous throughout the history of science, and his argument sets the stage for a more critical common sense akin to that which C. S. Peirce championed. Peirce was an advocate of science as a methodical approach, lauding its ability to upend misplaced beliefs and entrenched dogmatisms. Dewey, too, praised the scientific method and argued for its role in public culture. Not until pragmatism’s second generation revival was science scrutinized by some pragmatists, most notably and voraciously by Richard Rorty.²⁸¹ While not philosophical, Posner’s pragmatism nonetheless attempts to call back to the earlier appreciation and invocation of science. His approach, however, attempts to scientize common sense via economics, thus reframing common sense to cater to the economic judge.

For Posner, everyday pragmatism and economics are virtually synonymous, and both cultivate good common sense. Important to note are the many instances in which Posner associates a good common sense with consequences, which then leads him to economics. “The significance of economics for the study of judicial behavior lies mainly in the consilience of economics with pragmatism. The economist, like the pragmatist, is interested in ferreting out

²⁸⁰ Ibid., 79.

²⁸¹ See, for example, Richard Rorty, *Objectivity, Realism, and Truth: Philosophical Papers* (vol. 1) (Cambridge: Cambridge University Press, 1991) and *Philosophy and the Mirror of Nature: Thirtieth Anniversary Edition* (Princeton: Princeton University Press, 2009).

practical consequences rather than engaging in a logical or semantic analysis of legal doctrines.”²⁸² What will be the particular consequences of an act? Of a piece of legislation? Of a judicial decision? The good pragmatist, the good economist, and the good common sense judge ask these questions. Defining the rules of the game, Posner wants to be the house. As we all know, the house always wins.

2.4 CONCLUSION

As this chapter attempts to illustrate, Richard Posner’s economic model of adjudication draws upon a number of rhetorical faculties in addition to the standard resources of legal judgment. These faculties – economic objectivity, a balanced perspective, and common sense – animate Posner’s ideal judge: the economic judge. Although Posner presents the economic judge as a neutral and natural arbiter of the law, his judgment is nonetheless refracted through an economic discourse. The economic judge may utilize a pseudo-economic method to reach conclusions, but the act of translation it requires is inherently rhetorical. The economic judge may strike balance in his decisions, but it is a balance that is predisposed to an economically minded outcome. The economic judge may have common sense, but it is a particular kind of common sense that only he possesses.

Despite criticisms, the economic judge continues to enjoy great success. Posner is quick to note the success of the law and economics movement in his work and his self-praise is well deserved. Law and economics is one of the most widely taught courses throughout American law schools, quickly becoming one of the most ubiquitous legal theories by the end of the 20th century. As a model of judgment, the economic judge set the standard against which the next to models of judgment are responding.

²⁸² Posner, *How Judges Think*, 238.

3.0 MARTHA NUSSBAUM AND THE LITERARY JUDGE

“That is part of the beauty of all literature. You discover that your longings are universal longings, that you're not lonely and isolated from anyone. You belong.”

- F. Scott Fitzgerald, quoted in *Beloved Infidel: The Education of a Woman*

As the previous chapter explicates, Richard Posner's law-and-economics approach is the latest contribution in this vein of standardized jurisprudence, even going so far as to provide equations for determining the wealth maximization of a given legal scenario. His economic model of judgment continues to play a prominent role in shaping legal education, judicial decision-making, and the public conception of law. His embodied ideal, the economic judge, represents an approach to legal judgment that relies upon the rhetoric of common sense, balance, and expertise, all three of which are framed in economic terms. Since the law - according to Posner - is what judges do, the best approach to law is one that tries to universalize their approaches so that citizens, lawyers, and other judges know what to expect. Considering the ubiquity of law and economics in law schools and legal journals, his approach has been quite successful. His popularity is not without its detractors as a number of adroit scholars have advanced legal theories that operate in direct opposition to Posner's economic model of judgment. Martha Nussbaum is perhaps the most highly regarded public intellectual offering such a competing model of legal judgment. The greatest elements of human life and experience, argues Nussbaum, cannot be distilled into economic formulae, universal procedures, or abstract principles. For all his purported common sense, the economic judge lacks, in a word, heart.

Trained as a classicist yet quickly branching out to a wide array of philosophical interests that relate to the public good, Nussbaum condemns the growing interest in utilitarian and economic models of rational-choice theory. Critical of the “economist’s way of thinking,”¹ Nussbaum worries about the dangers inherent to economizing the non-economic, including issues pertaining to the family, sexuality, and human capabilities. “[T]he economic mind is blind,” claims Nussbaum.

Blind to the qualitative richness of the perceptible world; to the separateness of its people, to their inner depths, their hopes and loves and fears; blind to what it is like to live a human life and to try to endow it with human meaning. Blind, above all, to the fact that human life is something mysterious and extremely complicated, something that demands to be approached with faculties of mind and resources of language that are suited to the expression of that complexity.²

As a way of seeing the world and the resources it offers for legal judgment, the economic judge neglects the fragility of human experience that Nussbaum finds essential to *eudaimonia* – the flourishing life. It is this life that law must understand, defend, and actively cultivate. Law’s priority is not about the *standards* of judgment, as with the economic judge, but rather the *outcomes* of judgment. As such, Nussbaum advances a jurisprudence embodied by the *literary judge*.

The literary judge is dedicated to those who lack a powerful position in society and uses her judicial role to disrupt the many ways in which groups and individuals have been disenfranchised. Collapsing the divide between legality and morality, the literary judge uses law

¹ Martha C. Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (Boston: Beacon Press, 1995), 18.

² *Ibid.*, 27.

as a therapeutic, rehabilitative force to mend social ills. In order to do so, she must cultivate an attuned *literary imagination* that allows her to call upon the power of rhetorical invention to acknowledge and amend social, cultural, and political blindspots. As such, she must have a highly cultivated *emotional intelligence* that allows for sympathy and empathy while still remaining true to the law. Drawing from the great works of literature and moral philosophy, Nussbaum's approach reaffirms the innate dignity of human agents as they work toward achieving the flourishing life.

In order to achieve such lofty goals, Nussbaum must craft a robust conception of the literary judge that can adequately fulfill the requirements of justice while avoiding the pitfalls she sees in competing theories, especially the economic way of thinking. In this chapter, I highlight the most important and salient elements of her rhetorical project and the ways in which Nussbaum situates her jurisprudence as a direct response to Posner's economic model. Much like Posner, her appeals are not solely directed at and intended for fellow scholars or judges. Instead, Nussbaum's philosophy is intended to address and shape public conceptions of justice, a point she articulates and reinforces throughout her diverse and prolific work. I address three broad and interconnected rhetorical appeals that constitute the literary judge. First, I articulate the role of the literary imagination and its ability to cultivate a nuanced approach to rhetorical invention. Second, I address Nussbaum's claim that the literary judge has a finely tuned emotional intelligence that is able to negotiate between emotions that draw communities together (e.g. compassion) and those that drive them apart (e.g. shame and disgust). Finally, I illustrate the rhetorical function of Nussbaum's "capabilities approach" as it applies to the literary judge, arguing it serves a constitutive function in her jurisprudence. In doing so, I propose that the

literary judge, as characterized by Nussbaum, acts as a therapeutic doctor of society's collective soul.

The first element – the literary imagination - borrows from and builds on the “law and literature” movement and illustrates the necessity of rhetorical invention in legal adjudication. The second element – intelligent emotion – responds to the longstanding criticisms instigated by Plato and sustained by numerous philosophers and legal scholars who argue against *pathos* in persuasion and judgment. Nussbaum argues that emotions play a necessary and formative role for any good judgment and need not be discarded as merely subjective and relativistic. Quite the opposite, in fact: judges must have an expanded perception of emotions, their function in human motivation, and the role they play in practical judgment. Finally, given the literary judge's critical role in society, she relies upon the constitutive power of law to play a formative role in shaping social norms. In doing so, the literary judge does not focus on what *is*, which is the domain of the economic judge, but on what *could be*. Given the critical role judges play within a society, especially a democratic one, Nussbaum claims that they have a duty to nurture human flourishing.

3.1 LAW AND THE LITERARY IMAGINATION

Law is composed, in large part, of stories and storytelling. Even before litigation begins, clients tell their lawyers the stories that made them seek (or require) professional legal aide. In their closing remarks, lawyers both for the prosecution and the defense craft competing narratives that draw attention to particular elements of the case in order to entice judges and juries to agree with them. Decisions issued by judges often establish the facts of a case and the legal issue being contested through a narrative form that caters to their conclusions. As decisions become

precedent, these narratives are told and retold with new characters and new scenes being added whenever it is revisited. Perhaps more than legal professionals, the lay public also understands the law through stories and narratives with heroes and villains, plot twists and climactic conclusions. These narratives are reinforced throughout popular entertainment with courtroom dramas from *Twelve Angry Men* to *My Cousin Vinny*. Every year, a new slew of television dramas are set in legal practices while John Grisham churns out yet another *New York Times* bestseller. Even classic texts such as Plato's *Apology* and Isocrates' *Antidosis* utilize narratives in a courtly setting. And who can blame any of them: the stakes in a courtroom are high when justice is on the line.

While dramatic authors have turned to legal settings for millennia, the academic interest in the literary elements of law has been percolating for only a handful of decades. Responding to the detached reasoning prevalent in analytic jurisprudence, constitutional originalism, and law and economics, disenchanted legal scholars and interdisciplinary academics have turned to literature and literary studies for insight into the purpose and practice of law. Ignited by James Boyd White's publication of *The Legal Imagination* in 1973 – coincidentally, the same year that Richard Posner introduced *The Economic Analysis of Law* casebook – the law and literature movement has proved to be a compelling counter to the systematization and standardization of legal discourse. Rather than view the law as a set of rules and cases as sets of facts, law and literature stresses the aforementioned narratives that operate under the auspices of law.

Although several different manifestations of what a literary approach to law entails, Paul Gewirtz captures the general spirit of the movement well: “[T]reating law as narrative and rhetoric means looking at facts more than rules, forms as much as substance, the language used as much as the idea expressed...It means examining not simply how law is found but how it is

made, not simply what judges command but how the commands are constructed and framed.”³ A simple turn of phrase can mean all the difference in the world. Is Cohen’s infamous “Fuck the Draft” jacket an act of political dissent or is it juvenile obscenity?⁴ Did socialists distributing pamphlets during WWI compose a “clear and present danger” or were they, as Holmes described them in *Abrams v. U.S.*, “silly little leaflets” that were doing little harm?⁵ Is Edward Snowden a “whistleblower” or a “traitor”? The language and arguments deployed throughout all levels of law tell particular stories in an attempt to draw an audience’s attention in particular ways and arrive upon particular conclusions. The success or failure of these appeals certainly relies upon the facts of a case as they relate to existing statutes and precedent, but strategic, rhetorical choices are made at every turn.

As a vocal advocate for the important relationship between philosophy and literature, Martha Nussbaum has been championing the benefits of literature for law for nearly three decades. Drawing from (and arguably improving upon) an Aristotelian conception of practical judgment, she claims that literature is not only a comparative lens through which one may assess law (i.e. a hermeneutic approach), but also as a vital resource for legal training and the process of cultivating good legal judgment. Whereas other approaches to law and literature focus on law *in* literature, law *as* literature, and literature *in* law, Nussbaum proposes a *literature for law* approach rooted in the idea of the “literary imagination.”

The competing approaches to law and literature tend to fall into one of the three aforementioned categories: law in literature, literature in law, and law as literature. The law in literature approach focuses on those works of literature that incorporate law as part of the

³ Paul Gewirtz, “Narrative and Rhetoric in the Law,” in *Law’s Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz (New Haven: Yale University Press, 1996), 3.

⁴ *Cohen v. California*, 403 U.S. 15 (1971)

⁵ *Abrams v. United States*, 250 U.S. 616 (1919)

dramatic narrative. These courtroom dramas, argues Margaret Atwood, are “inherently dramatic” because they capture “our own fears about trial and judgment.”⁶ Book Twelve of Dostoevsky’s *The Brothers Karamazov*, for example, chronicles the murder trial of Dimitri Karamazov.⁷ The impassioned testimony of Katerina and the fervent closing remarks made by the prosecution and defense heighten the intensity of the narrative. The growing suspense is part and parcel of courtroom drama – especially a salacious murder trial – with Dostoevsky utilizing passionate speeches to intensify the story. The setting also allows Dostoevsky an opportunity to reflect upon the purpose and process of law amidst the lives of his characters. Dostoevsky’s *magnum opus* is but one of many examples wherein literature utilizes the inherent drama of law to drive the narrative forward. Sophocles’ *Antigone* interrogates the age-old divide between the spirit and the letter of the law. Herman Melville’s *Billy Budd* illustrates the challenges of legal formalism. Few American students can escape from reading *To Kill a Mockingbird* in high school, which underscores how bias and racism infect a trial and the judgments produced therein. And, whether you consider it quality literature or not, John Grisham’s courtroom dramas continually top the *New York Times* bestsellers list.

Robin West’s research captures the law in literature approach nicely, especially its antithetical position in regard to law and economics. In a well-known 1985 article in the *Harvard Law Review*, West draws upon Franz Kafka’s works, especially *The Trial*, to illustrate the inadequacies of Posner’s economic adjudication. Challenging Posner’s “simplistic and false psychological theory of human motivation,”⁸ West utilizes Kafka’s work to examine the “dark

⁶ Margaret Atwood, “Justice in the Literary Tradition,” in *Justice Beyond Orwell*, ed. Rosalie S. Abell and Melvin L. Rothman (Les Editions Yvon Blais: Montreal, 1985), 505.

⁷ Fyodor Dostoevsky, *The Brothers Karamazov*, trans. Richard Pevear and Larissa Volokhonsky (New York: Farrar, Straus, and Giroux, 1990).

⁸ Robin West, “Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner,” *Harvard Law Review* 99 (Dec. 1985), 385.

underside of Posner's argument."⁹ "Kafka's fictional world," she continues, "provides a dramatic enactment of Posner's normative claim: Posner argues that consent morally legitimates all; Kafka illustrates what a world so legitimated might look and feel like."¹⁰ Law in literature here understood serves as a useful opportunity to explore the implicit assumptions that undergird law and legal theory. It places the reader in a world that pushes an idea to its extreme with West exhibiting the moral and juridical hazards inherent to economic judgment.

Commenting on the value of the law in literature approach, Paul Gewirtz argues that at its best, such work can help to illuminate the legal world in distinctive ways by drawing attention to literature's narrative particularity, its focus on varieties of human understanding beyond reason alone, its capacity for provoking an empathic understanding of others' inner life, its forms and its self-consciousness about language, and its critical perspective (or at least perspective of ambiguity) toward the phenomena it represents.¹¹ This is an aspirational account of law, to be sure, as proponents of law in literature stress the dimensions of human experience that are traditionally ignored or undermined in legal decisions. Critics of the approach, however, claim that such scholarship "constitutes a kind of remedial reading" that is ultimately unhelpful for the practicing judge or lawyers.¹²

The inverse of the law in literature approach, the literature in law vein of research, tends to the various ways in which judges incorporate literature in their decisions. The most sparse of the all the angles of the law and literature movement, partly due to the rare occasions when

⁹ Ibid., 386.

¹⁰ Ibid.

¹¹ Gewirtz, 3.

¹² Robert Weisberg, "Proclaiming Trials as Narratives: Premises and Pretenses," in *Law's Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz (New Haven: Yale University Press, 1996), 70. See also, Richard Posner, *Law and Literature*, 3rd ed. (Cambridge: Harvard University Press, 2009), particularly chapter one, "Reflections on Law in Literature."

literature is evoked in a legal decision, the driving motivation behind this approach is to understand when judges incorporate a citation to a literary text in a decision and to what end. Justice William Brennan cited Orwell's *1984* in *Florida v. Riley*.¹³ Justice Harry Blackmun called upon Charles Dickens' *Pickwick Papers* to criticize debtors in *Overmyer v. Frick Co.*¹⁴ And in order to evoke sympathy for whales, Justice Thurgood Marshall turned to *Moby Dick* in *Japan Whaling Association v. American Cetacean Society*.¹⁵ Such invocations, however, are few and far between. In "Citing Fiction," Todd Henderson notes that a mere 543 references to works of fiction have been employed in over *two million* federal appellate decisions, about one in every 10,000.¹⁶ Although the Supreme Court is roughly five times more likely to cite literature,¹⁷ these occasions are still rare. Interestingly enough, despite his aversion to the law and literature movement, Richard Posner is one of the judges most likely to cite literature in his decisions.¹⁸

Unlike the law in literature and literature in law approaches, the law *as* literature approach takes a step back and assesses the role of hermeneutic interpretation inherent both to law and to literature. Acknowledging the fact that law and literature draw from a shared language that lends itself to ambiguity and evolves over time, proponents of this approach examine the ways in which legal texts – particularly judicial decisions – function within a “culture of argument.”¹⁹ The interpretive methods developed in literary studies are “imported into the study of law.”²⁰ These scholars attempt to pull back the curtain of professional, technical language in

¹³ *Florida v. Riley*, 488 U.S. 445 (1989)

¹⁴ *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 156 (1972).

¹⁵ *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986), Justice Marshall dissenting.

¹⁶ M. Todd Henderson, “Citing Fiction,” *The Green Bag* 11.2 (Winter 2008), 171.

¹⁷ *Ibid.*, 185.

¹⁸ *Ibid.*, 176.

¹⁹ Gewirtz, 5.

²⁰ Peter Brooks, “The Law as Narrative and Rhetoric,” in *Law's Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz (New Haven: Yale University Press, 1996), 15.

order to see the (all too human) wizard pulling the argumentative strings. Judicial decisions are not divined from the gods and their conclusions are hardly inevitable, especially in unique, complicated, and unforeseeable cases. Judges utilize linguistic devices and rhetorical turns in order to make a conclusion *appear* inevitable.²¹ Drawing from the rich theories of interpretation and hermeneutics developed in literary studies and rhetoric, the law as literature approach attempts to peel back these layers in order to understand the multifaceted meanings embedded in legal decisions.

This species of the law and literature movement is by far the most prolific and theoretically nuanced, with scholars from law, literary studies, rhetoric, critical and cultural studies, women's studies, psychology, and numerous other disciplines contributing to the wealth of scholarship. Consequently, there are numerous arguments as to what law as literature entails with many voices offering competing definitions and expectations. Indeed, there are no uniform approaches for assessing the merits of literature. What, then, does it mean to view law through a literary lens? While a detailed examination of these arguments could fill another dissertation, a number of recurring themes tend to emerge. The relationship between the author and the text, for example, is brought to the fore. Judges often metonymically detach their names and their individual perspectives from a majority opinion, instead speaking for "the court." Dissenting opinions offer more leeway and individual discretion, in part due to the fact that the arguments advanced are intended to criticize rather than to create precedent, but even these judicial moments are often framed as speaking "on behalf of" the law as "the voice of reason" which

²¹ As Robert Ferguson notes, "The only thing the judge never admits in the moment of decision is the freedom of choice. [The opinion] must instead appear as if forced to the inevitable conclusion." See Robert Ferguson, "The Judicial Opinion as a Literary Genre," *Yale Journal of Law* 2 (1990), 207, cited in Sanford Levinson, "The Rhetoric of the Judicial Opinion," in *Law's Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz (New Haven: Yale University Press, 1996), 189.

they hope will be vindicated in time. Only on rare occasions do judges and justices expose their individuality. A literary approach to law disrupts this pattern of thought and argument. Why *this* judge? Why now? Residing somewhere in between the author is dead and the author is all, a law and literature approach questions the elements of authorship that goes into writing about complicated and nuanced issues.

Similarly, law and literature also takes into account the audience. For whom are decisions written? Certainly the parties involved in the case are (or should be) primary audience members. If the case is being heard by a panel of judges rather than just one, then one's peers are no doubt important audience members as well. But what about judges who are not involved with case? For lower court judges, this issue is less important, but for higher courts – most notably the Supreme Court – their decisions create precedent that must be followed by lower courts. Breaking out of the judicial branch, the legislative and executive branches of government also follow the goings on of the courts. And when a decision is issued on a case surrounded by controversy such as abortion or same-sex marriage, then judges often surreptitiously speak to the general public as well. Not only are the individual audiences an important element in law and literature, but also how a judge *negotiates between* these different audiences.

Another running theme throughout law and literature is the context-embeddedness of legal issues and the mutability of legal ideas, a point shared with advocates of the “living constitution.” Legal ideas, especially the complex ones like liberty and equality, have undergone numerous evolutionary iterations. By most accounts, this is a fairly banal point (just don't tell the originalists). Often, however, law and literature scholars take it one step further and ask what happens in that moment of creation when a new legal idea takes shape within a decision. This act of creation is a central concern for James Boyd White. In *Heracles' Bow*, he calls attention to the

“acknowledgement of inconsistency and tension, the openness to ambiguity and uncertainty,”²² suggesting law is a creative practice of composition with many interrelated aspects combining to produce something akin to a work of art, rather than mere dogmatic rules. White perceives law and language to be “living material” that is used to create meaning;²³ a community practice of defining and redefining itself through the law.²⁴ In this regard, legal discourse provides a vital *constitutive* function that shapes and reshapes a communal identity, a point that I examine in greater detail later in this chapter. Briefly, however, legal and political institutions, whether they are embodied in an Ancient Greek *polis*, the Roman republic, or contemporary judicial bodies, are an important rhetorical lens through which a society views and creates a shared community. The essential yet fragile role of judges is to produce a strong foundational discourse that balances between the pragmatic needs of a given society while simultaneously illuminating a path for moral and cultural development. More importantly, it does so through argumentation and discourse, rather than force, for “only persuasion, and persuasion of the sincere and authentic kind by which community is established, can work.”²⁵ As I argue below, this constitutive function is an important aspect of Nussbaum’s literary judge.

These elements of law as literature are neither universal nor complete, but they nonetheless underscore some of the broad themes at play. Along with law in literature and literature in law, these three approaches compose the bulk of scholarship and overlap one another in many ways. While Nussbaum recognizes these different approaches, borrowing from and contributing to them in various ways, her most compelling contribution strays from the pack, and begins with a seemingly simple question: what does literature – particularly the novel – do *for*

²² James Boyd White, *Heracles’ Bow*, 124.

²³ *Ibid.*, 126.

²⁴ *Ibid.*, 225.

²⁵ *Ibid.*, 20

the act of legal judgment? Borrowing from Walt Whitman's depiction of the "poet-judge,"²⁶ which harkens back to "a normative conception of equitable judgment" advanced by Aristotle, Nussbaum argues that literature helps a judge to address a "diverse population" while negotiating issues of fairness and historic precedent.²⁷ More importantly, a judge steeped in good literature is able to "read the contrast between being an 'arguer' and being 'judgment'" by providing "equitable judgments, judgments that fit the historical and human complexities of a particular case."²⁸ Like the economic judge, the literary judge prizes judicial neutrality, but Nussbaum moves the idea of neutrality away from "remote generality" and "quasi-scientific abstractness" and toward "rich historical concreteness" and "a vision of the human world."²⁹ Stressing the importance of the novel over academic and theoretical texts, Nussbaum contends that good novels provide an engaging style and level of depth absent in other discourses. Literature offers both "horizontal" and "vertical" extensions of life; horizontal in its ability to "[bring] the reader into contact with events or locations or persons or problems he or she has not otherwise met," and vertical in its ability to "[give] the reader experience that is deeper, sharper, and more precise than much of what takes in life."³⁰ Simply put, good literature *improves* judgment, something that should pique the interest of all judges. Its ability to induce readers to critically reflect upon the struggles of achieving the flourishing life is especially important for the literary judge.

Most importantly, good literature reflected upon thoughtfully cultivates a "literary imagination." Nussbaum argues that both the form and the content of narrative literature

²⁶ Nussbaum also refers to the literary judge as the "poetic judge," which she borrows from Walt Whitman. Given Nussbaum's inclination toward literature rather than poetry, I find the literary judge a more apt characterization of her judicial outlook.

²⁷ Nussbaum, *Poetic Justice*, 80-1.

²⁸ *Ibid.*, 81.

²⁹ *Ibid.*

³⁰ Martha C. Nussbaum, *Love's Knowledge: Essays on Philosophy and Literature* (Oxford: Oxford University Press, 1992), 48.

illuminate the robust complexity and profound vulnerability of human life more accurately than a strictly theoretical approach like utilitarianism (which Nussbaum considers synonymous with Posner's law and economics approach) or Kantian deontology understood without the aid of literature. Nussbaum claims that literature returns practical philosophy, especially moral and legal philosophy, to its roots by focusing on what it means to live a good life by "being human and speaking humanly."³¹ As Nussbaum argues in one of her earliest defenses of literature's role in moral philosophy and practical reason, *The Fragility of Goodness*, "Literature, with its stories and images, enters in as an extension of our experience, encouraging us to develop and understand our cognitive/emotional responses."³² Literature grabs our "moral attention"³³ and exposes us to the lives of others in moving and meaningful ways that are simply unattainable in theoretical or academic writing. By attaining and directing our moral attention, it is also highly rhetorical: "the novel... is a morally controversial form, expressing in its very shape and style, in its modes of interaction with its readers, a normative sense of life. *It tells its readers to notice this and not this, to be active in these and not those ways. It leads them into certain postures of the mind and heart and not others.*"³⁴ Echoing the classical definition of a rhetorical trope, Nussbaum values literature's ability to direct attention in particular ways and to examine particular issues that are at the core of what it means to live a flourishing life. Analytic approaches to judgment that ignore the benefits wrought from literature fail to understand the human being *qua* human being. Much like Posner's rhetorical *use* of balance to illustrate the *importance* of balance, so too does Nussbaum both talk the talk and walk the walk. In order to

³¹ *Ibid.*, 53.

³² Martha C. Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy*, 2d ed. (Cambridge: Cambridge University Press, 1991), 186.

³³ Nussbaum, *Love's Knowledge*, 149.

³⁴ Nussbaum, *Poetic Justice*, 2, emphasis added.

strengthen her points and illustrate the power of literary narratives, she continuously weaves them throughout her work.

In many ways, Nussbaum's literary judge is employing a *creative rhetorical invention* that follows the sophistic tradition. Drawing from John Poulakos' analysis of *dissoi logoi* and sophistic rhetoric, Nathan Crick argues for the importance of examining the "process by which *novelty* arises from the clash of competing perspectives."³⁵ Invention thrives when one has a "wealth of available knowledge to produce desirable results."³⁶ Good judicial judgment requires a wealth of knowledge, too; nobody can honestly deny that fact. But when such knowledge is only derived from historic precedent, legal statutes, and an economic worldview, the prospect of robust invention becomes impotent. Crick claims, "The sophistic attitude thus approaches the arts and sciences as resources for rhetorical invention to master contingencies and reduce uncertainty in the midst of conflict and turmoil."³⁷ Although Nussbaum would no doubt oppose being characterized as a sophist,³⁸ her approach to literature and its influence on judgment nonetheless reinforces the sophistic invention Crick and Poulakos articulate. Literature serves as a means of cultivating an ability to imagine the position of another and to genuinely consider their motivations and arguments. The literary judge is not a flatterer, as Plato derided the sophists. She acknowledges that another's experiences can be very different than her own and understanding that others' experiences must be taken into account before good judgment is possible.

³⁵ Nathan Crick, "The Sophistical Attitude and the Invention of Rhetoric," *Quarterly Journal of Speech* 96.1 (Feb. 2010), 36. See also John Poulakos, *Sophistical Rhetoric in Classical Greece* (Columbia: University of South Carolina Press, 1995).

³⁶ *Ibid.*

³⁷ *Ibid.*, 39.

³⁸ See, for example, Martha C. Nussbaum, "Sophistry about Conventions," *New Literary History* 17.1 (Autumn, 1985), 129-139.

If invention is so important to good judgment, why has Nussbaum's literary judge faced so much resistance amongst legal scholars and acting judges? One reason may be its inherently humanistic approach that remains highly resistant to systematic, quantitative assessment. James Crosswhite hails invention as the most valuable element of rhetoric, "the one that historically dignifies rhetoric and lifts it from the occasional declines to which it has been subject," but he's also quick to note its "resistance to modeling."³⁹ In other words, invention – especially the type of invention that is inspired by literature – lacks the standards that the economic judge values so much. But should it be standardized? *Can* it be standardized? Herein lies the problem. Society demands that judges be well prepared for their duties and be able to perform said duties with a certain degree of uniformity lest we have the unpredictable "wildcard" judge. Crosswhite attempts to articulate a model of invention by utilizing *The New Rhetoric*, but struggles to pin down a definition that which would satisfy an economist or analytic philosopher. He notes that invention cannot be inspired "from isolated facts or values"⁴⁰ because "worlds are not inert systems."⁴¹ Although the economic judge may not conceive of legal issues operating in an inert world, he or she relies upon a number of fixed assumptions about human motivation; namely, a rational self interest that strives for wealth maximization.

An imaginative invention, however, can be sporadic and ephemeral. Even within literary experiences, two well read individuals can read from two very different libraries. Given the immeasurable amount of literature available, even the best read individual likely will have but a few books in common with my own library. Judges have no doubt read a common repository of cases, but outside of such reading how much overlap can we expect? Is there a way to *train* a

³⁹ James Crosswhite, "Awakening the *Topoi*: Sources of Invention in *The New Rhetoric's* Argument Model," *Argumentation and Advocacy* 44 (Spring 2008), 169.

⁴⁰ *Ibid.*, 172.

⁴¹ *Ibid.*, 173.

literary imagination capable of adequate creative invention? As Crosswhite notes, invention, on its own, cannot be trained. In the same regard, one cannot simply take a class to learn how to be funny. Teaching one to be inventive or humorous by distributing a list of attributes that constitute invention or humor will fail miserably. Yet, both invention and humor can be *cultivated*.

Crosswhite notes three particular capabilities necessary for invention: an awareness of one's surroundings, a sense of the actions and motivations taking place, and the ability to organize this knowledge and put it toward the most appropriate course of action. "These are capabilities that are acquired in a *broad education* that involves both knowledge of the world and repeated practical experience with arguments that arise in real situations."⁴² Like any art, whether it's painting, acting, composition, or motorcycle maintenance, rhetorical invention is not learned through a set of formulae. There is no *one* way to paint or act or write or tend to your boss hog. There are better and worse ways of approaching these arts, but they all depend on one's experience, the contextual nuances of the situation, and the desired result. Thus, the call for a broad education becomes all the more important, which is similarly at the heart of Nussbaum's project.

Nussbaum's defense of the liberal arts and her legitimate worry about the decline of the humanities in American schools and universities is well documented.⁴³ For our present purposes, the literary education of the law-student-turned-judge is of the utmost importance. In *Poetic Justice*, Nussbaum recounts a number of experiences she has had while teaching at the notably conservative University of Chicago School of Law. Highly critical of rational-choice theory and the economic judge (which was conceived, in large part, at the University of Chicago through the

⁴² Crosswhite, 173, emphasis added.

⁴³ See Martha C. Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* (Cambridge: Harvard University Press, 1998) and *Not for Profit: Why Democracy Needs the Humanities* (Princeton: Princeton University Press, 2010).

work of Posner and Becker), Nussbaum focuses most of her attention on Charles Dickens' *Hard Times*. The novel satirically illuminates the blindness Nussbaum argues is inherent to the economic way of seeing. As Nussbaum and the students navigate through the text, the deficiencies of the economic mindset become apparent. Noting the criticisms cast against literature as a form of argument – that it is “unscientific and subversive of scientific social thought,” that it is “irrational in its commitment to the emotions,” and that it “has nothing to do with the impartiality and universality that we associate with law and public judgment”⁴⁴ – Nussbaum responds by highlighting good literature's ability to disrupt and disturb misguided conventions,⁴⁵ especially those instantiated by economic thinking.

Nussbaum's aspirational account of literature's contribution to legal judgment faces an early challenge when pressured to define what constitutes “good” literature. Nussbaum regularly turns to the works of Charles Dickens and Henry James, with Marcel Proust and Samuel Beckett making steady appearances as well. A common theme connecting these authors is the density and length of their works. Unless one is vacationing on the hard, uncomfortable beaches of Maine, these are not summer beach reads, but rich explorations into the lives of complex characters. Although these writers and the others that Nussbaum incorporates in her scholarship have been widely celebrated, she nonetheless selects novels that align with her liberal worldview, predisposing the reader toward her political ideology and philosophical aims. Dickens' *Hard Times* is intended to disrupt the reader's faith in utilitarianism. James' *The Golden Bowl* is intended to illuminate the complexity and importance of human emotions, especially within intimate and familial relationships. These novels have been lauded for their perspicuity and are often considered part of the general canon of great western literature along

⁴⁴ Nussbaum, *Poetic Justice*, 4.

⁴⁵ *Ibid.*, 5.

with other mainstays like Chaucer, Shakespeare, Melville, and Joyce. Yet, popular novels such as Ayn Rand's *Atlas Shrugged* and *The Fountainhead* or Stephen Crane's *The Red Badge of Courage* challenge her preconceived notions about what a good society and what a good life entail. Crane's work, for example, downplays the role that compassion plays in acts of courage, starkly contrasting Nussbaum's position. Although one cannot fault Nussbaum for selecting texts that support her argument – we all do this – her characterization of good literature may operate as a self-serving bias, edifying readers on *her* conception of the flourishing life while ignoring or downplaying others.

Her constant return to Dickens and James places her in an interesting rhetorical bind. On the one hand, such choices reflect an academic elitism wherein good literature is almost inaccessible to the casual reader, reinforcing Posner's common sense argument that “calls down” academics from their lofty perch. Anyone who has read (or *attempted* to read) James' *The Golden Bowl* will understand. At over 400 dense pages, even the most stout of heart no doubt will struggle through the labyrinth of words as James waxes literary. Dickens is little different, although slightly more accessible. And this says nothing about excavating and understanding the deeply important meanings Nussbaum finds in these texts. Must these epic tomes constitute good literature? Is there no room for something more approachable yet nonetheless profound? Kurt Vonnegut prided himself on such a writing style and his works have been equally celebrated.

On the other hand, Nussbaum is also susceptible to attacks from feminist and critical theorists for supporting traditional social norms through the selection of patriarchal literature.⁴⁶

⁴⁶ For example, see bell hooks, “Postmodern Blackness,” *Postmodern Culture* 1.1 (Sept. 1990); Judith Butler, “Imitation and Gender Insubordination,” in *Inside/Out: Lesbian Theories, Gay Theories*, ed. Diana Fuss (New York: Routledge, 1991); Anne Babeau Gardiner, “Feminist Literary Criticism: From Anti-Patriarchy to the Celebration of Decadence,” *Modern Age* 49.4 (Fall 2007), 393-9; and Mary Eagleton, *Feminist Literary Criticism* (London: Longman, 1991).

After all, Dickens, James, and her other favorites are a collection of dead white men writing about dead white issues. Steeped in analytic philosophy and the liberal political tradition, Nussbaum is particularly resistant to postmodernism, as her longstanding intellectual feud with Judith Butler indicates.⁴⁷ In *Cultivating Humanity*, Nussbaum asserts that postmodernists “do not justify their more extreme conclusions with compelling arguments” and she goes on to characterize Derrida’s commentary on truth as “simply not worth studying” if one has had even limited exposure to academic philosophy.⁴⁸ Describing Foucault’s work as “the only truly important work to have entered philosophy under the banner of ‘postmodernism,’ she nonetheless addresses the problems with his scholarship, “from its historical incompleteness to its lack of conceptual clarity.”⁴⁹ In her fervent defense Aristotle, J.S. Mill, and other traditional philosophical mainstays, an underlying criticism of her work echoes Audre Lorde’s famous statement that one cannot dismantle the master’s house with the master’s tools.

For her part, Nussbaum is aware of such criticisms but does not find them very convincing. She accepts the fact that the literary canon is dominated by dead white men who mainly wrote about other dead white men, but that does not mean their works lack significant value. Nussbaum notes that a “central role of art is to challenge conventional wisdom and values,”⁵⁰ which closely aligns with the project of philosophy’s patron “saint,” Socrates. The divide between Nussbaum and her critics is less about which books ought to be read for edification (although she certainly has her favorites) and more about the teleological objectives she finds part and parcel with reading “good” literature. *Why do we read?* In short, we read to become better people and better citizens. We read to expose ourselves to people that we would

⁴⁷ See Martha C. Nussbaum, “The Professor of Parody,” *The New Republic* (Feb. 22, 1999), 37-45.

⁴⁸ Nussbaum, *Cultivating Humanity*, 41.

⁴⁹ *Ibid.*, 40.

⁵⁰ *Ibid.*, 99.

never encounter in our day-to-day lives. We read to explore complicated situations and imagine ourselves trying to work through them. Her wariness of postmodernism and deconstructionism is rooted in a fear that they are abandoning the moral and civic dimensions of cosmopolitan human living. This is one of her starting premises, which she asserts sets her at odds with many of her critics.

At its best, argues Nussbaum, literature has the ability to ignite our imaginations, granting us an opportunity to experience a life quite unlike our own with a depth and nuance that only well crafted narratives can produce. Literature allows an individual “the ability to imagine what it is like to live the life of another person who might, given changes in circumstance, be oneself or one of one’s loved ones.”⁵¹ Paralleling a theme in sophistic rhetoric, she continues, claiming, “*Literature focuses on the possible*, inviting its readers to wonder about themselves...

[L]iterature works typically invite their readers to put themselves in the place of people of many different kinds and to take on their experiences.”⁵² Such consciousness-raising may be possible through philosophical discourse, but the *impact* of a novel is often much more profound. Good novels have a rhetorical force with which few philosophical treatises can compete. Progress, argues Nussbaum, is not taught; rather, one is led to it “by a word, by a story, by an image – to see some new aspect of the concrete case at hand.”⁵³ If law is a progressive and moralizing force in society, which Nussbaum heartily defends, then literature serves as a vital resource for guiding judges, who in turn guide society.

For a sitting judge, this ability to imagine the lives of others is not just important; it is *necessary* for good judgment. Judges have an immense responsibility in and to our society. As

⁵¹ Nussbaum, *Poetic Justice*, 5.

⁵² *Ibid.*, emphasis added. See also, “Literature and the Moral Imagination,” in *Love’s Knowledge*.

⁵³ Nussbaum, *Love’s Knowledge*, 160.

the final arbiters and interpreters of law, they hold the fates of our country's most vulnerable denizens in their decisions. As Robert Cover stresses, they can quite literally author a life or death decision, a constant reminder of the violence undergirding justice.⁵⁴ As the gatekeepers of the Constitution, their decisions also shape and reshape our shared democratic culture. At its best, the literary imagination can inspire "identification and sympathy in the reader,"⁵⁵ traits that Nussbaum finds essential for good judgment. The narratives found in good literature cultivate habits that make a strange "other" an object of unselfish intrigue and genuine concern, rather than fear, paranoia, disinterest, or disgust. Nussbaum asserts that the literary imagination also reflects a "*public* imagination" in its ability to "steer judges in their judging."⁵⁶ Reading literature makes one better prepared to author better decisions and recent research in psychology bears out this point.⁵⁷

Important to note, Nussbaum's turn to imagination should not be construed as a flight of fancy one often associates with the term. Rather than an imagination that conceives of that which is unbelievable, erroneous, or delusional, Nussbaum suggests that an *attuned* imagination that remains contained in the strictures of reality does quite the opposite; it has the ability to expand one's perspective in order to see *more* of the realities that surround us. In one of her more recent works, *From Disgust to Humanity*, Nussbaum argues that it is only through imagination that one could ever "become able to see another as human... Only by imagining how the world looks through that person's eyes does one get to the point of seeing the other person as a someone and

⁵⁴ See Martha Minow, Michael Ryan, and Austin Sarat (eds.), *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1995).

⁵⁵ Nussbaum, *Poetic Justice*, 5.

⁵⁶ *Ibid.*, 3.

⁵⁷ See Maja Djikic, Keith Oatley, and Mihnea C. Moldoveanu, "Opening the Closed Mind: The Effect of Exposure to Literature on the Need for Closure," *Creativity Research Journal* 25.2 (2013), 149-154.

not a something.”⁵⁸ She continuously claims that one’s imagination can bring others into view and allow us to perceive them more readily and more fully.⁵⁹ By embodying an attuned imagination that has expanded her perception, the literary judge is better situated to employ good legal judgment, which Nussbaum characterizes as “the wise supplementing of the generalities of written law by a judge who imagines what a person of practical wisdom *would* say in the situation, bringing in the business of judging the resources of a rich and responsive personality.”⁶⁰ When deployed effectively, the literary imagination illuminates those paths of persuasion that tend to be blocked or obfuscated by rigid standards.

Nussbaum is certainly not the first advocate of law and literature to acknowledge the importance of imagination. James Boyd White’s *The Legal Imagination* tackles the issue head-on, although his approach differs from Nussbaum’s. Reflecting an approach focused on law *as* literature more than literature *for* law, White argues that the legal style of argumentation and persuasion is intricately connected to that of literary writing. He describes his project as “a study of what lawyers and judges do with words,” which includes “counseling, arguing, brief-writing, [and] negotiating.”⁶¹ Like literature, legal language is confined by an inherited tradition that guides its meaning and unites users under a shared history. Words and their meanings, however, are not fixed, and altering them requires a different set of rhetorical appeals, a different way of employing one’s legal imagination.

White highlights legal education as training students to think and, more importantly, *to speak* like a lawyer. Such training includes the law’s unique history and a technical, often

⁵⁸ Martha C. Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (Oxford: Oxford University Press, 2010), xvii.

⁵⁹ Martha C. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge: Cambridge University Press, 2001), 7, 84.

⁶⁰ Nussbaum, *Love’s Knowledge*, 100.

⁶¹ James Boyd White, *The Legal Imagination* (Chicago: University of Chicago Press, 1973), xxxi.

idiosyncratic discourse. Yet, as White notes, legal language operates within a broader social world. As such, it is “a sort of social literature... a way of talking about people and their relationships.”⁶² He turns to the legal imagination as a way to illustrate this important connection and to reinforce its vital place within law. Lawyers and judges, poets and novelists – they all construct and reconstruct their communities through rhetoric and persuasion. White argues that the law has the ability to create, maintain, undermine, and recreate different worlds with different possibilities, much like a great work of literature. Even though the parameters of legal argumentation may be narrower than that of a literary work, they nonetheless share a common interest in a community of readers.

In subsequent work, White has clarified and built upon his conception of the literary imagination. In *Heracles' Bow*, White claims that “the law is a language, a set of resources for expression and social action, and that, accordingly, the life of the lawyer is at its heart a literary one – a life both of reading the compositions of others (especially those authoritative compositions that declare law) and of making compositions of one’s own.”⁶³ Legal writing is but the other side of the same literary coin. Both involve an author attempting to convey a particular message while still aware of the challenges inherent to interpretation. Both use a shared language to give ideas weight and significance, imbuing them with a power to move the mind and the will of others. Both adopt particular words and phrases that “acquire their meaning from their gradual redefinition.”⁶⁴ And unlike the ephemerality of private conversation, both “speak to a range of readers, not just one, and...operate across a spectrum of contexts. They seek to establish the meaning of terms not merely for one conversation, for the present moment, but for a class of

⁶² Ibid., 243.

⁶³ James Boyd White, *Heracles' Bow*, 77.

⁶⁴ Ibid., 87.

conversations across time. Every legal and literary text implies a reader who will use it in circumstances that cannot now be known.”⁶⁵ Unlike Roland Barthes’ assertion that the “author is dead,” White asserts that the author and the audience are vibrantly alive and matter greatly both for law and for literature.

Interestingly, White’s scholarship on law and literature is all but absent in Martha Nussbaum’s work. Save an exceptionally brief footnote citing *The Legal Imagination*, Nussbaum almost entirely ignores his important contribution.⁶⁶ Her omission aside, the two share a few key points in common. Much like James Boyd White’s conception of legal interpretation, Nussbaum argues that one must read legal doctrines in a similar way as one would read literature. Although the subject matter and desired effect may be different, law and literature involve assessing and passing judgment on individuals. Viewing law as the creation and recreation of communities, White claims that “a purely conceptual and logical language. Like that of modern analytic philosophy, will always be incomplete or defective.”⁶⁷ Like Icarus flying toward the sun, the more that analytic legal theorists attempt to create a systematic, (pseudo-)scientific language of law, the more quickly they will fall from their heights. Rather than turning solely to science and logic for inspiration and influence, White argues that literature provides a more fitting example of what law is and does for a community.

Nussbaum and White part ways in the role that imagination plays in judgment. White hopes the turn to imagination would remove the blinders placed on law students (and, subsequently, lawyers and judges) to think, write, and speak about law within the confines of the technical tradition. Actual literature – Dickens, James, Joyce, and the like - only plays a

⁶⁵ Ibid., 88.

⁶⁶ Nussbaum, *Love’s Knowledge*, 43n.

⁶⁷ James Boyd White, *Heracles’ Bow*, 5.

tangential role within this scheme; it serves as an example, albeit a profound one. Throughout his work, White draws from literature – usually classical works – in order to illustrate how legal argumentation parallels the rhetorical situation of literary characters. White’s interpretation of the legal imagination strives to make this connection lucid. Nussbaum would certainly agree, but takes a more panoramic view of the legal system. Whereas White’s legal imagination is narrow, focused on a select group of people, Nussbaum expands the idea of the legal imagination and its connection with literature. Her arguments are not specifically intended for judges, although they are a group of individuals who could most benefit from the literary imagination.

Clearly, the literary judge must be sensitive to the moral function of law, something many legal scholars resist. As Nussbaum argues, the moral imagination is part and parcel with the literary imagination, both of which ought to function in legal judgment. *Lawrence v. Texas* exhibits this function well:

Lawrence's great achievement, then, was not conceptual clarity or sharp practical guidance, but a cast of mind, a judicial approach to liberty interests. In essence, it consists in a rejection of the politics of disgust so amply evident in *Bowers*, together with the Devlinesque conception of society dominated by tradition and solidarity, in favor of a politics of humanity that is the heir of John Stuart Mill both in its zealous protection of individual liberty and in its reliance on the ability to imagine a variety of human purposes... That's the achievement of the moral imagination. *Because law is inseparably bound up with the moral imagination, it is also an achievement of law.*⁶⁸

Her characterization of the literary imagination and its embodiment in the literary judge serve as an important counterargument to Posner’s economic judge. Drawing heavily from Aristotle,

⁶⁸ Nussbaum, *From Disgust to Humanity*, 89.

Nussbaum believes that practical reason and, consequently, good judgment are derived from human perception, which recognizes a certain degree of *incommensurability* that the economic judge lacks. If rhetoric is a “way of looking at things” as Thomas Farrell suggests, then the economic model is blinded by its adherence to economic rationality and the discursive confines therein. According to Nussbaum, “Frequently a reliance on the powers of the intellect can actually become an impediment to true ethical perception, by impeding or undermining these responses.”⁶⁹ The economic judge, for all of his vast intelligence, does not miss the forest for the trees, but rather the trees for the forest.

Nussbaum stresses the importance of imagination and the contribution that literature plays therein by stressing the narrow perception and altogether lack of imagination employed by the economic judge. She notes that the economic judge wants to eschew the humanistic elements of their “science” in favor of an ephemeral neutral position, but at what cost? Ideally, the transition would be seamless. In reality, however, the economic model attempts to quantify the unquantifiable. Noting the “economist’s way of thinking,” Nussbaum is wary of economizing the non-economic. Citing Posner’s economic cost-benefit analysis of different types of sexual intercourse as a prime example,⁷⁰ she questions not only the ability to distill something as intimate as sex into such terms, but also wonders what happens to the situation and individuals involved when an economic discourse is adopted. Where does emotional involvement come into play (and is that a cost or a benefit)? What about the history of the individual? Does it matter if someone was raised in a strict, conservative religious tradition that stigmatizes sex? What about individuals who were molested as children or raped at any point in their lives; ought we consider

⁶⁹ Nussbaum, *Love’s Knowledge*, 81

⁷⁰ Richard A. Posner, *Sex and Reason* (Cambridge: Harvard University Press, 1992), 119-20, as cited in Nussbaum, *Poetic Justice*, 18.

such traumatic experiences in our cost-benefit analysis? If so, how could we measure it? More importantly, *should* we measure it?

Describing the economic approach as an “as if” model in that it only works if people are acting *as if* they are rational wealth maximizers,⁷¹ Nussbaum fears the many ways in which economics has seeped into all manner of discourse. Creating an allure via its “elegant simplicity,” economic rational-choice theory boils down individual decisions to (overly) simple economic terminology. Characterizing the economic judge as “extreme,” she worries about an “across the board” application of economic rational-choice theory because it leaves out important elements of our humanity. “First,” Nussbaum argues, “it reduces qualitative differences to quantitative differences...by a process of abstraction from all in people that is not easily funneled into mathematical formulae.”⁷² It involves the whole range the humanistic, unquantifiable, incommensurable experiences that give normative character to a person and her community. Whereas Posner’s economic judge forms equations to maximize “correct” decisions, Nussbaum’s literary judge asks questions to elicit narratives that better illuminate the situation.

Nussbaum’s second critique of the economic judge is a variation on the same theme: “The [economic] mind, bent on calculation, is determined to aggregate the data gained about and from individual lives, arriving at a picture of total or average utility that effaces personal separateness as well as qualitative difference.”⁷³ Under the auspices of fairness, a person becomes a list of statistics. Quantitative assessment *requires* us to speak *as if* our lives fit the economic model. Yet, in order to function properly it must neglect or manipulate the qualitative, humanistic pegs to fit in the smaller economic holes. Even Ronald Coase doubted that his now-famous Coase

⁷¹ Nussbaum, *Poetic Justice*, 19.

⁷² *Ibid.*, 20.

⁷³ *Ibid.*, 21.

Theorem, which undergirds much of Posner's jurisprudence, could adequately assess the qualitative, contextually-based nuances of real-life scenarios. Nussbaum wants to reverse the process. Instead of sanding down the pegs to a smaller size (losing a lot of peg in the process), she wants to expand the hole and preserve the true pegginess of the peg.

Part of Nussbaum's rhetorical strategy is to highlight the ways in which economics reaches too far its attempt to justify judicial decisions or public policies on economic grounds, which reminds me of a good joke I heard the other day. A mathematician, an statistician, and an economist apply for the same job. The interviewer calls in the mathematician and asks, "What do two plus two equal?" The mathematician replies, "Four." The interviewer asks, "Four, exactly?" The mathematician looks at the interviewer incredulously and says, "Yes, four, exactly." Then the interviewer calls in the statistician and asks the same question, "What do two plus two equal?" The statistician says, "On average, four - give or take ten percent, but on average, four." Then the interviewer calls in the economist and poses the same question, "What do two plus two equal?" The economist gets up, locks the door, closes the shade, sits down next to the interviewer and says, "What do you want it to equal?" All joking aside, Nussbaum worries about the economic judge's eagerness to decide cases based on a pseudo-scientific process that eschews humanistic perception and the imaginative ability to understand others. "The intellect is not only not all-sufficient, it is a dangerous master. Because of its overreaching, knowledge can be 'dragged around like a slave.'"⁷⁴ One can rationalize all manner of sins. The literary judge must possess extensive knowledge and articulate well-reasoned arguments, but she must also be able to place that knowledge in conversation with an imaginative invention in order to reach a sound judgment.

⁷⁴ Nussbaum, *Love's Knowledge*, 81.

One of Nussbaum's favorite examples of the literary imagination's role in judicial decision-making is the 1967 antimiscegenation case, *Loving v. Virginia*. The landmark Supreme Court case examined the legality of marriage prohibitions between races. In 1958, Richard Loving, a white man, married Mildred Jeter, a black woman, in Washington, D.C. The couple moved to Virginia, which was one of sixteen states with laws that prohibited interracial marriage, and they were indicted by a grand jury. After pleading guilty, they turned to the state trial court to vacate the judgment and set aside the sentence on the grounds that it violated the Fourteenth Amendment. Failing to persuade the state court and the Supreme Court of Appeals of Virginia, the Lovings appealed to the U. S. Supreme Court. In the unanimous decision authored by Chief Justice Earl Warren, the court held that the state had no legitimate interests in racial classifications that were "independent of invidious racial discrimination." Consequently, the opinion found Virginia in violation of the Due Process clause of the Fourteenth Amendment.

Nussbaum's interest in this case not only concerns the significant step taken by the Supreme Court in expanding equality, a democratic virtue she sees as a ramification of a conscientious imagination.⁷⁵ The case also serves as a judicial response to Herbert Wechsler's "Toward Neutral Principles of Constitutional Law," a landmark essay in jurisprudence authored in 1959. Wechsler, who served as an Assistant Attorney General during the infamous *Korematsu v. United States* case and argued for the *New York Times* in the *Times v. Sullivan*, asserted that judicial decisions should be based on "neutral principles," or principles that "transcend any immediate result that is involved."⁷⁶ Wechsler cited *Brown v. Board of Education* as a case that flouted the idea of neutral principles in favor of political opportunism, later arguing that the case

⁷⁵ Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*. (Cambridge: Belknap Press, 2006), 323.

⁷⁶ Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73 (1959), 1.

"extended far beyond its rationale."⁷⁷ Although highly contested, the reliance on neutral principles continues to hold sway in the American judiciary, especially with constitutional originalists.

Nussbaum introduces Wechsler's idea of neutral principles because it highlights the insidious nature of a judge devoid of imagination. "From Wechsler's lofty distance from the human experience of discrimination," argues Nussbaum, "he fails to notice perfectly articulable and universalizable principles that do include the asymmetrical meaning of segregation and the history of segregation as stigma."⁷⁸ Consequently, his "failure of imagination" leads him to specious conclusions; namely, that "any law framed in a verbally neutral manner...cannot possibly be discriminatory."⁷⁹ The literary minded literary judge, however, has a panoramic view of citizenship and humanity, enabling her "to imagine situations of hierarchy and to appreciate their human meaning."⁸⁰ In *Loving v. Virginia* and *Brown v. Board of Education*, the literary judge would claim that the judges issuing the opinion were able to see *through* the purportedly neutral language. Their perceptions had been opened to include a greater swath of human experience. Law, as a normative process created by humans for the guidance and control of humans, can never be entirely neutral. Thus, our imaginations serve an important rhetorical function by opening up more paths of argumentation and cultivating a keen sense of rhetorical invention.

Critics may assert that Nussbaum's literary judge is more of an antagonist than a balanced judiciary figure, a figure at the margins who utilizes her literary imagination in order to

⁷⁷ Herbert Wechsler, "The Nationalization of Civil Liberties and Civil Rights," *Texas Quarterly* 12.2 (1970).

⁷⁸ Martha C. Nussbaum, "Narratives of Hierarchy: *Loving v. Virginia* and the Literary Imagination," *Quinnipiac Law Review* 17 (1997), 341.

⁷⁹ *Ibid.*

⁸⁰ Nussbaum, *Upheavals of Thought*, 444-5.

admonish established precedent without reflecting on the reasoning and restraints of the original decision. On the contrary, Nussbaum asserts that imagination plays a vital role in understanding both (or multiple) sides of an issue, even those an individual may find uncomfortable:

The idea that constitutional adjudication requires imagination does not turn the law into a soft morality of “*tout comprendre, c’est tout pardonner*.” Indeed, notice that imagination was exercised, in the cases I have discussed, on both sides of the matter. Judges had to identify the purpose animating the antimiscegenation laws, and that required them to see into the ideas of contamination and taint that constituted “white supremacy,” before they could articulate what that legal regime was all about.⁸¹

Although Nussbaum focuses on the literary imagination’s ability to vicariously experience the disenfranchised, emphasizing cases concerning African-Americans (*Loving* and *Brown*), women (*Roe v. Wade* and *Planned Parenthood v. Casey*), and the LGBTQ community (*Bowers v. Hardwick*), the literary judge must imaginatively engage the histories, traditions, motives, social pressures, and expectations of the opposition as well. What sorts of experiences shape a white supremacist or an anti-LGBTQ bigot? What rhetorical appeals do they make? How do they frame their position? Much like the impetus driving Kenneth Burke to examine Hitler’s rhetoric in “The Rhetoric of Hitler’s Battle,” the literary judge must attempt to grasp those positions she finds abhorrent. To disregard them out of hand would be a failure to address their narratives, a failure to imagine the web of experiences and relationships that create narrow-mindedness, a failure to understand the situation before issuing a judgment.

Robert Pirsig’s analogy of reason and experience chugging along as a freight train captures this sentiment well. In *Zen and the Art of Motorcycle Maintenance*, Pirsig likens

⁸¹ Nussbaum, *From Disgust to Humanity*, 49-50.

humans to mile long freight trains filled with all of the concepts that we have inherited from the past – from language, culture, and experience. These concepts and experiences fill the boxcars being pulled along. The older we get, the more experiences we have, the heavier the freight becomes. Consequently, it has a lot of momentum, a lot of weight behind it, but the front of the train is constantly breaking into new, unexplored territory. This “pre-intellectual” experience is well funded by not only one’s own experience, but also the collective cultural experience in which we learn to think and to speak. We all have a mile long train full of weight that comes to bear on our experiences. In order to do something well, we need to have a lot of experience in our boxcars such that the front of the train is prepared for new horizons. In essence, this is what it means to be an artist. Even a seemingly mundane task such as repairing a motorcycle takes a lot of experience. And this experience informs judgment.

For a judge, the boxcars are filled with some expected cargo: knowledge of the legal system and how it operates, the role of the judiciary within our democratic republic, historic precedent, the facts of the case, and so on. But the judge’s personal and cultural experiences also come into play, whether conscious of them or not. One of Nussbaum’s greatest concerns is the blind devotion to legal and intellectual experience accompanied by a narrow set of personal and cultural experiences that remain within the confines of a judge’s lived life. Most likely, these experiences will not adequately represent the broad swath of the American public, many of whom have a set of experiences markedly different than those of the judges. Yet, law constantly affects these people and their experiences. Most judges come from privileged backgrounds. Holmes, one of the most celebrated judges in American history, was part of the so-called “Boston Brahmin.” And he was no exception. Even contemporary judges who come from meager beginnings attain privilege in their adult lives. Just look at the schools that most federal

judges have attended: Harvard, Stanford, Yale, Columbia, Berkeley. Yes, they had to work incredibly hard, but their hard work is markedly different than the hard work of the single mother cleaning hotel rooms or the coalminer going into the depths of the earth. If they were not privileged in their youth, judges are certainly privileged once they enter school and begin their profession. As a senior judge in the British legal system recently asserted, most of her colleagues live “sheltered lives” that negatively influence their capacity for good legal judgment.⁸²

Good judges must be attentive to the whole of the citizenry, which includes people remarkably different than them. Alas, they cannot go out and experience their lives so easily. They have limited time and resources. And their mere presence may alter how others act and react to them (also known as the Hawthorne Effect). Literature, however, offers judges a rich set of experiences that they may not otherwise have. Literature grants access into the highly emotional and deeply nuanced inner dialogue of characters, an experience anyone rarely, if ever, enjoys in their day-to-day interactions. The literary judge *is* an artist because she must take all of this knowledge and experience and put it to good use. Anyone can fill in a formula and get an answer, as the economic judge proposes. But only the attentive, sensitive, compassionate person who strives to understand the defining characteristics, histories, and experiences of those different from her will become a good judge.

3.2 CULTIVATING INTELLIGENT EMOTIONS

The literary imagination’s ability to stretch a judge’s perspective and to enhance her perceptive powers of invention comes to fruition through emotional intelligence. For Nussbaum, the literary

⁸² David Barrett and John Bingham, “Judges Lead ‘Sheltered Lives’, Warns Britain’s Most Senior Female Judge,” *The Telegraph*, April 6, 2013. Retrieved from http://www.telegraph.co.uk/news/uknews/law-and-order/9976400/Judges-lead-sheltered-lives-warns-Britains-most-senior-female-judge.html#disqus_thread.

imagination and a nuanced emotional engagement are inseparably linked. All emotions, however, are not created equal. While she acknowledges great promise in a compassionate literary judge, Nussbaum is ever wary of the role that emotions like disgust and shame play in shaping practical judgment. Her call for an “intelligence of emotions” responds to the longstanding criticism against rhetorical appeals to *pathos* and challenges the ubiquitous “reasonable person” legal trope. As Nussbaum notes throughout numerous works, emotions are always there, always playing a role, always shaping judgment. To ignore them or place them at the tertiary of legal decision-making throws the baby out with the bathwater. Recognizing this, Nussbaum presents the literary judge as possessing a rich and nuanced view of emotions and their intimate relationship with legal judgment.

Nussbaum claims that competing theories of law can be dangerously reductionist or ignore the necessary role that emotions play in judgment. Her attacks against the economic judge illustrate one such reductionist approach. The economic judge utilizes a grammar that argues “in terms of” economic rationality, a position that eschews emotions as a valuable element of the decision-making process. Echoing Plato’s longstanding criticism of rhetoric and emotion, numerous approaches to law and justice position reason and the passions at odds with one another.

Nussbaum’s criticisms are not reserved for conservative leaning theorists. John Rawls’ egalitarian opus, *A Theory of Justice*, similarly maligns emotion as an inept guide for rational decision-making. Even though Nussbaum appreciates Rawls’ egalitarian bend and his appropriation of Kantian dignity, the veil of ignorance distances emotions from deliberation. So, too, does Jürgen Habermas’ ideal speech situation. Both theorists advocate for liberal approaches to law and justice, but resist integrating emotion into their grand schemes. Nussbaum argues that

competing legal philosophies are too focused on one narrow and limited perspective, ultimately missing the ubiquity of emotions in the formation of judgment. By framing competing models of judgment as naively reductionist, Nussbaum attempts to position the literary judge as possessing an adequately panoramic view of human life, a judge who considers the whole of human flourishing, including (and especially) the affective dimension.

Although emotion has enjoyed a handful of defenders throughout the history of philosophy, opponents of emotion have been greater in number and louder in protest. The Stoics, intellectual heirs of Plato, were staunchly opposed to emotions as a guide save a handful of later Stoics like Cicero and Seneca. The Age of Reason and the Enlightenment were similarly wary of emotions, promoting reason as the best guide for human action. Interestingly, Adam Smith, the father of modern economics, wrote extensively on “moral sentiments,” but contemporary economists often forget that legacy. The “invisible hand” is not described as being attached to an “invisible heart.” The scientization of philosophy and its dedication to logic throughout the 20th century has continued to resist the insights that emotions may introduce. Again, philosophers throughout the long history of Western thought do not argue that emotions are bad (save a few), but they nonetheless remain wary of emotions as what Nussbaum describes as “intelligent responses to the perception of value.”⁸³ Emotions are troublesome, they get in the way; thus, the majority of philosophy (and, consequently, jurisprudence) focuses on a cleaner, tidier view of reason. This is not to say that emotion has been ignored in philosophy. In fact, there has been a swelling interest in the topic within the last 30 years.⁸⁴ Although this scholarship has been

⁸³ Nussbaum, *Upheavals of Thought*, 1.

⁸⁴ Approaches include socio-cultural theories, evolutionary explanations, and aesthetic approaches to emotion, as well as the longstanding divide between cognitive and non-cognitive theories. In addition to Nussbaum’s germane contribution to emotion and philosophy, see also Paul Ekman and Richard J. Davidson, eds., *The Nature of Emotion: Fundamental Questions* (Oxford: Oxford University Press, 1994); Robert C. Solomon, *The Passions: Emotions and the Meaning of Life* (Indianapolis: Hackett,

growing, emotions nonetheless remain at the tertiary of philosophical scholarship and, in many ways, law has followed philosophy's lead.⁸⁵

Nussbaum finds such resistance to emotional perception problematic because it is detached from how individuals actually live their lives. Taking a page from Posner's rhetorical playbook described in the previous chapter, she criticizes competing theories for their aloofness: "an account of human reasoning based only upon abstract texts such as are conventional in moral philosophy is likely to prove too simple to offer us the type of self-understanding we need."⁸⁶ Importantly, the predominantly rational approaches to law that spurn emotion suffer from a *limited vocabulary*. Following legal theorist William Miller, "Emotions are feelings linked to ways of talking about those feelings, to social and cultural paradigms that make sense of those feelings by giving us a basis for knowing when they are properly felt and displayed."⁸⁷ Akin to Nussbaum's criticism of the economist's restrictive "way of thinking," practical legal judgment requires a vocabulary - a way of looking at and speaking about the world - that reflects human flourishing, which necessarily includes emotions. As Hegel reminds us, "To him who looks upon

1993); Adam Morton, *Emotion and Imagination* (Cambridge: Polity Press, 2013); Anthony Cunningham, *The Heart of What Matters: The Role for Literature in Moral Philosophy* (Berkeley: University of California Press, 2001); Giovanni Stanghellini, *Emotions and Personhood: Exploring Fragility, Making Sense of Vulnerability* (Oxford: Oxford University Press, 2013); Jesse J. Prinz, *Gut Reactions: A Perceptual Theory of Emotion* (Oxford: Oxford University Press, 2006); Peter A. French and Howard K. Wettstein, eds., *Philosophy of Emotions* (Notre Dame: University of Notre Dame, 1998). In addition, the Oxford University Press recently published a collection of essays examining the relationship between philosophy and emotion: Peter Goldie, ed., *The Oxford Handbook of Philosophy of Emotion* (Oxford: Oxford University Press, 2010).

⁸⁵ For example, see Russell B. Korobkin and Thomas S. Ulen, "Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics," *California Law Review* 88 (2000): 1051-144; Katherine K. Baker, "Gender and Emotion in Criminal Law," *Harvard Journal of Law and Gender*, 447 (2005), 447-66. Both articles underscore the legal system's reluctance to acknowledge the role that emotion plays in the legal process.

⁸⁶ Nussbaum, *Upheavals of Thought*, 3.

⁸⁷ William Ian Miller, *Humiliation* (Ithaca: Cornell University Press, 1995), 8.

the world rationally, the world in its turn presents a rational aspect.”⁸⁸ In other words, if you are touting around a rational hammer, everything looks like a rational nail. The challenge, then, is to provide judges with more tools in their toolboxes with which to take apart cases and assemble judgments.

According to Nussbaum, emotions are not mercurial and can provide a reliable guide for practical judgment, especially on issues pertaining to justice and morality. Describing her view as “cognitive-evaluative,” she notes four important elements that distinguish her approach to and use of emotions as an integral element of judgment. 1) “They are *about* something: they have an object.” 2) “The object is an *intentional* object: that is, it figures in the emotion as it is seen or interpreted by the person whose emotion it is.” 3) They “embody no simple ways of seeing an object, but beliefs – often very complex – about the object.” 4) “They are concerned with *value*, they see their object as invested with value or importance.”⁸⁹ Logic and reasoning are certainly important, but they fail to see the entire picture of human life and human judgment. Emotions are a *value added way of seeing*; a lantern on the path to the good life that rescues us from our darkest moments and shines a light on that which we hold dear. As Robert Solomon notes, “the passions do not fall beyond the domain of philosophy, but rather provide it with a subject matter.”⁹⁰ The guiding ideals of American democracy such as liberty and equality certainly have well reasoned, logical elements to them. But these arguments alone do not win the day, even in law. Reason, argues legal scholar Anthony Kronman, “lacks the power to compel us to embrace and follow its own prescriptive norms. Reason is needed to guide us, but is incapable of inducing

⁸⁸ G.W.F Hegel, *Lectures on the Philosophy of History*, trans. J. Sibree (New York: American Home Library, 1952), 55.

⁸⁹ Nussbaum, *Upheavals of Thought*, 27-30.

⁹⁰ Solomon, 7.

us to follow.”⁹¹

For the sitting judge, to ignore or restrict the place of emotions in the act of judgment overlooks the fragility and vulnerability that our emotional lives necessarily possess. The economic judge, for example, attempts to steel himself with a universal standard of judgment that serves as protective armor against the volatility of emotion. Consequently, there is always a correct decision if one adheres to the economic principles guiding the judge toward wealth maximization. Tragedy does not exist in the economic world because there is always a right decision.⁹² Well read in the Ancient Greek tragedies and the contemporary stories that place characters in impossible positions, the literary judge recognizes the sad truth that some decisions will never be “right.”⁹³

Although a number of legal theories attempt to insulate the law from the unpredictability of emotion, which Nussbaum describes as the “No-Emotion proposal,”⁹⁴ courtrooms have long recognized the mitigating factor that they play. We *expect* certain emotions in certain situations. A convicted murderer who shows remorse is often given a more lenient sentence than another who remains unrepentant. Judges allow gruesome photographs into evidence. One would be hard pressed to argue that such photos do not have (and are not intended to have) an emotional impact on judges and juries. We can also understand a powerful emotional response in an extreme situation. The father who walks in on his young daughter being raped by an intruder is not expected to remain calm and composed. We would think something was wrong with him if he

⁹¹ Anthony Kronman, “Leontius’ Tale,” in *Law’s Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz (New Haven: Yale University Press, 1996), 56.

⁹² This criticism also applies to Ronald Dworkin’s “right answer” thesis, although Nussbaum is more sympathetic to his view of what constitutes a “right answer” than Posner’s view.

⁹³ See Nussbaum, *The Fragility of Goodness*, particularly her analysis of luck (*tuché*).

⁹⁴ Martha C. Nussbaum, *Hiding from Humanity: Shame, Disgust, and the Law* (Princeton: University of Princeton Press, 2004), 5.

did. The literary judge believes that reason detached from emotion is not healthy, is not altogether human, and actively *inhibits* the cultivation of the flourishing life. By being aware of and a participant in our shared emotional lives, the literary judge is better able to promote emotional health, which, in turn, promotes legal and civic health, which, in turn, helps to cultivate *eudaimonia*.

Reason, however, should not be viewed with suspicion; it is merely *incomplete* without the contribution that emotions play in practical judgment. Nussbaum remains strongly opposed to theories that attempt to upend reason as a legacy of philosophical essentialism and patriarchy.⁹⁵ Noting how essentialism has become a “dirty word in the academy,” Nussbaum defends “a historically grounded empirical essentialism” that is rooted in human experience.⁹⁶ This “internalist essentialism” responds to the postmodern debunking of reason by providing an account of human flourishing that focuses on identification through compassion and respect. Much like her criticisms of law and economics, social contract theory, and originalism, Nussbaum’s argument against anti-essentialism calls for an expanded perspective, not a revolutionary upheaval. In order to respond to the anti-essentialist position *and* criticisms associated with relativism, Nussbaum argues for a particular type of essentialism that is stable enough to ground judgments yet flexible enough to respond to change.

⁹⁵ Rhetoricians have similarly addressed these issues. For example, see Karlyn Kohrs Campbell, “The Rhetoric of Women’s Liberation: An Oxymoron,” *Quarterly Journal of Speech* 59.1 (1973), 74-86; Phaedra C. Pezzullo, “Resisting ‘National Breast Cancer Awareness Month’: The Rhetoric of Counterpublics and Their Cultural Performances,” *Quarterly Journal of Speech* 89.4 (Nov. 2003), 345-65, which addresses, in part, the ways in which empowerment is being manipulated; and Nancy Tuana, “The Speculum of Ignorance: The Women’s Health Movement and Epistemologies of Ignorance,” *Hypatia* 21.3 (Summer 2006): 1-19, which illustrates the ways in which ignorance about women’s bodies and their health has been used to maintain a biased sense of “other”; and Sonja K. Foss and Cindy L. Griffin, “Beyond Persuasion: A Proposal for an Invitational Rhetoric,” *Communication Monographs* 62 (March 1995), 2-18.

⁹⁶ Martha C. Nussbaum, “Human Functioning and Social Justice: In Defense of Aristotelian Essentialism,” *Political Theory* 20.2 (May 1992), 208.

Nussbaum distinguishes between two major forms of essentialism and notes that we must not confuse the two. The first, metaphysical-realist essentialism, is characterized by “[s]ome mind or other” that is “able to grasp [the] real structure [of reality] as it is in itself.” “On such a view,” Nussbaum continues, “the way the human being essentially is will be a part of the independent furniture of the universe.”⁹⁷ Criticisms of this type of essentialism are not new, which Nussbaum acknowledges by citing Aristotle’s anti-Platonist arguments, but have gained popularity by postmodern “nonphilosophers” influenced by Jacques Derrida.⁹⁸ She more-or-less agrees that metaphysical realism is more confusing than helpful: “To cling to it as a goal is to pretend that it is possible for us to be told from outside what to be and what to do, when in reality the only answers we can ever hope to have must come, in some manner, from ourselves.”⁹⁹

While Nussbaum disagrees with metaphysical realism – or, at the very least, questions any conclusions that one would arrive upon through such argument – she holds onto an essentialism that relies upon universal *human capabilities* necessary to live a robust and truly human life. Nussbaum argues that internalist essentialism considers history and cultural differences as important elements of human development, allows for human freedom and autonomy, and avoids prejudicial application by allowing for negotiation within the capabilities. She recognizes the danger of relativism and the ease with which one can fall into a relativist view of judgment. Citing Stanley Fish as a representative example, Nussbaum laments the impact that relativism has had on judgment:

Fish says that all judgment is a matter of power – no good and bad reasons. This implies

⁹⁷ Nussbaum, “Human Functioning and Social Justice: In Defense of Aristotelian Essentialism,” 206.

⁹⁸ Nussbaum belittles Derrida a little bit later, wherein she claims that his arguments “are relatively minor contributions, which do not even confront a great many of the pressing questions that are at issue” (207). According to Nussbaum, philosophers such as Wittgenstein, Quine, Davidson, Putnam, and Goodman have already made better, more relevant arguments.

⁹⁹ *Ibid.*, 207.

that one can never give a morally good reason for criticizing the verdicts of established authority: when one does so one is by definition just playing for power and is thus no better, morally, than one's opponent. Where the game is power, weakness is always worse. The poor are losers, and that's that. A more lighthearted deconstructionist says it is all a matter of free play. So, if I want to play around with torture and slavery and you want to stop me, nothing can be said about the moral superiority of you to me. You have your way of playing, I have mine.¹⁰⁰

Judgment, especially on matters of justice, is no game for Nussbaum's literary judge.¹⁰¹

Emotions may be internal and subjectively felt, but they are not altogether relative. Humans share similar emotional experiences, especially individuals in the same culture. As such, the literary judge must understand how these emotions provide a normative function within their society and make judgments that promote human flourishing.

Yet, not all emotions benefit the judicial process. Nussbaum argues that some emotions infect the decision-making process and render professional and lay judges unduly and adversely influenced. In *Hiding from Humanity*, Nussbaum advocates against shame and disgust as useful emotions in legal judgment. Concerning the former, judges across the country have implemented shaming punishments and the trend is growing. For example, a recent case in Utah involved a 13-year-old girl cutting a 3-year-old's hair. The judge offered to reduce the girl's community service if the mother cut off her ponytail right then and there in the courtroom. In 2009, a Texas judge gave an abusive father an ultimatum: either spend 30 days in jail or sleep in a doghouse for 30 days. "In an Ohio case, a municipal judge sentenced two teens found guilty of breaking into a

¹⁰⁰ Ibid., 210.

¹⁰¹ Although tangentially related to relativistic judgment, Nussbaum's sharp criticism of Judith Butler in a book review for *The New Republic* illustrates the contempt she has for postmodern approaches the politics and law. See Nussbaum, "The Professor of Parody."

church on Christmas Eve to march through town with a donkey and a sign reading, ‘Sorry for the Jackass Offense.’ The same judge later ordered a woman to be taken to a remote location to sleep outside for abandoning kittens in parks.”¹⁰² Such punishments have gained praise for the reduced cost they require from taxpayers and the arguably cathartic feeling of revenge they evoke.

The literary judge is ill at ease with shaming punishments because they tend to exploit emotional vulnerabilities and promote unhealthy emotional cultivation. Unlike Posner’s economic judge, who may find such punishments reinforce a “wealth maximization” model of judgment, the literary judge believes that law provides a “dynamic and educative role.”¹⁰³ Law is normative. It reinforces the values of a society and helps to shape and reshape cultural norms. As such, some uses of shame may have a “positive ethical value,” but judges must avoid harmful, “primitive” shame.¹⁰⁴ In short: dignity must be preserved.

Drawing from developmental psychology, Nussbaum characterizes such negative shame as that which makes an individual view his or her whole self as weak or inadequate.¹⁰⁵ These individuals then internalize the shame and reconstruct their entire identities around their failures. Karen Horney’s germane contribution to psychological development, *Neurosis and Human Growth*, illustrates the gravity of this problem. Shame attacks the internal thought processes of individuals by greatly magnifying any failure and finding fault in any success.¹⁰⁶ The goal of shaming penalties is to humiliate, not simply to embarrass. As a result, individuals may internalize a penetrating vulnerability that leads to a “‘broken spirit’ – a long-term inability to

¹⁰² Lynn DeBruin, “‘Shame’ Punishments Like Ponytail Cutting Increase,” *Associated Press*, June 26, 2012.

¹⁰³ Nussbaum, *Hiding from Humanity*, 12.

¹⁰⁴ *Ibid.*, 176.

¹⁰⁵ *Ibid.*, 183-4.

¹⁰⁶ See Karen Horney, *Neurosis and Human Growth: The Struggle Towards Self-Realization*, 2d. ed. (New York: W.W. Norton, 1991).

recover self-respect and a sense of one's own worth."¹⁰⁷

Brené Brown's recent scholarship on shame and self-worth reinforces this notion. If we are shamed by an outside person, group, or institution for a limited time, the *internalized* shame carries forward indefinitely. Who among us can honestly claim that shameful moments in our pasts do not continue to haunt us? As a result, individuals – ourselves included – often attempt to numb themselves from such feelings rather than recover from them. After a while, such individuals begin to *feel badly*. To clarify, they do not feel bad; rather, their capacity to feel is greatly impaired or incapacitated. In order to avoid feeling constant shame, they stop feeling altogether. The shamed become inured to love, gratitude, and healthy pride in an attempt to escape the crushing pain and anxiety that are associated with shame.¹⁰⁸ If the law is normative and habituating – and the literary judge believes that it is – penalties that rely on shame undermine the dignity of the shamed and cultivate a citizenry that believes such attacks on dignity are good.

For Nussbaum, judgment that results in shame fails to acknowledge the law's respect for and obligation to human dignity. Claiming that shame punishments “are ways of marking a person, often for life, with a degraded identity,”¹⁰⁹ Nussbaum finds the state's involvement in such actions “indecent.” By participating in the humiliation of its citizens, the state is articulating a set of values “through its public system of law,” which is “profoundly subversive of the ideas of equality and dignity on which liberal society is based.”¹¹⁰ The danger lies in the connection

¹⁰⁷ Nussbaum, *Hiding from Humanity*, 231.

¹⁰⁸ See Brené Brown, *I Thought It Was Just Me (but it isn't): Telling the Truth About Perfectionism, Inadequacy, and Power* (New York: Penguin, 2007); *Connections: A 12-Session Psychoeducational Shame-Resilience Curriculum* (Center City, MN: Hazelden, 2009); and *The Gifts of Imperfection: Let Go of Who You Think You're Supposed to Be and Embrace Who You Are* (Center City, MN: Hazelden, 2010).

¹⁰⁹ Nussbaum, *Hiding from Humanity*, 230.

¹¹⁰ *Ibid.*, 232.

between the person and the person's act. By responding to illegal actions with shaming penalties, an individual is more likely to believe that he is a shameful *person* who is unworthy of respect or self-worth. Rehabilitation and redemption, paramount goals of our legal system, become less and less likely. Guilt, as Nussbaum notes, does not carry the same baggage because it is "fully compatible with respect for the dignity of the person."¹¹¹ The literary judge embraces this position and offers criminals a path toward reparation and reintegration. By figuring the objective of law as the protection, maintenance, and, if necessary, restoration of human dignity, the cost/benefit concerns articulated by the economic judge become moot.

Disgust is even more complicated because it plays a more formative role in the act of judgment, rather than a consequence of judgment as with shame. According to Nussbaum, disgust *limits* one's ability to judge effectively. Disgust *repels against* conscientious thought and compassionate engagement, creating distance between the judge and the person being judged. Distinct from anger or fear, argues Nussbaum, disgust is "typically unreasonable, embodying magical ideas of contamination, and impossible aspirations to purity, immortality, and nonanimality" and, as a result, "should make us skeptical about relying on it as a basis for law."¹¹² Anger and indignation are certainly expected responses in situations that violate an individual's expectations, but they differ from disgust in that they are less likely to be "normatively distorted"¹¹³ and are centrally concerned with "the idea of a wrong or a harm."¹¹³ Instead of conscientiously engaging an issue and working to resolve it, disgust obfuscates one's view of a situation and serves as a "distraction from the serious moral issues that ought to be considered."¹¹⁴ By turning to disgust, the broadened perspective that Nussbaum believes a

¹¹¹ Ibid., 233.

¹¹² Ibid., 14.

¹¹³ Ibid., 99.

¹¹⁴ Ibid., 142.

literary imagination can cultivate becomes narrowed and detaches from those involved.

For scholars of rhetoric and discourse, disgust understood in this way is particularly problematic because it cultivates an attitude of intolerance and disengagement. One does not seek to expose oneself to the disgusting for fear it will contaminate them, both literally and figuratively. Objects of disgust are distorted and, as a result, not worthy of the same rational discourse. When one comes upon an object of disgust – fecal matter, for example – the immediate reaction is to get away from it. Even when occupies a place you wish to or must also occupy, such as your home (bad dog!), the offending material merits no investigation beyond the desire to eliminate it. When it comes to poop, this is all well and good. But when the same attitude of disgust is cultivated toward particular groups or persons, the rhetorical fallout is the same. The disgusted individual does not want to engage the issue or, worse yet, the object of disgust. They become toxic, worthy of derision and ridicule rather than human dignity and rhetorical exchange. For understanding the other, “disgust is thus likely to pose a particular threat to compassion, or at least to any form of it that extends it to human beings generally, without hierarchy or discrimination.”³⁸ Rather than fostering an environment wherein citizens want to understand one another and reach consensus, a rhetoric of disgust creates an unsurpassable distance between oneself and the object of disgust.¹¹⁵

Consider for example the legislative and arguments surrounding immigration, which has long occupied American public discourse, functioning as a double-edged sword in law and public policy. Politicians seeking election are often quick to appeal to their immigrant roots, usually calling attention to a distant great grandparent’s struggle to come to the United States

¹¹⁵ Daniel Kelly’s recent work, *Yuck! The Nature and Moral Significance of Disgust* (Cambridge: MIT Press, 2013) bears this point out when he discusses justifications for classism, racism, and sexism, suggesting that people who find themselves superior to others invoke the experience of smelling something disgusting when describing those they find inferior.

with only a few dollars and a strong sense of determination. Through hard work and willpower, they were able to cobble together a decent life, which then benefited their future progeny. The American Dream wrapped up in a nice little package. Although such narratives define many rags-to-riches stories, a strong resistance to immigration is equally prominent. Stereotypical fear and resentment characterize each new generation of immigrants. Irish, Italian, and Jewish immigrants faced pronounced animosity throughout the 1800s and early 1900s. Presently, such animosity is directed toward Hispanic and Muslim immigrants as immigration policy continues to be a central concern in politics and public discourse. The most fervent objectors utilize a rhetoric of disgust that the literary judge finds uncivil and dangerous. By rhetorically framing immigrants as animalistic or as a dangerous infection that is spreading throughout the United States, judgment (be it by a judge or the public writ large) is negatively skewed.

The recent statements by Steve King, a Republican Representative from Iowa, illustrate this rhetorical turn well. In May of 2012, King stated,

You want a good bird dog? You want one that's going to be aggressive? Pick the one that's the friskiest ... not the one that's over there sleeping in the corner... You get the pick of the litter and you got yourself a pretty good bird dog. Well, we've got the pick of every donor civilization on the planet. We've got the vigor from the planet to come to America.¹¹⁶

More recently, King likened the children of Mexican immigrants to drug mules with “calves the size of cantaloupes” they developed from smuggling drugs into the United States.¹¹⁷ He has also

¹¹⁶ Jillian Rayfield, “Steve King: It was a Compliment to say Immigrants are Like Dogs,” *Salon.com* (Sept. 7, 2012), retrieved from http://www.salon.com/2012/09/07/steve_king_it_was_a_compliment_to_say_immigrants_are_like_dogs/.

¹¹⁷ Juliet Lapidus, “The Drug Mule-Cantaloupe Crisis,” *The New York Times* (July 25, 2013), retrieved from <http://takingnote.blogs.nytimes.com/2013/07/25/the-drug-mule-cantaloupe-crisis/>.

compared illegal immigrants passing over fences in the southern United States to livestock that deserved to be shocked. When pressed by Democratic challenger Christie Vilsack, King was brazen enough to claim his comments were intended to be a *compliment*. Although King has made a number of outlandish comments in the past, including remarks defending the notion that a woman cannot get pregnant from incest or rape, he is nonetheless a mainstream political figure and his words are echoed throughout the media.

Such rhetorical tactics are precisely what Nussbaum's literary judge finds so problematic with disgust. Drawing from an array of researchers in psychology and sociology, including Andras Angyal, William Miller, and Paul Rozin, Nussbaum asserts that "disgust pertains to our problematic relationship with our own animality."¹¹⁸ She notes that framing a group as essentially animals was a prominent rhetorical tactic for Hitler's anti-Semitic propaganda, a point that was not lost on Kenneth Burke in "The Rhetoric of Hitler's 'Battle.'"¹¹⁹ By likening immigrants to animals, King simultaneously relegates them to the status of creatures incapable of dignified human experience while also elevating himself and those like him to a higher moral plain.

Representative King's comments do not reflect an isolated incident or lone fringe political figure. Comparing immigrants to animals is a prominent rhetorical strategy primarily utilized by conservative groups. In 2011, Representative Jeff Duncan of South Carolina likened current immigration law to "taking the door off the hinges and allowing any kind of vagrant, or animal, or just somebody that's hungry, or somebody that wants to do your dishes for you, to

¹¹⁸ Nussbaum, *Hiding from Humanity*, 89.

¹¹⁹ Ibid., 110-11. See also, Kenneth Burke, "The Rhetoric of Hitler's 'Battle,'" in *The Philosophy of the Literary Form* (Berkeley: University of California Press: 1973).

come in.”¹²⁰ By comparing immigrants – or any group – to animals, Nussbaum argues that it represents an attempt to cultivate a sense of disgust at the maligned group. Rather than accepting our shared animality, a rhetoric of disgust deflects one’s animality onto others and reinforces a social hierarchy wherein one’s in-group, however defined, is morally and culturally superior to animalistic groups.

Sadly, the trend of likening immigrants to animals has a long history. Analyzing print media text surrounding the 1994 political debates concerning an anti-immigration referendum, Otto Santa Ana argues that “immigrants as animals” was a dominant metaphor used in attacks against the referendum. “Immigrants are seen as animals to be lured, pitied or baited,” argues Santa Ana.¹²¹ 20.6% of all metaphorical descriptions published during the political campaign likened immigrants to animals.¹²² Drawing from Lakoff and Johnson’s work on metaphor and public judgment, Santa Ana claims that such metaphors frame the public’s perspective to view an issue one way rather than another. Consequently, the “immigrants as animals” metaphor “belittles immigrants as it separates non-citizens and citizens, since it assigns them a less-than-human standing.”¹²³ Santa Ana asserts, and Nussbaum agrees, such “categorization of people [creates] a false hierarchy.”¹²⁴ By categorizing immigrants as animalistic “others” and creating a hierarchy that differentiates “us” from “them,” then “those quasi-animals stand between us and our own animality, then we are one step further away from being animal and mortal ourselves.”¹²⁵

¹²⁰ Rudolph Bell, “Jeff Duncan Compares Illegal Immigrants to Vagrants, and Animals,” *Greenville Online* (Nov. 1, 2011), retrieved from <http://data.greenvilleonline.com/blogs/politics/2011/11/01/jeff-duncans-open-house/>.

¹²¹ Otto Santa Ana, “‘Like an Animal I was Treated’: Anti-Immigrant Metaphor in US Public Discourse,” *Discourse & Society* 10.2 (1999), 200.

¹²² *Ibid.*, 199.

¹²³ *Ibid.*, 216.

¹²⁴ *Ibid.*, 216.

¹²⁵ Nussbaum, *Upheavals of Thought*, 347.

Underneath the thinly veiled racism of the metaphor is a sense of disgust toward immigrants that “pose a threat to the idea of the *equal* worth and dignity of persons that is a very important part of any morality that most of us would favor.”¹²⁶

Comparing immigrants to animals is only one of two ways in which the group is maligned as disgusting. Another prominent metaphor in contemporary public argument centers on “immigrants as infections.” This metaphor functions in two ways. The first suggests that immigrants are more likely to carry infectious diseases, thus more likely to infect a healthy population. The second suggests that an immigrant’s *culture* can infect the country to which they are immigrating and negatively affect or undermine the host culture. Both rhetorical strategies contribute to an overall sense of disgust.

The first proposal – immigrants as medically diseased – has an air of scientific legitimacy, as poorer countries struggle to contain infectious disease due to a lack of resources, inadequate methods of detection, poor health education, and a disparate population without the means to receive treatment if it is available.¹²⁷ Additionally, Big Pharma has urged the United States to put sanctions on countries struggling with infectious diseases that attempt to develop generic and far less expensive drugs. Nonetheless, the idea that all or even most immigrants from developing countries are infected and will spread disease throughout the United States is a prominent response against immigration. The rhetoric of disgust normalizes the idea that “those people” will bring death and disease in their wake.

¹²⁶ *Ibid.*, 221.

¹²⁷ For example, see Brian D. Gushulak and Douglas W. MacPherson, “Globalization of Infectious Diseases: The Impact of Migration,” *Clinical Infectious Diseases* 38.12 (June, 2004): 1742-8; and H. Huerga López-Vélez and M.C. Turrientes, “Infectious Diseases in Immigrants from the Perspective of a Tropical Medicine Referral Unit,” *American Journal of Tropical Medicine and Hygiene* 69.1 (July 2003): 115-21.

In 2007, the Comprehensive Immigration Reform Act was introduced but never voted on after heated debate. The bill contained a number of provisions, including increased border enforcement (Mexico, not Canada), a central database containing immigrant information, and the DREAM Act, which would grant illegal immigrants the possibility of citizenship if they met a set of requirements. As the bill was being debated, conservative-leaning FOX News warned of a flood of previously eradicated diseases being reintroduced into the American population “because of these 12 million illegals who come across the border,”¹²⁸ including tuberculosis and leprosy. Lou Dobbs claimed that 7,000 new cases of leprosy had been diagnosed within the last three years, when, in fact, they had been diagnosed within the last *thirty* years.¹²⁹

Moreover, there is little, if any, hard data that links immigrants to the spread of infectious disease. In a recent article by the *Texas Tribune*, Reeve Hamilton criticizes comments made by Representative Leo Berman who repeated the claim that “illegal immigrants are bringing in tuberculosis, malaria, polio, leprosy — even the plague.”¹³⁰ As Hamilton notes, “For most of the diseases on the list, it’s impossible to determine precisely how many people that have contracted them are in the country illegally.” The data does not track the number of illegal immigrants who have contracted the various diseases, nor does it account for the natural-born citizens who contracted the diseases through travel to foreign countries. The specious claims amount to scare tactics intended to characterize all immigrants as dangerously diseased, a rhetorical turn that uses paranoia to distinguish “us” from “them.”

¹²⁸ “Pat Buchanan Says Border Crisis May Tear the US Apart,” *Fox News* (July 16, 2014), retrieved from <http://www.foxnews.com/transcript/2014/07/17/pat-buchanan-says-border-crisis-may-tear-us-apart/>.

¹²⁹ David Leonhardt, “Truth, Fiction and Lou Dobbs,” *The New York Times* (May 30, 2007). Retrieved from <http://www.nytimes.com/2007/05/30/business/30leonhardt.html>

¹³⁰ Reeve Hamilton, “Explainer: Are Illegal Immigrants Importing Illness?” *Texas Tribune* (Feb. 28, 2011), retrieved from <http://www.texastribune.org/immigration-in-texas/immigration/are-illegal-immigrants-importing-illness/>

The racist undertones become overt when considering the second manifestation of “immigrants as infections,” which concerns their cultural influence. Most immigrants retain strong ties to their ancestral home and bring their cultural traditions to their new homes. Assimilation with American cultural norms certainly occurs, but such shifts take generations. Moreover, the result is rarely a complete “Americanization,” but an amalgamation of cultures. Italian, Jewish, and Irish immigrants in the 19th and early 20th centuries offer clear historic examples, as these cultures continue to remain vibrant and have fused with mainstream American culture. But much like the animosity directed at the Jewish and Irish immigrants 100 years ago, cultural shifts are hard fought battles. Moreover, earlier European immigrants had an entire ocean and slower means of travel separating them from their home cultures.

To staunch nationalists, changes to the social, cultural, economic, and political status quo reflect a contagion that is going to spread. If left unencumbered, the cultural habits maintained by foreign immigrants such as the prominent Hispanic population or the growing Hmong population will increase exponentially. In their germane booklength examination of California’s “Proposition 187,” *Shifting Borders*, Kent Ono and John Sloop note the pervasive nationalism and xenophobia in the public debates on immigration the proposition sparked. Taking a critical approach to vernacular rhetorics, Ono and Sloop argue that immigrants are most often associated with biological invasion. Disease, infection, and infestation are some of the most frequently used characterizations of contemporary immigrants.¹³¹ As David Cisneros notes, other scholars have acknowledged similar characterizations: immigrants as a danger to American

¹³¹ See Kent A. Ono and John M. Sloop, *Shifting Borders: Rhetoric, Immigration, and California’s Proposition 187* (Philadelphia: Temple University Press, 2002).

“purity,” immigrants as “invaders,” and immigrants as “pollutants” are all different ways of saying the same thing.¹³²

Portraying immigrant cultures as contagions attaches a powerful stigma to the groups and it becomes increasingly challenging for individuals exposed to these messages (but not the immigrants themselves) to identify with them. Not only are measures put into place that prevent their immigration - the ongoing calls for a country-long border fence and stricter immigration regulations come to mind - but they are actively avoided. As Lynn Fujiwara notes, one of the main challenges facing organized movements calling for more human rights in immigration is the persistent view that immigration is an epidemic invasion of an external parasite.¹³³ One of the most significant ramifications of the rhetoric of disgust surrounding immigration is its ability to make an issue *anti-rhetorical*. The very idea of deliberating the issue and acknowledging the shared humanity of immigrants seems ludicrous because it is beyond argument. As a result, characterizing immigrants as infections or pollutants is still at home in many pockets of contemporary public discourse. A “balanced approach,” as suggested by Jason Edwards and Richard Herner, is doomed to fail, even when a conservative president such as George W. Bush promotes it.¹³⁴

As this example indicates, rhetorics of disgust that are cultivated and utilized in public discourse pose a significant problem because they attempt to circumvent an engaged, civic discourse. This is the rhetorical situation wherein the literary judge finds herself. She is not only

¹³² For a good overview of these terms and their impact, see J. David Cisneros, “Contaminated Communities: The Metaphor of ‘Immigrant as Pollutant’ in Media Representations of Immigration,” *Rhetoric & Public Affairs* 11.4 (2008), 569-602.

¹³³ See Lynn H. Fujiwara, “Immigrant Rights are Human Rights: The Reframing of Immigrant Entitlement and Welfare,” *Social Problems* 52.1 (Feb. 2005): 79-101.

¹³⁴ Jason A. Edwards and Richard Herder, “Melding a New Narrative? President George W. Bush and the Immigration Debate,” *Howard Journal of Communications* 23.1 (Jan. 2012), 40-65.

surrounded by this rhetoric as the deliberation of various laws and policies are being discussed in legislatures and the public sphere, but she must also respond to these appeals when cases concerning immigration (or prisoners' rights or LGBTQ initiatives or abortion) when they make it to her bench. The underlying danger is that a rhetoric of disgust necessarily *narrows* one's perspective when it goes unchecked and relies upon ungrounded assumptions based on misinformation. Such misinformation tends to be overlooked, however, because disgust circumvents the rational, "intelligent" aspect of emotion engagement. The emotional response that is created in an audience divides individuals rather than establishing any common ground for deliberation. As a result, *stasis* becomes nearly impossible.

As one would expect, Nussbaum's position has met a number of criticisms. Leon Kass asserts that there is a "wisdom" to the feeling of disgust, arguing that it actually does the exact opposite of what Nussbaum claims: we feel disgust when our dignity is being undermined.¹³⁵ Even Judith Butler agrees that there is some value to disgust, suggesting that it calls attention to and questions socio-culture norms.¹³⁶ Justin Smith questions the relationship between disgust and "moral obtuseness" and notes that both Nussbaum and Kass fail to give due attention to cross-cultural value systems.¹³⁷ Although sympathetic to Nussbaum's overall goal of "putting emotions back into jurisprudence," David Archard nonetheless highlights the enduring challenge of liberal societies to demarcate a standard "reasonableness" (or "intelligence") of emotion, especially when issues like blasphemy/free speech are concerned.¹³⁸ Given the vast, multi-disciplinary

¹³⁵ Leon R. Kass, "The Wisdom of Repugnance," *New Republic* (June 2, 1997), 17-26.

¹³⁶ Judith Butler, "The Value of Being Disturbed," *Theory & Event* 4.1 (2000), retrieved from http://muse.jhu.edu/login?auth=0&type=summary&url=/journals/theory_and_event/v004/4.1butler.html.

¹³⁷ Justin E. H. Smith, "The Delights of Disgust," *The Chronicle of Higher Education* (January 14, 2013), retrieved from <http://chronicle.com/article/The-Delights-of-Disgust/136537/>.

¹³⁸ David Archard, "Disgust, Offensiveness, and the Law," *Journal of Applied Philosophy* 25.4 (2008), 320.

scholarship on disgust, these arguments are but a small sample. Yet they capture the two main threads: 1) disgust is not as bad as Nussbaum suggests, and even has some positive benefits, and 2) even if disgust were as bad as Nussbaum suggests, it is nearly impossible to regulate and prevent, especially in purportedly neutral liberal societies.

In Nussbaum's defense, she is not demanding that shame and disgust become expunged from our emotional repertoire. Instead, she wants to critically question why and how an impulse toward shame or disgust is produced and toward what end does a judgment rendered under the auspices of shame or disgust aspire. Nussbaum continuously notes the complicated roles that shame and disgust play in our personal lives in addition to the influence they play on our judgments and expectations of others. They each contain important evolutionary elements that cannot be willed away, which raises an important challenge for the literary judge. Much like love or anger or pity or compassion, disgust *happens*; it is an unavoidable part of the emotional spectrum. Although they may be unavoidable, Nussbaum believes these emotions are incomplete and, as they are often promoted in public discourse, immature. Continuing her call for an expanded perspective, one that stretches the scope of law to consider the emotional components of judgment, Nussbaum asks that we step back in order to reflect upon our tendencies to shame and the moments (and objects) that induce disgust. The literary judge, charged with deciding complicated cases that implicate cultural norms, must remain diligently aware of her own emotional state while simultaneously trying to grapple with the emotional states of the involved parties. When national issues are at stake – for example, the ongoing debates over public funding for controversial art and the increased calls for stricter immigration laws – entire swaths of the American public may be involved.

Nussbaum, however, faces a *rhetorical* challenge that remains unaddressed; namely, the examples she utilizes to illustrate the dangers of disgust tend to evoke a sense of disgust toward those who had acted on the basis of disgust. For example, she often turns to *Commonwealth v. Carr*,¹³⁹ a 1990 case wherein the defendant, Stephen Carr, shot two lesbian women (one of whom died) who were having sex in the woods near the Appalachian Trail because their homosexuality so disgusted him. As she describes the horrific details of the case and the unreasonableness of Carr's legal justification for his actions, LGBTQ readers and those sympathetic to their case are likely not only to gain sympathy for the victims, but also feel a sense of disgust with Carr. Although Nussbaum does not specifically label Carr as an object of disgust, her descriptive narrative elicits the very disgust she hopes to quell.

The same goes for her invocation of *State of North Carolina v. Norman*.¹⁴⁰ In this 1989 case, Judy Norman was on trial for murdering her husband. Describing the events leading up to her husband's murder, Nussbaum notes how she had been "physically and mentally abused by her husband for years. He forced her to engage in prostitution and he frequently threatened to kill her. One evening her husband beat her with unusual severity, called her a 'dog,' and made her lie on the floor while he lay on the bed."¹⁴¹ Granted, this is merely a description of the events that took place, but one would be hard pressed *not* to feel a sense of disgust toward her husband, thus justifying her actions.

Sadly, the news is riddled with similar stories of heinous crimes. In May of 2013, Ariel Castro was revealed to have held three women hostage for a decade as he subjected them to horrific physical and sexual abuse. Is disgust at such atrocity not expected? On February 27,

¹³⁹ *Commonwealth v. Carr*, 398 Pa. Super. 306 (1990)

¹⁴⁰ *State v. Norman*, 378 SE 2d 8 (1989)

¹⁴¹ Nussbaum, *Hiding from Humanity*, 20.

2012, T.J. Lane assaulted his Ohio high school with a .22 handgun, murdering three students, paralyzing another, and terrorizing the entire community. At his sentencing hearing, an unrepentant Lane wore a t-shirt with the word “Killer” written across the chest. After he was sentenced, he turned to his victims’ families and said, “This hand that pulled the trigger that killed your sons now masturbates to the memory. Fuck all of you.” Is not the appropriate emotion disgust? Do anger and indignation go far enough in describing such an abhorrent display? Less than a year and a half ago, not four blocks from where I lived in Davis, CA, an attorney and his wife were tortured and murdered in their home. Their 16-year old neighbor, who had been lauded as a hero four years earlier for saving his father from a near fatal heart attack, stands trial for the crime even. There was no discernable reason for the crime other than thrill and pleasure. Am I not expected to feel not only outrage, but disgust at these events? No doubt, these are extreme examples, but sadly they are not rare. Mind-bogglingly atrocious crimes are perpetrated with alarming regularity. Can we be expected to squelch our feelings of disgust?

Herein lies yet another of Nussbaum’s rhetorical challenges and another potential source of hypocritical critique: does she ask the impossible? Nussbaum is highly attentive to the practical element of philosophy and believes that it should be a resource to improve our day-to-day lives. The examples she uses to underscore the dangers of disgust are powerful and poignant as they illustrate how disgust has been used to malign traditionally disenfranchised groups, but can we steel ourselves against the perpetrators of abhorrent acts? Should we? In his critique of the classic liberal defense of freedom of speech and expression, John Durham Peters labels such defenders of shock material as embodying “homeopathic machismo,” which is akin to “the daily imbibing of poisons in small doses so that large drafts will not hurt.”¹⁴² “[S]ome liberals,” Peters

¹⁴² Ibid., 6.

continues, “celebrate provocation as an opportunity to show off the advanced state of their self-mastery.”¹⁴³ The more vile and offensive the material, the more the liberal is able to flout a Stoic command of emotion.

Although we may never be able to rid ourselves of disgust, Nussbaum’s position nonetheless highlights the important need to understand – or at least *attempt* to understand – that which disgusts us. In this regard, she shares a close similarity to Burke’s analysis of Hitler. Noting how easy it is to disregard the abhorrent out of hand without understanding it, Burke is averse to thin analyses that merely serve to provide “a favorable reception among the decent members of our population.” Instead, he advocates that we attempt to “discover what kind of ‘medicine’ this medicine-man has concocted, that we may know, with greater accuracy, exactly what to guard against, if we are to forestall the concocting of similar medicine in America.”¹⁴⁴ In many ways, this is the same task that Nussbaum advances. It is far too easy to label someone evil, to feel complete and utter disgust, and then put them out of sight and out of mind. The real challenge is unpacking how and why this person came to be, which the literary judge is tasked to do. The actions of Ariel Castro and T.J. Lane and Stephen Carr are reprehensible, but if society does not attempt to understand the processes and social forces that helped to create them (or, at the very least, failed to prevent them), then more Castros and Lanes and Carrs are bound to emerge.

Responding to the negative influences of shame and disgust, the literary judge approaches the decision-making process with compassion and humility. In part a consequence of exposure to morally engaging literature and a sensitivity to the ways in which shame and disgust shape our perceptions of ourselves and others, compassionate judgment acknowledges the

¹⁴³ Ibid., 7.

¹⁴⁴ Kenneth Burke, *The Philosophy of Literary Form*, 191.

common humanity shared by everyone and recognizes our inevitable imperfections. For judges, this includes an understanding of each defendant's individual situation, even those they find repugnant. What brought this person before the court? No doubt there was some sort of legal transgression, but *why*? Unlike the economic judge, the literary judge finds these narratives vital to the judicial process. They offer an explanation, which may be good or poor, effective or ineffective, but nonetheless deeper and richer than a list noting the bare-bone facts of the case. More importantly, these narratives highlight potential societal problems that may make legal transgressions more likely, such as the influence of poverty and squalor on one's ability to think critically and feel intelligently.¹⁴⁵ Building on her call for a literary imagination, Nussbaum claims "compassion requires the thought that another person is undergoing something seriously bad,"¹⁴⁶ and the sufferer is "not be fully to blame for his or her plight."¹⁴⁷ Moreover, Nussbaum's theory recognizes the vulnerability that everyone shares. Poor luck may befall even the most virtuous and stouthearted, forcing them into a position without any good options. The literary judge recognizes the possibility of tragic situations that do not have a "right" or "good" answer, yet still require action to be taken.

Recently, however, compassionate judgment has been characterized as a dangerous element of left-wing judicial activism. In 2009, President Barack Obama was in the process of making his first Supreme Court nomination, which eventually went to Justice Sotomayor. Before making his selection, he told the press he was looking for "empathy" in his nominee, someone

¹⁴⁵ In her analysis of Henry James' *The Princess Casamassima*, Nussbaum notes how his novel elucidates the influence of poverty and squalor on one's ability to use reason well. See *Love's Knowledge*, 209.

¹⁴⁶ Nussbaum, *Hiding from Humanity*, 49.

¹⁴⁷ *Ibid.*, 50.

who can identify with “people’s hopes and struggles.”¹⁴⁸ While he was campaigning in 2007, Obama asserted, “We need somebody who’s got the heart, the empathy, to recognize what it’s like to be a young teenage mom, the empathy to understand what it’s like to be poor or African-American or gay or disabled or old—and that’s the criterion by which I’ll be selecting my judges.”¹⁴⁹ Republicans immediately responded, claiming that Obama was advocating for an “empathy standard” that created an imbalanced, unfair, and unjust criterion of judgment. Empathy, under this understanding, lifts the blindfold over Lady Justice’s eyes and violates the virtue of dispassionate judicial restraint. Senate Minority Leader Mitch McConnell argued that Obama’s call for empathy was a thinly veiled indication of the President’s support “for certain groups or individuals” and would “undermine public faith in the judiciary.”¹⁵⁰

As one would expect, liberals and democrats rose to Obama’s defense. Left-leaning articles and editorials noted the importance of empathy throughout the legal system. George Lakoff pushed the argument even further by claiming that our entire democratic system was based on empathy; to abandon it is to abandon the entire democratic experiment.¹⁵¹ Yet, these two positions represent a false dichotomy. As Nussbaum notes, empathy can be used poorly, just

¹⁴⁸ Although scholars have noted the difference between empathy, sympathy, and compassion, they function in similar ways within this public debate. As a result, a detailed dissection of each term contributes little to the public controversy.

¹⁴⁹ Senator Barack Obama, “Campaign Speech to Planned Parenthood” (July 2007). Retrieved from <http://www.weeklystandard.com/Content/Public/Articles/000/000/014/849oyckg.asp>

¹⁵⁰ Peter Slevin, “In Filling Supreme Court Vacancy, Obama Looks for a Jurist with Empathy,” *Washington Post* (May 13, 2009), retrieved from http://www.washingtonpost.com/wp-dyn/content/article/2009/05/12/AR2009051203515_2.html?sid=ST2009051203561.

¹⁵¹ Lakoff claimed, “President Obama has argued that empathy is the basis of our democracy. It is because we care about others, he has argued, that we have principles like freedom and fairness, not just for ourselves but for everyone. I have found, in studies of largely unconscious political conceptual systems, that empathy is the basis of progressive political thought, and the basis for the very idea of social, not just individual, responsibility. Conservative political thought is otherwise structured, based on authority, discipline, and responsibility for oneself but not others. The major moral, social, and political divide in America centers around empathy.” Cited in Dan Froomkin, “The Empathy War,” *The Washington Post* (May 13, 2009), retrieved from <http://voices.washingtonpost.com/white-house-watch/the-empathy-war.html>.

as anger can be used poorly. Compassion may be colored by any number of circumstantial issues including proximity, misinformation, errors about fault, and a narrow “circle of concern.”¹⁵² Nussbaum’s literary judge, however, possesses a nuanced view of compassion that acknowledges the complicated rhetorical situation. To use compassion well requires that it be tethered to the facts of the case and the individuals involved. Reinforcing her argument for an *intelligence* of emotions, Nussbaum claims such compassion is rooted in reasonableness.¹⁵³

Nussbaum draws from a wealth of U.S. legal history to illustrate her point, noting the failures and the successes of the past. Consider, for example, *Woodson v. North Carolina* (1976). One of five death penalty cases heard in 1975,¹⁵⁴ the issue before the court was the legality of North Carolina’s *mandatory* death penalty for all convicted first-degree murders. Under such legislation, the facts of the case were irrelevant after conviction, as they all share in common the “malice aforethought.” Although the law faced staunch opposition from a number of anti-death penalty organizations, there was public support for the law. These were first-degree murderers, after all! Beasts of carnage preying on the innocent! There is a long history of maligning felons, particularly murderers and rapists, as inhuman.

In a 5-4 decision, the United States Supreme Court overturned the decision. Justice Potter Stewart, authoring the majority opinion, lamented the fact that the defendant’s history was ignored. Given the severity and finality of the penalty, he argued that we must acknowledge “the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.” To ignore such details treats these persons as “members of a faceless,

¹⁵² Nussbaum, *Hiding from Humanity*, 51-2.

¹⁵³ *Ibid.*, 54.

¹⁵⁴ The others being *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); and *Roberts v. Louisiana*, 428 US 325 (1976).

undifferentiated mass,” devoid of humanity and undeserving of sympathy.¹⁵⁵ As if channeling the literary judge, Justice Stewart bemoaned the damage wrought from judgments that rely on reason detached from emotion. As Nussbaum notes, this precedent has a complicated history, especially if you take into consideration the “reasonable person” argument that continues to play a formative role in legal theory.¹⁵⁶

For the literary judge, the narratives produced by defendants are essential because they are rhetorically situated to offer the “possibility of compassion.”¹⁵⁷ These narratives are invaluable because they can serve to discursively *reclaim* dignity from the deprivations of disgust. They illuminate the cracks in the humanity of our legal system. Undermining dignity is all too easy, especially when the rich, nuanced details of a life are ignored in favor of “just the facts, ma’am.” Worse yet are those judges who are guided by a rhetoric of disgust based on ungrounded fear and paranoia that often accompanies ignorance. One of the significant dangers looming behind arguments from disgust is the way in which decision-making appears easy.

3.3 CONSTITUTING CAPABILITIES

At the end of the day, possessing a literary imagination and emotional intelligence does not necessarily a good judge make. Posner’s longstanding criticism of Nussbaum’s approach is that it leaves the actual judge deciding actual cases with little guidance. Responding to the need for direction, Nussbaum advances the “capabilities approach.” Developed with Amartya Sen (yet distinct from his interpretation), the capabilities approach is an attempt to reframe the essential elements that constitute a flourishing life and offer some concrete guidance for a judge. These

¹⁵⁵ *Woodson v. North Carolina* 428 U.S. 280 (1976)

¹⁵⁶ Nussbaum, *Hiding from Humanity*, 21.

¹⁵⁷ *Ibid.*

elements, ten in all, serve as both a means and an end in producing a life reflecting an inherent human dignity. The list includes bodily health and integrity, senses, imagination, and thought, emotional cultivation, the ability to interact with ones environment including other species, the importance of affiliation, and the need for recreational play.¹⁵⁸

The list attempts to curb some of the problems Nussbaum finds with other approaches to justice, including the “trade-offs” afforded in utilitarian models.¹⁵⁹ Needless to say, the ten capabilities Nussbaum calls for are ambitious both in their breadth and depth, but still offer a set of universal guidelines for the literary judge just as wealth maximization serves as a guide for the economic judge. Although it is aspirational, she nonetheless argues, “The aim of the project as a whole is to provide the philosophical underpinning for an account of *basic constitutional principles* that should be respected and implemented by the governments of all nations, as a *bare minimum* of what respect for human dignity requires.”¹⁶⁰ Ever mindful of the tragic living conditions facing so many people, Nussbaum continuously reinforces the idea that her list is grounded in “what people are actually able to do and to be”¹⁶¹ and “highly attentive to the goal of functioning.”¹⁶² The capabilities approach is also a “great practical value for nonphilosophical people, giving them a framework in which to view what is happening to them and a set of concepts with which to criticize abuses that otherwise might have lurked nameless in the background of life.”¹⁶³ For the literary judge, the capabilities approach serves as the North Star, a guide beckoning the judge toward sound judgment, but not necessarily leading her to the exact

¹⁵⁸ Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2001), 78-80.

¹⁵⁹ *Ibid.*, 81.

¹⁶⁰ *Ibid.*, 5.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*, 88.

¹⁶³ *Ibid.*, 36.

spot.

Judges have a particular obligation to the citizenry. To be a judge is unlike the vast majority of other careers in that a judge directly shapes social and political culture through his or her decisions. Nussbaum no doubt would agree that her account is aspirational, but she would not accept the idea that such ambition means it ought to be discounted. Moreover, even if the literary judge is an unattainable ideal that does not mean that working toward (yet not fully achieving) such an ideal is a failure. A running theme throughout Nussbaum's prolific scholarship is the notion that we are all vulnerable and imperfect, but that should not prevent us from striving for the flourishing life as we accept our human frailties. The literary judge helps to make that life appear more and more possible for everyone, especially those groups that have been neglected and mistreated. In doing so, the literary judge relies upon the constitutive power of legal discourse to cultivate a more virtuous citizenry.

Through her legal opinions and public presence, the literary judge is attempting to cultivate virtue throughout the citizenry. As such, she serves a vital constitutive function in society. Building off of Nussbaum's work on Hellenistic ethics - particularly Seneca's conception of the wise stoic judge - the literary judge takes the "philosopher as doctor of the soul" argument and expands it. Rather than cultivating individual souls one by one, the literary judge functions more as a public health advocate who attempts to improve the lives of everyone in society through her legal judgments.

Drawing upon the wealth of medical analogies incorporated throughout Hellenistic ethics, Nussbaum argues that the characterization of the philosopher as a doctor of the soul reinforces the practical role philosophy ought to play in everyday life. Combining the "critical power of Platonism with the worldly immersion of ordinary-belief philosophy," Hellenistic

ethics maintains a deeply rooted “commitment to action.”¹⁶⁴ Nussbaum rightly acknowledges the inability to completely detach oneself from one’s experiences or culture, but still retain the ability to critically reflect on one’s position. The *process* of argumentation, then, becomes a key element of philosophical therapy. “Therapeutic argument is searchingly concrete. It approaches the pupil with a keen awareness of the daily fabric of her beliefs. And it holds, as well, that this fabric of belief is learned in particular cultural circumstances – so it commits itself to learning about and grappling with those circumstances.”¹⁶⁵ Through argumentation, one is better able to acknowledge her individual position – with all of her tendencies, preferences, strengths, and faults – in order to illuminate a path of self-improvement.

The Stoics, in particular, offer a thorough and compelling view of therapeutic philosophical argument. All the major Stoic philosophers drew from and utilized the medical analogy to the extent that “Cicero declares he is tired of their ‘excessive attention’ to it.”¹⁶⁶ As overly employed as the analogy may be, it nonetheless characterizes the Stoic conception of philosophy quite well. Critical reflection, practical reason, criticism of conventional beliefs, and a vigilant attention to virtue are hallmark traits of “Stoic tonics” - curative elements that help constitute the good life, all of which reverberate with Nussbaum’s overarching philosophical project. Although the pervasiveness of Stoicism in one’s life might conjure the image of a philosophical hypochondriac always seeking intellectual remedies for their diseased souls, the end goal is self-care. “The patient must not simply remain a patient,” writes Nussbaum, “she must become her own doctor. Philosophy’s medical function is understood as, above all, that of *toning up* the soul – developing its muscles, assisting it to use its own capabilities more

¹⁶⁴ Martha C. Nussbaum, *The Therapy of Desire: Theory and Practice in Hellenistic Ethics* (Princeton: Princeton University Press, 1994), 32-3.

¹⁶⁵ *Ibid.*, 44.

¹⁶⁶ *Ibid.*, 316.

effectively.”¹⁶⁷ This idea of therapeutic cultivation, which recognizes the slow, difficult, and rewarding process of “toning up” one’s capabilities, is an important facet of constitutive rhetoric. The constitutive perspective views argumentation more broadly. Instead of a one-on-one trainer helping to tone you up, it’s more akin to a group exercise class. You can go at your own pace, but others are there to guide and encourage. Constitutive rhetoric is Richard Simmons for the soul (as if he wasn’t already!).

At the outset, I recognize Nussbaum may be apprehensive to this idea. She notes that “therapeutic argument can never be fully or completely given in a treatise intended for public consumption. The paradigm of philosophical interaction is the quiet conversation of friends who have an intimate knowledge of one another’s character and situation.”¹⁶⁸ The turn to constitutive rhetoric is not intended to replace intimate interpersonal conversation; it is not advocating a public health approach that undermines the doctor-patient relationship. Instead, constitutive rhetoric ought to be viewed as an important supplement to philosophical introspection and conversation.

Drawing from Kenneth Burke and Louis Althusser, Maurice Charland argues that constitutive rhetoric is significant because “it positions the reader towards political, social, and economic action in the material world and it is in this positioning that its ideological character becomes significant.”¹⁶⁹ In many ways, the discourse we use defines (and limits) who we are and can be. Charland continues, describing the ideological nature of constitutive rhetoric, which is so “not merely because they provide individuals with narratives to inhabit as subjects and motives

¹⁶⁷ Ibid., 317-8.

¹⁶⁸ Ibid., 337.

¹⁶⁹ Maurice Charland, “Constitutive Rhetoric: The Case of the *Pueple Québécois*,” *Quarterly Journal of Speech* 73.2 (May 1987), 142.

to experience, but because they insert ‘narratized’ subjects-as-agents into the world.”¹⁷⁰

Although the ideological, critical theory language is heavy-handed, Charland nonetheless notes an important point that is as true today as it was in the Hellenistic period. Namely, the arguments we express and defend constitute ourselves and our society. Much like Nussbaum’s conception of philosophical therapy, it is the *process* of argumentation, not only the end result, that serves a therapeutic function.

Subsequent rhetoricians have developed Charland’s concept of constitutive rhetoric in an array of ways,¹⁷¹ but Thomas Farrell’s contribution is particularly useful. Broadening Charland’s original definition, Farrell argues that constitutive rhetoric not only helps to form collective identities, but “may also constitute problems, projects, or even historic conditions.”¹⁷² By offering a discourse or set of arguments that reframes a situation, constitutive rhetoric has the ability to turn potentially high aspirations (like the flourishing life) into manageable, humanistic goals. Furthermore, the audience plays an active role by serving as a “co-participant in the emergence of such identity.”¹⁷³ Constitutive rhetoric retains the important element of agency while still acknowledging the various guides along the discursive path.

Constitutive rhetoric becomes complicated, however, when we recognize the plethora of arguments and discourses swirling throughout any given community, many of which can be antagonistic if not mutually exclusive to one another. How can a community be created and

¹⁷⁰ Ibid., 144.

¹⁷¹ See, for example, “Reflections on the Role of Rhetoric in Public Policy,” *Rhetoric and Public Affairs* 13.1 (Spring 2010), 121-43; Michael C. Leff and Ebony A. Utley, “Instrumental and Constitutive Rhetoric in Martin Luther King Jr.’s ‘Letter from Birmingham Jail,’” *Rhetoric and Public Affairs* 7.1 (Spring 2004), 37-51; and Kenneth S. Zagacki, “Constitutive Rhetoric Reconsidered: Constitutive Paradoxes in G. W. Bush’s Iraq War Speeches,” *Western Journal of Communication* 71.4 (Oct. 2007), 272-93.

¹⁷² Thomas B. Farrell, “Rhetoric in History as Theory and Praxis: A Blast from the Past,” *Philosophy and Rhetoric* 41.4 (2008), 326-7.

¹⁷³ Ibid., 327.

maintained amidst such confusion? How can the philosophical attention to self-cultivation be expanded beyond the self (and is this advisable)? Can there be a social therapy to match the individual therapy Nussbaum advocates throughout her work? Enter law.

Eminent legal scholar James Boyd White responds by arguing that law satisfies these demands. Equally drawing from classical and contemporary resources, White argues a common thread weaved throughout legal discourse is its constitutive element:

Social and political institutions are such practices set up on a permanent basis. They are not objects, though that is how we often talk about them, but complex sets of understandings, relations, and activities. They are ways of talking that can be learned and understood, and they play their part in constituting a world... This is, of course, not the only way to talk about a collection of people in a place; it is a constitutive fiction, a way of talking and acting that creates a public world.¹⁷⁴

Legal and political institutions, whether they are embodied in an Ancient Greek *polis*, the Roman republic, or contemporary judicial bodies, are an important (but not the only) rhetorical lens through which we view our community. The essential, yet fragile, role of legislative and judicial bodies is to produce a strong foundational discourse that balances between the pragmatic needs of a given society while simultaneously illuminating a path for moral and cultural development. More importantly, it does so through argumentation and discourse, rather than force, for “only persuasion, and persuasion of the sincere and authentic kind by which community is established, can work.”¹⁷⁵ The literary judge thrives in this role. Utilizing the aforementioned resources of the literary imagination and emotional intelligence, in addition to a deep and nuanced knowledge of

¹⁷⁴ James Boyd White, *When Words Lose their Meaning*, 11.

¹⁷⁵ James Boyd White, *Heracles' Bow*, 20

the law, she possesses both the intellectual resources and broad platform necessary to shape a community.

Seneca's *De Clementia* serves as a useful text to help unite Nussbaum's belief in the therapeutic function of argumentation and the constitutive role it plays, in part because Nussbaum continues to find his work significant and influential in her own theorizing and uses it to advance her therapeutic argument. Seneca's wise judicial sage bears several similarities with Nussbaum's literary judge. Unlike many of his Stoic predecessors, Seneca serves as a useful focal point because he is less rigid in his philosophy, a flexibility Nussbaum admires. The traditional Stoic ideas are certainly present – the need for self-sufficiency, cosmopolitanism as a moral/political ideal, the completeness of virtue – but Seneca acknowledges the practical reality that achieving the Stoic ideal is rare. For our present purposes, two particular examples are useful in *De Clementia* and leave space for the ideas articulated in the previous sections. First, Seneca negotiates between the fool and the Stoic sage, offering the “progressor” as a useful middle term. Second, he recognizes the tension between general doctrines and particular rules, which are echoed in Nussbaum's capabilities approach.

The idea(l) of the Stoic sage is prominent throughout the Greek and Roman traditions. Drawing a stark contrast between a wise man and the more common fool, the former knows what is virtuous and acts on it, whereas the fool does not. The good is whole, full, complete. Diogenes Laertius defines the good as “the natural perfection of a rational being *qua* rational,”¹⁷⁶ upon

¹⁷⁶ Diogenes Laertius, *Lives of Eminent Philosophers*, v. II, trans. R. D. Hicks (Cambridge: Harvard University Press, 1925), 7.94.

which the virtuous sage consistently acts.¹⁷⁷ Virtue is an all or nothing characteristic; you either have it or you don't (it's just so happens that few, if any, happen to have it).

Although consistent with the ideal student or Stoic sage, the Stoics are not willing to completely abandon the foolish to lives of vice. Reinforcing the therapeutic aspect of Stoic philosophy, Cicero likens the progress toward virtue to the weak body of an amateur swimmer and the blurred vision of a newborn puppy: "By applying a remedy they improve day by day. Every day, one gets stronger, the other sees better. It is like this for every keen seeker after virtue. Their faults and their errors are gradually cured."¹⁷⁸ The Stoics maintain a stark contrast between virtue and vice, but moral progress and redemption are still possible. Brad Inwood notes the important distinction between the wise man and the ordinary man, claiming the Stoics, particularly Seneca, do not forget about the latter. Rather than offering two separate moralities, which would be antagonistic to the entire Stoic project, Inwood suggests Seneca recognizes two different *relationships* to morality.¹⁷⁹ Furthermore, just because one is not fully virtuous does not mean she cannot be actively working toward virtue.

Seneca's differentiation between the stern judge and the wise judge offers a useful point of reflection into this topic and illustrates a close connection with Nussbaum's literary judge. In an ill-fated attempt to advise Nero, Seneca's *De Clementia* articulates the need for mercy by juxtaposing blind rigidity and mindful flexibility. Whereas the stern judge will follow the letter of the law, the wise judge acknowledges the inevitability of wrongful acts. "We have all sinned," notes the wise judge, "and not only have we done wrong, but we shall go on doing wrong to the

¹⁷⁷ As A. A. Long and D. N. Sedley remind us, the Stoics acknowledged the "unlikelihood of anyone's achieving this utterly secure and faultless character." See *The Hellenistic Philosophers* (Cambridge: Cambridge University Press, 1987), 61 N2 and their commentary on pg. 383.

¹⁷⁸ Cicero, *De Finibus*, trans. Raphael Woolf (Cambridge: Cambridge University Press, 2001), 4.65

¹⁷⁹ Brad Inwood, "Rules and Reasoning in Stoic Ethics" in *Topics in Stoic Philosophy*, ed. Katerina Ierodiakonou (Oxford: Oxford University Press, 1999), 109-10.

very end of life. Even if there is any one who has so thoroughly cleansed his mind that nothing can any more confound him and betray him, yet it is by sinning that he has reached the sinless state."¹⁸⁰ Unlike the stern judge, who is unlikely to “escape conviction under the very law which they cite for the inquisition,”¹⁸¹ the wise judge recognizes the process of moral growth and development. Mercy is not required in every occasion, but given the circumstances and offending party, “there are a great many people who might be turned back to the path of virtue if [they are released from punishment].”¹⁸² Instead of rigidity, a common pejorative challenge against Stoicism, Seneca urges “wise moderation.” This is far from an exact science with explicit rules for when and how to be merciful; instead, it carries an artistic charm. The act of judging hard cases requires a keen sensitivity to contextual nuances while still embracing measured reason. Judgment in an official capacity not only requires a thorough knowledge of the particular case at hand, but also the ramifications the decision will produce. As noted earlier, James Boyd White argues such acts of judgment select particular discourses with which a community constitutes itself. An especially harsh decision may inspire revolt, whereas a merciful decision may encourage cooperation. Both are forms of cultivation via constitutive rhetoric. Seneca’s wise judge and Nussbaum’s literary judge, believing in the progressor, make that line of argument public and possible. If we are to learn from Nussbaum’s arguments in *The Therapy of Desire*, which pay particular attention to individual cultivation, there must also exist a space for the more general public health. Because public officials lack the regular dialectical engagement with their constituents, they must play a constitutive role with their public ideas.

¹⁸⁰ Seneca, *De Clementia*, 1.6.3-4.

¹⁸¹ *Ibid.*, 1.6.3.

¹⁸² *Ibid.*, 1.2.2.

Seeing the law and those who wield it as guides, the public actively reflects upon the merits of particular laws and the ways in which those laws are used (and abused). Overly strict laws and judges dedicated to following law to the letter may inspire dissent, whereas the caring hand of mercy is likely to acknowledge the wrongfulness of an act while simultaneously turning the transgressor toward the path of virtue. The former treats the foolish as an incurable lot, whereas the latter acknowledges the importance of the progressor. Furthermore, the process of reflection, argumentation, and action is part and parcel of therapeutic, constitutive argumentation.

This is important in light of the negotiation between strict rules and general guidelines. An equilibrium between the two is fragile, but necessary. Too many strict rules and the citizenry will feel constrained and oppressed; no guiding ideals will make the rules meaningless. Balancing the two provides an argumentative discourse that allows for negotiation (which includes mercy), while still oriented toward a virtuous end (dignity). The process of negotiation is not simply a precursor to a formal judgment made by a ruler or judicial body; it is omnipresent in everyday life. In order to make the process stronger, public arguments need to be put forth that best capture the delicate relationship between rules and guidelines. As Seneca illustrates in *De Clementia*, the wise judge can navigate through such problematic terrain and produce an argument that justifies their respective positions while providing the public with Stoic arguments with which they can use to constitute and reconstitute society.

Like Seneca's wise judge, Nussbaum's literary judge is not the sage tutor educating young elites on the life of reason. Rather, the literary judge operates in a broader, public capacity. The compassion Nussbaum encourages judges to adopt expresses a social aspiration, one that she hopes will encourage a diverse citizenry to take up the arguments and introduce

them into their own lives. As I have argued, one of the goals is to provide the capabilities by which individuals can better cultivate virtue. Granted, the student-teacher relationship is immensely important, but it is not the only resource available. The student-teacher relationship approaches philosophical therapy like the doctor aids a patient. Their connection is intimate and nuanced. Constitutive rhetoric serves a complimentary function by approaching therapeutic argumentation as a public health advocate. After all, a doctor can only tend to a handful of patients if she is to perform her job well. Providing the public with good ideas and arguments through a more public forum, namely legal judgments, promotes virtue and encourages appropriation.

Overall, Nussbaum believes in the importance of public philosophy and takes to heart the vital role to be played by intellectuals in the public arena. She is an active voice for many social causes and is noted as one of the world's leading public intellectuals. Her long list of engagements as a public intellectual deserves significant attention, such as her fervent call for women's equality around the globe. Including an active role with the World Institute for Development Economics Research alongside Harvard welfare economist Amartya Sen (which helped to reconfigure how the United Nations assessed quality of life *other than* the GDP), Nussbaum has been at the forefront of numerous causes. Her scholarship is a direct manifestation of these concerns. As such, Nussbaum writes for learned non-philosophers. In *Women and Human Development*, she acknowledges her role as a public philosopher. Chastising "some feminist philosophy" for "a type of abstraction that turns the mind away from reality," Nussbaum calls for greater attention to "real cases and...empirical facts" that have been ignored in some political theory.¹⁸³ The literary judge, with her strong presence and insightful ideas, *must*

¹⁸³ Nussbaum, *Women and Human Development*, 11.

embrace such a public role that remains rooted in real human experience, lest opposing forces constitute a less humane, less compassionate society.

3.4 CONCLUSION

Where, then, does this leave the literary judge? When considering Nussbaum's call for emotional intelligence strengthened by a literary imagination, one might claim that the literary judge is better suited for the professoriate than the bench. Unlike Posner's economic judge and, as we will see, Sunstein's deliberative judge, the literary judge appears effete and impractical. Whether one agrees with it or not, economic adjudication can be implemented by a sitting judge with relative ease, especially considering the bulk of a judge's caseload are fairly clear and simple. Only those unpredictable moments of complex, nuanced cases where the law is unclear does the economic judge struggle to produce the "right" decision. Yet, this is exactly Nussbaum's point! The economic model may be useful for deciding cases with ease, but that is because it ignores the complexities of human life. Nussbaum recognizes the ambitious nature of her program, but one of her rhetorical strengths is embracing the *possible* rather than accepting the current state of affairs.

4.0 CASS SUNSTEIN AND THE DELIBERATIVE JUDGE

“To refuse a hearing to an opinion, because they are sure that it is false, is to assume that *their* certainty is the same thing as *absolute* certainty. All silencing of discussion is an assumption of infallibility. Its condemnation may be allowed to rest on this common argument, not the worse for being common.”

- John Stuart Mill, *On Liberty*

In one of his more recent books, *Simpler: The Future of Government*, legal scholar and constitutional theorist Cass Sunstein recalls a first date ice-breaker with his future wife: “If you could have any job in the world, other than law professor, what would it be?” asked Samantha Power. Shooting for the stars, Sunstein replied, “Ohhhh, OIRO.”¹ That’s right: the glitz, the glam, the Office of Information and Regulation Oversight. Nothing makes a potential paramour swoon more than government bureaucracy. And from 2009-2012, Sunstein’s dream was his reality. *Simpler* recounts Sunstein’s tenure as the “regulatory czar” in President Obama’s White House administration. Although his time within the administration was markedly different than his role as professor and scholar, it is particularly notable because the position afforded him an opportunity to put his theories into practice on a grand scale. Unlike so many academics, Sunstein’s prominent role as a public intellectual was catapulted to greater heights as his ideas could directly impact public policy. Moreover, Sunstein’s theories of governmental regulation and oversight echo his theories of law. While Sunstein notes the vast difference between academia and public service, both require one vital element: good judgment. Throughout his expansive publications, Sunstein has crafted a model of judgment rooted in the Madisonian

¹ Cass R. Sunstein, *Simpler: The Future of Government* (New York: Simon & Schuster, 2013), 1.

tradition and embodied in the attentive civic sensibility of the judge. I believe that the best way to personify this civically minded model is to advance the notion of the “deliberative judge.”

Based on Sunstein’s extensive writings, I contend that the defining features of the deliberative judge are the deep trust placed in open *deliberation and dissent*, a keenly attuned sense of *kairos*, and a dedication to *rhetorical citizenship* that permeates the judicial decision-making process. In what follows these features are explored and scrutinized, particularly with respect to how they differentiate Sunstein’s approach from that of Posner or Nussbaum.

Sunstein’s embodied model of judgment, the deliberative judge, is not in outright conflict with Posner’s economic approach or with Nussbaum’s literary approach. In fact, the ideal deliberative judge forges many of the same rhetorical alignments, including the economic judge’s application of cost-benefit analysis to constitutional law, and the literary judge’s understanding of emotion as a vital element of judgment. Yet, the deliberative judge is wary of any single perspective dominating the decision-making process, because civic discourse embraces many perspectives.

Whereas the economic judge is informed by economics and the literary judge is informed by literature and moral philosophy, the deliberative judge draws inspiration from social psychology to render sound judgment. Judges, juries, congress, and even public discourse are all deliberators that share certain characteristics. Recognizing the dangers associated with isolated thought and deliberation without opposing viewpoints, Sunstein articulates a “constitution of many minds” that *embraces* the tensions between judges and judicial theories. Echoing the spirit of Lincoln’s “team of rivals,”² he paints a foreboding picture of judges unwittingly succumbing to such psychological pitfalls as conformity and group polarization. A deeply embedded culture of free speech in tandem with a “many-minded” approach to judicial decision-making serve as a

² See Doris Kearns Goodwin, *A Team of Rivals: The Political Genius of Abraham Lincoln* (New York: Simon & Schuster, 2006).

bulwark against ideological pressures and subconscious inclinations. Encouraging frank speech and open dissent, Sunstein's deliberative judge responds to the dangers of groupthink, and this resistance is an essential element of sound judgment.

Dedicated to the notions of citizenship and civic engagement, the deliberative judge must also recognize the many ways in which legal decisions echo beyond the courtroom and impact public discourse. In this model, the judge does not play a passive role by sitting on the sidelines of public discourse. Instead, there is an obligation to reflect upon the many ways in which a decision impacts that discourse and to produce judgments with that in mind. Given the fluctuations of policy, law, and public opinion, the deliberative judge must *know when to nudge*. Good decisions are not issued in a vacuum, but reflect careful consideration of where the legal system and the country are headed. Judges adopting this model function, to use Ronald Dworkin's phrase, as "seers and prophets"³ as they render their decisions. Such sensitivity to timeliness and appropriateness illustrates the finely attuned sense of *kairos* needed to be an effective deliberative judge.

Finally, we must ask, "To what end?" What is the deliberative judge trying to *create* through his judgments? Whereas Nussbaum pursues the flourishing life and Posner pursues the efficient life, Sunstein's *telos* is the communal, civic life; a life lived for and with others. Accordingly, the deliberative judge strives to promote, maintain, and facilitate *citizenship*. This broad goal is central to Sunstein's approach. Although the term "citizenship" carries with it broad rhetorical resonances, the focal citizenship role of the, deliberative judge is to encourage civic deliberation and promotes communal goods. The citizenry has an *obligation* to deliberate and the law has a responsibility to create and maintain healthy discursive communities. In

³ Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), 407.

keeping with this intellectual commitment, Sunstein has advanced proposals for new instrumentalities, including a second Bill of Rights and a “New Deal” for the First Amendment.⁴ The institution of law and the decisions that emanate from it must not only be mindful of citizenship, but ought to actively *encourage* deliberative democracy. The changes he suggests work toward an engaged public discourse, particularly political speech. In essence, he is following the steps of Isocrates by attempting to produce “equipment for civic living.”

4.1 DELIBERATION AND DISSENT

Although American society tends to wrap judges in a mythos of special capacities of keen wisdom and sage judgment (perhaps due to the secrecy shrouding the “least dangerous branch”), judges can be petty, vindictive, short-sided, vain, obtuse, and downright mean. Additionally, they are influenced by ideology. In fact, ever since the left-leaning Warren Court, a judge’s ideological orientation has emerged as a significant point of contention both for sitting judges and those hoping to be appointed. In addition, emerging technologies are affecting public discourse, which, in turn, influences judicial decisions (and vice versa). Recognizing the challenges to good judgment posed by such factors, Sunstein has been at the forefront of behavioral research on judges and the public discourse that surrounds them. In particular, he is concerned with the roles played by *conformity* and *group polarization*, which he argues impact judges’ decision-making processes and the conclusions they reach. In view of these considerations, Sunstein’s deliberative judge embraces dissent as a key feature of sound judgment. Acknowledging a certain degree of inevitability when it comes to such socio-

⁴ See Cass R. Sunstein, *The Second Bill of Rights: FDR’s Unfinished Revolution—And Why We Need It More Than Ever* (New York: Basic Books, 2004), *Designing Democracy: What Constitutions Do* (Oxford: Oxford University Press, 2001), and *Democracy and the Problem of Free Speech* (New York: The Free Press, 1993), particularly Chapter 2.

psychological pressures, the deliberative judge accepts his own fallibility and encourages dissent and “many-minded” judgment.

Dissent has a longstanding role within the rhetorical tradition. Perhaps the earliest and most formative defense of dissent is found in the anonymously authored “*Dissoi Logoi*.” The Ancient Greek text from around 400 BCE⁵ cites the subjective nature of such abstract notions as goodness, shamefulness, and truth by posing competing arguments rooted in different perspectives. For example, regarding the good and the bad, the author asserts an array of actions that may represent “goodness” in one situation and “badness” in another. A victory for the Greeks in a battle would be bad for the Persians, and vice versa.⁶ Even legal situations are present within the *dissoi logoi* text: “And someone who knows how to plead a case in court must understand justice correctly; for this is what trials are about. And if he knows this, he will also know its opposite and things different from these. He must also know all the laws; and yet if he does not understand the facts, he will not understand the laws either.”⁷ The goal of this approach is not to argue an entirely subjectivist morality, nor does it fall into nihilism. As Susan Jarratt argues, *dissoi logoi* advances “a means of discovering a truth rather than the expression of a...single Truth.”⁸ As John Poulakos notes, prominent sophistic educators such as Protagoras used *dissoi logoi* as a pedagogical tool, encouraging students to take apart an idea and find the

⁵ In a footnote, editors Michael Gagarin and Paul Woodruff cite the likely nearness to the Peloponnesian War, which would place the work around 400 BCE. See note 321 of “Dissoi Logoi,” in *Early Greek Political Thought from Homer to the Sophists* (Cambridge: Cambridge University Press, 1995) for their justification.

⁶ *Ibid.*, 297.

⁷ *Ibid.*, 308.

⁸ Susan C. Jarratt, *Rereading the Sophists: Classical Rhetoric Refigured* (Carbondale: Southern Illinois University Press, 1991), 49, as cited in Karen A. Hodges, “Unfolding Sophistic and Humanistic Practice through Ingenium,” *Rhetoric Review* 15.1 (Autumn 1996), 88.

two (or more) competing perspectives interacting with one another.⁹ At its worst, the process could be seen as uselessly eristic. At its best, however, the process cultivates “political wisdom”¹⁰ and stronger arguments that can withstand intense scrutiny.

Dissent is closely affiliated with *dissoi logoi* in that both engage opposing arguments and the process of argumentation that emerges from the confrontation. Whereas *dissoi logoi* lends itself to pedagogy, dissent carries stronger social, political, and legal connotations. Founding documents, not the least of which being the United States Constitution, were produced amidst intense dissent. Publius and Cato posed contrasting arguments in the pages of newspapers across the country for the fate of federalism. Essays such as Thomas Paine’s *Common Sense*, Henry David Thoreau’s “Civil Disobedience,” Martin Luther King, Jr.’s “Letter from Birmingham Jail,” and many others have been woven into a narrative of American civic religion that places dissent as a central virtue.¹¹ Prominent social movements, from the abolitionists to civil rights advocates to feminists and the LGBTQ movement, rally around expressions of dissent. Writing in reference to the influence of the abolitionist movement, legal scholar Akhil Reed Amar captures the hopeful potential of dissent as he writes,

But the key lesson of the abolitionist experiences is that today’s unpopular minority (like abolitionists in the 1830s) may legitimately become tomorrow’s mainstream (like

Lincoln’s Republic Party in the 1860s) – but for this to happen, we must allow the group

⁹ John Poulakos, “Rhetoric and Civic Education: From the Sophists to Isocrates,” in *Isocrates and Civic Education*, ed. Takis Poulakos and David J. Depew (Austin: University of Texas Press, 2004), 81-82, as cited in Gordon R. Mitchell, “Switch-Side Debating Meets Demand-Driven Rhetoric of Science,” *Rhetoric & Public Affairs*, 13.1 (2010), 108.

¹⁰ Arthur E. Walzer, “Teaching ‘Political Wisdom’: Isocrates and the Tradition of *Dissoi Logoi*,” in *The Viability of the Rhetorical Tradition*, ed. Arthur E. Walzer, Janet M. Atwill, and Richard Graff (Albany: State University of New York Press, 2005), 113-124.

¹¹ See, for example, Ralph F. Young, ed. *Dissent in America: The Voices That Shaped a Nation* (New York: Pearson Longman, 2009).

to speak and print in an effort to peacefully change the minds of fellow citizens. To safeguard popular self-government (in the long term), we must protect even (currently) unpopular expression.¹²

In many ways, we are a nation of dissenters hearkening back to the early founders. As Steven Hartnett argues in *Democratic Dissent and the Cultural Fictions of Antebellum America*, “Democracy is nothing more than the institutionalization of a culture that cherishes dissent.”¹³

In his extensive work on rhetoric and dissent, Robert Ivie argues that dissent can cultivate a “humanizing aesthetic” wherein “discourses of reflective perspective-taking build toward a positive peace based on non-violent struggle over competing versions of social justices. Dissent of this kind serves the democratic purpose of tactically resisting and strategically transforming the demonizing discourse of war culture.”¹⁴ “Otherwise,” argues Ivie elsewhere, “the failure to cultivate a democratizing style of peace-building dissent with which to resist demonizing propaganda will only serve to increase the likelihood of succumbing further to advancing techniques of governance, surveillance, containment, and control.”¹⁵ Dissent may divide a people, as Ivie suggests of “demonizing” dissent, but it may also unite them. This accords with the vision of Kenneth Burke, whose epigraph at the beginning of *A Grammar of Motives* “*ad bellum purificandum*,” signals an aspiration to make conflict meaningful rather than warlike.

¹² Akhil Reed Amar, “The Bill of Rights and Our Posterity,” *Cleveland State Law Review* 42 (1994), 577. Amar builds on this argument in two book-length works: *America’s Constitution: A Biography* (New York: Random House, 2006) and *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998).

¹³ Stephen Hartnett, *Democratic Dissent and the Cultural Fictions of Antebellum America* (Urbana, IL: University of Illinois, 2002), 176.

¹⁴ Robert L. Ivie, “Finessing the Demonology of War: Toward a Practical Aesthetic of Humanising Dissent,” *Javnost – The Public* 14.4 (2007), 52.

¹⁵ Robert L. Ivie, “Toward a Humanizing Style of Democratic Dissent,” *Rhetoric and Public Affairs* 11.3 (Fall 2008), 457. See also, Robert L. Ivie, *Dissent from War* (Bloomfield, CT: Kumarian Press, 2007).

Perhaps more than any other institution, the judicial system prides itself on the independence of the judiciary and the dissenting opinions it produces. Justices are celebrated for their scathing dissents if for no other reason than they help produce stronger opinions. Certainly, one may disagree with a dissent and the ideas it entails – perhaps virulently so – but at the very least it is reassuring to know that justices are formidable opponents. Sometimes these dissents are lost in time, but every once in a while a prophetic dissent is vindicated and later becomes the reigning majority opinion. Yet, dissent is not an end in itself, especially in a juridical setting that demands a modicum of consensus. Akin to the literary judge’s use of the literary imagination as a resource for invention, Sunstein invests the deliberative judge with a diplomatic appreciation for dissent that serves as a remedy for numerous deliberative ills. But, as I argue below, Sunstein is overly concerned with a paucity of dissent and forgets that there can be too much of a good thing. Just as the body responds negatively when there is a deficiency *and* toxicity of vitamins and minerals, so too does the body politic respond negatively when there is a dearth and surfeit of dissent. In order to understand how Sunstein rhetorically positions dissent in his legal theory and prioritizes it in his model of judgment, we must first examine the major problems to which dissent responds: conformity and group polarization.

Pressure to conform is part of the human condition and there is little reason to think that judges are immune. Psychological studies abound illustrating just how prevalent and pervasive conformity exists throughout human interaction. The 1950s A experiments of Solomon Asch, for example, show how easily an individual second guesses their own judgment and succumbs to social pressure.¹⁶ Asch’s experiment focused on an innocuous question, “Which line is longer?,” yet more disturbing acts of conformity have appeared in such tests. The most famous example,

¹⁶ Solomon E. Asch, “Effects of Group Pressure on the Modification and Distortion of Judgments.” In H. Guetzkow (Ed.), *Groups, Leadership, and Men* (Pittsburgh: Carnegie Press, 1951), 177–190.

the experiments of Stanley Milgram, dramatically demonstrated how behavior that would normally be thought unethical can be produced by conforming to perceived authority. In short, conformity is a hard fact of the human condition – we have a general tendency conform both to authority and to social pressure. As Sunstein documents in numerous works, judges are influenced to go with a majority on a court, even though this puts them at odds with their own ideological commitments. A judge’s wealth of knowledge and experience certainly factor into decisions and serve as a buttress against *blind* conformity. But, as Sunstein notes, the ideological composition of multi-judge panels contributes to conformity and group polarization. When the ideological composition of a multi-judge panel (i.e. federal appellate courts) is divided along ideological lines, then the minority judge is more likely to conform to a position that runs counter to their ideological viewpoint. For example, an ideologically liberal judge sitting on a three-judge panel with two ideologically conservative judges is more likely to vote with the conservatives than stand alone in a minority dissent.¹⁷

¹⁷ In *Are Judges Political?: An Empirical Analysis of the Federal Judiciary* (Washington, DC: Brookings Institution Press, 2006), Sunstein and his co-authors highlight fifteen separate issues that traditionally divide judges on ideological lines, including affirmative action, obscenity, and the Environmental Protection Agency. Examining 6,408 published three-panel decisions and the 19,224 associated votes of individual judges, Sunstein utilizes empirical data to illustrate three phenomena: ideological voting, ideological dampening, and ideological amplification. Ideological voting refers to judges voting in line with their political ideology (or, if their ideology is particularly difficult to pin down, the political ideology of the Presidents who appointed them). Ideological dampening is a species of conformity and occurs on split courts when a one judge holds a different ideological position than the other two; for example, a court composed of two Democrats and one Republican. Ideological amplification refers to an entire panel of like-minded judges pushing one another to a more extreme position than they previously held (Sunstein also uses the term “group polarization” when discussing ideological amplification, which will be addressed in greater detail). In *Why Societies Need Dissent*, he asserts that in cases concerning affirmative action, for example, a Democratic judge (one appointed by a Democrat) is 13% more likely to invalidate a statute or policy that promotes affirmative action when issuing a judgment with two Republicans. Likewise, a Republican judge is 17% less likely to invalidate when isolated with two Democrats. Sex discrimination and sexual harassment cases follow a similar pattern. Both Republicans and Democrats voted in favor of plaintiffs in sex discrimination cases 42% of the time when they are the sole voice from their ideological position. For Republicans, this is a 7% increase over their average voting patterns, whereas Democrats decreased such votes by 9%. In sexual harassment cases, Republicans increased their support of plaintiffs by 5% when with two Democrats, and Democrats decreased their

Similar to Posner's rhetorical strategy, Sunstein inundates the reader with an array of "hard data" to illustrate his point. Sunstein clothes his argument in pseudo-scientific statistics, but the numbers do not necessarily add up. He calls attention to the purported problem of conformity throughout many books and journal articles, but many examples rely upon a thin understanding of what conformity is and why it takes place. He sets up the reader to perceive the dangers of judicial conformity as comparable to the Milgram experiments that legitimized Arendt's idea of the banality of evil. Yet, the reasons for a judge perceived conformity are much more complex and diverse than their ideological commitments. Sunstein assumes that conformity is usually the result of lazy, doubt-ridden judgment or a conceited view of a conforming judge's self-image. His evidence, however, is thin. He conflates cases that fall within a similar category, but does not articulate the various ways in which the unique facts and circumstances of individual cases may have led judges to "conform." For example, cases involving sex discrimination are pooled together without distinguishing them in any way. He then generalizes the differences in voting habits for all cases falling under the same category, noting even the slightest changes to "average" voting patterns, some of which are not statistically significant. Any number of reasons may lead a judge to "conform" with his or her fellow judges that have

support by 6% when with two Republicans. Similar trends occur within the Supreme Court, although less pronounced given the selectivity of the court's docket. Nonetheless, when the issue before the court is "ideologically relevant," such as the heated topics mentioned by Sunstein, the justices "are more resistant to social influence." Paralleling Sunstein's research on appellate court conformity, one of the major reasons for vote shifting (also known as "fluidity") is a desire to be in the majority, not the minority. Historically, "justices are 12 times more likely to shift from the minority to the majority than to reflect a counter-conformity shift." Regarding conformity on multi-judge courts, see also Lawrence S. Wrightsman, *The Psychology of the Supreme Court* (Oxford: Oxford University Press, 2006). Saul Brenner's work is particularly illuminating on the topic of Supreme Court fluidity. See "Fluidity on the United States Supreme Court: The Judicial Ideology of Sandra Day O'Connor," *American Journal of Political Science* 24 (1980), 526-35; "Fluidity on the Supreme Court: 1956-1967," *American Journal of Political Science* 26 (1982), 388-90; "Fluidity on the United States Supreme Court: A Comparison of the Original Vote on the Merits with the Final Vote," *Jurimetrics Journal* 22 (1982), 287-92. See also, Saul Brenner and Robert H. Dorff, "The Attitudinal Model and Fluidity Voting on the United States Supreme Court: A Theoretical Perspective," *Journal of Theoretical Politics* 4 (1992), 195-205.

nothing to do with their ideology or self-image. A new statute or a precedent established by the Supreme Court may lead a judge to go against their ideological commitment, which is not accounted for in Sunstein's data, and is stronger evidence that the legal system is *not* as ideologically driven as Sunstein fears it is.

Following Sunstein's narrative of the court, non-conformity is worn as a badge of honor and a sign of healthy deliberation. But the potential problems associated with a non-conformist position are ignored. Under Sunstein's characterization, the non-conformist deliberative judge speaks truth to power for the good of the legal system and society writ large. This idealized notion of the non-conformist assumes that there is always something dangerous lurking behind an act of conformity, but that is not always the case. A judge who encounters and is persuaded by a good argument from their colleagues on the court who happen to share a different political ideology exhibits strength, not weakness. Taking a step back, such an act of conformity at the small scale of individual cases may be an act of *non*-conformity at the national level. If a conservative judge on a panel with two liberal judges votes in favor of same-sex marriage, Sunstein would count that as conformity. But that same conservative judge is being a non-conformist compared to his fellow conservative judges across the country. Sunstein's rhetorical strategy relies upon a narrow scope, assessing conformity on a binary (a judge is a conformist or a non-conformist) in relation to each individual court, rather than a broader position that would place conformity on a spectrum and consider regional or national factors that may influence a decision. Like the economic judge, the deliberative judge may miss the trees for the forest.

Conformity nonetheless remains a dangerous threat to good legal judgment in Sunstein's jurisprudence, but it is arguably less insidious than group polarization, which "occurs when group members, engaged in deliberation with one another, end up taking a more extreme position

in line with their predeliberation tendencies.”¹⁸ In other words, when like-minded people get together and discuss an issue, they will push one away from a moderate position and toward the margin. Juries, Sunstein notes, are notorious for group polarization; real life rarely plays out like *Twelve Angry Men*. Independent groups organized around a polarizing social issue are also more likely to adopt a more extreme view than they began with. The “Southern strategy” and the increased use of wedge politics rely on group polarization as a key part of their persuasive power. PETA activists do the same thing. Hate groups such as those listed by the Southern Poverty Law Center offer paradigmatic examples of the power and prevalence of group polarization. It is easy and reassuring to preach to the choir and validate one’s own beliefs in the process.

Sunstein argues that the public becomes fragmented and detached from one another as a result of the “limited argument pools,” which constitute “the central factor behind group polarization.”¹⁹ Argument pools, or the array of different arguments and perspectives that are involved in deliberation, remain undiluted when group polarization is in effect. In like-minded groups, the likelihood that a voice of opposition will be made (let alone *heard*) over the din of agreement diminishes greatly. As a result, the group falls into a pattern of “yes, and” that reinforces the already solid ground of agreement. Even the sharpest minds may succumb to group polarization when the group moves in a certain direction. Although Damien Pfister reminds us that such “enclave deliberation” can prove useful, particularly in the blogosphere’s ability to “[increase] the sophistication of reasoning,”²⁰ the dangers of group polarization are

¹⁸ Sunstein, *Why Societies Need Dissent*, 11. See also James N. Druckman and Kjersten R. Nelson, “Framing and Deliberation: How Citizens’ Conversations Limit Elite Influence,” *American Journal of Political Science* 47.4 (Oct. 2003), 729-745.

¹⁹ Sunstein, *Republic.com 2.0*, 65.

²⁰ Damien Smith Pfister, “The Logos of the Blogosphere: Flooding the Zone, Invention, and Attention in the Lott Imbroglio,” *Argumentation and Advocacy* 47 (Winter 2011): 141-162.

always looming. As argumentation scholarship reflects, decisions reached under the influence of such enclave effects are weaker given the limited quality and quantity of arguments and perspectives.²¹

As Sunstein uses the term, group polarization is more about identification than division. Unlike instances of conformity, which include competing ideologies but unbalanced representation (e.g. two conservatives and one liberal on a three-judge panel), group polarization begins with ideological unity (e.g. a three-judge panel with *all* conservatives or *all* liberals). In that sense, there is no act of division within the group at hand— everyone is on more-or-less the same page. Polarization takes place when like-minded individuals push one another toward a more extreme (perhaps radical) position that they did not (and perhaps would not) adopt before deliberation. A group of left-leaning environmentalists is likely to move even further left after they get together and discuss environmental issues. If division exists, it does not happen in the process of such enclave deliberations, but rather when considering their new, more extreme position in relation to broader national opinion. The environmental advocacy group Earth First! serves as a useful example. Known for their radical, subversive tactics and anarchist political philosophy, the group has been attached to chemical attacks and bombings. Most environmentalists do not agree with their tactics, but these more moderate voices are not present within the organization. Sunstein would argue that group polarization is present within

²¹ For example, see Steven M. Alderton, “Locus of Control-Based Argumentation as a Predictor of Group Polarization,” *Communication Quarterly* 30.4 (Fall 1982), 381-387; Damien Smith Pfister, “Introduction to Special Issue: Public Argument/Digital Media,” *Argumentation & Advocacy* 47.2 (Fall 2010), 63-66; Charles Pavitt, “Another View of Group Polarizing: The ‘Reason For’ One-Sided Oral Argumentation,” *Communication Research* 21.5 (Oct. 1994), 625-642; Deanna Kuhn, et. al., “Developing Norms of Argumentation: Metacognitive, Epistemological, and Social Dimensions of Developing Argumentative Competence,” *Cognition and Instruction* 31.4 (Oct. 2013), 456-496; Douglas Ehninger, “Argument as Method: Its Nature, Its Limitations and Its Uses,” *Speech Monographs* 37.2 (June 1970), 101-110; and Barbara Warnick, “The Rational and the Reasonable in the AIG Bonus Controversy,” *Argumentation & Advocacy* 46.2 (Fall 2009), 98-109.

deliberations between Earth First! members and makes it more likely for them to adopt an extreme position that is not in line with the majority of environmentalists. They identify with one another in the group, but they are divided from the broader majority outside of the group.

According to Sunstein, one of the primary reasons group polarization takes place is the lack of dissent in deliberation. The Bay of Pigs invasion, one of his favorite examples, illustrates the phenomenon. Echoing the work of Irving Janis, who coined the term “groupthink,”²² Sunstein asserts that the ill-conceived plan continued to move forward due to the lack of a dissenting argument. President Kennedy was surrounded by “yes men,” largely a product of his own doing. Potential dissenters fell in line while the most vocal supporters amplified the position of the group. In this example, conformity and group polarization contribute to one another. The individuals who might have wanted to voice their dissent conformed to the group because they did not want to be ostracized. As a result, group polarization was allowed to continue unabated.

As with conformity, judges are also vulnerable to the law of group polarization. Whereas conformity takes place on divided panels, Sunstein explains how group polarization takes place on appellate courts when all three judges hold the same ideological position, which makes them more likely to push one another further right or further left, depending on the composition of the court. The problem is not that judges tend to vote along ideological expectations, but rather they are pushing each other toward more extreme positions that they would not otherwise adopt.²³ Although Sunstein relies on a wealth of statistical data, his conclusions may fall prey to the *post hoc ergo propter hoc* fallacy. Pressures toward polarization and conformity occur within the context of multiple considerations and therefore cannot be accounted the cause of such decisions.

²² See Irving Janis, *Groupthink* (Boston: Houghton Mifflin, 1982).

²³ Only three areas remain resistant to this force: abortion, capital punishment, and national security. See Cass R. Sunstein, *Going to Extremes: How Like Minds Unite and Divide* (Oxford: Oxford University Press, 2009), 11.

If Sunstein's characterization is correct, the judiciary succumbing to group polarization rather than finding common ground not only compromises the independence of judgment, but presents a judicial failure to serve as a bulwark against group polarization in broader public discussions. Sunstein notes the potential for a "chilling effect" on public dissent. Those who disagree with particular policies or government actions, or at least have some reservations, remain silent for fear that their peers may shame them.²⁴ Invoking Elisabeth Noelle-Neumann's "spiral of silence" phenomenon wherein individuals with minority opinions silence themselves, Sunstein fears that these opinions will become completely removed from society over time.²⁵ Sunstein argues that self-censorship and conformity based on perceived or expected stigmatization can be detrimental to a deliberative, democratic group, including the judiciary. Without prominent and active voices of dissent from respected institutions, the likelihood of group polarization increases because there are fewer competing arguments to disrupt or counter the dominant perspective. As a result, the argument pools become greatly imbalanced. As Michael Billig reminds us, incorporating an array of different arguments and perspectives is not only important for interpersonal deliberation but dissent (or "anti-logos") is also vital at the intrapersonal level.²⁶

One of the important rhetorical turns Sunstein utilizes as he crafts the deliberative judge is the reliance upon social psychological data to justify his central tenets of good judgment, such as the role and power of dissent. While the mountain of data he and other like-minded legal

²⁴ Sunstein notes the potential stigma attached to dissent and the affect it may have on one's reputation. He addresses this trend throughout *Why Societies Need Dissent*, but focuses exclusively on stigma and reputation in chapter four, "What Will the Neighbors Think?"

²⁵ Sunstein, *Republic.com 2.0*, 65.

²⁶ See Michael Billig, *Arguing and Thinking: A Rhetorical Approach to Social Psychology* (Cambridge: Cambridge University Press, 1987). Of particular note is his treatment of "anti-logos" throughout the book.

scholars utilize is impressive, Sunstein uses an overly simplistic method of determining a judge's political ideology by turning to the political party of the president who appointed them. In contrast to many approaches to and analyses of ideology, most notably the critical-cultural tradition that emerged out of Marxist theory and the Frankfurt school, Sunstein's approach merely descriptive and is used primarily as a method of categorization. Such an approach carries at least five problems in varying degrees of significance. First, it neglects the many instances wherein a judge or justice has bucked the ideology of their appointee. Prominent examples include President Eisenhower appointing Chief Justice Earl Warren (a decision Eisenhower later claimed was "[T]he biggest damn fool thing I ever did"²⁷) and Justice William Brennan; President Nixon appointing Justice John Paul Stevens; and President George H. W. Bush appointing Justice David Souter.²⁸ Second, it perpetuates a false dichotomy by positing only two ideological positions, liberal and conservative. Not only does such a framework tend to undermine complex, nuanced approaches to important legal issues, the dichotomy also fails to acknowledge that judges and justices may adopt traditionally liberal positions regarding some issues and traditionally conservative positions regarding others (the classic social liberal, economic conservative). And let us not forget the plurality of ideologies that challenge the binary such as anarchism and libertarianism. Third, Sunstein's dichotomy also ignores the fact that many judges, especially those with aspirations for a Supreme Court appointment, are extremely cautious about showing their ideological hand. Some do so as a career strategy whereas others truly believe that the legal system is (or at least ought to be) apolitical. Fourth, one is hard

²⁷ Ed Cray, *Chief Justice: A Biography of Earl Warren* (New York: Simon & Schuster, 1997), 10. In his biography of Eisenhower, Stephen E. Ambrose also notes, "[I]n the sixties, Eisenhower frequently remarked that his biggest mistake was the appointment of that dumb son of a bitch Earl Warren." See *Eisenhower: The President* (New York: Simon & Schuster, 1984), 190.

²⁸ Interestingly, Republican presidents have had a more difficult time appointing justices that fall in line with the reigning party ideology.

pressed to know with any degree of certainty where the conformist pressure emerges. The relatively slight differences following party lines might be taken as indicating a broad tendency to conform. But it could also be interpreted as discernible patterns of political conformity, based on party—again, though, the differences seem too slight to give much support to that point. The gradual shift in public opinion may also be a contributing factor, a point not lost on Sunstein and the deliberative judge. Finally, as mentioned earlier, there may be any number of extraneous circumstances that encourage a judge to conform to the dominant opinion of the court.

Sunstein is not unaware of these problems, but they nonetheless complicate his socio-psychological approach to law. Yet he makes a reasonable case that conformity and group polarization exist within the judiciary and challenges the implicit belief that the judicial system is not significantly shaped by group affiliation. He also acknowledges the various ways in which judicial dissent is more difficult than one might expect. According to Sunstein, these difficulties have three general sources. The first is that votes of one’s colleagues carry information that may tempt one to defer to others rather than be a lone dissenter.”²⁹ If a judge is not confident with his knowledge, the easier path is the one of least resistance. Few relish being on the losing side (although Justice Scalia seems to relish being the exception to the rule).

The second pressure against dissent is the “burdensome and time-consuming” process of producing dissent knowing that “they might well be ineffectual.”³⁰ This point, however, might be countered by reference to the impact that dissenting opinions *may* have in future cases. Justice Oliver Wendell Holmes, Jr., known colloquially as “The Great Dissenter,” had a number of dissents vindicated by history, such as his famous dissents in *Lochner v. United States* and

²⁹ Sunstein, *Why Societies Need Dissent*, 182.

³⁰ *Ibid.*, 183.

Abrams v. United States. However, the likelihood that a dissenting opinion will be endorsed in time is highly unlikely.

The third factor militating against dissent, according to Sunstein, is that “dissenting opinions can cause tension among judges, a particular problem in light of the fact that judges must work together for many years.”³¹ Not only do judges care about their public reputations, they are also concerned about their reputations and relationships amongst their colleagues. Heated disagreements, even if they are done in good faith, can sour the most hearty of relationships. In addition to the general discomfort that would persist until death or retirement, they may also want to maintain convivial relationships with their peers in order to gain their support when the tables are turned. A judicial “you scratch my tort, I’ll scratch yours,” so to speak.

Even when a judge or justice wants to dissent, the more prudent path may involve biting their tongue. In the next section on *kairos*, it will be important to consider that judges must know when to dissent and know when to hold back. Justice Louis Brandeis was known to write, yet not to publish, an assemblage of dissenting opinions,³² restraining himself “if he thought the Court’s opinion was of limited application and unlikely to cause real harm in future cases.”³³ In doing so, Brandeis was able to navigate through the issue of collegiality that Sunstein notes by voicing his concern amongst his colleagues, but keeping his criticisms from the public eye (at least on what he deemed less important decisions). This is a difficult line to toe and judges are always in danger of succumbing to conformity or violating judicial decorum.³⁴ In landmark decisions,

³¹ *Ibid.*

³² These unpublished opinions have since been published: See Alexander M. Bickel, *The Unpublished Opinions of Mr. Justice Brandeis* (Cambridge: Belknap Press, 1957).

³³ Ginsburg, “The Role of Dissenting Opinions,” 4.

³⁴ According to Stephen A. Newman, Justice Scalia is a paradigm example of the latter – violating judicial decorum – as he has wanted to engage in “judge bashing” since his first dissenting opinion. See Stephen A

argues Christine Langford, dissents tend to abandon collegiality in favor of a rhetorical juxtaposition between good and evil.³⁵ Moreover, there exists a tendency to remember the dissents that have been vindicated by history while ignoring those that have not.

Dissent can produce needed reflection, even when not changing the immediate outcome. At their best, vocal non-conformists force others to reflect upon their judgments and justifications, cultivating and refining arguments in the process. Even if one disagrees, they must (or at the very least *should*) actively defend their position. Was *Bush v. Gore* poorly decided? What justifications are advanced? Unlike Justice Scalia's demand that the American citizenry "get over it," a moment of pause and reflection by Justice O'Connor may have yielded a different decision.³⁶ After all, she was long considered the "swing vote" of the court, a role that has since passed to Justice Kennedy. Such a position is powerful not only because it may prove to be the deciding vote, but also because their arguments are more appealing to others with reservations. When put in conversation with the other models of judgment, Sunstein's deliberative judge productively antagonizes his peers to reflect upon previously unaddressed

Newman, "Political Advocacy on the Supreme Court: The Damaging Rhetoric of Antonin Scalia," *New York Law School Law Review* 57 (2006), 907-926.

³⁵ See Catherine L. Langford, "Appealing to the Brooding Spirit of the Law: Good and Evil in Landmark Judicial Dissents," *Argumentation & Advocacy* 44.3 (Winter 2008), 119-129.

³⁶ Justice Sandra Day O'Connor's public misgivings over *Bush v. Gore*, a decision that has done more to stain the Supreme Court's reputation than any other in recent memory, illustrate this point. Reflecting on the case, O'Connor now claims, "It took the case and decided it at a time when it was still a big election issue. Maybe the court should have said, 'We're not going to take it, goodbye.' Obviously the court did reach a decision and thought it had to reach a decision. It turned out the election authorities in Florida hadn't done a real good job there and kind of messed it up. And probably the Supreme Court added to the problem at the end of the day."³⁶ Referring to the court as a disembodied "it," a sign she is distancing herself from her role on the court, Justice O'Connor's revelation comes at a time when public opinion of the court is nearly at its lowest. Although we can never know if O'Connor succumbed to the type of conformity articulated by Sunstein, her admission suggests either a certain degree of conformity or a flat-out misguided decision, neither of which bode well for a non-partisan, independent judiciary. For the full interview, see Dahleen Glanton, "O'Connor Questions Court's Decision to Take *Bush v. Gore*," *The Chicago Tribune* (April 27, 2013), retrieved from http://articles.chicagotribune.com/2013-04-27/news/ct-met-sandra-day-oconnor-edit-board-20130427_1_o-connor-bush-v-high-court.

arguments. Even if none of the judges change their respective opinions, they all benefit from expanded argument pool. It provides deliberative situations with more information, thus benefiting both dissenters *and* conformists.³⁷

This process of oppositional interaction underscores Sunstein's call for *many-minded judgment* that incorporates an array of jurisprudential viewpoints as the best resource for good legal judgment. In *A Constitution of Many Minds*, he argues that the genius of the Constitution is in the fact that it was produced through a bevy of competing arguments and that spirit should pervade the judiciary.³⁸ Sunstein's deliberative judge finds immense value in the different perspectives articulated by other judges. Whereas the economic judge and the literary judge heavily rely upon intrapersonal deliberation to arrive upon good judgment, the deliberative judge believes interpersonal interaction with an array of viewpoints is more vital. Moreover, the tensions that exist between these competing perspectives are beneficial; good judgment exists *because of* these tensions, not despite them.

In order to elucidate these tensions, Sunstein juxtaposes different approaches to judgment. These include minimalism (his personal disposition), majoritarianism, perfectionism, and fundamentalism. Each of the approaches offers something valuable for deliberation. For example, he appreciates aspects of majoritarianism, a judicial outlook he attributes to Oliver Wendell Holmes, Jr., particularly its respect for community social norms. Briefly, judicial majoritarianism echoes its political counterpart: democratic majorities can decide for themselves. "I always say," writes Holmes in a letter to Harold Laski, "that if my fellow citizens want to go

³⁷ Sunstein, *Why Societies Need Dissent*, 6.

³⁸ Cass R. Sunstein, *A Constitution of Many Minds: Why the Founding Document Doesn't Mean What It Meant Before* (Princeton: Princeton University Press, 2009), 3.

to Hell I will help them. It's my job.”³⁹ The protection and promotion of community, from the local to the national, is a recurring theme throughout Sunstein's work. As his lamentations against conformity and group polarization attest - there are better and worse communities. Rather than discounting majoritarianism, the deliberative judge wants to place it *in conversation* with others. For example, a minimalist judge would be highly resistant to large, sweeping changes at the behest of majorities. If change is going to take place, the minimalist advocates for incremental steps. Similarly, if majoritarians demand no change at all and wish to cling to outdated traditions, a perfectionist judge – that is, a judge who interprets cases in relation to the Constitution “in a way that both ‘fits’ with [the Constitution] and makes it best, and in that sense perfects it”⁴⁰ – may interpret such stagnancy as antithetical to the “best” interpretation of the Constitution.

The important point to note is that none of these approaches offers a complete, all-encompassing view of the law. Every approach has its blind spots and to make judgments without deliberating with competing perspectives makes poor decisions more likely. The different approaches *need* each other as a set of inter-judicial checks and balances in order to ensure that important ideas are brought to the fore. In a way, the deliberative judge acts as a (Kenneth) Burkean critic by suggesting that judges utilize everything at their disposal, especially when difficult cases are on the line. In this regard, the deliberative judge needs Posner's economic judge and Nussbaum's literary judge, in addition to the myriad of other perspectives, lest he succumb to his own criticisms. Through the tensions manifested throughout deliberation and dissent, the deliberative judge believes that better ideas emerge. Sunstein claims that in order

³⁹ Oliver Wendell Holmes, Jr. in a letter to Harold J. Laski, March 4, 1920. See Howe (ed.), *Holmes-Laski Letters*, 249.

⁴⁰ Sunstein, *A Constitution of Many Minds* 22.

to cultivate a stronger, more intellectually robust and respectful democratic nation, conscientious deliberation must play a key role. At its best, it can curb the distorting effects conformity and group polarization and help to facilitate tolerance. It also has significant rhetorical weight, as it connects well with the notion of citizenship and self-governance (which will be elaborated upon in a later section). In a healthy democratic community, the best deliberation will result in some sort of consensus about the better path to be taken at any given moment but consider as many ideas and options as possible in order to discern which path is the most appropriate.

The deliberative judge is willing, when necessary, to practice mindful dissent that appropriately challenges the reigning opinion, be it in the judicial system or the court of public opinion. Clearly, dissent is not required in every court decision, but the exploration of dissenting viewpoints should nonetheless be a part of every deliberative process. Even if a decision is unanimous, the opinion is strengthened when counterarguments are entertained. John Stuart Mill heralded this idea as one of the primary reasons to value the liberty of thought and discussion in a democratic society. While “[t]here is no guarantee” that a group – the judiciary included – will not fall prey to conformity or group polarization, “at least it can be said that a society which permits dissent and does not impose conformity is in a far better position to be aware of, and to correct, serious social problems.”⁴¹ In addition, dissents help to underscore the “incompleteness” of the “incompletely theorized agreements” as they provoke continued deliberation.

Underscoring his rhetorical strategy, Sunstein’s celebration of dissent as a remedy for poor judgment tends to amplify its positive benefits while minimizing potential problems. Looking at the picture of dissenting opinions Sunstein paints, they appear quite phenomenal – more phenomenal, in fact, than the majority opinions to which they respond. For a handful of

⁴¹ Sunstein, *Why Societies Need Dissent*, 149.

dissents this is true: they have crystalized ideas and catalyzed important and necessary movements in our shared democratic culture. Yet, upon closer inspection, Sunstein's portrait blurs some important lines. Although he recognizes some of the dangers in dissent, Sunstein nonetheless imbues dissent with near magical properties. Dissent becomes a near panacea to cure all manner of social ills and illustrates what I call Sunstein's "if only" approach. *If only* there had been a voice of dissent within Kennedy's administration during the Bay of Pigs invasion. *If only* there were vocal dissidents during times of war. *If only* judges and justices were more persistent with their opposition to poor decisions and bad judgments. *If only* a voice of reasoned opposition were present amidst group polarization. *If only* conformists met a dissenting opinion. Sunstein places a lot of faith – arguably too much so – in the power of dissent and the ensuing deliberation to quell some of the most longstanding and divisive problems in American society. But in order for a dissent (or an opinion) to have the most significant impact, the deliberative judge acknowledges that their arguments must strike at the right time and in the right way in order to be effective.

4.2 KNOWING WHEN TO NUDGE

One of Sunstein's most interesting rhetorical contributions to jurisprudence is the idea of timely judgment, which builds on his more expansive work on the "nudge." Along with co-author and behavioral economist Richard Thaler, Sunstein authored *Nudge: Improving Decisions About Health, Wealth, and Happiness*, wherein they make a case for "libertarian paternalism" (also known as "soft paternalism"). "A nudge," according to Sunstein and Thaler, "is any aspect of the choice architecture that alters people's behavior in a predictable way without forbidding any options or significantly changing their economic incentives. To count as a mere nudge, the

intervention must be easy and cheap to avoid.”⁴² They argue that through an array of policy initiatives, legal statutes, government programs, and subtle social pressures, citizens will begin to make healthier, more communal, and overall *better* choices. A nudge directs the attention of an individual. A nudge entices another to adopt a particular perspective and make a particular judgment. A nudge respects the agency of individuals while still helping them along the way. A nudge, in other words, is rhetoric in action. As this section will articulate, the deliberative judge’s ability to nudge underscores a rhetorical sensitivity to *kairos*, knowing how and when to issue a judgment. Moreover, the deliberative judge who knows when to nudge falls in line with Sunstein’s aforementioned judicial minimalism. Given Sunstein’s advocacy for the “expressive” function of law and the role that “commitments” play therein, the judge serves as a complement to legislative “choice architect” in shaping public conceptions of law.

Briefly, choice architecture is practice of “organizing the context in which people make decisions.”⁴³ Drawing on behavioral psychology, Sunstein argues that the simple, noninvasive, and seemingly innocuous construction of frameworks by which individuals make decisions can help them make better decisions. For example, something as easy as where a school cafeteria places fruits and vegetables in the lunch line can nudge unwitting students to opt for healthier options. The other, unhealthy food is not removed from the menu; rather, discrete organization and placement produce better judgments, hence the term “soft paternalism.”⁴⁴ The legislature

⁴² Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (New York: Penguin, 2008), 6.

⁴³ *Ibid.*, 2.

⁴⁴ In “Choice Architecture,” written by Sunstein, Thaler, and John Balz, the authors introduce a number of examples wherein the mere framing of a situation alters behavior in positive and predictable ways. See Richard H. Thaler, Cass R. Sunstein, and John P. Balz, “Choice Architecture,” in *The Behavioral Foundations of Public Policy*, Eldar Shafir, ed. (Princeton: Princeton University Press, 2013), 428-439. “Better” judgments are a sticky wicket and rely largely on a preconceived notion about what is better or worse in decision-making, which are highly debatable. This challenge to Sunstein’s argument will be addressed later in this section.

certainly plays a more active role as choice architects in their ability to construct and implement policies that nudge the public one way or another, but judges play their part, too. Not only are judges invested with the power to assess the legality of legislative policies that are brought before the bench, they also have the power to create precedents that will be followed indefinitely. In other words, judges are the “choice contractors” to the legislative “choice architects.” If a piece of legislation has created negative, perhaps unforeseen ramifications or if legislation becomes out of date and a stagnant Congress is unwilling or unable to amend it, judges are afforded discretion to alter or eliminate said legislation so long as they stay tethered to the Constitution. Occasional cries of “judicial activism” notwithstanding, judges and justices make these decisions on a daily basis, often concerning cases that draw little if any attention from politicians, pundits, or the public. At their best, their decisions (and even dissents) serve as nudges working toward incremental change rather than complete upheaval.

The ability to know what is best (or, at the very least, to know what is *better*), but also to know how to nudge people along the way is an invaluable resource for the deliberative judge. Drawing on Sunstein’s overarching jurisprudence, nudging is prevalent in two distinct yet interconnected ways: good laws nudge *people* in the right direction and good judges, mindful of legal history and public opinion, nudge *law* in the right direction. The first underscores Sunstein’s belief in the “expressive” function of law whereas the second underscores his belief in “judicial minimalism.” Describing the expressive function of law, Sunstein asserts that “actions are expressive; they carry meanings.”⁴⁵ This applies to something as seemingly innocuous as

⁴⁵ Cass R. Sunstein, “On the Expressive Function of Law,” *University of Pennsylvania Law Review* 144.5 (May, 1996), 2021. According to Sunstein, these commitments precede constitutional rights; the latter is a subset of the former. Only in moments of immense national crisis – what Bruce Ackerman characterizes as “constitutional moments” – are these commitments illuminated and tested. Thus, explicit statutes and judicial precedents are not the only important documents used to understand the public’s constitutive commitments, but popular culture also becomes significantly influential. Both formal jurisprudence and

clothing choices to “the statements made by law.”⁴⁶ Such actions reflect the reigning social norms, but the added power of law is its ability to shape and reshape social norms in significant ways, whether it is the creation of law by the legislature or the evaluation and alteration of law by the judiciary. Advancing the expressive function of law, Sunstein negotiates the tensions between the pragmatic and expressive tasks, responding both the letter and the spirit of law - what law *is* and what law *can be*. While Sunstein resists the urge for judges to act as a “moral compass,” he nonetheless argues that they have an obligation to help cultivate and maintain a healthy democratic culture. Through the power wielded by the deliberative judge, law serves as a vital social *signal*, a nationwide beacon, nudging citizens along the better path.

For the deliberative judge, constitutive commitments are an essential component of any sound judgment, a violation of which “would amount to a kind of breach – a violation of trust.”⁴⁷ The judge wants commitments to nudge the citizenry toward more democratic, more communal, and more deliberative perspectives while still being corralled by the specific laws and statutes. “We might think of the underlying laws as exercises in *norm management*,” claims Sunstein.⁴⁸ In a society as large as the United States, with more than 315 million citizens, covering nearly four million square miles of land, the judicial system is one of the most ubiquitous shapers of social

popular representations of law and the Constitution socialize law into public consciousness, creating a “public constitution” or “public law” similar to, but distinct from, technical interpretations. Public discourse has its own way of talking about “liberty” and “equality,” which may be influenced by anything from a television show like *Law and Order* to journalism coverage of legal issues. Rituals, such as the celebrations surrounding the Fourth of July, also act to highlight the importance of the Constitution as a binding document to be upheld in all situations. The individuals resisting participation and refusing to ascribe devotion to the sacrosanct document may be ostracized and their patriotism questioned. As a result, public knowledge becomes affected, guiding individuals to see constitutional wishes as universally good. As Kenneth Burke aptly notes in *Permanence and Change*, explanation leads to socialization.

⁴⁶ *Ibid.*, 2022.

⁴⁷ Sunstein, *The Second Bill of Rights*, 62.

⁴⁸ Sunstein, *Why Societies Need Dissent*, 44.

norms. By virtue of the near omnipresence of law, Sunstein believes that judges have an obligation to nudge citizens in the right direction.

Whereas the expressive function of law illustrates how law nudges the citizenry, Sunstein also believes that judges (along with public opinion) nudge the law. As Sunstein argues in *Why Societies Need Dissent*, “Law is most effective when it goes somewhat, but not too far, beyond people’s current values.”⁴⁹ Thus the deliberative judge who knows when and how to nudge is a judicial minimalist – a position that asks courts (especially the Supreme Court) to focus on the specific case at hand without overreaching in their decisions. One of the important rhetorical qualities of the deliberative judge is a keen sensitivity to public opinion and the direction that it is headed. If the deliberative judge knows what is better (a problematic position to begin with, but for argument’s sake let’s give him the benefit of the doubt), he must also know when and how to deploy an argument such that it has the greatest impact. But unlike Ronald Dworkin’s mythic judge “Hercules,” Sunstein’s deliberative judge does not subscribe to the “right answer” thesis. Sunstein is less interested in social engineering at the judicial level and more interested in social refining. A nudge works better than a shove.

In order to rhetorically frame his position as more salient, more effective, and more democratic, Sunstein juxtaposes his preferred method of minimalist judicial restraint against overzealous judicial activism. Sunstein describes the minimalist court as one that settles the case before it, but it leaves many things undecided. It is alert to the existence of reasonable disagreement in a heterogeneous society. It knows that there is much that it does not know; it is intensely aware of its own limitations. It seeks to decide cases on narrow grounds. It avoids clear rules and final resolutions. *Alert to the problem of*

⁴⁹ Ibid., 44.

unanticipated consequences, it sees itself as part of a system of democratic deliberation; it attempts to promote the democratic ideals of participation, deliberation, and responsiveness. It allows continued space for democratic reflection from Congress and the states. It wants to accommodate new judgments about facts and values. To the extent that it can, it seeks to provide rulings that can attract support from people with diverse theoretical communities.⁵⁰

The minimalist position has significant rhetorical appeal. It evokes notions of modesty and prudence, acknowledging the unpredictability of future developments while still responding to the present moment.⁵¹

Perhaps most importantly, judicial minimalism encourages the public debate to continue while still satisfying the need for timely judgment. For the deliberative judge, a good decision provides a nuanced perspective on the case at hand and *facilitates further deliberation*. Justice Robert Jackson famously said of the Supreme Court: “We are not final because we are infallible; we are infallible because we are final.”⁵² Adopting a minimalist perspective, the deliberative judge suggests they are neither infallible nor final. “Above all,” writes Sunstein in *Radicals in Robes*, “minimalists attempt to reach *incompletely theorized agreements* in which the most fundamental questions are left undecided.”⁵³ A judicial decision marks a significant moment in an ongoing public discussion; yet rather than closing off deliberation, a good decision facilitates *more and better* deliberation. Remember: it’s a nudge, not a shove.

⁵⁰ Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 2001), ix-x, emphasis added. See also *A Constitution of Many Minds* and *Radicals in Robes* wherein Sunstein juxtaposes the minimalist with other, less desirable approaches.

⁵¹ The subsequent section on “many-minded judgment” will elaborate upon judicial minimalism and its relationships with “fundamentalism,” “perfectionism,” and “majoritarians.”

⁵² *Brown v. Allen*, 344 U.S. 443 (1953)

⁵³ Sunstein, *Radicals in Robes*, 28.

Yet, as Sunstein notes throughout various works, any nudge must be done at the right time and in the right way; it must be timely and appropriate. In other words, it must be *kairotic*. John Poulakos argues that “if what is said is timely, its timeliness renders it more sensible, more rightful, and ultimately more persuasive.” “In short,” he continues, “*kairos* dictates that what is said must be said at the right time.”⁵⁴ *Kairos*, the ancient Greek term that (roughly) translates to “timeliness,” is a key rhetorical faculty for the deliberative judge. In her introduction to a collection of essays examining the relationship between *kairos* and rhetoric, Carolyn Miller notes the importance of *kairos* to “invent, within a set of unfolding and unprecedented circumstances, an action (rhetorical or otherwise) that will be understood as uniquely meaningful within those circumstances.”⁵⁵ Attention to *kairos* within rhetorical scholarship continues to grow and expand the scope of the term to encompass seemingly disparate discourses including Lyndon Johnson’s push for civil rights,⁵⁶ the New Testament,⁵⁷ the nature of philosophy,⁵⁸ and just about everything in between.⁵⁹

Justice has always had a close relationship with time and timeliness. In his juxtaposition between *kairos* and *chronos*, John E. Smith notes, “In the ethical domain *kairos* appears as

⁵⁴ Poulakos, “Toward a Sophistic Definition of Rhetoric,” 40-1. See also John Poulakos, “Rhetoric, the Sophists, and the Possible,” *Communication Monographs* 51 (1984): 215-26.

⁵⁵ Carolyn R. Miller, “Foreword,” *Rhetoric and Kairos*, xiii.

⁵⁶ Garth E. Pauley, “Rhetoric and Timeliness: An Analysis of Lyndon B. Johnson’s Voting Rights Address,” *Western Journal of Communication* 62.1 (Winter 1998): 26-53.

⁵⁷ See Dale L. Sullivan, “*Kairos* and the Rhetoric of Belief,” 78 (1992): 317-32.

⁵⁸ See Melissa Shew, “The *Kairos* of Philosophy,” *Journal of Speculative Philosophy* 27.1 (2013): 47-66. Unsurprisingly, this essay cites but one essay produced by a scholar of rhetoric.

⁵⁹ There is a wealth of good scholarship on *kairos* and it continues to grow. In addition to the aforementioned essays, see also Edward Berry, “Doing Time: King’s ‘Letter from a Birmingham Jail,’” *Rhetoric & Public Affairs* 8.1 (2005): 109-32; Amos Kiewe, “Time in Rhetoric: An Investigation into Temporal Probabilities in Vatican II’s *Nostra Aetate*,” *Journal of Communication and Religion* 34.2 (Nov. 2011): 144-57; James L. Kinneavy and Catherine R. Eskin, “*Kairos* in Aristotle’s *Rhetoric*,” *Written Communication* 17.3 (July 2000): 432-40; Carol Mejia LaPerle, “Rhetorical Situationality: Alice Arden’s *Kairotic* Effect in *The Tragedy of Mater Arden of Faversham*,” *Women’s Studies* 39 (2010): 175-93; and J. Blake Scott, “*Kairos* as Indeterminate Risk Management: The Pharmaceutical Industry’s Response to Bioterrorism,” *Quarterly Journal of Speech* 92.2 (May 2006): 115-43.

justice or the proper measure according to merit or what is ‘due’ to an individual in an order of equality.” As a result, “*kairos* signals the need to bring universal ideas and principles to bear in historical time and situations and, thus, calls for decisions about values, means, and ends that cannot be a matter of law alone but requires wisdom and critical judgment.”⁶⁰ James Kinneavy also acknowledges the role that *kairos* plays in law, claiming it “has a clear relation to the legal concept of equity,” which has migrated through Greek to Roman law, “thence, into the major legal systems of Europe and America.”⁶¹ One need not look far to see *kairos* in action throughout the United States legal system. If prosecuted, citizens are guaranteed a speedy trial in the United States. The state cannot hold a defendant indefinitely. The suspension of *habeas corpus* and the enduring problem of the Guantanamo Bay prisons highlight an imperfect system. But the American judicial process is – on the whole – fairly quick and efficient, which may help to explain the staggeringly high prison population. As the saying goes, justice delayed is justice denied, and any judge worth his weight in statutes recognizes the importance of expeditious decision-making.

The deliberative judge’s sense of *kairos*, however, goes beyond the day-to-day minutiae that constitute the bulk of the legal system. As it concerns the law, *kairotic* judgment involves at least three important elements: 1) shifting public opinion, 2) the particular case and the individuals involved, and 3) the composition of a court. Concerning the first issue, shifts in public opinion, consider three landmark cases that exhibit the Supreme Court capitalizing on a *kairotic* moment: *Griswold v. Connecticut*, *Brown v. Board of Education*, and *Lawrence v. Texas*. *Griswold* examines the concept of “marital privacy” in relation to the First, Third, Fourth,

⁶⁰ John E. Smith, “Time and Qualitative Time,”

⁶¹ James L. Kinneavy, “*Kairos* in Classical and Modern Rhetorical Theory,” in *Rhetoric and Kairos: Essays in History, Theory, and Praxis*, ed. Phillip Sipiora and James S. Baumlin, 68.

Fifth, Ninth, and Fourteenth Amendments. In the early 1960s, the executive director of Planned Parenthood League of Connecticut, Estelle Griswold, and the director of the Yale Medical School, C. Lee Buxton, were charged with violating two state statutes. One prohibited the use of contraception and the other penalized anyone who “assists, abets, causes, hires, or commands another to commit any offense,” punishing the provocateur “as if he were the principal offender.” Joining Justice Douglas in the majority opinion, Justice Potter Stewart etched an important space for “marital privacy” that he stitched together from an array of amendments and precedents.⁶² Although *Griswold* was an “aggressive ruling,” Sunstein notes, “Connecticut was the only state that banned married people from using contraceptives.” As a result, “the court was vindicating, not opposing, widely held commitments within the nation as a whole.”⁶³

Similarly, *Brown* fell in line with the growing national sentiment against segregation. Following the Civil War and its accompanying “Civil War Amendments” (13-15), Jim Crow laws dominated the Reconstruction period. By 1900, they had effectively denied African-Americans equality under the law. After the fallout from *Plessy v. Ferguson*’s devastating 8-1 decision supporting segregation (as well as the lesser known but equally disheartening 1908 decision in *Berea College v. Kentucky*, which upheld a state law that required private educational institutions to remain segregated⁶⁴), groups determined to eliminate segregation began to emerge. The National Association for the Advancement of Colored People (NAACP) formed in 1909, only one year after *Berea*. By 1938, the Court ordered Missouri to admit a black applicant to the state-supported law school because Missouri had not established a segregated alternative.⁶⁵ In a concerted effort to highlight the inherent inequality, the NAACP sought *timely* cases that would

⁶² *Griswold v. Connecticut* 381 U.S. 479 (1965).

⁶³ Sunstein, *Why Societies Need Dissent*, 191.

⁶⁴ *Berea College v. Kentucky*, 211 U.S. 45 (1908)

⁶⁵ See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938)

make it before the Supreme Court during the early 1950s. By 1954, five separate cases were combined into the landmark *Brown v. Board* decision.⁶⁶ Moreover, national public opinion was firmly against segregation. “Some of the earliest public-opinion polls in the 1940s found that an overwhelming majority (about two-thirds) of whites were willing to support segregated schools.”⁶⁷ Again, the decision was forceful and it marked a monumental moment in the history of the Supreme Court, but the idea that the justices broke away from prevailing public opinion is simply incorrect. Chief Justice Earl Warren recognized and capitalized on a *kairotic* opportunity, nudging the public along the path they were already on.

Finally, the majority decision in *Lawrence*, which overturned the somewhat recent *Bowers v. Hardwick*, expanded LGBTQ rights as the citizenry increasingly opened to such changes.⁶⁸ Similar to *Griswold* in its focus on privacy, *Lawrence v. Texas* examined the legality of the Texas “Homosexual Conduct” statute. The law was used against the defendants, John Lawrence and Tyron Garner, who had been engaging in private, consensual, adult same-sex relations and were discovered by police officers responding to a reported weapon disturbance. Utilizing the Due Process Clause, Justice Anthony Kennedy wrote the majority decision overturning the statute. Upon first glance, the case appears to be a stark contrast to prior legislation and precedent. Only 17 years prior in *Bowers v. Hardwick*, the Court decided that a Georgia statute banning sodomy did not infringe upon a fundamental right. Penning the majority opinion, Justice Byron White worried that to decide any differently would amount to “judge-

⁶⁶ In addition to *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the Court also examined *Briggs v. Elliott*, *Gebhart v. Belton*, *Davis v. County School Board of Prince Edward County, Virginia et al.*, and *Bolling v. Sharp*.

⁶⁷ Taeku Lee, “Polling Prejudice,” *The American Prospect* (March 9, 2011), retrieved from <http://prospect.org/article/polling-prejudice>. Alarming, “By the mid-1990s (the last time questions on school segregation were asked), only one out of every 25 whites held on to the same view.”

⁶⁸ Sunstein, *Why Societies Need Dissent*, 193.

made constitutional law” (the judicial activism bogeyman strikes again!). Ten years later, congress implemented the Defense of Marriage Act when only 25% of the U.S. population supporting gay marriage. But by 2003, public opinion concerning the LGBTQ community had changed drastically. When *Bowers* was decided in 1986, nearly 75% of the country deemed homosexual acts “Always Wrong.”⁶⁹ When *Lawrence* was decided, public opinion was more-or-less split. Acknowledging the *kairotic* nature of the situation, Justice Anthony Kennedy could see the direction the country was headed. The decision he authored nudged them further and created a space for more *choice*, codifying Sunstein’s “libertarian paternalism.”

Pushing aside the political ideologies of judicial appointees, Sunstein claims that the Supreme Court is “unmistakably influenced by changes in public opinion over time, and for reasons that should now be familiar. If most people think that sex discrimination is morally unacceptable and akin to racial discrimination, some justices will listen.”⁷⁰ Legal ideas are constituted and reconstituted as public discourse changes. Rhetorical shifts in public discourse make new ways of knowing and new social perspectives possible. Recognizing this fact, the deliberative judge is mindful of public opinion and knows just when to nudge them along with a timely decided and appropriately argued judgment.

Sadly, history has just as many examples of judges *falling prey* to a misguided public opinion. Undermining the Missouri Compromise and reinforcing the expansion of slavery in *Dred Scott v. Sandford*;⁷¹ corralling thousands of Japanese-Americans into WWII internment

⁶⁹ See Tom W. Smith, “Public Attitudes toward Homosexuality,” *NORC/University of Chicago* (September, 2011), retrieved from http://www.norc.org/PDFs/2011%20GSS%20Reports/GSS_Public%20Attitudes%20Toward%20Homosexuality_Sept2011.pdf.

⁷⁰ Sunstein, *Why Societies Need Dissent*, 192.

⁷¹ *Dred Scott v. Sandford*, 60 U.S. 393 (1857)

cases in *Korematsu v. U.S.*;⁷² praising the merits of segregation in *Plessy v. Ferguson*⁷³ – these cases do not reflect a stark contrast from the reigning public opinion. Quite the opposite; these landmark cases, now considered some of the most morally horrendous decisions in Supreme Court history, were more-or-less in line with the public opinion at the time. Only now, decades later, do we look back at these decisions with pity and shame, which leaves one to wonder: what will we regret next?

But *kairos* in law is more than a judge knowing current trends; the deliberative judge must also choose the right case and argue it in the right way. Good timing with public opinion loses its rhetorical force when it utilizes unfit material. With the right case, the rhetorically savvy judge can help to *create* an opportune moment. The criminal rights revolution ignited by *Mapp v. Ohio* exemplifies the marriage between timely public opinion and a fitting case.⁷⁴ The case originally concerned an obscenity charge from lewd books discovered during a warrantless search. The Supreme Court, however, brushed aside the obscenity charge and focused on the warrantless search, evidence from which was still legally admissible in Ohio (and about half of the other states). The Supreme Court utilized the case to extend the “fruit from the poisonous tree” doctrine that was already in place at the federal level.

The *kairotic* moment emerged due to the circumstances surrounding the case. *Mapp v. Ohio* moved through the judicial system as a violation of obscenity law based on an Ohio statute. While there was some legal grounding for this charge, the reigning Supreme Court precedent, *Roth v. United States*, concerned the sale or transfer of obscene materials via post.⁷⁵ Social norms were shifting, however, and lewd material was gaining legal protection. After all, Playboy had

⁷² *Korematsu v. United States*, 323 U.S. 214 (1944)

⁷³ *Plessy v. Ferguson*, 163 U.S. 537 (1896)

⁷⁴ *Mapp v. Ohio*, 367 U.S. 643 (1961)

⁷⁵ *Roth v. United States*, 354 U.S. 476 (1957)

already been around for eight years. Moreover, the issue of possession was also complicated as Mapp claimed the books were left by a man renting out a room who had absconded without them. Without a warrant and with an entirely different reason for searching her home, Mapp's seven year conviction seemed extreme. The circumstances were ripe for a court looking for the chance to apply federal search and seizure regulations at the state level. Only seven years earlier, in *Wolf v. Colorado*, the court upheld a state's right to admit evidence derived from a warrantless search.⁷⁶ But in that case, the warrantless search involved an abortion clinic, so it was generally accepted that the ends justified the means. Overturning precedent is significant, but to overturn a precedent established only seven years prior while the authoring justice was still a member of the court was unheard of. *Mapp* provided the opportune moment because the ends seemed insignificant and the means extreme. If a murder weapon had been discovered, the likelihood that *Wolf* would have been overturned would be improbable if not impossible.

Whereas some cases like *Mapp v. Ohio* are chosen because of the contextual facts that bear on the issue before the court, other cases are chosen because of the compelling narratives provided by the defendants or respondents. Decisions that break from precedent are easier to justify when they involve sympathetic figures. We can see this occur in the recent landmark decision in *United States v. Windsor*.⁷⁷ The opinion of the court upended the Defense of Marriage Act (DOMA) and has led to a tidal wave of lower courts recognizing the Constitutional validity of same-sex marriage. While many challenges had been issued since DOMA's inception in 1996, such efforts were ineffective. Roberta Kaplan, the lawyer who argued before the court in favor of *Windsor* and against DOMA, claims that she latched on to the case in large part because of *Windsor* and her narrative. In an interview with Dahlia Lithwick, Kaplan describes her interest

⁷⁶ *Wolf v. Colorado*, 338 U.S. 25 (1954)

⁷⁷ *United States v. Windsor*, 570 U.S. ____ (2013)

in Windsor as the most effective vehicle to dismantle DOMA. Kaplan notes how “charming,” “bright,” “charismatic,” and “beautiful” Windsor is,

and on top of all that, think about her marriage. This is two women who lived together for 44 years, many of those years one of them was essentially paralyzed, she was a quadriplegic. And when you think about the marriage oath, the traditional marriage oath, it says, ‘In sickness and in health, ‘til death do us part.’ There’s a couple who really lived those words and took them seriously. It’s hard to imagine any married couple who took them more seriously than Thea and Edie. So, I personally was very moved by those facts, and I thought Americans would be moved by those facts, and I even thought the justices would be moved by those facts.⁷⁸

The narrative surrounding Edie and Thea was not mired in scandal or controversy. They were a loving couple and Edie, upon the death of Thea, was beset with a heavy burden of estate taxes, which would not have happened had Windsor been married to a man. Commenting on the strategic choice of Windsor’s case over other potential options, Justice Ginsburg claims, “The reaction to Windsor I think has been positive from the public. She was such a *well-chosen plaintiff*. People could understand the injustice of the way she was treated. I haven’t seen a social change that rapid in – ever. It’s just great that people who for years have been disguising what they were are now free to be what they are.”⁷⁹ A different plaintiff and a different set of circumstances may have yielded a similar decision, but the moment was made more opportune with Windsor.

⁷⁸ Dahlia Lithwick, “Amicus: Revenge of the Octogenarians,” *Slate* (October 25, 2014), retrieved from http://www.slate.com/articles/podcasts/amicus/2014/10/slate_amicus_with_dahlia_lithwick_on_the_supreme_court_s_abortion_and_voter_1.html

⁷⁹ Ruth Bader Ginsburg, “Justice Ginsburg Chats About Obamacare, Gay Rights and Surveillance,” *Wall Street Journal* (May 2, 2014), retrieved from <http://blogs.wsj.com/law/2014/05/02/justice-ginsburg-chats-about-obamacare-gay-rights-and-surveillance/>

The final and most obvious factor contributing to the timeliness of a decision is the composition of the court. Again, the Warren Court serves as a prime example. With the appointment of Chief Justice Earl Warren in 1954 and Justice William Brennan in 1956, in addition to the final retirement of the old-guard conservatives with Justice Felix Frankfurter in 1962, the court had a lasting impact on racial segregation, cruel and unusual punishment, voting, privacy, criminal procedure, the establishment clause, and free speech. With the appointment of Justice Thurgood Marshall in 1967, the liberal wing of the Court had a stable and reliable bloc.

But there is an ebb and flow when it comes to Supreme Court ideology. The Warren Court was a response to the more conservative court of the previous generation. In response to the Warren Court, a more conservative tide rolled in. Addressing the growing interest in and attention to minimal welfare guarantees in the 1960s, Sunstein rests its ultimate failure on the sharp judicial turn instigated by President Richard Nixon and his four Supreme Court appointees who promptly reversed the emerging trend, insisting that the Constitution does not include social and economic guarantees... As a practical matter, the Constitution means what the Supreme Court says that it means. With a modest shift in personnel, the Constitution would have been understood to create social and the economic rights of the sort recognized in many modern constitutions.⁸⁰

In this example, the President and his appointees recognized the *kairotic* moment presented before their opposition and acted quickly to squash it. *Kairos* and public opinion swing both ways.

The trend continued in the 1980s with the appointment of Justice Antonin Scalia and Justice Clarence Thomas. With the latter replacing Justice Thurgood Marshall, the court took a

⁸⁰ Sunstein, *The Second Bill of Rights*, 108.

significant conservative turn. (Aware of his failing health during the Reagan presidency, Marshall is said to have remarked, “If I die while that man is in office, prop me up and keep voting!”) Present-day court nomination hearings are often thinly veiled quests to ascertain which camp the potential judge will join since numerous landmark decisions have hinged on a single swing vote. Justice Sandra Day O’Connor held the swing vote for a number of years and Justice Anthony Kennedy took her place, a role he relishes.

As significant a role as new appointees can play, the composition of the court can also move given ideological shifts by the sitting justices. The most famous instance is Justice Owen Roberts and his “switch in time that saved nine.” Throughout much of President Franklin Roosevelt’s New Deal, the Supreme Court proved to be a constant thorn in his side by invalidating 11 out of 13 initiatives. In response, Roosevelt proposed monumental court reform that would add upwards of six justices to the Supreme Court. Only a few weeks later, the court issued their decision in *West Coast Hotel Co. v. Parrish* (1937) and upheld the statewide minimum wage enacted by Washington state. While this judicial about-face was quick and severe, other shifts have been more gradual. Justice John Paul Stevens, for example, was appointed by President Gerald Ford and originally considered a stable conservative vote. Over the years, however, he inched more and more to the left, ultimately becoming the leader of the left-wing of the court.⁸¹

All of the aforementioned appointments and ideological shifts indicate the role that the composition of the court plays in making particular decisions possible. *Kairos* is no doubt an element in legal judgment. Not every judgment, to be sure, but some of the most monumental

⁸¹ Justice Stevens maintains that he is a judicial conservative, claiming that the court has become increasingly conservative since 1975, thus making him appear more liberal. See Jeffrey Rosen, “The Dissenter, Justice John Paul Stevens,” *The New York Times* (Sept. 23, 2007), retrieved from <http://www.nytimes.com/2007/09/23/magazine/23stevens-t.html>

decisions in Supreme Court history resonate with *kairos*. Given the deliberative judge's interest in the expressive function of law and the rhetorical nudges such an approach requires, a finely tuned sense of *kairos* is a necessity. Nonetheless, these examples highlight a paradoxical problem when grounding a theory, especially a *legal* theory, in *kairos*: only time will tell. And if history is written by the winners, as it usually is, then the deliberative judge is left with little more than a hunch, crossing his fingers that the future unfolds as planned. Yes, the landmark decisions in *Brown*, *Griswold*, *Lawrence*, and *Mapp* have been vindicated (*Windsor* is still fresh, but the tide seems to be turning in its direction) and the country will likely continue along the same trajectory. But what about decisions like *Citizens United*, which opened the floodgates for unlimited corporate campaign contributions and reinforced the idea of corporate personhood?⁸² Or the 2012 ruling on "Obamacare"? Will we look back on these decisions as key moments in the debates over campaign finance and health care, respectively? We don't know. We *can't* know, not until history unfolds. The wonderfully infuriating and infuriatingly wonderful characteristic of U.S. jurisprudence is that the sun never sets. For an idealist like the literary judge, this waiting game illustrates one of the weaknesses of the legal system, or at least a failure of Sunstein's approach. Law should not be a gamble, she may say, which is why an approach that gives voice to the voiceless is of the utmost concern for law. Even Posner's economic judge may be more proactive, given Posner's reluctance to consider and respond to public opinion (or at least incorporate public opinion into his legal formulae).

Although recognizing the merits of their respective counterarguments, Sunstein's deliberative judge would categorize them as naïve and ignorant to the lessons of behavioral

⁸² *Burwell v. Hobby Lobby*, 573 U.S. ____ (2014) continued to solidify corporate personhood by recognizing the right of for-profit companies to assert religious freedom so long as the government does not have a compelling interest.

psychology. Moreover, the public does not tend to respond positively when they are forced into something too soon. Instead of shoving them with the full force of the judicial system, the deliberative judge would suggest that judges nudge the public along such that they think they adopted a position of their own accord. The most skilled rhetor gets his audience to accept his point but lets them think it was their idea all along. If “the legal system is pervasively in the business of constructing procedures, descriptions, and contexts for choice,”⁸³ as Sunstein argues, then the near omnipresence of law in U.S. society together with a judiciary intent on nudging the public along should achieve incremental social good that the economic and literary models make unlikely.

When deployed *kairotically*, choice architecture and nudging serve as key rhetorical concepts that not only promote Sunstein’s deliberative model of judgment, but they also encapsulate Sunstein’s response to Richard Posner’s economic judge. Unlike the literary judge, the deliberative judge embraces the insights that economics can provide for law. Sunstein’s defense of the nudge relies on cost-benefit analysis, but a form of cost-benefit analysis that is markedly different than Richard Posner’s wealth maximization. We are not unencumbered, rationally detached creatures with the ability to objectively survey our options and choose that which will yield the “best” result, whatever that may be. And, importantly, neither are judges. Moreover, the distinction between the two approaches to economics reflects the separate rhetorical faculties embodied by their respective models..

Sunstein, writing with Richard Thaler and Christine Jolls, break from Posner’s use of classic economic theory, arguing that it is not a realistic articulation of how humans behave.

⁸³ Cass R. Sunstein, “Introduction,” in *Behavioral Law & Economics*, ed. Cass R. Sunstein (Cambridge: Cambridge University Press, 2000), 2.

Differentiating *homo economicus* from “real people,”⁸⁴ they draw attention to the *boundedness* of human decision-making. Whereas *homo economicus* is guided by reason, real people “have limited computational skills and seriously flawed memories.”⁸⁵ We have “bounded rationality.” Whereas *homo economicus* is able to resist temptation in order to acquire something more worthwhile, real people “often take actions that they know to be in conflict with their own long-term interests.”⁸⁶ Walk around any hospital and you will inevitably find a gaggle of doctors and nurses on a smoke break. More than any others, these people know of the dangers caused by smoking. They also *see* the horrible effects of smoking in their professional lives. Yet they continue to act on their impulses. We have “bounded willpower.” Whereas *homo economicus* maintains self-interest in association with wealth maximization, real people are “both nicer and (when they are not treated fairly) more spiteful than the agents postulated by neoclassical theory.”⁸⁷ Such niceness or spitefulness can lead to decisions that are not in one’s best self-interest. We have “bounded self-interest.” “If you look at economics textbooks,” write Sunstein and Thaler in *Nudge*, “you will learn that *homo economicus* can think like Albert Einstein, store as much memory as IBM’s Big Blue, and exercise the willpower of Mahatma Gandhi.”⁸⁸ To the contrary, for Sunstein and Thaler, we are a weak-willed species that lacks foresight and has a propensity for pettiness.

Responding to the growing swell of economic research challenging longstanding assumptions in classic economic theory, Sunstein and his coauthors advocate for a *behavioral*

⁸⁴ In his introduction to the edited collection, Sunstein juxtaposes *homo economicus* with *homo reciprocans* (those who “sacrifice their own self-interest in order to be, or to appear, fair”), however, he does not reiterate this concept at any other point in the book nor addresses it in his unwieldy corpus of books and articles (8-9).

⁸⁵ *Ibid.*, 14.

⁸⁶ *Ibid.*, 15.

⁸⁷ *Ibid.*, 16.

⁸⁸ Thaler and Sunstein, 6.

approach to economics, law, and public policy. Introducing a collection of essays on the emerging subset of legal theory, he asks a seemingly simple question: “How does law *actually* affect people?”⁸⁹ Although Posner’s economic judge may ask insightful questions and contribute an interesting argument, his conclusions are based on an incomplete view of human social psychology. Turning one of Posner’s biggest challenges to competing legal theories against him, Sunstein asks what good is a theory if it is not aligned with reality and produces questionable results. Rather than adopting hard and strict economic interpretation of law as in Posner’s economic judge, Sunstein’s deliberative judge leans on a longstanding figure in rhetoric: heuristics.

Akin to the rhetorical *topoi*, heuristics function as “rules of thumb,” guidelines for judgment and action. “[F]rom a practical perspective,” argues Gabor Tahin, “the method of rhetorical heuristics can be employed as a device to *discover* the (presumably) most persuasive argumentative strategy among possible alternatives in a particular legal or political case.”⁹⁰ Different rhetorical strategies work in different rhetorical situations and several factors, such as audience composition, can significantly change the receptiveness to persuasion. A lawyer, for example, will utilize different rhetorical appeals depending on whether she is trying to convince a lay jury versus a knowledgeable judge (or panel of judges). As the previous section on conformity and group polarization can attest, judges are also tugged by their ideological inclinations and will be more susceptible to a set of arguments that caters to their preconceived notions if the situation is right. Instead of explicating a scientific method for achieving

⁸⁹ Sunstein, *Behavioral Law & Economics*, 1, emphasis added.

⁹⁰ Gabor Tahin, “Rhetorical Heuristics: Probabilistic Strategies in Complex Oratorical Arguments,” *Argumentation* 25.1 (2011), 2

persuasion, rhetorical heuristics are more probabilistic in nature and point to what, generally, might work best in a given situation.

Drawing on the classical rhetorical tradition, particularly Cicero, Tahin argues that heuristics “often represent logically faulty or legally inadmissible forms of probable reasoning which nevertheless appear highly persuasive.”⁹¹ Because individuals do not possess the rationality, foresight, and willpower of *homo economicus*, they are susceptible to imperfect, yet highly effective appeals. These are, in effect, rhetorical nudges, using existing propensities and predilections to push people toward thinking and judging in one way rather than another. The skilled student of rhetoric, according to Barry Brummett, will have an array of heuristics available as a means “to experience their rhetorical environments more richly. The more dance steps one knows in the abstract, the better able one will be to dance no matter the circumstances.”⁹² Like knowing the special and general *topoi* or a wide array of tropes, having a strong command of heuristics provides the rhetor with a larger and more versatile rhetorical armory. Judgment is a tricky business and audiences can be a fickle, unpredictable lot. Although heuristics do not offer the rhetor any guarantees (not even sound logic can do that), they nonetheless offer a “best practices” approach given general human psychological dispositions.

Whereas Tahin lists seventeen different heuristic appeals he derives from ancient rhetoric,⁹³ Sunstein focuses on three prominent heuristics that have become increasingly popular in cognitive psychology: anchoring, availability, and representativeness.⁹⁴ Anchoring centers on

⁹¹ *Ibid.*, 8.

⁹² Barry Brummett, “Rhetorical Theory as Heuristic and Moral: A Pedagogical Justification,” *Communication Education* (Apr. 1984), 103.

⁹³ See Gabor Tahin, *Heuristic Strategies in the Speeches of Cicero* (Radstock, UK: Springer, 2014).

⁹⁴ Sunstein and Thaler ground their work Amos Tversky and Daniel Kahneman’s germane contributions to psychology, particularly “Judgment Under Uncertainty: Heuristics and Biases,” *Science* 185 (1974), 1124-1131.

the ways in which people ground judgments from an initial starting point. For example, highly priced merchandise that is “60% off” anchor the customer’s mind to the original price, whereby the sale makes it appear that they are almost making money. The initial starting point may be completely arbitrary and anchoring still takes effect.⁹⁵ Once we get an idea in our head, it begins to influence our decisions whether we recognize its role or not. Within the judiciary this may be as simple as a prosecutor’s sentencing request, a number that then anchors a judge’s decision. “[A]nchors serve as nudges,” according to Sunstein and Thaler. One still retains a complete ability to choose, but that choice is tethered to a starting point and it is difficult to shake loose.

Availability is similar in that it offers a starting point of sorts, but focuses on the readiness with which one can produce examples. Following the debut of the movie *Jaws*, a panic swept through the nation and beachgoers heeded the ominous words printed on the movie posters: don’t go into the water.⁹⁶ After 9/11, fear of flying rose sharply. George Gerbner’s “mean world syndrome” illustrates that watching television increases viewer fear and cultivates the idea that crime is waiting outside their door. Watching the news makes it appear as if young black men perpetrate most crimes. The availability heuristic is shaped by what comes to mind, rather than what is actually true. Rhetorically speaking, this heuristic echoes the idea of depleted argument pools referenced in the previous section on dissent and contributes to conformity and group polarization. Dissent may help to disrupt the bias created, but it is nearly impossible to shed in one fell swoop. Instead, Sunstein wants to put it to good use. “When ‘availability bias’ is at work, both private and public decisions may be improved if judgments can be nudged back in the directions of true probabilities.”⁹⁷

⁹⁵ Thaler and Sunstein, 23-24.

⁹⁶ Attesting to the film’s impact, 40 years after its debut my mother still refuses to put so much as a toe into a body of water.

⁹⁷ Thaler and Sunstein, 26.

Finally, representativeness concerns the similarity (or dissimilarity) between two objects or phenomena. Stereotyping is the most well known example; sometimes stereotypes are spot on while oftentimes stereotypes perpetuate harmful, misguided myths. We go through much of our lives making judgments based on their perceived representativeness for good and for ill. Kenneth Burke's characterization of rhetoric as primarily concerned with identification and division reinforces this point. If a rhetor can identify herself with an audience or an idea held favorably by an audience, she has already gone a long way in persuading her audience. Like the other heuristics, the representativeness heuristic does not guarantee the type of judgment one seeks, but it is useful to have it on your side.

As the refrain in this chapter goes: judges are no different than the rest of us. In many ways, *stare decisis* serves as an institution-wide anchor throughout the judiciary. Decisions are tethered to precedent, even if the connection is weak or the precedent is misguided. Moreover, *which* precedents come to mind are also important, reflecting the availability heuristic. In many cases, one could find existing cases that offer competing arguments on the case at hand. If only one comes to mind, then the decision will likely flow from that precedent. And to think that judges do not stereotype is almost laughable.⁹⁸ Importantly, a judge still retains the ability to choose and a number of extraneous factors and other psychological nudges are always in effect. These heuristics, however, push judges in various directions and make them more likely to decide cases in predictable ways. The great challenge for the deliberative judge is then twofold: 1) How can he avoid the harmful elements of heuristics? 2) How can he utilize the beneficial elements of heuristics in order to nudge others in the right direction?

⁹⁸ See Lawrence S. Wrightsman, *Judicial Decision Making: Is Psychology Relevant?* (New York: Kluwer Academic, 1999).

Alas, there is no quick or easy answer for either issue, especially considering these challenges deal with that which is probable in any given case. An openness to competing ideas as addressed in the preceding section on dissent and many-minded judgment is a useful starting point. Doing so helps to minimize depleted argument pools and, hopefully, reduces the negative aspects associated with conformity and group polarization. Simply being aware of heuristics is also useful, although individuals have a nasty habit of seeing them operate on others while being blind to the ways they influence themselves. Perhaps this is an important point at which the literary judge's argument supporting the role of literature for law can take root in Sunstein's deliberative model. As far as the use of heuristics toward (hopefully) noble ends is concerned, knowledge of the heuristics is again useful. Reiterating Brummet, "The more dance steps one knows in the abstract, the better able one will be to dance no matter the circumstances." Yet, scholarly knowledge is no substitute for experience, especially when heuristics must be *kairotically* deployed. Good timing can be studied and analyzed from every angle, but the performance is entirely different than the rehearsal. A comedian does not learn good timing in solitude, but rather working and reworking her act. It is found, not created. So, too, must the deliberative judge-as-rhetor cultivate his sense of *kairos*. Sometimes the moment will be lost, sometimes the wrong heuristic will be deployed or lack the impact expected, but with experience one gains a keener, more refined sense of *kairos*. And as Justice Holmes famously asserted, law is about experience. With time, the deliberative judge is increasingly capable of fulfilling his obligations as a judge and edging closer toward his guiding *telos* of law: citizenship.

4.3 LEGAL JUDGMENT AS EQUIPMENT FOR CIVIC LIVING

The deliberative judge may hold a privileged position in society, but he is first and foremost a citizen. For the deliberative judge, citizenship is the guiding *telos* of American law. Whereas the Posner's economic judge works toward an efficient legal system, as an economic mindset is what he wants to do, and Nussbaum's literary judge works toward cultivating the flourishing life in her decisions, Sunstein's deliberative judge is primarily concerned with what democratic citizenship means, what responsibilities it entails, and how good judgments can yield increased deliberative engagement within the citizenry. The following section articulates the rhetorical underpinnings of deliberative democracy and argues that Sunstein's argument parallels the Isocratic tradition by advancing legal judgment as a key feature in producing equipment for civic living.

The deliberative judge advocates on behalf of and justifies his decisions in the value of citizenship, which plays a central role in two parallel movements in political philosophy: "deliberative democracy" and "civic republicanism."⁹⁹ Both argue that judges and the lay public alike have an obligation to society and, at best, ought to contribute to a thoughtful and thought provoking public discourse. Citizenship is more than casting a ballot, the secular equivalent of Christmas and Easter Catholicism. For the deliberative judge, citizenship is a constant state of being, whether citizens realize it or not. But there are many forces acting against citizenship, such as the increasing challenges surrounding protest, corporate media focused on profits and increased viewership over an informed citizenry, and an increasingly polarized public. Although

⁹⁹ Some label the burgeoning interest in civic republicanism as "communitarianism," a label eschewed by earlier theorists including Michael Sandel, Alastair MacIntyre, Michael Walzer, and Charles Taylor. The label communitarian was not originally self imposed, but rather given to these scholars and others of a similar philosophical bent by their critics, yet the negative connotation has subsequently waned and scholars have adopted the label as a positive reinforcement of their core theoretical values. See, for example, Amitai Etzioni, *New Common Ground: A New America, A New World* (Dulles, VA: Potomac Books, 2009), the most recent book of his embracing and supporting the ideals of communitarianism.

he cannot wave his gavel and fix all of the problems that trouble American democracy, the deliberative judge can play a vital role when such problems cross his bench.

Deliberative democracy is a relatively recent concept in political philosophy, but its history is nonetheless rich. Democracy's early manifestation in Ancient Greece was heavily deliberative, albeit limited in its definition of "citizen." Their robust (yet sometimes petty¹⁰⁰) political deliberations are significant for the historic relationship between public deliberation and democracy. Another consequential development of this time bears on our focus on the underpinnings of a *public* philosophy of law; namely, the debate surrounding the aforementioned term *philosophia*. As Plato was writing his great dialogues on justice, beauty, truth, and the divide between appearances and reality, *philosophia* was still ambiguous and highly contested. Although similarly oriented toward virtue and justice as Plato,¹⁰¹ Isocrates claims that a Platonic approach, which has subsequently become more-or-less synonymous with "philosophy," is simply training for an Isocratic education: "I do not, however, think it proper to apply the term 'philosophy' to a training which is not help to us in the present either in our speech or in our actions, but rather I would call it a gymnastic of the mind and a preparation for philosophy."¹⁰² By focusing on the idealistic world of the forms, Plato's philosophy eschews what Isocrates considers the more challenging problems embedded in practical affairs. Isocrates continues, "I hold that men who want to do some good in the world must banish utterly from their interests all vain speculations and all activities which have on bearing on our lives."¹⁰³ Isocrates is concerned with the contingent, not the eternal, the conditional, not the absolute. His *philosophia* regards the

¹⁰⁰ Aristophanes' *The Clouds*, for example, offers a comedic jab at the potential lunacy of untethered, unprincipled deliberation.

¹⁰¹ Isocrates, *Antidosis*, in *Isocrates*. 3 vols. trans. George Norlin (vols. 1-2) and LaRue Van Hook (vol. 3) (London: William Heinemann, 1928), 47.

¹⁰² *Ibid.*, 266.

¹⁰³ *Ibid.*, 269.

ideal forms as inaccessible and, as a result, not something to consume the philosopher's life or the life of a *polis*. Instead, Isocrates encourages attention to civic life and the cultivation of good character.¹⁰⁴ In doing so, he pays particular attention to contextually nuanced and temporally restrained concepts such as education, practicality, *kairos*, community, and speech, all of which Sunstein's deliberative judge would adopt millennia later. Isocrates' *paideia* offers the "equipment for civic life" necessary to nudge the *demos* toward the best course of action. These broad concepts do not capture the full depth of Isocratic *philosophia*, but they nonetheless reflect some of the important ways in which Isocrates differentiates himself from his contemporary rival, Plato, and provide a conception of *philosophia* that more closely aligns to Sunstein's conception of deliberative democracy and the demands such a perspective requires of the deliberative judge.¹⁰⁵

Given deliberative democracy's attention to civic engagement and public reason, its theoretical development has been particularly popular with American scholars, even if popular public discourse has not adopted their recommendations and remedies. John Dryzek, for example, develops a thread of deliberative democracy that is intertwined with critical theory and advocates the extension of franchise (number of capable participants), scope (diversity of issues),

¹⁰⁴ For an array of essays supporting this claim, see Takis Poulakos and David Depew, eds., *Isocrates and Civic Education* (Austin: University of Texas Press, 2004).

¹⁰⁵ Other historic moments and figures certainly contribute to the prototypical development of deliberative democracy, but a detailed analysis goes beyond the scope of this project. For historic analyses of deliberative democracy, see Jon Elster, "Introduction," in *Deliberative Democracy*, Jon Elster, ed. (Cambridge: Cambridge University Press, 1998), 1-18, and James Bohman and William Rehg, "Introduction," in *Deliberative Democracy: Essays on Reason and Politics*, James Bohman and William Rehg, ed. (Cambridge: MIT Press, 1997). For a brief overview of the late twentieth century emergence of the term "deliberative democracy" and its early proponents see the introduction to John S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, and Contestations* (Oxford: Oxford University Press, 2000).

and authenticity of control (“real rather than symbolic” participation).¹⁰⁶ He offers a fairly succinct overview of the main themes:

Deliberation as a social process is distinguished from other kinds of communication in that deliberators are amenable to changing their judgements (*sic*), preferences, and views during the course of their interactions, which involve persuasion rather than coercion, manipulations, or deception. The essence of democracy itself is now widely taken to be deliberation, as opposed to voting, interest aggregation, constitutional rights, or even self-government. The deliberative turn represents a renewed concern with the authenticity of democracy: the degree to which democratic control is substantive rather than symbolic, and engaged by component citizens.¹⁰⁷

Unwilling to concede that democracy’s representative anecdote is the voter booth, Dryzek and his fellow deliberative democrats’ main goal is the cultivation of thoughtful public discussion on issues of social and political importance.¹⁰⁸

¹⁰⁶ See Dryzek, *Deliberative Democracy and Beyond*, 29. Dryzek’s definition of “authenticity of the control” is certainly problematic considering is condescending treatment of the symbolic. A charitable read would treat his definition of inauthentic symbolism as discursive practices that are never intended to affect practical change, as in meeting with another to “discuss” with no intention of giving up one’s position.

¹⁰⁷ *Ibid.*, 1.

¹⁰⁸ An in-depth analysis of the contemporary arguments for deliberative democracy is a monumental project in and of itself. For germane arguments on deliberative democracy, its possibilities, and its social role(s), see Seyla Benhabib, “Toward a Deliberative Model of Democratic Legitimacy,” in *Democracy and Difference: Contesting Boundaries of the Political*, Seyla Benhabib, ed. (Princeton: Princeton University Press, 1996), 67-94; James Bohman, *Public Deliberation: Pluralism, Complexity and Democracy* (Cambridge: MIT Press, 1996); Joshua Cohen, “Deliberation and Democratic Legitimacy,” in *The Good Polity: Normative Analysis of the State*, Alan Hamlin and Philip Pettit, ed. (Oxford: Basil Blackwell, 1989), 17-34; Bernard Manin, “On Legitimacy and Political Deliberation,” *Political Theory* 15 (1987), 338-368; and the collection of essays in Jon Elster, ed. *Deliberative Democracy* (Cambridge: Cambridge University Press, 1998). To consider some of the challenges facing deliberative democracy, see Matthew C. Flamm, “The Demanding Community: Politicization of the Individual after Dewey,” *Education and Culture* 22.1 (2006), 35-54.

Civic republicanism is similarly interested in civic engagement and the discursive unity of a public. Emerging, in part, as a response to John Rawls' *A Theory of Justice*, civic republican moral and political philosophy continues to expand. Rawls' seminal work, which revitalized political philosophy in the United States, is guided by a seemingly simple thought experiment: What if citizens assembled and had to choose the fairest society, but didn't know anything of their own position and status in society? Gender, race, income, skills – the traits that often determine one's social and political standing – what if these were shrouded by a veil of ignorance? What social arrangement would we then choose? With these guiding questions in mind and a Kantian notion of dignity in tow, Rawls' carefully constructed a new liberal conception of the social contract that balanced idealism and practicality.¹⁰⁹

Challenging Rawlsian liberalism, civic republicans argue his project ignores or obfuscates vital aspects necessary to live a good life and places too much faith in the ideal of “unencumbered selves.” In his sharp critique of contemporary political philosophy and civic discourse, Michael Sandel argues for a revival of the American republican tradition. Disputing liberalism's moral relativity, Sandel calls for a revitalization of Aristotelian virtue amidst a pluralist society.¹¹⁰ Sandel's conception of public philosophy sees the need for a community

¹⁰⁹ John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971). See also John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) and *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge: Belknap Press, 2001). For extensive treatment of Rawls' work, see Samuel Freeman, ed., *The Cambridge Companion to Rawls* (Cambridge: Cambridge University Press, 2003); Norman Daniels, ed., *Reading Rawls: Critical Studies on Rawls' "A Theory of Justice"* (Stanford: Stanford University Press, 1989); Jon Mandle, *Rawls' "A Theory of Justice": An Introduction* (Cambridge: Cambridge University Press, 2009); and Samuel Freeman, *Rawls* (New York: Routledge, 2007).

¹¹⁰ Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge: Harvard University Press, 1996). See also Alisdair MacIntyre, *After Virtue: A Study in Moral Theory*, 3rd ed. (Notre Dame: University of Notre Dame Press, 1981). Elsewhere, Sandel claims, “Self-government today, however, requires a politics that plays itself out in a multiplicity of settings, from neighborhoods to nations to the world as a whole. Such a politics requires citizens who can abide the ambiguity associated with divided sovereignty, who can think and act as multiply situated selves. The civic virtue distinctive to our time is the capacity to negotiate our way among the sometimes overlapping and sometimes conflicting obligations that claim us, and to live with the tension to which multiple loyalties give rise.”

rooted in a common ethic that emerges from conscientious discursive engagement. The challenge then becomes how a society educates and cultivates a citizenry capable of looking beyond their unencumbered selves and focuses their attention on commonality rather than difference.¹¹¹

Utilizing Cicero as his paradigmatic example, Robert Hariman argues there is a distinct “republican style” that is imbued within civic republican political theory, using both Alistair McIntyre and Michael Sandel as contemporary examples. Concerned with consensus, civility, voice, performance, self-control, and effectiveness, the republican style embraces a “verbal artistry” that must be embraced by orators. He argues,

[T]he republican style seems to be particularly imbued with a set of ideas about human nature and good government. This conception of political life celebrates self-government as the highest moral calling, insists that citizens’ political activities should be motivated and guided by civic virtues, and cautions against the influences of private, especially commercial, interests. These precepts in turn requires that public institutions (such as the legislature), public practices (such as the practice of oratory), and public figures (such as the president) cultivate a moral sense in the citizenry that would result in decisions being made primarily with regard to the common good. The achievement of good government at any time requires active participation by individuals successfully striving to overcome their private interests through common deliberation, and the stability of the republic

See Michael J. Sandel, *Public Philosophy: Essays on Morality in Politics* (Cambridge: Harvard University Press, 2005), 34.

¹¹¹ Sandel is by no means the only contemporary scholar to make such an argument, nor the first. See also William M. Sullivan, *Reconstructing Public Philosophy* (Berkeley: University of California Press, 1986), E. J. Dionne, ed. *Community Works: The Revival of Civil Society in America* (Washington, D. C.: The Brookings Institute, 1998); Robert N. Bellah, *Habits of the Heart: Individualism and Commitment in American Life* (Berkeley: University of California Press, 1996). For an astute collection of essays countering Sandel’s arguments (and, by relation, civic republicanism writ large), see Anita L. Allen and Milton C. Regan, Jr., *Debating Democracy’s Discontent: Essays on American Politics, Law, and Public Philosophy* (Oxford: Oxford University Press, 1998).

through time depends on its ability to cultivate individuals possessing this virtuous character.¹¹²

The rhetorical character of civic republicanism (and deliberative democracy) acknowledges the power of discourse to shape and be shaped by the social, political, and legal landscape. The commonality Sandel hopes to discover is not an external trait, an outward characteristic that can be pointed to, quantified, and scientifically dissected. As Hariman aptly notes, the republican style, which both civic republicanism and deliberative democracy adopt in one way or another, *creates* a community by adopting an intellectual and rhetorical position that allows such engagement to happen.

The work of sociologist Amitai Etzioni draws heavily upon this desire to create and sustain strong communities. The founder of the “Communitarian” movement – a species of deliberative democracy and civic republicanism – Etzioni argues for a revived “spirit of community” that demands active democratic participation at every level. Describing Communitarianism as, “Part change of heart, part renewal of social bonds, part reform of public life,”¹¹³ Etzioni calls for a revitalized attention to “the moral foundations of our society,” including “family,” “schools,” “neighborhoods,” and the subscription to “a set of overarching values: specifically the democratic process, the Constitution and its Bill of Rights, and the commitment to be more respectful to others.”¹¹⁴ Like deliberative democracy and civic republicanism, at the core of Etzioni’s ambitious (some would say naïve) project is the idea that

¹¹² Robert Hariman, *Political Style: The Artistry of Power* (Chicago: University of Chicago Press, 1995), 95.

¹¹³ Amitai Etzioni, *The Spirit of Community: The Reinvention of American Society* (New York: Touchstone, 1993), 247.

¹¹⁴ *Ibid.*, 248-9.

citizenship is both a right *and a responsibility*.¹¹⁵ Herein lies the challenge for the deliberative judge: how can his decisions create spaces for public deliberation? How can he provide “equipment for civic living?”

Sunstein weaves deliberative democracy through the majority of his work. An early adopter of the theory, he introduces the idea in one of his earliest works, *Democracy and the Problem of Free Speech*. Published in 1993, Sunstein praises the “distinctive feature of American republicanism” in its “extraordinary hospitality toward disagreement and heterogeneity, rather than fear of it,” making the prospect of deliberative democracy a viable option.¹¹⁶ But rather than seeing it as something to work toward, Sunstein argues that deliberative democracy has been a cornerstone of American law all along. It’s what our Constitution *does*; it’s what it was *designed to do*.¹¹⁷ Sunstein asserts, “The framers’ greatest innovation consisted not in their emphasis on deliberation, which was uncontested at the time, but in their skepticism about homogeneity, their enthusiasm for disagreement and diversity, and their effort to accommodate and to structure that diversity.”¹¹⁸ This “republic of reasons” serves as the crux of the system of checks and balances immortalized in the Constitution.¹¹⁹ Not only must the deliberative judge operate within such a constitutional framework, he must also *actively promote* the type citizenship entailed in deliberative democracy in his decisions.

One is left wondering what traits the deliberative democrat judge must possess in order to achieve such ambitious ends. In *Designing Democracy*, Sunstein enumerates several traits that

¹¹⁵ This is a recurring theme throughout Etzioni’s work. In addition to *The Spirit of Community*, see also Amitai Etzioni, *New Common Ground* and *The New Golden Rule: Community and Morality in a Democratic Society* (New York: Basic Books, 2006).

¹¹⁶ Sunstein, *Democracy and the Problem of Free Speech*, 241-2.

¹¹⁷ Sunstein, *Designing Democracy*, 6.

¹¹⁸ Sunstein, *Why Societies Need Dissent*, 150.

¹¹⁹ Sunstein, *The Second Bill of Rights*, 31

characterize the deliberative democrat. Deliberative democrats resist “majority rule” as “a caricature of the democratic aspiration.” Instead, “democratic government is based on reasons and arguments, not just votes and power. Deliberative democrats believe that people tend to overstate the tensions between democracy, properly understood, and individual rights.”¹²⁰ Deliberative democrats seek a “genuine republic, not a direct democracy”¹²¹ Deliberative democrats “create institutions to ensure that people will be exposed to many topics and ideas, including ideas that they reject, and topics in which they have, as yet, expressed little interest.”¹²² Deliberative democrats are keenly aware of “the problems, even the pathologies, associated with deliberation among like-minded people.”¹²³ Deliberative democrats “fear that what has happened [in regard to the statewide referendum on homosexual marriage] is parody of democratic aspirations.”¹²⁴ Deliberative democrats are “nervous about judicial entanglement in managerial issues – but also stresses that people in desperate conditions cannot have the independence and security that citizens require.”¹²⁵ With such attributes, Sunstein hopes to encourage increased deliberative engagement within the citizenry. The genius of the Constitution, Sunstein argues elsewhere, is that it serves as a “*republic of reasons* – a system of checks and balances that would increase the likelihood of reflective judgments.”¹²⁶ Such reflective judgments are not just the domain of official institutions like the judiciary or legislature; the public also has a vested interest in the ongoing legal and political issues surrounding them. Drawing attention to the Madisonian tradition, Sunstein argues that the Constitution and Bill of Rights are embedded

¹²⁰ Sunstein, *Designing Democracy*, 7.

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*, 8.

¹²⁵ *Ibid.*, 10.

¹²⁶ Sunstein, *The Second Bill of Rights*, 31.

within the national culture and produce a pervading sense of community under the “unifying theme” of citizenship.¹²⁷ One of the critical requirements of such citizenship is the rhetorical exchanges it facilitates.

While this may be the ideal, the reality is far less inspiring. The quality of public deliberation has been a source of ill repute for just about as long as we have had a unifying theme of citizenship. Tocqueville saw it throughout his travels in antebellum America. Walter Lippmann found the public to be a “phantom,” a “deaf spectator in the back row.” Harold Bloom lamented the closing of the American mind. Every year a slew of articles and op-eds inveigh against the perceived loss of civility in all corners of public discourse. Whether or not one agrees with these tales of woe, most would agree that there is always room for improvement. While it is impossible to compel a respect for citizenship and the obligations it entails, the deliberative judge nonetheless uses citizenship as his North Star guiding judgment.

A number of areas of law bear on such an ambitious project, but Sunstein’s focus on the freedom of speech – its problems and its possibilities – offers a representative anecdote for his broader approach to citizenship. Throughout *Democracy and the Problem of Free Speech*, Sunstein draws inspiration from the Madisonian and Brandeisean traditions in his approach to the First Amendment. Sunstein laments the growing protections for individualism and corporate speech, arguing that such trends negate the discursive sense of community on which the Constitution was built and charged to maintain. Calling for a “New Deal” for speech, Sunstein wants to draw on “Madison’s conception of sovereignty and on Justice Brandeis’ insistence on the role of free speech in promoting political deliberation and citizenship.”¹²⁸ He claims that the “marketplace of ideas” metaphor advanced by Justice Holmes and others has failed to live up to

¹²⁷ Ibid., 111-112.

¹²⁸ Sunstein, *Democracy and the Problem of Free Speech*, 119.

the constitutional commitment to citizenship that prioritizes engaged and diverse deliberation. Although legislation must be enacted to combat the threats he articulates, judges must also play a formative role by deciding cases that work toward citizenship rather than against it.

In order to position his argument, Sunstein crafts a two-tiered approach to free speech issues. The first tier is the most protected speech: expressions and words that are *political* in nature. He notes the long history of free speech as being inherently tied to politics and argues that we must rekindle this long held ideal in order to derive the best we can out of the First Amendment. He offers several arguments supporting his claim, such as the need for a people to keep their government in check and the vested interest a government has in suppressing speech with which it disagrees. Just look at the Alien and Sedition Acts of 1798, the first major attack on free speech issued less than a decade after the ink on the First Amendment had dried. The Sedition Act made criticisms against the leading party (the Federalists) and president illegal (although vice-president Thomas Jefferson, a Democratic-Republican, was fair game). As a result, the first person imprisoned was a senator who disagreed with the administration. Because a government may try to suppress seditious speech, Sunstein argues that it must be protected for a flourishing democracy to truly exist.

The second tier, however, involves such speech as obscenity and libel, both of which tread the line between acceptable and unacceptable and challenge what it means to be a good citizen. Regarding obscenity, Sunstein appears content with the current standards set forth by *Miller v. California* and supports the value-based judgments expressed by the Supreme Court.¹²⁹ Thus, pornography remains protected, although Sunstein argues that limitations are warranted and acceptable, even if the material is produced and consumed by consenting adults. Concerning

¹²⁹ Ibid., 124.

libel, Sunstein suggests *New York Times v. Sullivan* has been expanded too far and encapsulates more than it should, making celebrity privy to attack, rather than centering on speech of a political nature. He argues that libel laws should not leave people open for attack solely based on whether or not they are well known. For example, in *Hustler v. Falwell*, Hustler magazine was sued for publishing a satirical story wherein Rev. Jerry Falwell was described as having sex with his mother in an outhouse. Seeking damages, Falwell sued Hustler on the basis of libel, arguing it had created emotional and image-related damage. The Supreme Court eventually decided in favor of Hustler and the opinion left celebrities and other figures in the public eye open to a wide range of non-political parody and satire. Not only did the case require “public figures” to prove “actual malice,” in cases of libel, it also left a lingering question: what about Falwell’s mother?

The two-tier system Sunstein advances serves as a guide for judges, not the lay public. It offers a way to approach challenging First Amendment cases and provides a useful yet incomplete resource for the deliberative judge. Interpreted through the lens of citizenship, recent decisions like *Citizens United* would likely produce different opinions. While the case is directly concerned political speech, the creation of Super PACs and the near endless resources they possess are antithetical to citizenship not only because they cater to the extremely wealthy, but they also actively contribute to group polarization. I contend the recently argued but yet-to-be-decided case *Elonis v. United States* would also face a new set of challenges. The case concerns an amateur rapper posting extremely violent, potentially threatening lyrics about his ex-wife to his Facebook page, which she was likely to see. The legal question centers on what constitutes a “true threat” and the judicial standard for proof of intent to threaten. While numerous rap songs are political in nature, this is not one of them. As a result, the deliberative judge would be more likely to lean on values-based arguments like those Sunstein allows in obscenity and libel

decision-making. Even if the lyrics were simply a misunderstood avenue for cathartic expression, there is no doubt they had a chilling effect on his ex-wife, stifling healthier and more beneficial methods of discursive interaction. Moreover, if this incident is an example from a much larger trend that suggests an imbalance of gender equality, the deliberative judge would be encouraged to right that wrong on the grounds that it produces a more robust public.

The First Amendment is certainly not the only legal space wherein citizenship should play an active role for the deliberative judge. The equal protection clause of the 14th Amendment is also heavily vested in citizenship, as the denial of equal rights and opportunities undermines the very possibility of a healthy deliberative democracy. As Sunstein notes, “The distribution of benefits or the imposition of burdens must reflect a conception of the public good. Benefits and burdens may not be based solely on political power or on a naked preference for one group over another.”¹³⁰ When the judiciary is charged with promoting the public good by maintaining an active and interactive citizenry, discriminatory laws constitute a violation the constitutional commitment to citizenship. A deliberative democracy cannot succeed if the process of judgment precludes a respect for and appreciation of a diverse citizenship.

Not only is there a moral ground for this argument, which Sunstein is willing to incorporate so long as it follows the strictures of judicial minimalism by being “incompletely theorized,” but there is also a practical rhetorical argument that emerges from his interest in dissent. Limiting or excluding a group’s rhetorical capability and accessibility ignores the wider array of perspectives and arguments that a more diverse population is likely to produce. Argument pools are depleted, individuals are exposed to ideas that cater to their established ideological perspective, and the quality public discourse drops significantly. When citizenship is

¹³⁰ Sunstein, *Designing Democracy*, 188.

set as the guiding *telos* of legal judgment, the deliberative must not only embrace a multitude of perspectives throughout his own decision-making process, he must also defend the citizen's need for such diversity in order to fulfill their civic obligations. The broad implications of the 14th Amendment bring an array of issues under the purview of citizenship. Economic and environmental policy, privacy, immigration, education – all of these issues contain elements that deal with equality and due process. Following the deliberative judge, one must examine them through the lens of citizenship.

Granted, every case that comes before the court is not intimately connected to citizenship. Much of the court's work, especially at the lower levels of the judiciary, are rote decisions that bear little on a citizen's discursive responsibilities to the community. But the infrequency of cases that deal with core aspects of citizenship does not negate their significance. They are key opportunities to reinforce a foundational value that is embedded in the interstices and penumbras of the Constitution. The deliberative judge also must be mindful to the potential implications of a decision and how it might impact the rhetorical interaction of future citizens. At the higher levels of the judiciary, the opportunity to create reinforce, and alter precedent is an immense responsibility. Such decisions serve as a powerful representation of institutionalized national values. "In fact it is possible that moral judgments," argues Sunstein, "including the distinctive kinds that result in constitutional law, are best described not as emanation of a broad theory but instead as a reflection of prototypical cases, or 'precedent,' from which moral thinkers – ordinary citizens and experts – work."¹³¹ Law functions as a site of and resource for public deliberations about our shared moral convictions.

¹³¹ Sunstein, *Designing Democracy*, 62.

However, a problem that continually arises from Sunstein's position is its idealism, a continuation of his "if only" approach. He thinks that if only American society can create room for political discussion that it will happen (a judicial "If you build it, they will come," so to speak). Time and time again we see the apathy of the United States citizens seemingly destroy this argument. To a certain extent, there exists a situation akin to the "tragedy of the commons" in that many citizens believe that there is no direct benefit to be had by deliberation about and active interest in politics, especially considering all the time and energy it takes to be truly engaged. Walter Lippmann noted this problem nearly 100 years ago in his sharp critiques of the American public.¹³² What makes Sunstein so confident that the judiciary, arguably the branch of government most detached from the public, could significantly impact public deliberation through their decisions? On this point, Posner's economic judge serves as a foil to Sunstein's deliberative judge, especially in light of the former's unique common sense. Many citizens are uninterested and/or incapable of participating in democratic citizenship to the extent Sunstein and other deliberative democrats desire. In addition, there are also a multitude of definitions of citizenship, some of which are antithetical to one another. How does one know the "right" definition of citizenship? If this is part of Sunstein's call for "incompletely theorized agreements," how does that help the deliberative judge decide cases that require a commitment one way or the other?

For his part, Sunstein is aware of the potential limitations of his approach but maintains that it is nonetheless the responsibility of the judiciary to cultivate a more interactive citizenry while still remaining true to the spirit of the Constitution. The incompleteness of citizenship should be seen as a strength, not a weakness, as it remains flexible to unforeseeable social and

¹³² See Walter Lippmann, *The Phantom Public* (New Brunswick: Transaction, 1993).

technological changes. Moreover, the deliberative judge looks forward to debates about the role and value of citizenship in challenging cases – doing so helps to refine yet not settle the idea of citizenship and reap the benefits of many-minded judgment. According to Sunstein, such an approach has worked well for other vague constitutional commitments like the equal protection clause.¹³³ By working through practical examples and arguing through analogy rather than abstract theories, the deliberative judge is able to maintain a commitment to citizenship while still embracing the minimalist judicial mindset. Citing *Brown v. Board* as an example, Sunstein argues that *Brown* “inaugurated a kind of legal revolution, not because the Court adopted a general theory but because subsequent courts used that incompletely theorized decision as a basis for other incompletely theorized decisions, most of them highly critical of longstanding practices.”¹³⁴

While an incompletely theorized yet generally understood notion of citizenship and an appreciation for the deliberation that surrounds complex, nuanced cases is vital for the deliberative judge, the judiciary can only do so much. The deliberative judge must provide the space, but a cultural shift is needed. If we are to “cultivate our garden,” as Voltaire suggests, the most that the judiciary can do is ensure that the ground is tilled and the soil is as rich as it can be. It is the citizen’s responsibility to sow the seeds and care for them as they grow. To that end, the deliberative judge has an important role in ensuring the law does not create an undue burden on citizens and their ability to deliberate with one another. But the deliberative judge cannot force deliberation just as the economic judge cannot force rationality just as the literary judge cannot force emotional intelligence. At his best, the deliberative judge provides and protects the “equipment for civic living” celebrated by Isocrates, but the decision to utilize such equipment

¹³³ Sunstein, *Designing Democracy*, 63.

¹³⁴ *Ibid.*

rests on the shoulders of the public. The deliberative judge can only nudge them in the right direction at opportune moments.

4.4 CONCLUSION

Where then does this leave the deliberative judge? Sunstein's model of judgment operates as both counter and complement to Posner's economic judge and Nussbaum's literary judge. As a counter, Sunstein's interest in social psychology and behavioral economics undermine Posner's classic approach to economics and its usefulness in judicial decision-making. Nussbaum's aspirational literary approach and the abstract philosophical ground on which it is built contrasts with Sunstein's disinterest in abstract theory and his focus on incremental, minimalist judicial decision-making. But unlike the competing models of judgment, Sunstein's approach actively embraces an array of perspectives and rests faith in the beneficial results that occur when they interact with one another. Perhaps the best decisions are arrived upon not by a panel of deliberative judges, but a panel with all three different approaches (and more, if possible). So long as these other judges participate in rigorous deliberation and do not pursue ends antithetical to citizenship, the deliberative judge would welcome them as worthy interlocutors.

This approach is not without its weaknesses. Dissent is not always productive and does not always come from a position of concern for the public. It can just as easily serve as an unnecessary wedge driving individuals or ideas apart. *Kairotic* judgment is problematic because its pragmatism (a point shared with Posner's economic adjudication) can be at odds with its idealism (a point shared with Nussbaum's literary judge). Inching toward a more just society favors those who already have power and social standing. Although the changes may be beneficial, they may also be extremely slow to the detriment of an already marginalized group.

Sometimes society needs a shove rather than a nudge. Both rhetorical qualities, dissent and *kairos*, share the problem of hindsight. We can only know a dissent was effective or a decision was issued in a timely fashion after the fact. Knowledge, experience, and intuition are certainly useful, but the deliberative judge has no guarantee that he will hit the mark. Moreover, there is also the danger of falling prey to the *post hoc ergo propter hoc* fallacy. Sunstein borders on an “if only” longing for dissent and *kairotic* judgment, but we can never know how history would have unfolded had a dissent been issued (or held back) or a decision issued at a more timely (or untimely) moment. Herein lies an inherent challenge for rhetoric and its focus on the contingent rather than the eternal.

Despite these issues, one would be hard pressed to deny the importance of the deliberative judge’s rhetorical faculties. As a rhetorical figure, the deliberative judge echoes many of the virtues celebrated by Isocrates and his characterization of rhetoric as equipment for civic living. Many of the same rhetorical problems have plagued democracies for millennia continue and the contemporary context has produced an array of new challenges that exacerbate these problems, including conformity and group polarization. Ever mindful of these challenges, the deliberate judge remains hopeful of the power conscientious deliberation and dissent as an effective buttress against such hazards. With citizenship as a guiding light and a keen sense of *kairos*, the deliberative judge learns when and how to nudge the public while always remaining tethered to the constitutional commitments of our judicial system.

5.0 CONCLUSION

“What is law?...Law is not exhausted by any catalogue of rules or principles, each with its own dominion over some discrete theater of behavior. Nor by any roster of officials and their powers each over part of our lives. Law’s empire is defined by attitude, not territory or power or process.”

- Ronald Dworkin, *Law’s Empire*

On January 21, 2010, the United States Supreme Court issued their much-anticipated decision on *Citizens United v. Federal Election Commission*.¹ The case emerged from a legal dispute over the ability of the conservative nonprofit organization, Citizens United, to air its film, *Hillary: The Movie*, a partisan depiction of then-senator Hillary Clinton intended to hinder her presidential aspirations. The case challenged both policy (Bipartisan Campaign Reform Act of 2002) and precedent (*Austin v. Michigan Chamber of Commerce* and *McConnell v. FEC*). The greatest challenge before the court was to assess whether the First Amendment protects corporations and organizations as much as it does individual citizens and whether or not partisan political media can be recognized as campaign contributions.

In a lengthy opinion, Justice Anthony Kennedy, with Justices Thomas, Scalia, Alito, and Roberts concurring, supported the First Amendment right of Citizens United to produce, promote, and air their politically charged film. A key finding by the Court was that First Amendment rights pertain to “association[s] in the corporate form.” Thus, General Electric would have the same legal protection for political speech as does the American Civil Liberties Union (and other non-profits) as does the individual citizen. In response, Justice John Paul

¹ *Citizens United v. Federal Elections Commission* 558 U.S. 310 (2010)

Stevens authored a furious 90-page dissent, joined by Justices Breyer, Ginsberg, and Sotomayor, wherein he attacks the majority for its “rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt.” As a self-styled judicial umpire who “calls them as they are,” Chief Justice John Roberts sided with the opinion of the court, tipping the scales in the 5-4 decision. In his concurring opinion, Roberts wrote that “there is a difference between judicial restraint and judicial abdication.” Roberts has vehemently clung to his call-them-as-they-are model of judgment, despite decisions such as *Citizens United*.

Roberts is not alone in showing the difficulty of embodying an idealized model of judgment, as it is virtually impossible given the complex, nuanced, and unforeseeable issues that make their way through the judicial system. A model is essentially aspirational—it is not a formula. Despite their limitations, model judges are useful in that they underscore the most important attributes of good legal judgment as understood by a school of thought or individual legal philosopher. Just because an ideal is impossible to attain does not mean that the pursuit of such perfection is done in vain.

Citizens United was the case that spurred this entire dissertation project, the core issue being “what constitutes good legal judgment?” This question has plagued me ever since I began the odyssey that is this dissertation. Upon reflection, however, that question presupposed things at my starting point that fell away as my inquiry proceeded. As I have come to realize, legal judgment – even *good* legal judgment – comes in an array of types and depends largely on the teleological orientation of the judge and individuals assessing the quality of judgment. The preceding pages have not been an attempt to articulate a guiding legal theory, but rather to

highlight the rhetorical tropes that undergird some of the most prominent legal philosophies. Importantly, these philosophies are targeted to a diverse audience of legal scholars, judges, lawyers, and the lay public, all of which have a vested interest in law in one way or another.

Given the contingency at the heart of law – the ebb and flow of public policy, legal doctrine, and the philosophies that attempt to crystalize particular legal values – the rhetorical focus is particularly advantageous for evaluating legal judgment as it recognizes the importance of viewing judgments on a relative spectrum of better or worse, contingent upon shifting circumstances and competing perspectives rather than upon a simple dichotomy of right or wrong. Philosophical or ideological commitments contribute to discounting particular approaches to law and jurisprudence rather than viewing each theory as a means to help audiences render good judgment. In effect, these theories uniquely attempt to imbue their audiences with a certain kind of *phronésis*. As Thomas Farrell argues, “If *phronésis* is not to be reduced to wise guessing on the one hand or technical reason on the other, we must find some grounds for affiliating logos with the normative tendencies of modern critical reflection. Rhetoric may then be conceived as a kind of *creative reasoning*.”² Balance, common sense, literary imagination, emotional intelligence, *kairos*, civic virtue – these are neither scientific terms dictating a taxonomy of what law *is* nor are they mere opinions based on a flight of fancy. These resources of legal judgment are rhetorical considerations displayed for the reader in an attempt to illustrate the usefulness of particular modes of creative reasoning. As Farrell later notes, “If judgment is treated only as a faculty, it is unlikely that audiences will ever be lucky enough to share in the privilege. By contrast, if judgment is treated as an acquired competence, sophisticated through practice, the prospect for its democratization is considerably more

² Farrell, *Norms of Rhetorical Culture*, 145.

promising.”³ Each model of judgment is an attempt to advocate and cultivate a more attuned, nuanced sense of legal judgment. Rather than listing the necessary attributes of good judgment, my approach to jurisprudence recognizes the variable ways in which such attributes are performed in context. The contextual and temporal restraints on legal processes press philosophical commitments toward practical adaptation. Rhetoric, as the art that “adjusts ideas to people and people to ideas,”⁴ provides ways of understanding this adaptation.

Herein lies the contribution I have aspired to make to the rhetoric of law: showing how the models of legal judgment articulated by prominent contemporary philosophers of law are rhetorical enactments of philosophical commitments. The use of the model judge is by no means new. In *De Clementia*, Seneca wrote about the wise stoic judge juxtaposed against the stern judge. The former knew that it was better to remain flexible with law rather than to follow it to the letter. Following Seneca’s model, mercy and compassion are just as important to the law as punishment if moral guidance is the end goal. Walt Whitman advocated for the poet judge, a figure Nussbaum draws upon as she constructs her own literary model. Like the literary judge, the poet judge resists the urge to view law through a scientific lens. As Kenneth Burke would later echo in his analysis of semantic and poetic meanings, the poet judge acknowledges and embraces seemingly incongruous ideas as possibilities rather than problems. Such models open new ways of understanding, new ways of knowing, to which the semantic/scientific mind is blind.

Perhaps the most famous contemporary model judge is Ronald Dworkin’s “Hercules.” Deployed to decide the 1983 English case *McLoughlin v. O’Brian*⁵ (amongst others), Dworkin

³ Ibid., 228.

⁴ Donald C Bryant, “Rhetoric: Its Functions and Its Scope,” *Quarterly Journal of Speech* 39 (1953), 413.

⁵ *McLoughlin v. O’Brian* 1 A.C. 210 (1983)

describes Hercules as “an imaginary judge of superhuman intellectual power and patience who accepts law as integrity.”⁶ Like the model judges described in the preceding chapters, Dworkin’s judge embodies the ideals of his legal philosophy, such as the oft-debated “right answer” approach to law, and operates under the guiding *telos* of integrity, which Dworkin describes as an “interpretive ideal.”⁷ Reflecting on how Hercules would decide landmark cases like *Plessy v. Ferguson* and *Brown v. Board*, Dworkin asserts that his avatar “interprets each one so as to make its history, all things considered, the best it can be.”⁸ We can inject Hercules into historic moments where we see the “right answer,” imagining how the heroic judge would decide contemporary cases based upon principle and not immediate practicality. “We use Hercules,” Dworkin writes, “to abstract from these practical issues, as any sound analysis must, so that we can see the compromises actual justices think necessary as compromises with the law.”⁹ At his best, Hercules is a lens through which to examine law as it is and imagine law as it should be. The decisions of such a judge may point toward the superhuman, but, according to Dworkin, that does not mean a judge should not aspire to such Olympic heights.

Model judges may not be new, but they also are not passé. Close attention to contemporary models may be as important now as ever, in part because they are so little recognized and their role so underestimated. In their respective works, Seneca, Whitman, and Dworkin use their model judges rhetorically. These writers use idealized judges to direct attention toward a particular perspective on law and judgment, foregrounding it while pushing other perspectives and considerations to the background, if not off the stage entirely. Whereas these thinkers are explicit with their avatars, the legal philosophers analyzed throughout this

⁶ Ronald Dworkin, *Law’s Empire*, 239.

⁷ *Ibid.* 255.

⁸ *Ibid.* 379.

⁹ *Ibid.* 380-1.

dissertation are subtler. Yet, amidst their prolific writings Posner, Nussbaum, and Sunstein each center on the attributes that they believe produce good judgment within their philosophical worldviews. As I have argued, these attributes are steeped in rhetoric even if the philosophers are reluctant to agree. Rather than supporting a particular jurisprudence over others, I have argued that these legal philosophies are in constant dialogue with each other (and the public), vying for influence and adaptation.

By addressing the paragons of good judgment crafted by Richard Posner, Martha Nussbaum, and Cass Sunstein, I have attempted to cast light on some of the ways that jurisprudence is undergirded by rhetoric, and to show how these particular rhetorical inventions work in the service of differing philosophical and social perspectives. In order to see what possibilities are at play in the context of judgment one must be aware of the implicit dialogues opened up by the competing perspectives. Previous scholarship by rhetoricians, philosophers, and legal scholars has yet to address how the different *conceptions* of law and jurisprudence bear on the framing of competing claims about specific cases. There have been studies of the rhetorical elements of a legal theory, as examined, for example, in analyses of Richard Posner's "Law and Economics," and rhetorical case studies of such judicial landmark cases as *Brown v. Board of Education*; but there is little, if any, research that examines attempts to negotiate among *multiple* philosophies of law, or to understand their aggregate impact on public discourse about the nature and purposes of the law. My contribution is to situate juridical expertise as participation in perspective-taking and in voicing aspirations.

Four considerations commend the "models of judgment" approach: 1) It turns attention to the rhetoric of jurisprudence, where there is a dearth of scholarship; 2) It responds to a need for new theoretical tools for understanding law as a site for the intersection of rhetoric and

philosophy; 3) It opens a relatively clear path for extending the approach to understanding other legal philosophers; and 4) It underscores the importance of examining public philosophies of law in ways that are accessible to both academics and the general public.

Concerning the first point, there are surprisingly few rhetoricians focusing on the rhetoric of law. Compared to the surfeit of scholarship in public address, political rhetoric, history of rhetoric, critical/cultural rhetoric, feminism and LGBTQ studies, rhetorical criticism, and rhetorical theory, the rhetoric of law is a guppy trying to keep up with the big fish. There are certainly moments when these areas intersect, but there are few rhetoric scholars dedicated to law *qua* law rather than law as a vehicle to talk about something else. Of these scholars, fewer still train their attention on jurisprudence. Most scholarship focuses on landmark judicial opinions, from *Marbury v. Madison* to *Citizens United*. Others examine a single legal issue as it moves through time, such as equality, privacy, or personhood. These are important and admirable works, but they nonetheless have a blind spot when it comes to the legal theories guiding the judgments they examine. Precious little attention has been given to the philosophy of law as understood through a rhetorical framework, even though such scholarship is ripe with rhetorical possibility. By taking a step back and examining the theories and theorists contributing to the ongoing dialogue about legal judgment, rhetoric scholars will be in a better position to critique the idea of judgment as well as the judgments themselves.

The second important contribution I hope to have made focuses on the intersection of rhetorical theory and jurisprudence. Each of the chapters teases out a model of judgment that taps into recognizable rhetorical strategies. Richard Posner's economic judge draws on common sense and the rhetoric of balance to illustrate his effectiveness. Martha Nussbaum's literary judge relies upon the power of narrative as a means of cultivating a nuanced rhetorical invention that is

better able to understand, respond to, and empathize with a diverse citizenry. The emotional intelligence that (hopefully) ensues avoids the dangers of disgust while embracing the law's ability to protect and uphold dignity. Cass Sunstein's deliberative judge has a keenly attuned sense of *kairos* and capitalizes on psychological heuristics so as to issue judgments at the right time and in the right way in order to produce a healthy, deliberative democracy. Ever wary of the dangers of group polarization and other pitfalls that emerge when groupthink takes hold, the deliberative judge encourages a form of dissent akin to *dissoi logoi* and the good that can come from "many-minded" judgment. I have introduced and built upon this wide array of rhetorical staples and illustrated how they are inseparable from the broader legal philosophy in which they are used.

Third, the approach I have taken is not exclusive to the three philosophers addressed. Given the breadth of legal philosophy and the wide array of theories that populate the discipline, one could approach any prominent philosopher of law (or even several scholars contributing to a single theory) by examining their ideal model of judgment and the rhetorical faculties therein. My original intent was to include Ronald Dworkin and Antonin Scalia in these pages, but I opted to set these chapters aside for another time. However, both offer their own models of judgment that merit further rhetorical examination. Dworkin is quite explicit with this avatar, the aforementioned Hercules, but the rhetorical dimensions of "law as integrity" have yet to be explored. Scalia's non-judicial writings are far sparser than those of his academic contemporaries, but he nonetheless espouses an ideal model of judgment that embraces textual originalism (perhaps the "historian judge"). Other prominent legal theories and theorists merit attention as well, such as Andrea Dworkin and the "feminist judge" or Richard Delgado and the "critical judge," both of whom have written for academic and lay audiences and have been

particularly influential outside of legal studies. One may also consider juxtaposing judicial avatars within a single legal theory. Posner is certainly not the only philosopher writing on law and economics, just as Nussbaum and Sunstein are not the only philosophers writing within their respective legal theories. Yet, their approaches differ from their fellow theorists. Future scholarship could examine the competing avatars produced within a single theory, be they contemporaries or historic figures.

Finally, I hope to have contributed to the relationship between legal philosophy and the ways in which the public views the role of law and legal judgment. Law is the most promising site for public philosophies to be constructed and deployed, as it gives the public intellectual and the citizen a common locus for considering a wide array of philosophical issues. Oliver Wendell Holmes, Jr. captured the connection between law and philosophy well in a letter to Ralph Waldo Emerson: “I have learned, after a laborious and somewhat painful period of probation, that the law opens a way to philosophy as well as anything else.”¹⁰ As the vast expanse of judicial decisions, legal and political philosophies, constitutional theories, and public commentaries have increased exponentially, Holmes’ statement holds true today. But unlike so many other philosophical endeavors, law actively and immediately engages every citizen. It wrestles with everything from mundane issues of zoning permits and contracts to moral and political beliefs that serve as a cornerstone for civic living. Debates on epistemology, metaphysics, and the philosophy of the mind rarely grace the pages of newspapers and magazines, and are often relegated to academic journals and conferences that remain isolated from the public eye. Law, on the other hand, is constantly under public scrutiny, and yet it still engages profound philosophical

¹⁰ Oliver Wendell Holmes, Jr. to Ralph Waldo Emerson, April 16, 1876, Harvard Archives, quoted in G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (Oxford: Oxford University Press, 1993), 112.

questions. What constitutes a person? What is dignity and how ought it factor into legal disputes? What is the relationship between liberty and equality? What are the limits of reason? These are far-reaching problems with which philosophers have been struggling for millennia, but which nonetheless bear on quick decisions by a time-constrained judicial system.

The approach explored here is offered as lens that may allow legal philosophers, rhetorical theorists and critics, and the lay public a robust, nuanced way in which to see and engage the idea of law. Law is arguably the most prominent way in which the public and philosophers engage one another. Complex legal cases beget complex philosophical problems, which affect and are affected by public discourse. Their rhetorical constructions and discursive turns are not born of immaculate conception, but emerge from, respond to, and transform a long, ongoing tradition of philosophical explication and negotiation. The public philosophers addressed offer distinct argumentative discourses that help to shape how readers understand good legal judgment; but to isolate one and label it our fixed star ignores the many ways in which it is situated in a greater constellation. By addressing the ways in which these philosophers use rhetorical strategies to situate and promote their philosophies, particularly the ways in which they construct rhetorical tropes to direct attention one way rather than other, the constellation comes into better view.

To that end, I have stayed true to the original metaphor articulated as constellational jurisprudence. That is to say, these voices and the positions they represent form a constellation within the civic culture. Just as one star, while perhaps interesting in itself, also occurs within a constellation, so it is with the “stars” of the public philosophy of law. These theorists offer robust legal philosophies, but to understand their place within the public star system one must address them in relation to one another. In particular, the respective philosophies of Posner, Nussbaum,

and Sunstein are highly interactive. As longtime colleagues at the University of Chicago, these scholars have worked together (and against one another) to construct their legal theories. To view them in isolation is to take in only part of the picture.

As prominent public intellectuals whose reach goes far beyond classrooms, conferences, and academic journals, the legal philosophers addressed throughout this dissertation are utilizing rhetorical strategies that situate them not only as experts with a useful intellectual background, but also as citizen scholars contributing to an ongoing discourse. Working amidst theoretical principles and contextual intricacies, their craft requires *phronésis* - a sage balance between *episteme* and *doxa*. Whereas most attention given to the practical wisdom of public intellectuals (especially those interested in law) focuses on their ability to explain, my analysis underscores the ways in which they *show* via their ideal models of judgment. In so doing, they are able to reinforce a particular *process* that leads to a good judgment such that others can adopt it and apply it elsewhere. As I argued in the chapters on Posner, Nussbaum, and Sunstein, the processes they articulate are imbued with rhetorical faculties that guide judgment toward their respective *teloi* of law. To remove the rhetorical characteristics of their models of judgment would be to upend them entirely.

In many ways, the aforementioned philosophers are just as invested in the act of creation as they are the act of explanation. All of them attempt to construct an idea of legal judgment that can be adopted by academics, judges, and the public alike. Given the malleability of meaning and the evolution of social norms, law serves as a philosophical touchstone rooted in the Constitution. The Constitution has served as a vital, often deified, document that has been constantly returned to and reimagined, particularly in moments of crisis. It has become more than simply a legal document. Following James Boyd White:

It is the purpose of the instrument known as the “Constitution of the United States of America” to do what the Declaration neither attempted nor achieved; to establish and organize a national community not merely at a transcendent moment of crisis but in its ordinary existence and over time. It is not a battle-cry but a charter for collective life – for the life we have earned when the Declaration has done its work – and our questions accordingly are: What kind of life does it make possible? What roles does it establish? What relations does it define among them? What opportunities for speech and thought does it create? This Constitution means to establish the conditions on which, and many of the materials with which, life will actually be led by a people no longer claiming to be united in a splendid moment of common sentiment but now engaged in, and divided by, their ordinary activities and moved by their ordinary motives.

The Constitution is a text that calls for interpretation. The immense beauty and insufferable challenge of the Constitution is that it has given its interpreters the same material, but that material is not yet fully formed and never will be. As a result, different philosophers are giving shape to the material of law, sculpting it with the hope that they are creating something more beautiful and more practical. The end results are different sculptures, imagining life and law in varying ways. These visions, however, emerge from a common material. The public philosophers addressed are, in large part, artists creating through discourse.

This is not to suggest that rhetoric is superior to or replaces the array of other productive lenses through which to examine the philosophy of law, such as those approaches offered by sociology, legal studies, political science, cultural studies, or philosophy. Yet rhetoric’s contribution is nonetheless unique, given the different issues apropos of the rhetorical tradition. For example, philosophy often attempts to find the correct or best jurisprudence, which is evident

in the numerous works arguing for a particular legal worldview. A rhetorical approach, however, acknowledges the tensions present as these philosophies negotiate with each other in an attempt to gain greater recognition, support, and, ultimately, influence. This view is well articulated by Michael Leff:

Rhetorical discourse occurs in the contexts where judgments must be rendered about specific matters of communal interest. Such judgments normally invoke the general principles that categorize and direct our response to public events. Yet the application of these principles is open to question, and, in their abstract state, they are insufficient to allow for an adequate decision in any given case. Moreover, these principles themselves are subject to revision in light of our concrete experiences.¹¹

As a prominent site of judgments that bear upon important communal issues, law is situated within a robust, complex, and nuanced rhetorical setting. Philosophers of law play a significant role therein as they help to shape and reshape the principles that constrain legal judgment. Overall, this project does not advocate a particular philosophical worldview, even though I may be partial to particular interpretations of the Constitution and the legal philosophies underlying such arguments. Rather, my goal has been to unearth and elucidate the rhetorical qualities inherent to the aforementioned philosophers of law and to argue that they can be best understood as embodied models of judgment imbued with particular rhetorical faculties. If law is the writing of an “epic” chain novel, as Ronald Dworkin contends, then we must examine the heroes of the story if we have any hope of understanding the breadth and depth of the tale.

¹¹ Michael Leff, “The Habitation of Rhetoric,” in *Contemporary Rhetorical Theory: A Reader*, ed. John Luis Lucaites, Celeste Michelle Condit, and Sally Caudill (New York: Guilford Press, 1999), 61.

APPENDIX: A MODEL COURT IN ACTION

A good model of judgment is useless if it cannot be put into practice. This is a point of agreement between Posner, Nussbaum, and Sunstein. Their agreement, however, is short lived. The economic judge views a case through the lens of wealth maximization, seeks balance amidst competing legal interests, and utilizes a common sense notion of economic adjudication. Antagonistic to the economic judge, the literary judge finds the translation of incommensurable ideas a dangerous practice. Instead, literary judges draw upon their literary imagination to refine the process of rhetorical invention by offering an opportunity to experience the “other.” Exposure to literature also expands the literary judge’s capacity for emotional sensitivity and works toward minimizing the influence of dangerous emotions, a central concern for the literary judge but of little interest to her economically minded counterpart. Civic republican judges acknowledge the benefits to be gained from open deliberation and dissent with their peers. Not only does good judgment require sound legal arguments, it must also be issued at the right time and contribute to the production of a healthy, engaged citizenry.

Each chapter thus far has offered various examples illustrating how the model judges approach and decide cases, but there has been little overlap save a handful of landmark decisions. Given their different orientations to law, each scholar focuses on different types of cases in order to frame their respective positions in the best light. In order to avoid imbalanced attention in their scholarship and yet another analysis of *Brown v. Board* or *Roe v. Wade*, this chapter will apply the different models of judgment to a fictitious, yet not unlikely case: *Concerned Citizens v. National Security Agency*. As the American public grows increasingly concerned over the ongoing wiretapping and data mining by the NSA, a three-member appellate

court agrees to a hear the case. Composing the panel, the economic judge, the literary judge, and the civic republican judge must decide whether or not the expansive NSA wiretapping unveiled in 2013 violates the Fourth or Fifth Amendments. The judges draw from the same legal resources – the amendments, legal precedent, statutes like the Patriot Act, the checks and balances outlined in the Constitution – but their rhetorical faculties bring forth markedly different concerns, arguments, and conclusions. What follows is 1) a brief history of privacy law and an overview of the current NSA controversy; 2) a fictional exchange between the petitioner and respondent counsel and the appellate court composed of the model judges; and 3) the decision of the court.

LEGAL, PUBLIC, AND POLITICAL BACKGROUND

In order to set up a robust analysis, one must first understand the legal and extralegal issues surrounding wiretapping and the role of privacy in American law. Since the invention of the electric telegraph in the early 1800s and its commercialization shortly after, lawmakers and law enforcement agencies have had an interest in intercepting real-time messages in order to prevent crimes or implicate individuals in a crime that has already been committed. As the telegraph made way for the telephone, legislators across the country established provisions protecting citizens from unlawful surveillance. Although telegraph and telephone technology was widespread at the turn of the 19th century,¹ the judicial branch had not addressed the issue until *Olmstead v. U.S.* (1928). Issuing the opinion of the court, Chief Justice William Taft denied an appeal to the Fourth Amendment by narrowly construing the scope of the exclusionary clause (i.e. “unreasonable search and seizure”) and relying upon a literal reading of the text. Chief

¹ For a detailed analysis of the rise and spread of the telephone (as well as other communication technologies), see Tim Wu, *The Master Switch: The Rise and Fall of Information Empires* (New York: Knopf, 2010).

Justice Taft wrote, one “can not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight.”² With this characterization of the Fourth Amendment, Taft argued that there cannot be a challenge to the Fifth Amendment: “There is no room in the present case for applying the Fifth Amendment, unless the Fourth Amendment was first violated. There was no evidence of compulsion to induce the petitioners to talk over their many telephones.”³

Justice Louse Brandeis issued a now-famous dissent calling for the Constitutional protection of privacy. Although he had publicly advocated for a right to privacy as far back as 1890 when he coauthored “The Right to Privacy” with Samuel Warren,⁴ Brandeis did not have the opportunity to adjudicate a case of this nature until nearly forty years later. According to Brandeis,

[The amendments] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Brandeis constructed a legal justification for the right to privacy from what Justice Oliver Wendell Holmes, Jr. described as the “penumbras of the Fourth and Fifth Amendments,” a turn

² *Olmstead v. U.S.* 277 U.S. 438 (1928)

³ *Ibid.*

⁴ Samuel D. Warren and Louis D. Brandeis, “The Right to Privacy,” *Harvard Law Review* 4.5 (Dec. 1890), 193-220.

of phrase that would be adopted in Justice William O. Douglas's defense of privacy in *Griswold v. Connecticut* (1965), albeit a privacy issue that did not entail wiretapping surveillance.

Despite the fact that Brandeis' dissent failed to swing the court in his direction, his dissent became vindicated with the expansion of privacy rights throughout the 1960s and '70s. In addition to *Griswold v. Connecticut*, which etched a place for privacy from "all government invasions 'of the sanctity of a man's home and the privacy of life,'"⁵ *Mapp v. Ohio* (1961) defended a citizen's right to privacy against warrantless searches four years earlier.⁶ By the time wiretapping again found itself under the scrutiny of the Supreme Court in *Katz v. U.S.* (1967), the Constitutional protection of privacy had a strong foothold. *Katz* questioned the legality of wiretapping a public telephone to record a private conversation. In the majority opinion, Justice Potter Stewart argued that such investigative pursuits "violated the privacy upon which he justifiably relied while using the telephone booth."⁷ As a result, the FBI had conducted an illegal search and seizure and "ignored 'the procedure of antecedent justification...that is central to the Fourth Amendment,' a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case."⁸ Authoring a concurring opinion, Justice Harlan suggested the "reasonable expectation" standard for determining the legitimacy of legal appeals to privacy. In short, if someone expects privacy in a given situation (making a call on a public telephone, for example) and said expectation is "one that society is prepared to recognize as

⁵ *Griswold v. Connecticut* 381 U.S. 479 (1965)

⁶ *Mapp v. Ohio* (1961). Until *Mapp*, the idea that evidence procured from a warrantless search constituted "fruit from the poisonous tree" and thus could not be included in building a case was applicable to federal law enforcement agencies, but it was not applicable to state and local law enforcement.

⁷ *Katz v. United States*, 389 U.S. 347 (1967)

⁸ *Ibid.* See also Edmund W. Kitch, "Katz v. United States: The Limits of the Fourth Amendment," *Supreme Court Review* (1968), 133-152; and Mark Rahdert, "Tracking Katz: Beepers, Privacy and the Fourth Amendment," *Yale Law Journal* 86 (1977), 1461-1508.

‘reasonable,’⁹ then government surveillance of the conversation is unconstitutional. Five years later the court would again defend privacy against warrantless electronic surveillance in *United States v. United States District Court for the Eastern District of Michigan Southern Division* (1972) and limited an expanding executive authority.¹⁰

Whereas the judicial branch expanded the Constitutional protection of privacy and continued to rule against the legality of warrantless searches,¹¹ the executive and legislative branches were expanding the scope of their surveillance initiatives. In response to revelations that President Nixon used the NSA to engage in the illegal surveillance of activist groups (also known as the “Church Committee” controversy), congress passed the Foreign Intelligence Surveillance Act (FISA) of 1978. Notably, the Act created the FISA Court, which continues to convene and decide (in secret) whether or not to grant surveillance warrants. Although imperfect, the balance between the different branches was more-or-less at equilibrium for many years until the signing of the Patriot Act in 2001. “Title II: Enhanced Surveillance Procedures” greatly expanded the scope of government surveillance programs and limited the transparency legally required by authorities. The Patriot Act amends FISA and the Electronic Communications Privacy Act of 1986 in its pursuit to “obtain foreign intelligence information.”¹² “Foreign intelligence” pertains not only to the surveillance of non-citizens and foreign communication, but also applies to domestic communication and United States citizens who are affiliated with

⁹ *Katz v. U.S.*, Justice Harlan concurring.

¹⁰ *United States v. United States District Court for the Eastern District of Michigan Southern Division*, 407 U.S. 297 (1972)

¹¹ In addition to the aforementioned cases, the illegality of warrantless searches was further solidified in *Terry v. Ohio*, 392 U.S. 1 (1968), *Chimel v. California*, 395 U.S. 752 (1969), and *Payton v. New York* 445 U.S. 573 (1980).

¹² *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001).

suspected terrorist organizations.¹³ Warrant-sanctioned surveillance became less of an obstacle and the secret FISA Court made external review more difficult. In 2008, FISA was amended which further loosed its restrictions even further. Three years later, President Obama signed an extension of the surveillance provisions in the Patriot Act (which are temporary, whereas the rest of the Patriot Act is permanent), which added four more years to authorize for roving wiretaps and the ability to gather data on “lone wolf” suspects who are not connected with a larger organization.

Opponents of the Patriot Act’s surveillance provisions compose an array of unlikely allies, including politicians Senator Rand Paul and Senator Dick Durbin, and non-profit organizations the Patriots to Restore Checks and Balances and the American Civil Liberties Union. The vague language of the Enhanced Surveillance Procedures grants governmental agencies sweeping powers to secretly gather data on those parties it deems of interest. In media-grabbing act of politicking, Paul unsuccessfully attempted to use a legislative procedural tactic to delay the 2011 extension. Conservative critics – primarily from the vocal libertarian wing – tend to focus on domestic privacy issues and violations of citizen’s rights. Liberal critics share these concerns, while expanding their concern to include questions of racial profiling and Internet freedom. In one way or another, all of the critics worry about the potential overreach by government agencies. Defenders of the surveillance provisions counter the claims of overreach by highlighting the oversight and regulations embedded within the legislation, suggesting

¹³ Much debate surrounds qualifications needed to categorize a group as a “terrorist organization” and the degree to which an individual is “affiliated” with such an organization. Although exact numbers are unknown due to the classified nature of the list, upwards of one million names are presently on the terrorist watch list, which includes an estimated 9,000 U.S. citizens. See Shaun Waterman, “Terror Watch List Grows to 875,000,” *The Washington Times* (May 3, 2013), retrieved from <http://www.washingtontimes.com/news/2013/may/3/terror-watch-list-grows-875000/>; and American Civil Liberties Union, “Terror Watch List Counter: A Million Plus,” *American Civil Liberties Union* (n.d.), retrieved from <https://www.aclu.org/technology-and-liberty/terror-watch-list-counter-million-plus>.

opponents are falling prey to the slippery-slope fallacy. Given the new risks present in the post-9/11 world, these measurements are necessary to ensure the safety of U.S. citizens. “It’s an important tool for us to continue dealing with an ongoing terrorist threat,” claimed President Obama after extending the surveillance programs he had criticized in his 2008 presidential campaign.

Public opinion concerning the Patriot Act has been divided. Early polls (June 2002) note broad public support, but it slowly waned during President Bush’s first term¹⁴ and remained more-or-less split through his second term and up to President Obama’s 2011 extension.¹⁵ A majority of republic presidential candidates voiced support for the Act to agreeing crowds during the 2012 primary season. Polls Support for surveillance since the adoption of the Patriot Act is more difficult to discern, as polls about it are not only irregular and uncommon, but also ask broad questions about the entirety of the act rather than its specific surveillance provisions. As *Mother Jones* reports, there tends to be a small increase in support for surveillance, with 51% calling the provisions acceptable in January 2006 to 56% in June 2013.

The Patriot Act has received a handful of notable legal challenges. Some of which limited the scope of its power, including *Hamdi v. Rumsfeld* (2004), which defended a U.S. citizen’s right to due process while detained as an enemy combatant (although this is not a right granted to foreign detainees),¹⁶ and *Hamdan v. Rumsfeld* (2006), which blocked war-crimes trials for Guantanamo detainees and maintained the Supreme Court’s authority to hear their cases.

Although the Supreme Court checked executive power in a significantly and openly, the bulk of

¹⁴ David W. Moore, “Public Little Concerned About Patriot Act,” *Gallup* (Sept 9, 2003), retrieved from <http://www.gallup.com/poll/9205/public-little-concerned-about-patriot-act.aspx>.

¹⁵ Pew Research Center, “Public Remains Divided Over the Patriot Act,” *Pew Research* (Feb 15, 2011), retrieved from <http://www.pewresearch.org/2011/02/15/public-remains-divided-over-the-patriot-act/>.

¹⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)

the Patriot Act's power remained and eventually grew with the 2008 amendments to FISA and 2011 extension of the surveillance provisions.

Legal challenges to the surveillance provisions have fared less well in court. In *Clapper v. Amnesty International* (2013), the case was dismissed on the ground that the ACLU respondents moving the case forward had no legal standing, thus avoiding the legal challenge to the NSA's warrantless wiretapping program. This decision will be of little help for the pending case in the Ninth Circuit, *Center for Constitutional Rights v. Bush*, wherein the respondents argue that the NSA's wiretapping of Guantanamo prisoners and their lawyers that compromises their ability to provide the a high standard of legal service and produces a chilling effect on their speech. The Ninth Circuit is also waiting to issue a decision on a broader challenge to the NSA in *Jewel v. National Security Agency*. The case may be dismissed, however, due to the government's appeal to state's secrets privilege. Interestingly, support has shifted from primarily Republicans in 2006 to a majority Democratic base in 2013.¹⁷ The shift is undoubtedly due to the 2013 NSA information leaks revealing the Obama administration's sweeping data collection and wiretapping program, which provides the impetus for and rhetorical situation surrounding *Concerned Citizens v. NSA*.

On June 5, 2013, *The Guardian* newspaper published the first of several reports by Glenn Greenwald that detailed the various ways in which the National Security Agency was engaging in a vast program of wiretapping and data mining. The report included a secret court order from the Foreign Intelligence Surveillance Court was publicized, implicating Verizon Communication in the program. The following day, Greenwald reported on another covert surveillance program:

¹⁷ Kevin Drum, "New Poll Says American Public is Fine with NSA Surveillance," *Mother Jones* (June 10, 2013), retrieved from <http://www.motherjones.com/kevin-drum/2013/06/new-poll-says-american-public-fine-nsa-surveillance>.

PRISM. PRISM, or “Planning Tool for Resource Integration, Synchronization, and Management,” expands the U.S. surveillance program by including a number of Internet and tech companies including Google, Microsoft, and Apple. The public uproar was swift and loud. Major newspapers published scathing editorials criticizing the Obama administration for its sweeping and secret initiative. Exacerbating the furor was a three-month old testimony by the James Clapper, the Director of National Intelligence. Senator Ron Wyden asked a seemingly direct yes-or-no question: “Does the NSA collect any type of data at all on millions or hundreds of millions of Americans?” “No, sir,” replied Clapper. “Not wittingly.” Clapper would go on to apologize for his “erroneous,” which he described as the “least untruthful” response he could give.

The political ramifications have been mixed. Many high-ranking Democrats and Republic were quick to defend the programs. Senator Dianne Feinstein, the Senate Intelligence Committee Chair, assured the public that NSA surveillance was narrow in scope and limited to general data, such as timestamps on telephone calls, but not specific conversation information (i.e. what was said during the conversation). The House Intelligence Committee Chair, Mike Rogers, voiced a similar defense. “The National Security Agency does not listen to Americans’ phone calls and it is not reading Americans’ emails,” asserted Rogers. “None of these programs allow for that.”¹⁸ For her efforts in defending these issues, Representative Nancy Pelosi was booed by her own constituents.¹⁹ Citing the demands for security in a post 9/11 world, proponents position the surveillance programs as a necessary tool to prevent future attacks. They also note the various checks and balances in place, highlighting the different, interacting roles

¹⁸ Imtiyaz Delawala, “Intelligence Committee Leaders Defend NSA Surveillance,” *ABC News* (Jun 9, 2013), retrieved from <http://abcnews.go.com/blogs/politics/2013/06/intelligence-committee-leaders-defend-nsa-surveillance/>.

¹⁹ Nick Wing, “Nancy Pelosi Booed, Heckled Over Edward Snowden, NSA Comments at Netroots Nation 2013,” *Huffington Post* (Jun 22, 2013), retrieved from http://www.huffingtonpost.com/2013/06/22/nancy-pelosi-booed_n_3484062.html.

that the executive, legislative, and judicial branches play, although the secrecy of their interactions remains a point of contention.

Politicians have been equally vocal in their criticisms of the expanded programs. Al Gore deplored the tactics as unconstitutional, claiming that “[i]t is not acceptable to have a secret interpretation of a law that goes far beyond any reasonable reading of either the law or the constitution and then classify as top secret what the actual law is.”²⁰ Senator Rand Paul sponsored the “Fourth Amendment Restoration Act of 2013” in an attempt to curb domestic surveillance (Paul is more-or-less fine with foreign surveillance). Longtime supporter of President Obama, Representative Elijah Cummings reflected, “The president said that I must return to my authentic self. And I think the president needs to go back and read his own speeches.”²¹ Echoing criticisms cast against President George W. Bush, who initiated the NSA wiretapping program, detractors stress the importance of Constitutional protections of liberty and privacy, the exaggerated claims of immanent danger, and the need for increased transparency as reasonable concerns.

For their part, the public has been starkly divided. Polling data suggests that a small majority (56%) of Americans consider data collection on telephone records an “acceptable” means to investigate terrorism and squelch potential threats, whereas a large minority (41%) find such means unacceptable. The numbers are even closer for email data collection, with 45% indicating the government is within their power to monitor email communications and 52%

²⁰ Ian Millhiser, “Al Gore: NSA Surveillance Programs Violate the Constitution,” *Think Progress* (Jun 17, 2013), retrieved from <http://thinkprogress.org/justice/2013/06/17/2165371/al-gore-nsa-surveillance-programs-violate-the-constitution/>.

²¹ Darren Samuelsohn, “George W. Bush Critics Turn Wrath on President Obama,” *Politico* (Jun 7, 2013), retrieved from <http://www.politico.com/story/2013/06/george-w-bush-haters-turn-wrath-on-obama-92388.html>.

claiming it should be beyond the scope of their power.²² As with any poll, the wording of the questions matters greatly. For example, polling data varied greatly depending on whether the government was tracking “ordinary citizens” or “suspected terrorists.”²³ The only point of agreement seems to be the support of congressional hearings to examine the NSA surveillance programs in greater detail.²⁴

Since the initial revelation through *The Guardian* and *The Washington Post*, a torrent of information and accusations has flooded public and political discourse. No matter what position one holds, the 2013 NSA controversy brings to light a number of legal, political, and philosophical issues that coalesce into a tangled knot for any legal theory. What follows is a mock appellate court trial beginning with oral arguments before the court followed by the opinion of the court and dissenting opinions. The mock oral arguments draw inspiration from previously argued cases dealing with privacy and wiretapping with interjections representative of the model judges. The subsequent opinions and dissents will similarly draw from the rhetorical qualities of each judge articulated in the previous chapters.

Regarding the background of the fictitious case at hand, *Concerned Citizens v. National Security Agency*, a few things merit attention before engaging the oral arguments and opinions issued by the model judges. The case is fantastic not only because it is being heard by three idealized model judges, but also because it is being heard by a panel of three judges as opposed to a single judge from a district court or the nine justices on the Supreme Court. The vast

²² Pew Research Center, “Majority Views NSA Phone Tracking as Acceptable Anti-terror Tactic,” *Pew Research* (Jun 10, 2013), retrieved from <http://www.people-press.org/2013/06/10/majority-views-nsa-phone-tracking-as-acceptable-anti-terror-tactic/>.

²³ See Emily Ekins, “Public More Wary of NSA Surveillance Than Pundits Claim,” *Reason* (Jun 18, 2013), retrieved from <http://reason.com/blog/2013/06/18/public-more-wary-of-nsa-surveillance-tha>.

²⁴ Scott Clement and Sean Sullivan, “Poll: Public Wants Congressional Hearings on NSA Surveillance,” *Washington Post* (Jun 19, 2013), retrieved from <http://www.washingtonpost.com/blogs/the-fix/wp/2013/06/19/poll-public-wants-congressional-hearings-on-nsa-surveillance/>

majority of three-judge panels exist at the appellate level, which would not likely see a case like *Concerned Citizens v. NSA*.²⁵ Consequently, the three-judge model court has more in common with the Supreme Court than a federal appellate court. In order to facilitate interaction between the model judges, I opted to overlook this detail in favor of efficiency and expediency. As I envision *Concerned Citizens v. NSA*, an *ad hoc* federal court has been created to hear the case. Spurred by the revelations of potential governmental overreach made public by Edward Snowden in connection with *The Guardian* and *The Washington Post*, the non-profit government watchdog group Concerned Citizens charged the NSA with overstepping its bounds and violating the Constitution.

The collection of metadata includes numerous issues that create an intricate web of legal questions, which are made more complex when different legal philosophies focus attention on different elements of the case. An initial challenge for Concerned Citizens is whether or not they have standing in the case. In other words, what harm has come to the organization and how have their rights been violated? Why do they have a right to bring the case before the court as opposed to those individuals who have been targeted by perceived violations of the NSA? If one accepts that they have standing, an intricate knot of issues must be unraveled to ascertain whether or not the government has overstepped its bounds. These issues not only include legal statutes and precedent, but also the shifting social and technological trends that have emerged in the relatively new digital age. Of particular concern for the court are the following:

²⁵ Historically, some issues have merited the creation of a three-judge district court panel including cases involving the Sherman Anti-Trust Act, the Interstate Commerce Act, and state legislation blocking desegregation.

- What information is being accrued and does it qualify as an illegal search and seizure?
The 4th Amendment states that “persons, houses, papers, and effects” are protected unless a warrant is used with probable cause, but metadata falls in a grey area.
- If metadata falls inside the scope of the 4th Amendment, is the warrant process followed by the FISA court constitutional? Although an official judicial body, critics of post-9/11 intelligence gathering programs cite the highly secretive nature of the court and lack of external oversight as a source of concern.
- Does the type of information being accrued distinguish it from other 4th Amendment challenges? Public officials who support the collection of metadata argue that the information is generic (e.g. time stamps, call times, phone numbers of inbound and outbound calls, email recipients, etc.) and does not constitute a violation of privacy. If the NSA wants to investigate *content*, that is the words said in a telephone call or typed in an email, then they must receive a court order to proceed. Again, the secrecy of the FISA court issuing such court orders serves as a point of contention.
- Does it matter who, or rather *what*, is collecting the data? Given the volume of information, human agents see precious little data. The information is collected and stored while computer algorithms filter through the data. Only when the algorithm comes across something suspicious is it flagged for investigation by human agents.
- Is the data secure? Even if there are no violations of the 4th Amendment, can the citizenry be assured that the immense amount of data is safe from hackers who may use the information for nefarious purposes (e.g. corporate espionage)?
- How long is the data kept and should there be limits? Presently, data is supposed to be held for a maximum of two years barring a court ordered extension, but records indicate

data is being stored indefinitely. If there is no harm in collecting this data, what is the point of time constraints? At what point is the threat reduced such that the programs may be terminated or will they continue indefinitely?

- Is the 5th Amendment being violated when metadata information is used against a witness?
- Is there a chilling effect to communication? Are political organizations and subversive (but wholly legal) groups silencing themselves for fear that they may be targeted in the future?
- Are legal (and public) interpretations of privacy outdated in light of emerging technology? Is the idea of public privacy fading away? The digital age has inspired an unprecedented amount of self-publication. With the advent of Facebook, MySpace, Twitter, Four Square, Instagram, and the endless number of social media apps that continue to ask users to divulge information. This is particularly important for younger users who developed their sense of privacy as they were embedded in social media.
- Are particular groups being targeted given their group affiliation and does this violate the 14th Amendment? Is a Muslim American more likely to be targeted than a Christian American for no other reason than their religious affiliations?

These issues will be addressed throughout the oral arguments delivered by the counsel for the respondents and the petitioners, in addition to the opinions issued by the model judges. As you will see, the judges will focus their attention on particular elements of the case will pushing aside others given their different legal philosophies.

ORAL ARGUMENTS

THE DEPUTY CLERK: Appearance for the respondents.

MR. JONES: Michael Jones for the respondents.

THE COURT: Good morning.

THE DEPUTY CLERK: Appearance for the petitioners.

MS. SHAW: Deborah Shaw from the Justice Department.

THE COURT: Good morning. This is oral argument, both on the Concerned Citizen's preliminary injunction and the government's motion we propose to conduct the argument in the following will hear first from Concerned Citizens and then from the Department of Justice on your principal arguments for approximately 20 minutes each. Of course, we will allow some flexibility in that, but that's our general intention. So with that in mind, do you want to be heard, Mr. Jones?

RESPONDENT'S ARGUMENTS

MR. JONES: Yes, your Honors. Thank you. As you know, this case involves a challenge to the NSA's wiretapping and mass collection of communication metadata, colloquially known as "big data." It is our contention that the collection of this data and programs such as PRISM violate the First, Fourth, and Fourteenth Amendments of the Constitution. We will argue that the secretive Foreign Intelligence Surveillance Court is overextending its reach under the Foreign Surveillance Intelligence Act of 1978 and the Patriot Act of 2001. Specifically, Sections 215 and 702 of FISA have been misappropriated by the NSA and violates the citizens' reasonable expectation of privacy and the metadata reveals highly personal and sensitive information. As you know, Section 215 states that the FBI

may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the First Amendment to the Constitution.²⁶

It is our contention that the “tangible things,” particularly the inclusion of “other items,” is overly broad and vague. As such,

ECONOMIC JUDGE: But isn’t there regular judicial oversight? After all, Section 215 also stipulates that monthly reports are to be filed. And every 90 days the FISA court is reviewed by the Department of Justice and National Security Agency, and the court must also reauthorize programs within the same time frame.

MR. JONES: That is correct, your Honor. Part of the problem is that such oversight is secretive and the reports about the NSA are created by that very institution. There is precious little external oversight of these programs by parties without a vested interest.

ECONOMIC JUDGE: So these reports ought to be public? Wouldn’t that defeat the purpose?

MR. JONES: We are not contending that they should be made public, your Honor; merely pointing out the inadequacies of the current model. We agree that the NSA requires secrecy in order to be effective, but the depth and breadth of that secrecy is much too expansive. From the documents divulged by Edward Snowden, it is now public knowledge that NSA analysts collected and maintained possession of information they deemed useless. These documents included “stories of love and heartbreak, illicit sexual liaisons, mental-health crises, political and

²⁶ “The Foreign Intelligence Surveillance Act of 1978,” Pub.L. 95–511, 92 Stat. 1783, 50 U.S.C. ch. 36, Section 215, emphasis added.

religious conversations, financial anxieties and disappointed hopes.”²⁷ 90% of account holders were not on any watch list or affiliated in any way with a terrorist organization. Nonetheless, the NSA, with permission of the FISA court, stored files like these from as far back as 2009.

ECONOMIC JUDGE: Are these individuals being actively pursued by law enforcement? Are their ideas or activities being exposed to their families, friends, employers, or anyone else?

MR. JONES: Not to our knowledge, your honor, but with all due respect, that is beside the point.

ECONOMIC JUDGE: How so? If their private information stays private, isn't their expectation of privacy being respected?

MR. JONES: No, your Honor. By the rights and privileges granted by the 4th Amendment and the precedent established in *Griswold v. Connecticut*, *Mapp v. Ohio*, and *Katz v. United States*, citizens' right to privacy extends beyond the sharing of their information; there is also the expectation that said information will not be pursued, collected, and stored indefinitely without just cause.

CIVIC REPUBLICAN JUDGE: Is not just cause addressed through the warrant process established through FISA and granted by the judicial court that oversees the program?

MR. JONES: Yes and no, your Honor. Yes, the programs established by the NSA have some oversight by the judicial branch, but the secretive nature of the court makes it markedly different than any other court established in the United States. As I mentioned before, we agree that some secrecy is warranted, but the NSA cannot and should not be given carte blanche to collect and store metadata. Moreover, we contend that the ease with which an individual may be targeted for surveillance is far too great. Presently, the criteria by which an individual may be blacklisted

²⁷ Barton Gellman, Julie Tate, and Ashkan Soltani, “In NSA-Intercepted Data, Those Not Targeted Far Outnumber the Foreigners Who Are,” *The Washington Post* (July 5, 2014), retrieved from http://www.washingtonpost.com/world/national-security/in-nsa-intercepted-data-those-not-targeted-far-outnumber-the-foreigners-who-are/2014/07/05/8139adf8-045a-11e4-8572-4b1b969b6322_story.html.

include such national security threats as the destruction of government property – *any* government property – and damaging the computers used by financial institutions. “Terrorism” is defined quite loosely, as any act deemed dangerous to property with the intent to intimidate qualifies. As a result, some forms of protest could now be considered terrorism. We argue that the NSA can adequately fulfill its obligations without such expansive breadth. Justice Sonia Sotomayor argues in a concurring opinion in *United States v. Jones* that aggregated metadata “generates a precise, comprehensive record” of people’s daily lives, which in turn “reflects a wealth of detail about [their] familial, political, professional, religious, and sexual associations.”²⁸ Even if the government can obtain call records under Section 215, the scale at which such records have been obtained far exceeds the law as it was written and intended.²⁹

Ideally, the oversight by the FISA court that the Deliberative Judge referenced may be adequate and constitutional, but it is being abused and the government has used the veil of secrecy to obscure these abuses. Presently, the NSA is able to collect and store upwards of 20 billion “record events” every day.³⁰ More than call log data, warrants have been extended to cover personal financial information.³¹ So, at the judicial level there has been overreach. The legislative branch has done little better. The Congressional Oversight Committees tasked with ensuring the NSA stayed within their legal bounds were largely unaware of the activities under their domain. Many representatives were denied basic information when they requested it,

²⁸ *United States v. Jones*, 565 U.S. ___, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring)

²⁹ *American Civil Liberties Union v. Clapper*, No. 13-3994 (S.D. New York Dec. 28, 2013), oral arguments.

³⁰ James Risen and Laura Poitras, “N.S.A. Gathers Data on Social Connections of U.S. Citizens,” *New York Times* (Sep. 28, 2013), retrieved from <http://www.nytimes.com/2013/09/29/us/nsa-examines-social-networks-of-us-citizens.html>.

³¹ Siobhan Gorman, Devlin Barrett, and Jennifer Valentino-Devres, “CIA’s Financial Spying Bags Data on Americans,” *Wall Street Journal* (Jan. 25, 2014), retrieved from <http://www.wsj.com/news/articles/SB1000142405270230355950457919837011316353>.

making oversight of the Agency antithetical to democratic and constitutional values. The government has touted the fact that Congress has renewed the surveillance programs on an annual basis, but as Judge Robert Sack has queried, “I wonder how valid that ratification argument is when you're dealing with what is essentially secret law. I thought the ratification notion is you're dealing with something that's public and that by ratifying it again and again you're somehow reflecting the public will because they know about it.”³² The minimal oversight and degree of discretion afforded the NSA undermines the democratic process of checks and balances. The utter lack of transparency has allowed the NSA to move forward without providing an adequate justification for their reasons. Unchecked surveillance threatens the core values of democracy and is justified by a false choice between privacy and security. Knowing the government is collecting and storing so much data profoundly alters the relationship between citizens and their government. People should know what tactics are at the NSA’s disposal, who has access to the data, the record keeping guidelines and limitations, and the various protections in place to safeguard their information. Moreover, the increased breadth of the programs has proven largely ineffective, as scant evidenced has been produced showing that metadata collection has been used to thwart terrorist activity.

ECONOMIC JUDGE: If these cases were made public, would that undermine the future effectiveness of the same tactic, essentially showing your hand to your opponent?

MR. JONES: Again, your Honor, we are not advocating for complete transparency on these cases. We are arguing, however, that the near complete veil of secrecy covering these cases and the programs utilized by the NSA goes well beyond the authority granted to that agency. When

³² Josh Gerstein, “Appeals Court Chilly to Feds’ Arguments for NSA Surveillance Program,” *Politico* (Sept. 2, 2014), retrieved from <http://www.politico.com/blogs/under-the-radar/2014/09/appeals-court-chilly-to-feds-arguments-for-nsa-surveillance-194760.html>.

the democratically elected members of Congress charged with overseeing the NSA are denied information about their programs, there is a significant break from healthy governance. Even the specific committees have been misled and even outright lied to. In a Senate Intelligence Committee meeting on March 12, 2013, Senator Ron Wyden asked National Intelligence Director James Clapper, “Does the NSA collect any type of data at all on millions, or hundreds of millions of Americans?” Clapper responded, “No, sir... Not wittingly.” Let me stress that this response, which Clapper later described as “clearly erroneous,” was delivered under oath to a member of the Senate Intelligence Committee. When even the select group of representatives is denied access to the information they need to perform their job adequately and in good faith to the American public, oversight and checks and balances no longer exist.

DELIBERATIVE JUDGE: Remind me, was this committee meeting public or private?

MR. JONES: It was public, your Honor.

DELIBERATIVE JUDGE: Doesn't that change the situation drastically? Isn't a public intelligence hearing an oxymoron?

MR. JONES: We respect Sen. Wyden's discretion in this matter. As a member of the senate committee, he knew the hearing was public and chose to ask the question nonetheless. The brazen defiance by Director Clapper is indicative of our worst fears regarding powerful intelligence agencies: when given an inch they take a mile. Ideally, the NSA and affiliated agencies would remain within the legal strictures established by the legislative branch to prevent overreach. The latitude of secrecy maintained by the NSA has prevented adequate oversight and has led to a number of questionable if not illegal actions. At a certain point we must ask, “Who watches the watchers?”

ECONOMIC JUDGE: Are these so-called illegal actions documented or are you postulating hypotheticals?

MR. JONES: At the behest of an ACLU request for documents filed under the Freedom of Information Act, it has recently come to light that the NSA has overstepped its bounds on numerous occasions. These actions include but are not limited to storing information on unsecured computers, keeping information after it was supposed to be deleted, and emailing data on Americans to unauthorized individuals. Some of these prohibited actions were the result of unintentional human error, but others were quite willful and egregious, such as the NSA analyst who searched her husband's personal telephone. Given the significant amount of information redacted from the released documents, not to mention the numerous documents that remain wholly classified, these violations may be the tip of the iceberg.

DELIBERATIVE JUDGE: If these allegations were true, then wouldn't the most appropriate response be to fix these problems rather than uproot the entire system that we have in place?

MR. JONES: That depends, your Honor. If "fixing" the NSA is limited to the proper handling and storage of five zettabytes of data, which is the equivalent of roughly 1.25 trillion DVDs, then no. We certainly believe that personnel who abuse the power granted to them by their positions must be removed and punished accordingly, but our intent is not to make the system run more smoothly. Rather, the immense amount of data collected and stored is problematic in and of itself. The violations I noted indicate the significant amount of problems associated with an intelligence agency that is barely tethered to the legal system.

We would also like to call attention to the problematic position that communication-based Internet companies have been placed. Google, Yahoo, Microsoft, Facebook, Twitter, and a slew of others are in a catch-22: either they can protect their customers' information, which is

one of the reasons individuals utilize their services, and face fines/penalties from the legal system or they can divulge customer information, potentially losing said customers, and give the government what it wants. They are being asked to violate their stated principles because the government presents an omnipresent threat of terrorism.

ECONOMIC JUDGE: In your view, is privacy a fundamental right or an instrumental right?

That is, do Americans enjoy a right to privacy akin to their right to liberty, which is inalienable and inherent to the idea of democratic living? Or is the right to privacy a means to achieved desirable ends?

MR. JONES: Following the Supreme Court's interpretation of privacy and its roots in the Bill of Rights, we argue that it is fundamental right to be enjoyed by all citizens of the United States.

That being said, it does not give the citizenry carte blanche to do as they wish. Just as with liberty, one's right to privacy is not absolute. When the state has a clear and justified interest in accessing a particular citizen's private information, whether it is a wiretap on their telephone, their email correspondence, or the metadata attached to their communication, then the government should have the ability to access that information so long as they have a warrant. But the blanket collection of metadata and the secrecy with which it has been accessed fall beyond the pale of reasonable search and seizure. Such a context demands citizens to prove the value and necessity of their privacy rather than demanding the government to prove the value and necessity of encroaching upon the public's privacy. The burden of proof lands on the people, and that is not how our legal system was established.

I see that my time is running out, so I would like to end with one final point. The main justification at the heart of FISA and the Patriot Act is to protect the American citizens and investigate terrorist threats and their perpetrators. What tangible good has come of these

programs? In what ways has it been more useful than other, less invasive means acquiring information and creating a strong case? The NSA has offered precious little evidence that their blind, wholesale accumulation of data has amounted to much of anything, ultimately justifying the storage of massive amounts of information on the basis of a universal skepticism of all citizens. President Obama and his top aides suggest that as many as 50 potential terrorist attacks have been prevented across the globe as the result of the NSA's programs. But these numbers are deceptive. Not only are they issued with extraordinary redactions, but they are also created by the very organization under question. An independent examination of their cases suggests that less than 1.8% of cases were initiated based on information acquired through Section 215 of the Patriot Act.³³ The vast majority of cases utilized non-invasive and more reliable methods including undercover agents and informants.

In short, the Sections 215 and 702 of FISA constitute an illegal search and seizure guaranteed by the Fourth Amendment and reinforced by the precedent established by the Supreme Court. The unprecedented lack of transparency highlights a stark break from previous legal doctrine and highlights the significant overreach of the NSA. These tactics have been proven to be largely ineffective and ripe for abuse. On these grounds, we ask this court to nullify the surveillance provisions in Sections 215 and 702. Thank you for your time.

THE COURT: Thank you Mr. Jones. Now we will hear from the petitioners. Ms. Shaw, would you like to be heard?

³³ Peter Bergen, David Sterman, Emily Schneider, and Bailey Cahall, "Do NSA's Bulk Surveillance Programs Stop Terrorists?" *New America Foundation* (Jan. 13, 2014), retrieved from http://www.newamerica.net/publications/policy/do_nsas_bulk_surveillance_programs_stop_terrorists)

PETITIONER'S ARGUMENTS

MS. SHAW: Yes, thank you your Honors. May it please the Court, although there has been a large amount of public discussion about the alleged actions of the NSA, this case is narrowly focused on the powers granted to the executive and judicial powers granted by the PATRIOT Act and the extent to which abides by the Constitution. We contend that Sections 215 and 702 of the PATRIOT Act, which were democratically enacted and receive annual renewal by Congress, have legally granted the surveillance strategies utilized by the NSA. We argue that new and emerging technologies have required new responses, which have already proved successful for other governmental agencies like the FBI. It is our opinion that the information collected does not violate a citizen's reasonable right to privacy as the data is nondescript and remains unanalyzed unless several red flags are raised. Ultimately, the FISA court provides adequate oversight and the security interests of the NSA supersede the type of public disclosure demanded by the respondents.

The technological landscape has changed drastically since the original implementation of FISA in 1978. The Internet and wireless communication has opened whole new avenues by which illegal activities. The state cannot govern and successfully protect the citizenry with dated tactics. The expansion to surveillance instigated by the PATRIOT Act of 2001 illustrates a logical and legal evolution of NSA strategy in order to sufficiently respond to a similarly evolved criminal element. To date, there have been no terrorist attacks on the United States since congress expanded the scope of FISA had been expanded.

ECONOMIC JUDGE: Where is the data proving that the absence of an attack was a result of the new surveillance tactics? Doesn't this tread dangerously close to the *post hoc ergo propter hoc* fallacy?

MS. SHAW: Not so, your honor. NSA officials have cited dozens of cases where their surveillance tools helped to disrupt terrorist plots or identify suspects. They cite e-mails as a particularly effective resource. The cases cited by MR. JONES represent only a small, select portion of the total number of cases pursued by the NSA. If any fallacy is being used, it is the MR. JONES and the sharpshooter fallacy. The cases brought about by the PRISM program and others do not materialize overnight. It takes many months, sometimes years for terrorists and those who wish to harm American interests are ferreted out. One of the significant benefits from the collection of metadata under Sections 215 and 702 is the NSA's ability to examine a suspect's entire network of interaction over time. Only when the agency is actively pursuing a suspect do they utilize the array of data at their disposal at which point it is immensely useful to know who they have been contacting and when such contact is made.

LITERARY JUDGE: What sorts of checks or standards are in place such that the suspects being actively pursued merit the additional surveillance? How are abuses curbed?

MS. SHAW: In addition to the standard intelligence protocols used by the NSA and affiliated agencies, the FISA court reviews requests for warrants.

LITERARY JUDGE: If I am not mistaken, the FISA court has denied a mere 11 warrants in the last 33 years. With some 34,000 requests, their rejection rate is an astonishing 0.03%. Are we to believe that *all* of these requests were necessary and none of them unnecessarily targeted innocent citizens?

MS. SHAW: We defer to the discretion and expertise of the FISA court and the judges reviewing the cases. The process and the programs, which are renewed by Congress annually, are entirely constitutional. Only a single district court judge has taken issue with the program and ruled against it. Several other lower court judges have dismissed similar lawsuits and they continue to

approve of applications to continue the surveillance. The legislative branch has approved of these initiatives; the executive branch has approved of these initiatives; and the judicial branch has approved these of these initiatives. Any amendments and alterations should be enacted through the legislative branch, not this court. We argue that the respondent does not have standing on this issue. The harms articulated by the respondents are merely speculative. The issues cited by the MR. JONES on behalf of the respondents are no doubt undesirable, but they are not problems with the FISA programs and warrant process. They are rare issues with employees and should be dealt with at that level. The kinds of harm that are at the heart of the case before the court are based on hypothetical conjecture. They are building on an argument on would *could* happen. If cases are to be decided based on this standard, virtually any statute could be deemed unconstitutional. As *Clapper v. Amnesty International* (2013) articulates, speculative harm is insufficient in proving standing. Concerned Citizens has not made an argument about how they have been harmed, nor have they given any solid evidence that the potential harms have manifested into real-world harms.

We acknowledge that Section 215 expands the scope of intelligence gathering, but surveillance programs have always evolved to reflect the contextual nuances and limitations of their time. Early “pen registers” recorded telegraph signals, but the scope of their surveillance was expanded to include a wider array of technological devices.

LITERARY JUDGE: And what about the Electronic Communications Privacy Act? Doesn't that limit the reach of these pen registers?

MS. SHAW: Not exactly, your Honor. While the Act does characterize pen registers as a resource for telephone surveillance, its scope was widened by Section 215 of the PATRIOT Act

to include devices and programs that provide a similar function via Internet communication.

Presently, pen registers are defined as

a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such information shall not include the contents of any communication, but such term does not include any device or process used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider or any device or process used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business.³⁴

LITERARY JUDGE: And this does not violate a reasonable expectation of privacy?

MS. SHAW: No, your Honor. As the Supreme Court decided in *Smith v. Maryland* (1979), use of a pen register does not constitute a search. Only the *content* of a conversation constitutes a search under the precedent they established. The metadata under question in this case includes message times and the sending and receiving sources. The content of these messages remains private unless an additional, more specific warrant is approved.

LITERARY JUDGE: To what extent is the content important? Can't we piece together a fairly detailed story based on the data collected, even if no content is included?

MS. SHAW: That is precisely the point, your Honor. The data collected is noninvasive, yet provides the NSA with enough information to notice patterns that indicate terrorist activity.

³⁴ 18 U.S.C. § 3127(3)

LITERARY JUDGE: Won't other patterns unrelated to terrorist activities also be available to the NSA? Might calls to a certain doctor's office indicate an individual has cancer? Or emails with a certain lawyer suggest an imminent divorce? Or messages with a certain psychiatrist point to marital trouble? Why should we trust the NSA to focus attention and not wander into other personal information?

MS. SHAW: Although the data is collected and stored, the information cannot be accessed and analyzed unless the NSA articulates a reasonable suspicion that it will serve their counterterrorism purposes. We already invest a lot of trust in our law enforcement and national security agencies, your Honor. If NSA employees or contractors are going outside of their jurisdiction, that is a personnel matter and should be dealt with accordingly. As the law stands, it is entirely constitutional to collect data via pen register and the FISA court has implemented other controls for the program.

Programs similar to NSA surveillance have already been around for years and have been used to great effect by the FBI, DEA, and local police forces.³⁵ Even before the PATRIOT Act, law enforcement agencies have included the collection of raw data as an important investigative tactic utilized before a direct wiretap. Responding to the rise of drug trafficking in the 1980s and '90s and the use of public pay phones and pages to conduct illegal business, law enforcement agencies began culling call data from public telephones. After a judge approved a warrant, just like the NSA is required to acquire in the case before the court today, local police collected the call data from any of the public phones they believed to be used by drug dealers. The vast majority of the call logs were innocent citizens unaware of and unaffected by the drug trade. The detectives were waiting for those precious few calls made by targeted drug deals and traffickers,

³⁵ David Simon, "We are Shocked, Shocked..." *The Audacity of Despair* (June 7, 2013), retrieved from <http://davidsimon.com/we-are-shocked-shocked/>.

but they had to cast a very wide net in order to catch the fish they wanted. Not only were these tactics were successful and wholly legal, but citizens did not bat an eye at any purported invasion of privacy because these blanket warrants did not allow detectives to *listen* to conversations. Another warrant was needed and there needed to be probable cause for a judge to grant such a warrant. The current practices of the NSA are no different; the only thing that has changed is the scale on which surveillance is taking place. I must stress that these practices are entirely legal and regularly scrutinized for their legitimacy and effectiveness.

DELIBERATIVE JUDGE: How closely are these programs scrutinized? After all, in 2011 the classified documents describing the program were not made available to the House of Representatives and several members of Congress have openly stated that they had no idea what Section 215 was being used to justify.

MS. SHAW: Since 2011, only the intelligence committees have been granted access to the classified documents that address the NSA surveillance programs. Prior to that, all members of congress were allowed to view the documents. The documents were in a secure place on Capitol Hill, but they could still be accessed if the congressperson took the time to view them.

DELIBERATIVE JUDGE: How can we maintain a republican democracy when representatives are unable to make informed decisions on behalf of their constituents?

MS. SHAW: Intelligence committees have long been granted special privileges when it comes to information access. These are sensitive and critical issues and the wide dissemination of such information would compromise the program and ongoing investigations. If the intelligence committees believe certain information ought to be more widely distributed, they may take the proper steps to ensure it is. If, on the other hand, they feel it reasonable to keep the information within the committee, we defer to their discretion. I must stress, however, that Congress

regularly reauthorizes the programs whether they are involved in the committees or not. If they wanted to halt or alter them in any way, they have the power to do so. They recognize that the technological landscape is changing and they need to respond to those changes. Citizens already divulge a large amount of private information throughout the Internet and to an array of corporations. This information is often much more detailed and invasive than the data collected by the NSA.

DELIBERATIVE JUDGE: But this is done willingly and with full consent of the individual.

MS. SHAW: That is correct, your Honor. I was simply trying to illustrate how much more open the population has become with their information.

LITERARY JUDGE: Should that be the standard by which we judge the limits of privacy – the general trend of openness instigated by social media and corporate advertising? Doesn't this remind you of the old adage about the frog boiling in water?

MS. SHAW: I disagree, your honor. The quickly changing landscape of privacy as a result of the Internet and mobile devices is not inherently harmful as your boiling water analogy suggests. The data is out there. If we continue on the trend of increased use of and reliance upon networks and mobile technology – and there is no reason to believe we won't – then this data will only increase, likely exponentially so. As a result, citizens are becoming increasingly comfortable with noninvasive information being made available. What the respondents are arguing is that the NSA ought to ignore this vast sea of data at their disposal even when this data is acquired in the legal pursuit of investigating criminal activity. And for what? As I argued earlier, the dangers articulated by Concerned Citizens are speculative. Following your analogy, it is more accurate to say that the frog is in water and the stove isn't on, but the stove *could* be turned on.

LITERARY JUDGE: To what extent has the NSA and other affiliated agencies pursued other methods for gathering information that don't involve collecting data on *every* citizen?

MS. SHAW: The NSA uses every legal means possible to develop intelligence, pursue leads, and capture criminals meaning to or having done harm to the United States. When an individual merits specific attention, warrants are requested to investigate each particular case. This may include bank records, credit card information, international travel, or wiretaps on their communication lines. Such methods are standard protocol for any agency gathering information and building cases but require warrants that go beyond the metadata collection presently under question. The meta-data serves a vital function in the investigatory process by providing agents a pattern of past communication accessible after a suspect merits further attention. Without this data collection, years of communication information is lost and those affiliated with a suspect remain unknown. The tactics utilized by the NSA are intended to discover, investigate, and undermine terrorist plots. These plots require a wealth of organization and a large network of operatives. Abandoning the metadata means the NSA must be willfully blind to all the correspondence prior to a warrant issued for a particular individual. Accomplices who have gone dark remain undiscovered live threats. The data mining programs that indiscriminately gather information are the least invasive way in which past communication can be collected and stored for later use. Presently, the only way to accomplish the tasks set before the NSA with the minimal degree of invasiveness is to utilize the data collection programs under question.

With the little remaining time I have, I would like to highlight the key points of our argument. First, the programs used by the NSA have been and continue to be approved by Congress. They are wholly legal. Second, the programs used by the NSA are noninvasive. The harms articulated by the respondents are merely speculative, thus they have no standing in this

court. Finally, the tactics employed by the NSA are necessary and effective. Necessary in that the telecommunications have evolved significantly in the past 20 years and our agencies need to evolve with them. Effective in that they have a proven track record of success and are presently used for ongoing investigations. For these reasons, we argue that this case be ruled in favor of the respondent.

OPINION OF THE COURT

THE ECONOMIC JUDGE delivered the opinion of the court.

Section 215 of the PATRIOT Act of 2001 amended 50 U. S. C. §1861 and Section 702 of the FISA Amendment Act of 2008 amended 50 U. S. C. §1881a. These amendments to the Foreign Intelligence Surveillance Act of 1978 (FISA) grant the Attorney General and Director of National Intelligence additional latitude “to protect against international terrorism or clandestine intelligence activities.” The case brought against the National Intelligence Agency by the organization *Concerned Citizens* specifically targets the collection and storage of large amounts communication information, or “metadata,” including timestamps and recipients from telephone calls and emails. The issues before the court are threefold: first, do the respondents have standing in this case with respect to Article III of the U.S. Constitution? Second, if the respondents have standing, are the alterations to the original FISA in Section 215 of the PATRIOT Act and 702 of the FISA Amendment Act constitutional? Third, as presently written, are Sections 215 and 702 over broad or over vague, such that this court would remand the legislative body to further specify the breadth of powers afforded to intelligence gathering agencies? It is the opinion of this Court that the respondents indeed have standing in this case. However, the complaint issued by *Concerned Citizens* against Sections 215 and 702 do not hold; they are wholly legal and

conducive to the agenda of the National Security Agency pursuant to the investigation and deterrence of terrorist threats at home and abroad.

Regarding the first issue, the petitioner's standing, the argument delivered by the respondent relies heavily on *Clapper v. Amnesty International USA* (2013) wherein the Supreme Court ruled that *Amnesty International* did not have standing under Article III of the Constitution because no injury occurred. *Clapper* argued that the prospect of abusing the intelligence gathering resources and the potential harm that would ensue was not sufficient. Whereas *Amnesty International* issued their challenge on the day the Section 702 amended FISA, thus no abuses could have taken place as the affiliated programs were not active, the complaint issued by *Concerned Citizens* follows years of use and, according to their complaint, abuse. The case before this court differs in that *Concerned Citizens* have indicated specific abuses that have taken place such as storing information beyond its scheduled deletion without proper authorization, sending data to unauthorized individuals, and searching an individual with whom an analyst had a personal connection without authorization. These harms are not speculative, but rather quite real and troubling.

Given the respondent has standing in this case, the primary concern becomes the extent to which the intelligence gathering strategies initiated by Sections 215 and 702 are constitutional and whether or not they are over broad and over vague as presently written. The respondents argue that the collection of metadata violates the reasonable expectation of privacy granted by the 4th and 5th Amendments and supported by *Griswold v. Connecticut*, *Mapp v. Ohio*, and *Katz v. U.S.* Although the Supreme Court has acknowledged and maintained such a standard, it is not absolute. The government must always balance between the interests of the state and the interests of the citizenry. Given that the type of information gathered is a modest intrusion of privacy, at

most, this court does not agree with the respondent's complaints. They are using an expansive notion of privacy that amplifies its importance within democratic culture and ignores the many dangers privacy fosters. Legal scholars have attempted to situate privacy as a core moral principle embedded within the Constitution and sustained in the everyday lives of the citizens. The notion that privacy is a core principle of democratic governance and that actually *behave* as such is a farce. Privacy is overvalued and used as a trump card by academic legal theorists and criminals alike. Whereas academics cite a personal intimacy and view of selfhood that is connected with privacy, they tend to ignore the most common reason that people turn to privacy: they want to conceal the unsavory if not villainous parts of their conduct. Privacy serves as a rhetorical guise used to hide one's bad behavior in order to improve one's social, political, or economic opportunities.³⁶

In many ways, privacy is antagonistic to the ideals and aspirations of law. If, following Justice Holmes', laws should be written with the "bad man" in mind, then privacy offers extensive and unnecessary protections for nefarious activity. The bad man, according to Holmes, is "[a] man who cares nothing for an ethical rule which is believed and practiced by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can."³⁷ Dominated by self-interest, yet possessing enough foresight and judgment to acknowledge the potential retribution his actions may elicit, the bad man seeks to maximize personal advancement within the confines of a legal system. It is from this perspective, Holmes argues, that law must be examined and created: "If you want to know the

³⁶ Richard Posner continues to assert this point. For example, see Richard A. Posner, "The Right of Privacy," *Georgia Law Review* 12.3 (Spring 1978), 393-422; and Nick Gillespie, "Richard Posner: Privacy is 'Mainly' About Concealing Guilty Behavior," *Reason* (Dec. 8, 2014), retrieved from <http://reason.com/blog/2014/12/08/richard-posner-privacy-is-mainly-about-c>.

³⁷ Oliver Wendell Holmes, Jr., "The Path of Law," *Harvard Law Review* 10.8 (1897), 459.

law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vague sanctions of conscience.”³⁸ Who benefits from privacy – the upstanding citizens who go about their business honorably and without malicious intent or the criminals attempting to hide their illicit and unlawful activities from their communities and law enforcement? Much has been made of privacy in the landmark cases issued by the Warren Court and the academic articles that have spun out of these cases. While citizens should no doubt expect a modicum of privacy, especially in their bedrooms as articulated in *Griswold v. Connecticut* and *Bowers v. Hardwick*, the reality of the situation is that privacy has been overextended and people engaging in criminal activity are able to use it as a pretense to carry out their unlawful acts. The case before the court is not one of police officers intruding on a bedroom or reading the diary of a citizen without just cause. The information acquired by the NSA through the programs initiated by Sections 215 and 702 is nominally invasive, at most. The comparison of cell phone call logs and email sender/receive lists to warrantless searches on an innocent citizen’s private home is absurd. Yes, abuses have taken place, but they must be dealt with on an individual basis rather than undermining the entire programs wherein they occurred. The idealistic notion of privacy advocated by the respondents and the legal theorists who support them lacks common sense and neglects the reality of the situation in favor of naïveté. Their view of privacy is simply unsustainable in the current socio-political climate.

The new frontiers opened by the Internet and mobile technologies have left many clinging to old traditions that are no longer useful, viable options for law enforcement.

³⁸ Ibid.

Traditional wiretaps on telephones worked for its age, but crime has evolved alongside technology. When the government and its agencies refuse to evolve along with them, then they will be left at a significant disadvantage. Perhaps the most unsettling aspect is that this disadvantage will be self-imposed in the name of a notion of privacy that is fairly recent in the history of law. The blanket statement that privacy is valuable in and of itself – a point that privacy advocates are often quick to make – is a misguided fiction. It is instead an “intermediate good,” a means to an end rather than an end in itself.³⁹ Each generation has faced a similar dilemma as new technologies have emerged. What worked for one will not necessarily work for another. If evolutionary biology has taught us anything, it is that cheaters – those trying to co-opt social order to for their own benefit without getting caught – will always try to game the system. If nothing is done about their actions, they will continue to work society to their personal benefit while the rest of society pretends to see no evil, hear no evil, speak no evil. We must learn and benefit from our past, not have it weigh us down. As a legal court, we defer to precedent but we are not bound to it. As the social, cultural, political, and religious climates change, we must acclimate lest we run the risk of being left out in the cold.

The full-throated defense of privacy by advocates on the left and the right skews the costs and benefits of these forms of investigation. Privacy represents a cultural artifact, not a human need.⁴⁰ Justifications for the latter tend to creep in on substantiated Constitutional rights such as liberty. *Griswold*, for example, arrived upon the right conclusion, but took the wrong legal path to get there. At issue was not privacy, but rather “an undue limitation of freedom of action.”⁴¹ One of the problems associated with privacy is that the public tends to view it as a moral good

³⁹ Posner, “The Right to Privacy,” 394.

⁴⁰ Posner, *The Economics of Justice*, 274.

⁴¹ *Ibid.*, 327.

and increasingly inflate its value. As a result, privacy is vociferously upheld to the detriment of competing interests. The result is inefficiency. But what the public believes and how the public behaves are two very different things. With the advent of the digital age and the meteoric rise of social media, people are increasingly likely to divulge vast amounts of information about themselves. A majority of the so-called “millennial” generation has not lived their lives off-line. The rapid expanse of blogging, the advent of MySpace, Facebook, Twitter, and Instagram, and the exponential growth in mobile technology make living off-line nearly impossible lest you want to be a social pariah. Not all citizens wish to be so open with their personal lives and the law must respect that, but to conflate metadata to these much more personal exhibitions is disingenuous.

Prophetic as always, Justice Holmes was able to address the crux of the issue in *Olmstead v. United States* (1928):

We must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and, to that end, that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crime, when they are the means by which the evidence is to be obtained.⁴²

The legal system must not cater wholly to the government or the citizenry; the former would be brutish authoritarianism and the latter would be naïve populism. Holmes aptly argues that a balance must be struck between competing interests. This process is at the heart of our system of law. Tip too far in one direction and the law becomes less effective and less efficient. The tactics employed by the NSA and similar intelligence-gathering organizations serves this purpose well.

⁴² *Olmstead v. U.S.* (1928), Holmes dissenting.

The tactics are noninvasive in that they do not disrupt the regular activities of citizens and they prove useful in responding to networked criminal organizations.

The petitioner, *Concerned Citizens*, asserts that the government is perpetrating grave harms as they collected metadata, but what are these harms? How are they being experienced by the average American citizen? They noted a handful of examples, but these were due to individual negligence or misconduct and not indicative of a broader systemic problem with the information-gather tactics. Consider *who* is doing the bulk of the data assessment. If reports are accurate, more than a trillion data points have been collected thus far. If one thousand agents spent a mere one second examining each piece of data, it would take them nearly 32 years of non-stop analysis to work through everything, presuming no additional information is gathered. The idea of a human agent examining the lives of all Americans is an egotistical farce. The use of computer algorithms removes the invasive human element such that only those records flagged by the algorithm are investigated further. The vast majority of information remains unexamined by human eyes. Rather than upend the entire project, these instances should be treated as such – single moments that merit individual remedy. *Concerned Citizens* is calling for an axe when a scalpel will do just fine.

Most importantly, the programs are regularly approved by Congress, reviewed by intelligence committees and the Attorney General, and must face constitutional scrutiny with the FISA court as dictated by Section 215 and Section 702. Year after year, the programs are renewed. Moreover, one must not ignore the *type* of information being accrued. The information is limited to such generic information as time stamps, call times, phone numbers of inbound and outbound calls, and email recipients. The NSA must receive a court order to proceed further. Yet, given the secrecy of the programs and the equally secretive court that oversees them,

opponents question whether or not these limitations are actually followed. Unless a vast conspiracy has been underway for several years, these programs are wholly legal and useful in pursuing threats to the United States and its citizens. The critics who note that the programs are highly secretive ignore the fact that a degree of secrecy goes with any law enforcement strategy attempting to ferret out the criminal element. We have always invested a significant amount of breathing room for our law enforcement agencies to do their jobs effectively and this is no different.

One these grounds, this court finds in favor of the respondent.

THE DELIBERATIVE JUDGE concurring in part, dissenting in part.

The case before the court is not new; rather, it is the newest manifestation of a series of concerns over the relationship between privacy, technology, and the government's need to pursue threats to the United States and its citizens. On one hand, *Concerned Citizens* raise important questions regarding the scope, longevity, and targets of the government surveillance programs authorized by Sections 215 and 702. Noting particular breaches of protocol and security, I concur my colleague, the Deliberative Judge, in not recognizing the respondent's claim that *Concerned Citizens* does not have standing on grounds that they have not been harmed directly. Even if they had not, however, they would nonetheless have standing as the live possibility of abuse and harm merits juridical attention. The court cannot abide a government stance that seeks forgiveness rather than asking permission. On the other hand, the government and its intelligence-gathering agencies have a vested interest in pursuing potential threats to the health and well being of the United States and its citizens. The safety and security of citizens is a

paramount concern for any government; to interfere with or otherwise disrupt this process requires intense scrutiny as lives are at risk.

In order to adequately assess the legal issues before the court, one must step back and understand the legislative impetus that created these surveillance powers in the first place. In response to the attacks on the World Trade Centers on September 11, 2001, the government took swift action in order to 1) search for and bring to justice those who had organized the attacks, and 2) prevent future attacks from taking place. As a result, the PATRIOT Act was produced and allotted far-reaching power to the executive branch in its pursuit of these goals. Passing the House and Senate with remarkably high numbers while receive wide public support, the government had an abundance of resources now at its disposal. Admittedly, this law was born, in part, out of fear, a fear that gripped a nation still struggling to understand what had happened and how best to respond. History tells a sad tale when decisions are made out of fear. If *Korematsu v. United States* has taught us anything, it is that we have a habit of becoming consumed with a misplaced fear. The end goal of a secure nation may be noble and worthwhile, but the trappings of the process by which this goal is achieved are often blinded when a fear plays a determining factor.

One of the great dangers of laws that emerge out of fear is the polarization that results. Fear serves as a trump card that either undercuts a compelling argument when it is presented or discourages someone from contributing an argument for fear of stigmatization. The result is a pool filled with thin arguments, none of which can hold much water but nevertheless remain because they have not been popped. The polarized discourse pushes individuals to extremes they may have never considered let alone adopted if a healthier deliberative atmosphere surrounded

them. Over time, more and better arguments finally make their way to the pool, but they are already at an immediate disadvantage as laws have already been passed and policies initiated.

The core issue at the heart of this case is the tension between privacy and security, which constitutes a feud that has been around ever since Justice Brandeis proposed the “right to privacy” in his landmark essay over 100 years ago. While I do not completely agree with the Economic Judge’s claim that privacy is overblown and mostly used as a shroud covering criminal behavior, one cannot deny that the criminal element uses privacy to their advantage (just as they use any laws to their advantage if and when possible). The tactics used by the NSA and other intelligence-gathering organizations are not without their benefit. Terrorist organizations are alive and well at home and abroad. While most of the attention is given to international groups such as Al Qaeda and ISIS, the Southern Poverty Law Center lists a myriad of locally grown associations that merit the title “hate group.” As they apply to local groups, the intelligence-gathering tactics utilized by the NSA can be invaluable. Not only do they help to get a better understanding of the interconnected networks spread throughout the country, but also the information collected helps law enforcement an opportunity to smartly infiltrate and ultimately undermine these organizations without the use of force. Extremist groups pose a unique threat given their isolationist disposition and the dedication their members have toward the organization. Force is only one way to oppose them – a particularly vulgar one at that. However, such tactics are often used as a means for recruitment rather than a deterrent. Save complete annihilation, force, whether it is in the form of military attacks or severe economic embargo, will never be able to undermine extremist groups at home and abroad. Such groups are best dismantled from the inside out by way of cognitive infiltration.⁴³ The collection of metadata

⁴³ See Cass R. Sunstein and Adrian Vermeule, “Conspiracy Theories: Causes and Cures,” *The Journal of Political Philosophy*, 17.2 (2009), 202-227.

serves as a minimally intrusive yet exceedingly effective method by which government agencies can work to undermine terrorist organizations without the unnecessary shedding of blood. As the Economic Judge aptly notes, to ignore the resources at the government's disposal is to unnecessarily handicap it.

As *Concerned Citizens* notes, the net cast in pursuit of terrorist activities can trap those do not belong. A growing concern is whether or not the NSA goes beyond computer algorithms and metadata analysis to target those who do not meet the standards of just cause. The long history of sedition in times of war indicates a trend of the government investigating and suppressing political speech.⁴⁴ While privacy is not an absolute right, it must always serve as a bulwark against government intrusions when political speech is at stake. Understood as a two-tiered system,⁴⁵ *Concerned Citizens* is right to express unease at the potential for the NSA to abuse their powers in pursuit of political opposition. I agree with the Literary Judge that this is not a fictitious problem, but one that has existed with every new generation of political activists. If these government initiatives are labeling groups or individuals as terrorists solely because of the political threat they pose, then it is our constitutional responsibility to stop them. There is a spectrum of invasion of privacy. As the programs are supposed to run, this does not meet the standard of an invasion of privacy to the same degree as listening in on telephone conversations or reading emails. There must be just cause that passes the oversight of the FISA court. There must be just cause to pursue any citizen beyond the collection of metadata. Yet, no evidence has been produced to indicate such violations have taken place. Given the various levels of oversight by all three branches of government, there is no good reason to believe the programs are being systematically abused.

⁴⁴ See Geoffrey Stone, *Perilous Times*.

⁴⁵ Sunstein, *Democracy and the Problem of Free Speech*.

If at some point evidence emerges implicating the government in the targeting of political organizations or social activists not affiliated with extremist groups or terrorist organizations, then this court would have good cause to restrict the programs. I agree with the Literary Judge in being on guard to such potential abuses, especially when they target speech that is political in nature. Information gathering tactics that produce an undue burden on political organizations and have a chilling effect must be curtailed. Although the NSA has overstepped its boundaries in the past, there is no solid evidence to suggest it is doing so presently.

I concur with the Economic Judge and the opinion of the court in that it follows a minimalist path and remains tethered to the facts of the case, not cynical speculation. It is not the duty of this court to muse about probabilities, but rather to assess the legality of actualities. Nonetheless, the executive and legislative bodies have done a poor job in articulating the need and scope of these programs. Although it is not within the jurisdiction of this court to dictate the practices of the other branches of government, I encourage them to reflect upon the ways in which faith in the programs can be strengthened and the deliberative nature of our democracy embraced. The government must be ever vigilant that the NSA and affiliated organizations draw within the lines they are given. In order to do so, the legislative body must be more deliberative and explicit about the programs they have created. Furthermore, they must keep the public as informed as they can be without undermining the programs, rather than sneaking in amendments to the PATRIOT Act without public knowledge. Our democracy thrives when the government cultivates and maintains an engaged, balanced public discussion on important issues such as the scope of power given to intelligence-gathering organizations. The public and representatives must play an active role in deliberating about and issuing judgments on these decisions. The Snowden leaks ignited this conversation, which is good, but a more concerted effort is required.

Considering the potential for abuse, appropriate avenues and protections must be in place to bring to light such abuses.

Concerned Citizens has the best of intentions, but their request is misplaced. Now is not the time for compromising the NSA by judicial fiat. A decision in favor of *Concerned Citizens* would overstep the boundaries of this court and throw the entire intelligence gathering programs in disarray. The pen-register tactics have been around for nearly 100 years without much concern and the collection of metadata is different only in volume. The technologies are still young and, more problematic, constantly evolving. To issue a judgment impeding present and future acts of intelligence gathering, effectively tying the hands of the government.

THE LITERARY JUDGE dissenting.

The arguments advanced in the opinion of the court illustrate a gross misunderstanding of the role of privacy in contemporary U.S. culture and the extent to which powers granted to law enforcement and intelligence agencies are continually abused. As my colleague, the Deliberative Judge, aptly notes, these laws were born out of a misguided fear that benefited from crisis and confusion in order to expand the scope of military and surveillance powers. The fear of an external threat turned inward, viewing every citizen as a potential threat. The result is a collection of data larger than this world has ever seen. So vast is the amount of information that an immense data center is being constructed in order to store the information indefinitely.

My colleague, the Economic Judge, claims that the right to privacy is overblown and primarily benefits the illicit elements of our community. While that may be the case, they similarly benefit from *all* laws protecting citizens. If we are to follow his line of argument, must we also revert to a “bad tendency” understanding of the First Amendment, preventing or

punishing speech when the government believes it has a propensity to spur illegal action? Must we abandon the idea of “fruit from the poisonous tree” as it applies to the Fourth Amendment, allowing warrantless searches free reign so long as they produce some form of evidence? Must we abandon the right to bear arms, even knives and hunting rifles, for fear they may be used to aid illegal acts? The Economic Judge believes we can throw out the bathwater and keep the baby, but that is not possible in a democratic society. Yes, criminals will find ways to benefit from the protections afforded to all citizens, but that is no reason to intrude upon the rights everyone enjoy, including the right to privacy. We must not cater to the lowest common denominator in our culture; to do so would abandon the common civic ties that unite all citizens and turn our society into a paranoid surveillance state.

My colleague employs Holmes’ Bad Man Theory to justify the tactics employed by the NSA, arguing that the collection of metadata is a minimally invasive way to investigate threats to U.S. citizens. What if we were to turn the Bad Man Theory around and use it to examine the government? If law is to be crafted with the bad man in mind, should it not also be written with the bad government in mind? During the Nuremburg Trials, Hermann Goering provided a haunting truth:

It is the leaders of the country who determine the policy and it is always a simple matter to drag the people along, whether it is a democracy, or a fascist dictatorship, or a parliament, or a communist dictatorship. Voice or no voice, the people can always be brought to the bidding of the leaders. That is easy. All you have to do is tell them they are being attacked, and denounce the peacemakers for lack of patriotism and exposing the country to danger. It works the same in any country.⁴⁶

⁴⁶ G. M. Gilbert, *Nuremberg Diary* (New York: Farrar, Straus, & Co., 1947), 278-279.

Studies abound with examples of power corrupting even the most passive and peaceful individuals. The Milgram Experiments illustrated the ease with which people blindly follow authority. The Stanford Prison Experiment illustrated how swiftly power corrupts even the seemingly passive and peaceful. The primary justification behind the 1978 Foreign Intelligence Surveillance Act was to *curb* the myriad of domestic intelligence abuses by the Nixon administration. Amazingly, the PATRIOT Act and the amendments to FISA have directly undercut this primary objective. Under the guise of “national security,” the programs have been able to run largely unobstructed save for a few moments of public attention.

This is perhaps the most alarming aspect about the government’s actions and the Economic Judge’s opinion. FISA was not created as part of an initiative to *expand* intelligence gathering, but rather to *limit* it. In addition to legitimate targets, scores of domestic activist groups that were in opposition to the government at its policies were secretly under surveillance. Herein lies the biggest danger that Sections 215 and 702 make possible: the secret investigation of counter publics that are antagonistic to the government. Participants in *Occupy Wall Street*, Ferguson protesters, LGBTQ advocates, avowed communists and anarchists, atheists, radical feminists, former prison inmates, and Muslim activists challenge the status quo regularly and do so within the confines of the law. Examples abound from U.S. history: Emma Goldman was targeted. Eugene V. Debs was targeted. The FBI voraciously targeted Martin Luther King, Jr. for his purported “clandestine” activities. Nelson Mandela was on a terrorist watch list until 2008! Reports indicate that the U.S. has *millions* of names on the watch list, with an acceptance rate of nearly 99%. Many of these individuals have no verifiable connection to any known terrorist group, but nonetheless may be subject to intense scrutiny. Once on the list, their web of metadata may be investigated further. Issues of race, class, gender, sexuality, religious orientation, national

origins, and political affiliation of those target must not be ignored, yet the secrecy afforded the NSA allows bias to exist unimpeded.

The opinion of the court illustrates a remarkably unenlightened perspective of and lack of sensitivity to the marginalized groups within United States. The majority of the legislative, judicial, and executive bodies are composed of those with privilege and affluence. They do not understand what it is like to be targeted unjustly because they and those they know have never been targeted unjustly. But cases abound with people who have been on the wrong side of the law if only because they had the wrong last name, or their skin color did not match that of the lawmakers, or their ideas challenged the dominant power structure. Perhaps if the lawmakers and judges had an opportunity to experience, or at the very least understand, how these individuals live, they would not be so quick to make their lives even more difficult. They value privacy not because they are engaging in nefarious activities, but rather because the institution of law has been a constant source of pain and frustration. As Robert Cover argued throughout his career, law is inherently violent as it legitimates future harm in the form of punishment or validates past harm.⁴⁷ The expectation of privacy provides a respite from the multitude of agencies and institutions that have worked against them time and time again. As it stands, there is no way for an individual or an organization targeted by these programs to challenge them. Moreover, the tactics are indefinite. Once they are legitimized, the government has little incentive to go back if the context changes. This will only encourage them to reach for more and more in incremental steps. While it may be warming to imagine a benevolent government and legal system, history tells a different story.

⁴⁷ See Martha Minow, Michael Ryan, and Austin Sarat (eds.), *Narrative, Violence, and the Law: The Essays of Robert Cover* (Ann Arbor: University of Michigan Press, 1995).

Both the Economic Judge and the Deliberative Judge highlight the various measures in place to ensure adequate oversight, yet the petitioner has illustrated several instances when information was left vulnerable or the power of analysts abused. Given the immense secrecy protecting the programs, it is more than likely that such instances are not few and far between. According to the Rules of Procedure for the Foreign Intelligence Surveillance Court, records and rulings concerning the FISA court may be released only on the authorization of the presiding judge.⁴⁸ Having little incentive to do so, there have been precious view disclosures.⁴⁹ The vastness of the metadata collection suggests that adequate oversight is impossible. As a report issued by the Brennan Center for Justice indicates, the various safeguards “still afford the government sweeping authority to use, keep and share the data it collects, and in practice have been difficult to enforce... The court’s Presiding Judge Reggie Walton recently admitted that the court is forced to rely on intelligence agencies to report and correct noncompliance with these safeguards.”⁵⁰ The lack of oversight by the judicial system, even a judicial system shrouded in secrecy, and the expectation of the NSA to report its own abuses flies in the face of democracy. Even if adequate oversight existed, the programs effectiveness remains highly questionable. Once again, we must trust the information issued by the NSA concerning the successes of their own program. Consequently, the public is left with a haunting, unanswered question: who watches the watchers?

⁴⁸ Foreign Intelligence Surveillance Court, “Rules and Procedure for the Foreign Intelligence Surveillance Court,” Rule 62.

⁴⁹ All Matters Submitted to Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611. (Foreign Intelligence Surveillance Court, 2002).

⁵⁰ “U.S. Surveillance: Unchecked and Unsupervised,” *Brennan Center for Justice* (Nov. 6, 2013), 9, retrieved from <http://www.brennancenter.org/analysis/us-surveillance-unchecked-and-unsupervised>.

BIBLIOGRAPHY

- Abrams v. United States*, 250 U.S. 616 (1919).
- Ackerman, Bruce. *We the People, Volume I: Foundations*. Cambridge: Belknap, 1993.
- Agnew, Lois. "The 'Perplexity' of George Campbell's Rhetoric: The Epistemic Function of Common Sense." *Rhetorica: A Journal of the History of Rhetoric* 18.1 (Winter 2000): 79-101
- Allen, Julia M. and Lester Faigley. "Discursive Strategies for Social Change: An Alternative Rhetoric of Argument." *Rhetoric Review* 14 (1995): 142-147.
- Amar, Akhil Reed. *America's Constitution: A Biography*. New York: Random House, 2006.
- _____. *America's Unwritten Constitution: The Precedents and Principles We Live By*. New York: Basic Books, 2012.
- _____. "The Bill of Rights and Our Posterity," *Cleveland State Law Review* 42 (1994): 573-586.
- _____. *The Bill of Rights: Creation and Reconstruction*. New Haven: Yale University Press, 1998.
- Alderton, Steven M. "Locus of Control-Based Argumentation as a Predictor of Group Polarization." *Communication Quarterly* 30.4 (Fall 1982): 381-387.
- Allen, Anita L. and Milton C. Regan, Jr. *Debating Democracy's Discontent: Essays on American Politics, Law, and Public Philosophy*. Oxford: Oxford University Press, 1998.
- Altman, Karen. "Rhetorics of Difference in Feminist Argument." In *Spheres of Argument: Proceedings of the Sixth SCA/AFA Conference on Argumentation*, ed. Bruce E. Gronbeck. Annandale, VA: Speech Communication Association, 1989: 346-353.
- Ambrose, Stephen E. *Eisenhower: The President*. New York: Simon & Schuster, 1984.
- American Civil Liberties Union. "Terror Watch List Counter: A Million Plus," *American Civil Liberties Union* (n.d.). Retrieved from <https://www.aclu.org/technology-and-liberty/terror-watch-list-counter-million-plus>.
- American Civil Liberties Union v. Clapper*, No. 13-3994 (S.D. New York Dec. 28, 2013).
- Archard, David. "Disgust, Offensiveness, and the Law." *Journal of Applied Philosophy* 25.4 (Nov., 2008): 314-321.

- Anthony, Louise and Charlotte Witt. *A Mind of One's Own: Feminist Essays on Reason and Objectivity*. Boulder: Westview Press, 1993.
- Arendt, Hannah. *The Human Condition*. Chicago: University of Chicago Press, 1958.
- Aristophanes, *Clouds*, trans. Peter Meineck. Indianapolis: Hackett, 2000.
- Aristotle, *On Rhetoric: A Theory of Civic Discourse*, trans. George A. Kennedy. Oxford: Oxford University Press, 1991.
- Aristotle, *Nicomachean Ethics*, 2nd. edition, trans. Terrence Irwin. Indianapolis: Hackett, 1999.
- Asch, Solomon E. "Effects of Group Pressure on the Modification and Distortion of Judgments." In H. Guetzkow (Ed.), *Groups, Leadership, and Men* (Pittsburgh: Carnegie Press, 1951), 177-190.
- Atwood, Margaret. "Justice in the Literary Tradition," in *Justice Beyond Orwell*, ed. Rosalie S. Abell and Melvin L. Rothman. Montreal: Les Editions Yvon Blais, 1985
- Aune, James Arnt. "Justice Holmes's Rhetoric and the Progressive Path of the Law," in *Rhetoric and Reform in the Progressive Era: A Rhetorical History of the United States, Volume VI*, ed. J. Michael Hogan. East Lansing: Michigan State University Press, 2002: 145-184.
- _____. "On the Rhetorical Criticism of Judge Posner." *Hastings Constitutional Law Quarterly* 23.3 (Spring 1996): 658-670.
- Austin, John. *The Province of Jurisprudence Determined*. Cambridge: Cambridge University Press, 1995.
- Bailyn, Bernard. "Common Sense" in *Fundamental Testaments of the American Revolution*. Washington, D.C.: Library of Congress, 1973.
- Baker, Katherine K. "Gender and Emotion in Criminal Law." *Harvard Journal of Law and Gender*, 447 (2005): 447-466.
- Balkin, J. M. and Sanford Levinson. "The Canons of Constitutional Law." *Harvard Law Review* 111 (1998): 964-1022.
- Barrett, David and John Bingham. "Judges Lead 'Sheltered Lives', Warns Britain's Most Senior Female Judge." *The Telegraph* (April 6, 2013). Retrieved from http://www.telegraph.co.uk/news/uknews/law-and-order/9976400/Judges-lead-sheltered-lives-warns-Britains-most-senior-female-judge.html#disqus_thread.
- Bartness, Martin A. "Achieving Unanimity in *Brown v. Board of Education*," *Journal of the Northwest Communication Association*, 24 (Spring 1996): 49-61.

- Beattie, James. *An Essay on the Nature and Immutability of Truth, in Opposition to Sophistry and Scepticism*. Edinburgh: A. Kincaid and J. Bell, 1770.
- Becker, Gary S. *The Economics of Discrimination*. Chicago: University of Chicago Press, 1957.
- _____. *Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education*. Chicago: University of Chicago Press, 1964.
- _____. "A Theory of the Allocation of Time." *Economic Journal* 75 (1965): 493-517.
- _____. "Crime and Punishment: An Economic Approach." *The Journal of Political Economy* 76 (1965): 169-217.
- _____. *The Economic Approach to Human Behavior*. Chicago: University of Chicago Press, 1976.
- Bell, Rudolph. "Jeff Duncan Compares Illegal Immigrants to Vagrants, and Animals." *Greenville Online* (Nov. 1, 2011). Retrieved from <http://data.greenvilleonline.com/blogs/politics/2011/11/01/jeff-duncans-open-house/>.
- Bellah, Robert N. *Habits of the Heart: Individualism and Commitment in American Life*. Berkeley: University of California Press, 1996.
- Benhabib, Seyla. "Toward a Deliberative Model of Democratic Legitimacy." In *Democracy and Difference: Contesting Boundaries of the Political*, Seyla Benhabib, ed. Princeton: Princeton University Press, 1996: 67-94
- Benoit, William L. and J. Michael D'Agonstine, "'The Case of The Midnight Judges' and Multiple Audience Discourse: Chief Justice Marshall and *Marbury v. Madison*." *Southern Communication Journal* 59 (Winter 1994): 89-96.
- Berea College v. Kentucky*, 211 U.S. 45 (1908)
- Bergen, Peter, David Sterman, Emily Schneider, and Bailey Cahall. "Do NSA's Bulk Surveillance Programs Stop Terrorists?" *New America Foundation* (Jan. 13, 2014). Retrieved from http://www.newamerica.net/publications/policy/do_nsas_bulk_surveillance_programs_stop_terrorists.
- Bickel, Alexander M. *The Unpublished Opinions of Mr. Justice Brandeis*. Cambridge: Belknap Press, 1957.
- Biesecker, Barbara. "Coming to Terms with Recent Attempts to Write Women into the History of Rhetoric." *Philosophy and Rhetoric* 25 (1992): 140-161.
- _____. "Negotiating with Our Tradition: Reflecting Again (Without Apologies) on the Feminization of Rhetoric." *Philosophy and Rhetoric* 26 (1993): 236-41.

- Billig, Michael. *Arguing and Thinking: A Rhetorical Approach to Social Psychology*, 2nd ed. Cambridge: Cambridge University Press, 1996.
- Bitzer, Lloyd F. "Hume's Philosophy in George Campbell's 'Philosophy of Rhetoric'." *Philosophy and Rhetoric* 2 (1969): 139-166.
- Blackstone, William. *Commentaries on the Laws of England*, ed. Wayne Morrison. London: Cavendish Publishing, 2001.
- Blankenship, Jane and Deborah C. Robson. "A 'Feminine Style' in Women's Political Discourse: An Exploratory Essay." *Communication Quarterly* 43 (1995): 353-366.
- Bohman, James. *Public Deliberation: Pluralism, Complexity and Democracy*. Cambridge: MIT Press, 1996.
- Bohman, James and William Rehg. "Introduction." In *Deliberative Democracy: Essays on Reason and Politics*, James Bohman and William Rehg, ed. Cambridge: MIT Press, 1997.
- Bormann, Dennis. R. "Some 'Common Sense' about Campbell, Hume, and Reid: The Extrinsic Evidence." *Quarterly Journal of Speech* 71.4 (Nov. 1985): 395-421.
- Boyd, Josh and Melissa Stahley. "Communitas/Corporatas Tensions in Organizational Rhetoric: Finding a Balance in Sports Public Relations." *Journal of Public Relations Research* 20 (2008): 251-270.
- Bracey, Christopher A. "The Cul de Sac of Race Preference Discourse." *Southern California Law Review* 79 (Sept. 2006): 1231-1325.
- Bratman, Michael E. *Intentions, Plans, and Practical Reason*. Cambridge: Center for the Study of Language and Information, 1999.
- Brandzel, Amy L. "Queering Citizenship? Same-Sex Marriage and the State." *GLQ: A Journal of Lesbian and Gay Studies* 11 (2005): 171-204.
- Brenner, Saul. "Fluidity on the United States Supreme Court: The Judicial Ideology of Sandra Day O'Connor." *American Journal of Political Science* 24 (1980): 526-35.
- _____. "Fluidity on the Supreme Court: 1956-1967," *American Journal of Political Science* 26 (1982): 388-90
- _____. "Fluidity on the United States Supreme Court: A Comparison of the Original Vote on the Merits with the Final Vote," *Jurimetrics Journal* 22 (1982): 287-92.

- Brenner, Saul and Robert H. Dorff. "The Attitudinal Model and Fluidity Voting on the United States Supreme Court: A Theoretical Perspective." *Journal of Theoretical Politics* 4 (1992): 195-205.
- Brest, Paul. "The Misconceived Quest for the Original Understanding," in *Interpreting Law and Literature: A Reader*, Sanford Levinson and Steven Mailloux, eds. Evanston: Northwestern University Press, 1988: 69-96.
- Brewer, John D. "Competing Understandings of Common Sense: A Brief Comment on 'Common Sense Racism'." *The British Journal of Sociology* 35.1 (Mar. 1984): 66-74.
- Breyer, Stephen. *Active Liberty: Interpreting Our Democratic Constitution*. New York: Vintage, 2006.
- Brooks, Peter. "The Law as Narrative and Rhetoric," in *Law's Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz. New Haven: Yale University Press, 1996.
- Brown, Brene. *Connections: A 12-Session Psychoeducational Shame-Resilience Curriculum*. Center City, MN: Hazelden, 2009.
- _____. *The Gifts of Imperfection: Let Go of Who You Think You're Supposed to Be and Embrace Who You Are*. Center City, MN: Hazelden, 2010.
- _____. *I Thought It Was Just Me (but it isn't): Telling the Truth About Perfectionism, Inadequacy, and Power*. New York: Penguin, 2007.
- Brown, Richard Harvey. "Reason as Rhetorical: On Relations among Epistemology, Discourse, and Practice," in *Rhetoric and the Human Science: Language and Argument in Scholarship and Public Affairs*, John S. Nelson, Allan Megill, and Donald N. McCloskey, eds. Madison: University of Wisconsin Press, 1987.
- Brown v. Allen*, 344 U.S. 443 (1953)
- Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)
- Brummett, Barry. "Rhetorical Theory as Heuristic and Moral: A Pedagogical Justification." *Communication Education* (Apr. 1984): 97-107.
- Buchanan, Richard. "Design and the New Rhetoric: Productive Arts in the Philosophy of Culture." *Philosophy and Rhetoric* 34.3 (2001): 183-206.
- Burke, Kenneth. *Attitudes Toward History*. 3d ed. Berkeley: University of California Press, 1984.

- _____. *A Grammar of Motives*. 2d ed. Berkeley: University of California Press, 1969.
- _____. *Permanence and Change: An Anatomy of Purpose*. 3d ed. Berkeley: University of California Press, 1968.
- _____. *The Philosophy of Literary Form: Studies in Symbolic Action*. 2d ed. Berkeley: University of California Press, 1967.
- _____. *A Rhetoric of Motives*. 2d ed. Berkeley: University of California Press, 1969.
- Burwell v. Hobby Lobby*, 573 U.S. ____ (2014)
- Butler, Judith. "Imitation and Gender Insubordination," in *Inside/Out: Lesbian Theories, Gay Theories*, ed. Diana Fuss. New York: Routledge, 1991.
- _____. "The Value of Being Disturbed." *Theory & Event* 4.1 (2000): 1-9.
- Calebresi, Guido. "Some Thoughts on Risk Distribution on the Law of Torts." *Yale Law Journal* 70 (1961): 499-553.
- Calvert, Clay and Robert D. Richards. "Gay Pornography and the First Amendment: Unique First-Person Perspectives on Free Expression, Sexual Censorship, and Cultural Images." *American University Journal of Gender, Social Policy & the Law* 15 (2007): 687-731.
- Campbell, George. *Philosophy of Rhetoric, Vol. 1*. London: W. Strahan, 1776.
- Campbell, Karlyn Kohrs. "Biesecker Cannot Speak for Her Either." *Philosophy and Rhetoric* 26 (1993): 153-159.
- _____. *Man Cannot Speak for Her: A Critical Study of Early Feminist Rhetoric, Vol. 1*. New York: Praeger, 1989.
- _____. "The Rhetoric of Women's Liberation: An Oxymoron." *Quarterly Journal of Speech* 59.1 (1973): 74-86.
- Carcasson, Martin and James Arnt Aune. "Klansman on the Court: Justice Hugo Black's 1937 Radio Address to the Nation." *Quarterly Journal of Speech* 89.2 (May 2003): 154-170.
- Cardozo, Benjamin N. *The Nature of the Judicial Process*. Lexington, KY: Feather Trail Press, 2009.
- Carlos, Claudia. "Translation as Rhetoric: Edward Jerningham's 'Impenitence' (1800)." *Rhetoric Review* 28.4 (2009): 335-51.

- Caudill, David S. "On the Rhetorical Invention of a Failed Project: A Critical Response to Skeel's Assessment of Christian Legal Scholarship." *Seton Hall Law Review* 40. 3 (2010): 971-990.
- Charland, Maurice. "Constitutive Rhetoric: The Case of the *Peuple Québécois*." *Quarterly Journal of Speech* 73.2 (May 1987): 133-150.
- Charles, David. *Aristotle's Philosophy of Action*. London: Duckworth Press, 1984.
- Cicero, Marcus Tullius. *De Finibus*, trans. Raphael Woolf. Cambridge: Cambridge University Press, 2001.
- Chimel v. California*, 395 U.S. 752 (1969)
- _____. *On the Orator*, Book I, trans. E. W. Sutton and H. Rackham. Cambridge: Harvard University Press, 1942.
- _____. *On the Orator*, Book III, trans. H. Rackham. Cambridge: Harvard University Press, 1942.
- Cisneros, J. David. "Contaminated Communities: The Metaphor of 'Immigrant as Pollutant' in Media Representations of Immigration." *Rhetoric & Public Affairs* 11.4 (2008): 569-602.
- Clement, Scott and Sean Sullivan. "Poll: Public Wants Congressional Hearings on NSA Surveillance." *Washington Post* (Jun 19, 2013). Retrieved from <http://www.washingtonpost.com/blogs/the-fix/wp/2013/06/19/poll-public-wants-congressional-hearings-on-nsa-surveillance/>.
- Coase, Ronald. "The Problem of Social Cost." *Journal of Law and Economics* 3 (1961): 1-44.
- Cohen, Joshua. "Deliberation and Democratic Legitimacy." In *The Good Polity: Normative Analysis of the State*, Alan Hamlin and Philip Pettit, ed. Oxford: Basil Blackwell, 1989: 17-34.
- Cohen v. California*. 403 U.S. 15 (1971)
- Collins, Allison L. "'I Will Not Pronounce You Husband and Husband': Justice and the Justice of the Peace." *Alabama Law Review* 61 (2010), 847-867.
- Collins, Harry and Robert Evans. *Rethinking Expertise*. Chicago: University of Chicago Press, 2007.
- Comim, Flavio. "The Scottish Tradition in Economics and the Role of Common Sense in Adam Smith's Thought." *Review of Political Economy* 14.1 (2002): 91-114.
- Commons, John R. *Legal Foundations of Capitalism*. New York: MacMillan, 1924.

- Commonwealth v. Carr*, 398 Pa. Super. 306 (1990)
- Condit, Celeste Michelle and John Louis Lucaites. *Crafting Equality: America's Anglo-African Word*. Chicago: University of Chicago Press, 1993.
- Condit, Celeste Michelle, John Louis Lucaites, and Marouf Hasian, Jr. "The Rhetorical Boundaries of 'the Law': A Consideration of the Rhetorical Culture of Legal Practice and the Case of the 'Separate But Equal' Doctrine." *Quarterly Journal of Speech* 82.4 (Nov. 1996): 323-342.
- Copleston, Frederick. *A History of Philosophy, Volume I: Greece and Rome, Part II*. Garden City: Image Books, 1946.
- Corgan, Verna C. "Controversy, Courts, and Community: The Rhetoric of Judge Miles Welton Lord." *Contributions in Legal Studies* 79 (1995): 175-196.
- Corley, Pamela C., Steigerwalt, Amy and Ward, Artemus. *The Puzzle of Unanimity: Consensus on the United States Supreme Court*. Stanford: University of Stanford Press, 2013.
- Cray, Ed. *Chief Justice: A Biography of Earl Warren*. New York: Simon & Schuster, 1997.
- Crick, Nathan. "Rhetoric, Philosophy, and the Public Intellectual." *Philosophy and Rhetoric* 39.2 (2006): 127-139.
- _____. "The Sophistical Attitude and the Invention of Rhetoric." *Quarterly Journal of Speech* 96.1 (Feb. 2010): 25-45.
- Crosswhite, James. "Awakening the *Topoi*: Sources of Invention in *The New Rhetoric's* Argument Model." *Argumentation and Advocacy* 44.4 (Spring 2008): 169-184.
- Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899)
- Cunningham, Anthony. *The Heart of What Matters: The Role for Literature in Moral Philosophy*. Berkeley: University of California Press, 2001.
- Dahl, Norman O. *Practical Reason, Aristotle, and Weakness of the Will*. Minneapolis: University of Minnesota Press, 1984.
- Daniels, Norman, ed., *Reading Rawls: Critical Studies on Rawls' "A Theory of Justice."* Stanford: Stanford University Press, 1989.
- Davidson, Donald. *Essays on Actions and Events*. Oxford: Oxford University Press, 1980.
- Dean, Cordelia. "Scientific Savvy? In U.S., Not so Much." *New York Times* (Aug. 30, 2005). Retrieved from <http://www.nytimes.com/2005/08/30/science/30profile.html>.

- DeBruin, Lynn. "Shame' Punishments Like Ponytail Cutting Increase." *Associated Press*, June 26, 2012. Retrieved from <http://www.deseretnews.com/article/765585887/Shame-punishments-like-ponytail-cutting-increase.html>.
- DeLaet, Debra L., and Rachel Paine Caufield. "Gay Marriage as a Religious Right: Reframing the Legal Debate Over Gay Marriage in the United States." *Polity* 40 (2008): 297-320.
- Delawala, Imtiyaz. "Intelligence Committee Leaders Defend NSA Surveillance." *ABC News* (Jun 9, 2013). Retrieved from <http://abcnews.go.com/blogs/politics/2013/06/intelligence-committee-leaders-defend-nsa-surveillance/>.
- Dellapenna, Joseph W. and Kathleen Farrell. "Law and the Language of Community: On the Contributions of James Boyd White." *Rhetoric Society Quarterly* 21.3 (Summer, 1991): 38-58.
- Derrida, Jacques. *The Ear of the Other: Otobiography, Transference, Translation*. Schocken: New York, 1982.
- Dewey, John. "Common Sense and Science: Their Respective Frames of Reference." *Journal of Philosophy* 45.8 (Apr. 1948): 197-208.
- D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 156 (1972).
- Dionne, E. J., ed. *Community Works: The Revival of Civil Society in America*. Washington, D. C.: The Brookings Institute, 1998.
- Djikic, Maja, Keith Oatley, and Mihnea C. Moldoveanu. "Opening the Closed Mind: The Effect of Exposure to Literature on the Need for Closure." *Creativity Research Journal* 25.2 (2013): 149-154.
- Donohue, John J. III and Ian Ayres. "Posner's Symphony No. 3: Thinking about the Unthinkable." *Stanford Law Review* 39 (1986): 791-812.
- Dostoevsky, Fyodor. *The Brothers Karamazov*, trans. Richard Pevear and Larissa Volokhonsky. New York: Farrar, Straus, and Giroux, 1990.
- Downey, Sharon D. "Rhetoric as Balance: A Dialectical Feminist Perspective." *Women's Studies in Communication* 20.2 (Fall 1997): 137-150.
- Downing, John. "Terrorism, Torture and Television: "24" in Its Context." *Democratic Communiqué* 21.2 (2007): 62-82.
- Dred Scott v. Sandford*, 60 U.S. 393 (1857).

- Druckman, James N. and Kjersten R. Nelson. "Framing and Deliberation: How Citizens' Conversations Limit Elite Influence." *American Journal of Political Science* 47.4 (Oct. 2003): 729-745.
- Drum, Kevin. "New Poll Says American Public is Fine with NSA Surveillance." *Mother Jones* (June 10, 2013). Retrieved from <http://www.motherjones.com/kevin-drum/2013/06/new-poll-says-american-public-fine-nsa-surveillance>.
- Dryzek, John S. *Deliberative Democracy and Beyond: Liberals, Critics, and Contestations*. Oxford: Oxford University Press, 2000.
- Dworkin, Ronald. "Is Wealth a Value?" *Journal of Legal Studies* 9.2 (Mar. 1980): 191-226.
- _____. *Law's Empire*. Cambridge: Harvard University Press, 1986.
- Eagleton, Mary. *Feminist Literary Criticism*. London: Longman, 1991.
- Edwards, Jason A. and Richard Herder. "Melding a New Narrative? President George W. Bush and the Immigration Debate," *Howard Journal of Communications* 23.1 (Jan. 2012): 40-65.
- Ehninger, Douglas. "Argument as Method: Its Nature, Its Limitations and Its Uses." *Speech Monographs* 37.2 (June 1970): 101-110.
- Ehrlich, Isaac and Richard A. Posner. "An Economic Analysis of Legal Rulemaking." *The Journal of Legal Studies* 3.1 (Jan., 1974): 257-286.
- Ekins, Emily. "Public More Wary of NSA Surveillance Than Pundits Claim." *Reason* (Jun 18, 2013). Retrieved from <http://reason.com/blog/2013/06/18/public-more-wary-of-nsa-surveillance-tha>.
- Ekman, Paul and Richard J. Davidson, eds. *The Nature of Emotion: Fundamental Questions*. Oxford: Oxford University Press, 1994
- Elshtain, Jean Bethke. *Democracy on Trial*. New York: Basic Books, 1995.
- _____. "Feminism Discourse and Its Discontents: Language, Power, and Meaning." *Signs* 7 (Spring 1982): 603-621.
- Elster, Jon. *Deliberative Democracy*. Cambridge: Cambridge University Press, 1998.
- Etzioni, Amitai. *New Common Ground: A New America, A New World*. Dulles, VA: Potomac Books, 2009.
- _____. *The New Golden Rule: Community and Morality in a Democratic Society*. New York: Basic Books, 2006.

- _____. *The Spirit of Community: The Reinvention of American Society*. New York: Touchstone, 1993.
- Farrell, Thomas B. "Knowledge, Consensus, and Rhetorical Theory." *Quarterly Journal of Speech* 62 (1976): 1-14.
- _____. *Norms of Rhetorical Culture*. New Haven: Yale University Press, 1993.
- _____. "Rhetoric in History as Theory and Praxis: A Blast from the Past." *Philosophy and Rhetoric* 41.4 (2008): 326-327.
- Feldman, Cassi. "Jurors Find More Sympathy for Defendant." *New York Times* (Feb 14, 2007). Retrieved from <http://www.nytimes.com/2007/02/14/nyregion/14jurors.html>.
- Ferguson, Robert. "The Judicial Opinion as a Literary Genre." *Yale Journal of Law* 2 (1990): 201-219.
- Fineman, Howard. *The Thirteen American Arguments: Enduring Debates that Define and Inspire Our Country*. New York: Random House, 2009.
- Fisher, William W. "Interpreting Holmes" *Harvard Law Review* 110 (1997): 1010-1012.
- Fjelstad, Per. "Legal Judgment and Cultural Motivation: Enthymematic Form in *Marbury v. Madison*." *Southern Communication Journal* 60 (Fall 1994): 22-32.
- Flamm, Matthew C. "The Demanding Community: Politicization of the Individual after Dewey." *Education and Culture* 22.1 (2006): 35-54.
- Florida v. Riley*, 488 U.S. 445 (1989).
- Foss, Karen A. and Sonja K. Foss. *Women Speak: The Eloquence of Women's Lives*. Prospect Heights, IL: Waveland Press, 1991.
- Foss, Sonja K. and Cindy L. Griffin, "Beyond Persuasion: A Proposal for an Invitational Rhetoric." *Communication Monographs* 62 (March 1995): 2-18.
- Foust, Christina R. "A Return to Feminine Public Virtue: Judge Judy and the Myth of the Tough Mother." *Women's Studies in Communication* 27.3 (Fall 2004): 269-293.
- France, Peter. "The Rhetoric of Translation." *The Modern Language Review* 100 (2005): 255-268.
- Frank, David A. and Mark Lawrence McPhail. "Barack Obama's Address to the 2004 Democratic National Convention: Trauma, Compromise, Consilience, and the (Im)Possibility of Racial Reconciliation." *Rhetoric & Public Affairs* 8.4 (2005): 571-594.

- Fraser, Nancy. "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," in Craig Calhoun, ed., *Habermas and the Public Sphere*. Cambridge: MIT Press, 1992: 109-142.
- Freeman, Samuel, ed. *The Cambridge Companion to Rawls*. Cambridge: Cambridge University Press, 2003.
- Freeman, Samuel. *Rawls*. New York: Routledge, 2007.
- French, Peter A. and Howard K. Wettstein, eds. *Philosophy of Emotions*. Notre Dame: University of Notre Dame, 1998.
- Froomkin, Dan. "The Empathy War." *The Washington Post* (May 13, 2009). Retrieved from <http://voices.washingtonpost.com/white-house-watch/the-empathy-war.html>.
- Fujiwara, Lynn H. "Immigrant Rights are Human Rights: The Reframing of Immigrant Entitlement and Welfare." *Social Problems* 52.1 (Feb. 2005): 79-101.
- Gagarin, Michael and Paul Woodruff. *Early Greek Political Thought from Homer to the Sophists*. Cambridge: Cambridge University Press, 1995.
- Gardiner, Anne Babeau. "Feminist Literary Criticism: From Anti-Patriarchy to the Celebration of Decadence." *Modern Age* 49.4 (Fall 2007): 393-399.
- Gearhart, Sally Miller. "The Womanization of Rhetoric." *Women's Studies International Quarterly* 2 (1979): 195-201.
- Gellman, Barton, Julie Tate, and Ashkan Soltani. "In NSA-Intercepted Data, Those Not Targeted Far Outnumber the Foreigners Who Are." *The Washington Post* (July 5, 2014). Retrieved from http://www.washingtonpost.com/world/national-security/in-nsa-intercepted-data-those-not-targeted-far-outnumber-the-foreigners-who-are/2014/07/05/8139adf8-045a-11e4-8572-4b1b969b6322_story.html.
- Gerstein, Josh. "Appeals Court Chilly to Feds' Arguments for NSA Surveillance Program." *Politico* (Sept. 2, 2014). Retrieved from <http://www.politico.com/blogs/under-the-radar/2014/09/appeals-court-chilly-to-feds-arguments-for-nsa-surveillance-194760.html>
- Gewirtz, Paul. "Narrative and Rhetoric in the Law," in *Law's Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz. New Haven: Yale University Press, 1996.
- Gibson, Katie L. "In Defense of Women's Rights: A Rhetorical Analysis of Judicial Dissent." 35 (2012): 123-137.
- _____. "The Rhetoric of *Roe v. Wade*: When the (Male) Doctor Knows Best." *Southern Communication Journal* 73.4 (Sept. 2008): 312-331.

- Gilbert, G. M. *Nuremberg Diary*. New York: Farrar, Straus, & Co., 1947.
- Gillespie, Nick. "Richard Posner: Privacy is 'Mainly' About Concealing Guilty Behavior." *Reason* (Dec. 8, 2014). Retrieved from <http://reason.com/blog/2014/12/08/richard-posner-privacy-is-mainly-about-c>.
- Gilligan, Carol. *In a Different Voice*. Cambridge: Harvard University Press, 1982.
- Ginsburg, Ruth Bader. "Justice Ginsburg Chats About Obamacare, Gay Rights and Surveillance." *Wall Street Journal* (May 2, 2014). Retrieved from <http://blogs.wsj.com/law/2014/05/02/justice-ginsburg-chats-about-obamacare-gay-rights-and-surveillance/>
- _____. "The Role of Dissenting Opinions." *Minnesota Law Review* 95.1 (2010): 1-8.
- Glanton, Dahleen. "O'Connor Questions Court's Decision to Take Bush v. Gore." *The Chicago Tribune* (April 27, 2013). Retrieved from http://articles.chicagotribune.com/2013-04-27/news/ct-met-sandra-day-oconnor-edit-board-20130427_1_o-connor-bush-v-high-court.
- Glendon, Mary Ann. *Rights Talk: The Impoverishment of Political Discourse*. New York: Free Press, 1991.
- Goankar, Dilip Parameshwar. "The Idea of Rhetoric in the Rhetoric of Science," in *Rhetorical Hermeneutics: Invention and Interpretation in the Age of Science*, Alan G. Gross and William M. Keith, eds. Albany: State University of New York Press, 1996: 25-88.
- Goldie, Peter, ed. *The Oxford Handbook of Philosophy of Emotion*. Oxford: Oxford University Press, 2010.
- Goodnight, G. Thomas. "The Personal, Technical, and Public Spheres of Argument: A Speculative Inquiry into the Art of Public Deliberation," in *Contemporary Rhetorical Theory: A Reader*, ed. John Luis Lucaites, Celeste Michelle Condit, and Sally Caudill. New York: Guilford Press, 1999.
- Goodwin, Doris Kearns. *A Team of Rivals: The Political Genius of Abraham Lincoln*. New York: Simon & Schuster, 2006.
- Gordon, Mitchell. "Adjusting the Rear-view Mirror: Rethinking the Use of History in Supreme Court Jurisprudence." *Marquette Law Review* 89 (Spring 2006): 475-540.
- Gorman, Siobhan, Devlin Barrett, and Jennifer Valentino-Devres. "CIA's Financial Spying Bags Data on Americans." *Wall Street Journal* (Jan. 25, 2014). Retrieved from <http://www.wsj.com/news/articles/SB1000142405270230355950457919837011316353>.
- Gregg v. Georgia*, 428 US 153 (1976).

- Green, Craig. "An Intellectual History of Judicial Activism." *Emory Law Journal* 58.5 (May 2009): 1195-1263.
- Grisez, Germain Gabriel. *Way of the Lord Jesus*. St. Bonaventure, NY: Franciscan Institute Publications, 1997.
- Griswold v. Connecticut* 381 U.S. 479 (1965)
- Gushulak, Brian D. and Douglas W. MacPherson. "Globalization of Infectious Diseases: The Impact of Migration." *Clinical Infectious Diseases* 38.12 (June, 2004): 1742-1748.
- Haack, Susan. "Reflections of a Critical Common-Sensist." *Transactions of the Charles S. Peirce Society* 32.3 (Summer 1996): 359-373.
- Habermas, Jürgen. "A Reply to My Critics," in John B. Thompson and David Held, ed. *Habermas and the Public Sphere*. Cambridge: MIT Press, 1992: 421-61.
- _____. "The Public Sphere," in Robert E. Goodin and Philip Pettit, ed. *Contemporary Political Philosophy: An Anthology*. Oxford: Blackwell Publishers, 1997.
- _____. *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*. Cambridge: MIT Press, 1989.
- Hagan, Michael R. "Roe v. Wade: The Rhetoric of Fetal Life." *Central States Speech Journal* 27.3 (Fall 1976): 192-199.
- Hale, Robert. *Freedom Through Law: Public Control of Private Governing Power*. New York: Columbia University Press, 1952.
- Hall, Stuart. "The Rediscovery of 'Ideology': Return of the Repressed in Media Studies." in *Culture, Society and the Media*, ed. Michael Gurevitch, et al. London and New York: Methuen, 1982.
- Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)
- Hamilton, Reeve. "Texplainer: Are Illegal Immigrants Importing Illness?" *Texas Tribune* (Feb. 28, 2011). Retrieved from <http://www.texastribune.org/immigration-in-texas/immigration/are-illegal-immigrants-importing-illness/>
- Hardy, Bruce. "Stephen Colbert's Civics Lesson: Or, How a TV Humorist Taught America about Campaign Finance," *The Annenberg Public Policy Center* (June 2, 2014). Retrieved from http://www.annenbergpublicpolicycenter.org/wp-content/uploads/Stephen-Colberts-Civics-Lesson_release_6-02-14_Final.pdf
- Hariman, Robert. *Political Style: The Artistry of Power*. Chicago: University of Chicago Press, 1995.

- Hartelius, E. Johanna. *The Rhetoric of Expertise*. Lanham, MD: Lexington Books, 2010.
- Hartocollis, Anemona. "Man Who Stabbed Wife is Acquitted." *New York Times* (Feb 14, 2007). Retrieved from <http://www.nytimes.com/2007/02/14/nyregion/14landlord.html>.
- Hartnett, Stephen. *Democratic Dissent and the Cultural Fictions of Antebellum America*. Urbana, IL: University of Illinois, 2002.
- Hasian, Marouf, Jr. "The Advent of Critical Memory Studies and the Future of Legal Argumentation." *Argumentation & Advocacy* 38.1 (Summer 2001): 40-45.
- _____. "The Aesthetics of Legal Rhetoric: The Ambiguities of Race in *Adarand v. Peña* and the Beginning of the End of Affirmative Action." *Howard Journal of Communications* (1997): 113-127.
- _____. "Canadian Civil Liberties, Holocaust Denial, and the Zundel Trials." *Communications & the Law* 21.3 (Sept. 1999): 43-56.
- _____. "Critical Legal Theorizing, Rhetorical Intersectionalities, and the Multiple Transgressions of the 'Tragic Mullata,' Anastasie Deserzant." *Women's Studies in Communication* 27.2 (Summer 2004): 119-148.
- _____. "Critical Memories of Crafted Virtues: The Cadbury Chocolate Scandals, Mediated Reputations, and Modern Globalized Slavery." *Journal of Communication Inquiry* 32.3 (July 2008): 249-270.
- _____. "Cultural Amnesia and Legal Rhetoric: Remember the 1862 United States-Dakota War and the Need for Military Commission." *American Indian Culture and Research Journal* 27.1 (2003): 91-117.
- _____. "The Cultural, Legal, and Scientific Arguments in the Human Genome Diversity Debate." *Howard Journal of Communications* 13.4 (Oct-Dec. 2002): 301-319.
- _____. "The Domestication of Legal Argumentation: A Case Study of the Formalism of the Legal Realists." *Communication Quarterly* 46.4 (Fall 1998): 430-445.
- _____. "Judicial Rhetoric in a Fragmentary World: 'Character' and Storytelling in the Leo Frank Case." *Communication Monographs* 64.3 (Sep. 1997): 250-269.
- _____. "Jurisprudence as Performance: John Brown's Enactment of Natural Law at Harper's Ferry." *Quarterly Journal of Speech* 86.2 (May 2000), 190-214.
- _____. "Legal Argumentation in the Godwin-Malthus Debates." *Argumentation & Advocacy* 37.4 (Spring 2001): 184-97.

- _____. *Legal Memories and Amnesias in America's Rhetorical Culture*. Boulder: Westview Press, 2000.
- _____. "Myth and Ideology in Legal Discourse: Moving from Critical Legal Studies toward Rhetorical Consciousness." *Legal Studies Forum* (1993-1994): 347-363.
- _____. "O.J. Simpson and the Rhetoric of Law." *Review of Communication* 3.1 (Jan. 2003): 60-63.
- _____. "Performative Law and the Maintenance of Interracial Social Boundaries: Assuaging Antebellum Fears of 'White Slavery' and the Case of Sally Miller/Salome Müller." *Text & Performance Quarterly* 23.1 (Jan. 2003): 55-86.
- _____. "Race, Crime, and the Law," *Rhetoric & Public Affairs* 1.2 (Summer 1998), 279-281.
- _____. "Remembering and Forgetting: A Postmodern Interpretation of the Origins of the 'Right of Privacy.'" *Journal of Communication Inquiry* 19.2 (July 1995): 33-49.
- Hasian, Marouf, Jr. and Earl Croasmun. "Rhetoric's Revenge: The Prospect of a Critical Legal Rhetoric." *Philosophy & Rhetoric* 29.4 (1996): 384-399.
- Hasian, Marouf, Jr. and Lisa Flores. "Mass Mediated Representations of the Susan Smith Trial." *Howard Journal of Communications* 11.3 (Jul-Sep. 2000): 163-178.
- Hasian, Marouf, Jr. and Trevor Parry-Giles. "'A Stranger to its Laws': Freedom, Civil Rights, and the Legal Ambiguity of *Romer v. Evans*." *Argumentation & Advocacy* 34.1 (Summer 1997): 27-42.
- Haskins, Ekaterina. *Logos and Power in Isocrates and Aristotle*. Columbia, SC: University of South Carolina Press, 2004.
- Hauser, Gerald. *Vernacular Voices: The Rhetoric of Publics and Public Spheres*. Columbia: University of South Carolina Press, 1999.
- Hegel, G.W.F. *Lectures on the Philosophy of History*, trans. J. Sibree. New York: American Home Library, 1952.
- Henderson, M. Todd "Citing Fiction." *The Green Bag* 11.2 (Winter 2008): 171-185.
- Hirst, Russel. "Austin Pehlps's Theory of Balance in Homilectic Style." *The Journal of Communication and Religion* 18.2 (1995): 17-27.
- Hodges, Karen A. "Unfolding Sophistic and Humanistic Practice through Ingenium," *Rhetoric Review* 15.1 (Autumn 1996): 86-92.

- Hoffman, David C. "Paine and Prejudice: Rhetorical Leadership through Perceptual Framing in *Common Sense*." *Rhetoric & Public Affairs* 9.3 (2006): 373-410.
- Hogan, J. Michael and Glen Williams. "Republican Charisma and the American Revolution: The Textual Persona of Thomas Paine's *Common Sense*." *Quarterly Journal of Speech* 86.1 (2000): 1-18.
- Holmes, David G. "Affirmative Reaction: Kennedy, Nixon, King, and the Evolution of Color-Blind Rhetoric." *Rhetoric Review* 26.1 (2007): 25-41.
- Holmes, Oliver Wendell, Jr. *The Common Law*. New York: Dover, 1992.
- _____. "The Path of Law." *Harvard Law Review* 10.8 (1897): 457-478.
- hooks, bell. "Postmodern Blackness." *Postmodern Culture* 1.1 (Sept. 1990).
- Hookway, Christopher. "Critical Common-Sensism and Rational Self-Control." *Noûs* 24 (1990): 397-412.
- Horney, Karen. *Neurosis and Human Growth: The Struggle Towards Self-Realization*, 2d. ed. New York: W.W. Norton, 1991.
- Howe, Mark DeWolfe (ed.). *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski 1916-1935*. Harvard: Harvard University Press, 1953.
- _____. "The Positivism of Mr. Justice Holmes." *Harvard Law Review* 64.4 (1951): 529-546.
- Hsu, Kenneth K. "Why the Politics of Marriage Matter: Evaluating Legal and Strategic Approaches on Both Sides of the Debate on Same-Sex Marriages." *BYU Journal of Public Law* 20.2 (2006): 275-312.
- Huhn, Wilson Ray. "The Constitutional Jurisprudence of Sandra Day O'Connor: A Refusal to 'Foreclose the Unanticipated.'" *Akron Law Review* 39 (2006): 373-414.
- Hume, David. *An Enquiry Concerning Human Understanding and Other Writings*, ed. Stephen Buckle. Cambridge: Cambridge University Press, 2007.
- Hunsaker, David M. "The Rhetoric of *Brown v. Board of Education*: Paradigm for Contemporary Social Protest." 43 (Winter 1978): 91-109.
- Hunt, II, Cecil J. "The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence." *Michigan Journal of Race & Law* 11 (Spring 2006): 477-555.
- Hutto, David. "Ancient Egyptian Rhetoric in the Old and Middle Kingdoms." *Rhetorica: A Journal of the History of Rhetoric* 20.3 (Summer 2002): 213-233.

- Idleman, Scott C. "A Prudential Theory of Judicial Candor." *Texas Law Review* 73 (1995): 1307-1417.
- Inniss, Lolita Buckner. "A Critical Legal Rhetoric Approach to African-American Slave Descendants Litigation." *St. John's Journal of Legal Commentary* 24.4 (Summer 2010): 649-696.
- Inwood, Brad. "Rules and Reasoning in Stoic Ethics" in *Topics in Stoic Philosophy*, ed. Katerina Ierodiakonou. Oxford: Oxford University Press, 1999: 95-107.
- Isocrates. *Isocrates*. 3 vols. Trans. George Norlin (vols. 1-2) and LaRue Van Hook (vol. 3). London: William Heinemann, 1928.
- Ivie, Robert L. "Democratic Dissent and the Trick of Rhetorical Critique," *Cultural Studies, Critical Methodologies* 5.3 (2005): 276-293.
- _____. *Dissent from War*. Bloomfield, CT: Kumarian Press, 2007.
- _____. "Finessing the Demonology of War: Toward a Practical Aesthetic of Humanising Dissent," *Javnost – The Public* 14.4 (2007): 37-54.
- _____. "Toward a Humanizing Style of Democratic Dissent," *Rhetoric and Public Affairs* 11.3 (Fall 2008): 454-458.
- Jacobellis v. Ohio* 378 U.S. 184 (1964).
- James, William. *Writings 1902-1910*. New York: Library of America, 1988.
- Janowitz, Naomi. "The Rhetoric of Translation: Three Early Perspectives on Translating Torah." *The Harvard Theological Review* 84.2 (Apr., 1991): 129-140.
- Janis, Irving. *Groupthink*. Boston: Houghton Mifflin, 1982.
- Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986).
- Jarratt, Susan C. *Rereading the Sophists: Classical Rhetoric Refigured*. Carbondale: Southern Illinois University Press, 1991.
- Jones, James M. "From Racial Inequality to Social Justice: The Legacy of *Brown v. Board* and Lessons from South Africa." *Journal of Social Issues* 62.4 (Dec. 2006): 885-909.
- Jurek v. Texas*, 428 US 262 (1976).
- Kahn, Ronald. "The Meaning of Liberalism/Conservatism on the Mature Rehnquist Court: First Amendment Absolutism and a Muted Social Construction Process." *The Good Society* 14 (2005): 50-58.

- Kaposy, Chris. "Proof and Persuasion in the Philosophical Debate about Abortion." *Philosophy and Rhetoric* 43 (2010): 139-162.
- Kass, Leon R. "The Wisdom of Repugnance." *New Republic* (June 2, 1997): 17-26.
- Kellogg, Frederic R. "Holmes, Pragmatism, and the Deconstruction of Utilitarianism." *Transactions of the Charles S. Peirce Society* 23.1 (Winter 1987): 99-120.
- Kelly, Daniel. *Yuck! The Nature and Moral Significance of Disgust*. Cambridge: MIT Press, 2013.
- Kelman, Mark. "Legal Economists and Normative Social Theory," from *A Guide to Critical Legal Studies*. Cambridge: Harvard University Press, 1987: 114-150.
- Kelman, Steven. "Ethical Theory and the Case for Concern about Charges," from *What Price Incentives? Economists and the Environment*. Boston: Auburn House, 1981: 27-91.
- Kennerly, Michele. "Getting Carried Away: How Rhetorical Transport Gets Judgment Going." *Rhetoric Society Quarterly* 40.3 (Summer 2010): 269-291.
- Keslowitz, Stephen. "The Simpsons, 24, and the Law: How Homer Simpson and Jack Bauer Influence Congressional Lawmaking and Judicial Reasoning." *Cardozo Law Review* 29.6 (2008): 2787-2822.
- Kidwell, Erin Rahne. "The Paths of the Law: Historical Consciousness, Creative Democracy, and Judicial Review." *Albany Law Review* 62.1998 (2001): 91-146
- Kitch, Edmund W. "Katz v. United States: The Limits of the Fourth Amendment." *Supreme Court Review* (1968): 133-152.
- Klamer, Arjo. "As If Economists and Their Subject Were Rational," in *Rhetoric and the Human Science: Language and Argument in Scholarship and Public Affairs*, John S. Nelson, Allan Megill, and Donald N. McCloskey, eds. Madison: University of Wisconsin Press, 1987.
- Knowles, David. *The Evolution of Medieval Thought*. New York: Vintage, 1962.
- Korematsu v. United States*, 323 U.S. 214 (1944)
- Korobkin, Russell B. and Thomas S. Ulen. "Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics." *California Law Review* 88 (2000): 1051-1144.
- Kozinski, Alex. "What I Ate for Breakfast and Other Mysteries of Judicial Decision Making." *Loyola of Los Angeles Law Review* 26 (1993): 993-999.

- Kronman, Anthony. "Leontius' Tale," in *Law's Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz. New Haven: Yale University Press, 1996.
- Kuhn, Deanna, et. al. "Developing Norms of Argumentation: Metacognitive, Epistemological, and Social Dimensions of Developing Argumentative Competence." *Cognition and Instruction* 31.4 (Oct. 2013): 456-496.
- Laertius, Diogenes. *Lives of Eminent Philosophers, v. II*, trans. R. D. Hicks. Cambridge: Harvard University Press, 1925.
- Landes, William M. and Richard A. Posner, "An Economic Analysis of Copyright Law." *The Journal of Legal Studies* 18.2 (Jun., 1989): 325-353.
- _____. "A Positive Economic Analysis of Products Liability." *The Journal of Legal Studies* (Dec., 1985): 535-567.
- _____. "The Influence of Economics on Law: A Quantitative Study." *Journal of Law and Economics* 36.1, Part 2 (Apr. 1993): 385-424.
- Langford, Catherine L. "Appealing to the Brooding Spirit of the Law: Good and Evil in Landmark Judicial Dissents." *Argumentation & Advocacy* 44.3 (Winter 2008): 119-129.
- Lapidos, Juliet. "The Drug Mule-Cantaloupe Crisis," *The New York Times* (July 25, 2013). Retrieved from <http://takingnote.blogs.nytimes.com/2013/07/25/the-drug-mule-cantaloupe-crisis/>.
- Lay, Mary M. "Midwifery on Trial: Balancing Privacy Rights and Health Concerns after *Roe v. Wade*." *Quarterly Journal of Speech* 89.1 (Feb. 2003): 60-77.
- Lee, Taeku. "Polling Prejudice." *The American Prospect* (March 9, 2011). Retrieved from <http://prospect.org/article/polling-prejudice>.
- Leff, Arthur Alan. "Economic Analysis of Law: Some Realism about Some Nominalism." *Virginia Law Review* 60 (1974): 451-482.
- Leff, Michael. "The Habitation of Rhetoric," in *Contemporary Rhetorical Theory: A Reader*, ed. John Luis Lucaites, Celeste Michelle Condit, and Sally Caudill. New York: Guilford Press, 1999: 61
- Leff, Michael C. and Ebony A. Utley. "Instrumental and Constitutive Rhetoric in Martin Luther King Jr.'s 'Letter from Birmingham Jail.'" *Rhetoric and Public Affairs* 7.1 (Spring 2004): 37-51.
- Leonhardt, David. "Truth, Fiction and Lou Dobbs," *The New York Times* (May 30, 2007). Retrieved from <http://www.nytimes.com/2007/05/30/business/30leonhardt.html>.

- Levasseur, David G. and Diana B. Carlin. "Egocentric Argument and the Public Sphere: Citizen Deliberations on Public Policy and Policymakers." *Rhetoric & Public Affairs* 4.3 (Fall 2001): 407-31.
- Levinson, Sanford. "The Rhetoric of the Judicial Opinion," in *Law's Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz. New Haven: Yale University Press, 1996: 187-205.
- Lillehammer, Hallvard. "Analytical Dispositionism and Practical Reason." *Ethical Theory and Moral Practice* 2.2 (Jun. 1999): 117-133.
- Linger, Daniel T. "The Hegemony of Discontent." *American Ethnologist* 20.1 (Feb. 1993): 3-24.
- Lippmann, Walter. *The Phantom Public*. New Brunswick: Transaction, 1993.
- Liptak, Adam. "Justices Agree to Agree, at Least for the Moment." *The New York Times* (May, 2013). Retrieved from <http://www.nytimes.com/2013/05/28/us/supreme-court-issuing-more-unanimous-rulings.html>
- Liptak, Adam and Allison Kopicki. "Approval Rating for Justices Hits Just 44% in New Poll." *The New York Times* (June 7, 2012). Retrieved from <http://www.nytimes.com/2012/06/08/us/politics/44-percent-of-americans-approve-of-supreme-court-in-new-poll.html>.
- Lithwick, Dahlia. "Amicus: Revenge of the Octogenarians," *Slate* (October 25, 2014), retrieved from http://www.slate.com/articles/podcasts/amicus/2014/10/slate_amicus_with_dahlia_lithwick_on_the_supreme_court_s_abortion_and_voter_1.html.
- _____. "Richard Posner: A Human Pentium Processor has been Assigned to settle the Microsoft Case." *Slate* (Nov. 24, 1999). Retrieved from http://www.slate.com/articles/news_and_politics/assessment/1999/11/richard_posner.html.
- Llewellyn, Karl N. *Jurisprudence: Realism in Theory and Practice*. Chicago: University of Chicago Press, 1962.
- Logie, John. "Lost in Translation: The Influence of 20th Century Literary Theory on Plato's Texts." *Rhetoric Society Quarterly* 34.1 (Winter 2004): 47-71.
- Long, A.A. and D.N. Sedley (trans.) *The Hellenistic Philosophers*. Cambridge: Cambridge University Press, 1987.
- López-Vélez, H. Huerga and M.C. Turrientes, "Infectious Diseases in Immigrants from the Perspective of a Tropical Medicine Referral Unit." *American Journal of Tropical Medicine and Hygiene* 69.1 (July 2003): 115-21.
- Lucas, Stephen E. *Portents of Rebellion: Rhetoric and Revolution in Philadelphia, 1765-76*. (Philadelphia: Temple University Press, 1976).

- Lynch, Andrew. "Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia." *Melbourne University Law Review* 27 (2003): 724-769.
- Lyne, John R. "Science Controversy, Common Sense, and the Third Culture." *Argumentation and Advocacy* 42 (Summer 2005): 38-42.
- MacDonald, Cynthia. "Theories of Mind and 'The Commonsense View'." *Mind & Language* 17.5 (Nov. 2002): 467-488.
- Maciejewski, Jeffrey J. "Justice as a Nexus of Natural Law and Rhetoric." *Philosophy and Rhetoric* 41 (2008): 72-9.
- MacIntyre, Alisdair. *After Virtue: A Study in Moral Theory*, 3rd ed. Notre Dame: University of Notre Dame Press, 1981.
- Mandle, Jon. *Rawls' 'A Theory of Justice': An Introduction*. Cambridge: Cambridge University Press, 2009.
- Manin, Bernard. "On Legitimacy and Political Deliberation." *Political Theory* 15 (1987): 338-368.
- Mansfield, Dorothy M. "Abigail S. Duniway: Suffragette with Not-so-common Sense." *Western Speech* (Winter 1971): 24-29.
- Mapp v. Ohio*, 367 U.S. 643 (1961)
- Marcotte, Amanda. "Justice Scalia Compares Sodomy to Murder." *Slate* (Dec. 11, 2012).
Retrieved from http://www.slate.com/blogs/xx_factor/2012/12/11/scalia_compares_sodomy_to_murder_why_because_he_says_so.html.
- Mathisen, James A. "A Further Look at 'Common Sense' in Introductory Sociology." *Teaching Sociology* 17.3 (Jul. 1989): 307-315.
- McCloskey, Dierdre N. "Big Rhetoric, Little Rhetoric: Gaonkar on the Rhetoric of Science," in *Rhetorical Hermeneutics: Invention and Interpretation in the Age of Science*, Alan G. Gross and William M. Keith, eds. Albany: State University of New York Press, 1996: 101-112.
- _____. *The Rhetoric of Economics*. 2nd ed. Madison: University of Wisconsin Press, 1998.
- McDormon, Todd F. "History, Collective Memory, and the Supreme Court: Debating 'the People' through the Dred Scott Controversy," *Southern Communication Journal* 71.3 (Sept. 2006): 213-234.
- McGee, Michael Calvin. "The 'Ideograph': A Link Between Rhetoric and Ideology." *Quarterly Journal of Speech* 66.1 (Feb. 1980): 1-16.

- _____. "In Search of 'the People': A Rhetorical Alternative," in *Contemporary Rhetorical Theory: A Reader*, ed. John Luis Lucaites, Celeste Michelle Condit, and Sally Caudill. New York: Guilford Press, 1999.
- _____. "'Social Movement': Phenomenon or Meaning?" in *Readings on the Rhetoric of Social Protest*. ed. Charles E. Morris, III and Stephen H. Brown. State College: Strata, 2001: 125-136.
- McGee, Michael Calvin and John R. Lyne. "What Are Nice Folks Like You Doing in a Place Like This? Some Entailments of Treating Knowledge Claims Rhetorically," in *The Rhetoric of the Human Sciences: Language and Argument in Scholarship and Public Affairs*, ed. John S Nelson, Allan Megill, and Donald N. McCloskey. Madison: University of Wisconsin Press, 1987: 381-406.
- McInerny, Ralph. "Thomistic Natural Law and Aristotelian Philosophy," in *St. Thomas Aquinas and the Natural Law Tradition: Contemporary Perspectives*, eds. J. Goyette, et al. Washington, D.C.: The Catholic University of America Press, 2004.
- McIntyre, Alasdair. *After Virtue: A Study in Moral Theory*, 2d ed. Notre Dame: University of Notre Dame Press, 1984.
- McKee, Alan. *The Public Sphere: An Introduction*. Cambridge: Cambridge University Press, 2005.
- McLeod, Kembrew. *Freedom of Expression ®: Overzealous Copyright Bozos and Other Enemies of Creativity*. New York: Doubleday, 2005.
- Miller, Terri Beth. "'Reading' the Body of Terri Schiavo: Inscriptions of Power in Medical and Legal Discourse." *Literature and Medicine* 28 (2009): 33-54.
- Miller, William Ian. *Humiliation*. Ithaca: Cornell University Press, 1995.
- Millhiser, Ian. "Al Gore: NSA Surveillance Programs Violate the Constitution." *Think Progress* (Jun 17, 2013). Retrieved from <http://thinkprogress.org/justice/2013/06/17/2165371/al-gore-nsa-surveillance-programs-violate-the-constitution/>.
- Minow, Martha, Michael Ryan, and Austin Sarat, eds. *Narrative, Violence, and the Law: The Essays of Robert Cover*. Ann Arbor: University of Michigan Press, 1995.
- Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938)
- Mitchell, Gordon R. "Switch-Side Debating Meets Demand-Driven Rhetoric of Science." *Rhetoric & Public Affairs*, 13.1 (2010): 95-120.
- Moore, David W. "Public Little Concerned About Patriot Act." *Gallup* (Sept 9, 2003). Retrieved from <http://www.gallup.com/poll/9205/public-little-concerned-about-patriot-act.aspx>.

- Mootz, Francis J. III. "The Irrelevance of Contemporary Academic Philosophy for Law: Recovering the Rhetorical Tradition," in *On Philosophy in American Law*, Francis J. Mootz III, ed. Cambridge: Cambridge University Press, 2009.
- _____. *Law, Hermeneutics and Rhetoric*. London: Ashgate Publishing, 2010.
- _____. *Rhetorical Knowledge in Legal Practice and Critical Legal Theory*. Tuscaloosa: University of Alabama Press, 2006.
- _____. "Perelman's Theory of Argumentation and Natural Law." *Philosophy and Rhetoric* 43.4 (2010): 383-402.
- Morrow, Terence S. "Common Sense Deliberative Practice: John Witherspoon, James Madison, and the U.S. Constitution." *Rhetoric Society Quarterly* 29.1 (Winter 1999): 25-47.
- Morton, Adam. *Emotion and Imagination*. Cambridge: Polity Press, 2013.
- Moyers, Bill and Michael Winship. "Presto! The DISCLOSE Act Disappears." *Huffington Post* (July 17, 2012). Retrieved from http://www.huffingtonpost.com/bill-moyers/presto-the-disclose-act-d_b_1679743.html.
- Muir, Star A. "Toward an Ecology of Language," in *Kenneth Burke and the 21st Century*, ed. Bernard L. Brock. Albany: State University of New York Press, 1999.
- Murray, Jeffrey W. "Kenneth Burke: A Dialogue of Motives." *Philosophy and Rhetoric* 35.1 (2002): 22-49.
- Murray, Michael D. "Law and Economics as a Rhetorical Perspective in Law." *Law Faculty Publications* (2011): Paper 8.
- Newman, Stephen A. "Political Advocacy on the Supreme Court: The Damaging Rhetoric of Antonin Scalia." *New York Law School Law Review* 51 (2006/2007): 907-926.
- Niblett, Anthony, Richard A. Posner, and Andrei Shleifer. "The Evolution of a Legal Rule." *The Journal of Legal Studies* 39.2 (June 2010): 325-358.
- Nussbaum, Martha C. *Cultivating Humanity: A Classical Defense of Reform in Liberal Education*. Cambridge: Harvard University Press, 1998.
- _____. *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy*, 2d ed. Cambridge: Cambridge University Press, 1991.
- _____. *From Disgust to Humanity: Sexual Orientation and Constitutional Law*. Oxford: Oxford University Press, 2010.

_____. *Frontiers of Justice: Disability, Nationality, Species Membership*. Cambridge: Belknap Press, 2006.

_____. *Hiding from Humanity: Shame, Disgust, and the Law* (Princeton: University of Princeton Press, 2004).

_____. "Human Functioning and Social Justice: In Defense of Aristotelian Essentialism." *Political Theory* 20.2 (May 1992): 202-246.

_____. *Love's Knowledge: Essays on Philosophy and Literature*. Oxford: Oxford University Press, 1992.

_____. "Narratives of Hierarchy: *Loving v. Virginia* and the Literary Imagination." *Quinnipiac Law Review* 17 (1997): 337-355.

_____. *Not for Profit: Why Democracy Needs the Humanities*. Princeton: Princeton University Press, 2010.

_____. *Poetic Justice: The Literary Imagination and Public Life*. Boston: Beacon Press, 1995.

_____. "The Professor of Parody." *The New Republic* (Feb. 22, 1999): 37-45.

_____. "Sophistry about Conventions." *New Literary History* 17.1 (Autumn, 1985): 129-139.

_____. *The Therapy of Desire: Theory and Practice in Hellenistic Ethics*. Princeton: Princeton University Press, 1994.

_____. *Upheavals of Thought: The Intelligence of Emotions* Cambridge: Cambridge University Press, 2001.

_____. *Women and Human Development: The Capabilities Approach*. Cambridge: Cambridge University Press, 2001.

Obama, Barack. Campaign speech to Planned Parenthood (July 2007). Retrieved from <http://www.weeklystandard.com/Content/Public/Articles/000/000/014/849oyckg.asp>

Olmstead v. U.S. 277 U.S. 438 (1928)

O'Neill, Kate. "Rhetoric Counts: What We Should Teach When We Teach Posner." *Seton Hall Law Review* 39 (2009): 507-557.

Ono, Kent A. and John M. Sloop. *Shifting Borders: Rhetoric, Immigration, and California's Proposition 187*. Philadelphia: Temple University Press, 2002.

- O'Rourke, Sean. "Cultivating the 'Higher Law' in American Jurisprudence: John Quincy Adams, Neo-Classical Rhetoric, and the *Amistad* Case." *Southern Communication Journal* 60 (1994): 33-43.
- O'Rourke, Sean and Laura K. Lee Dellinger. "Romer v. Evans: The Centerpiece of the American Gay-Rights Debate," in *Anti-Gay Rights: Assessing Voter Initiatives*, ed. Stephanie L. Witt and Suzanne McCorkle. Santa Barbara: Praeger, 1997: 133-157.
- Palmer, Kathryn and Stephen E. Lucas. "On Trial: Conflicting Versions of Emma Goldman's Address to the Jury." *Rhetoric & Public Affairs* 11 (Spring 2008): 47-88.
- Panetta, Edward M. and Marouf Hasian, Jr. "Anti-Rhetoric as Rhetoric: The Law and Economics Movement" *Communication Quarterly* 42.1 (Winter 1994): 57-74.
- Patterson, Robert and Ronald Lee. "The Environmental Rhetoric of 'Balance': A Case Study of Regulatory Discourse and the Colonization of the Public." *Technical Communication Quarterly* 6.1 (Winter 1997): 25-40.
- Pavitt, Charles. "Another View of Group Polarizing: The 'Reason For' One-Sided Oral Argumentation." *Communication Research* 21.5 (Oct. 1994): 625-642.
- Payton v. New York* 445 U.S. 573 (1980)
- Peirce, Charles S. *Philosophical Writings of Peirce*, ed. Justus Buchler. New York: Dover, 1955.
- Perelman, Chaïm and L. Olbrechts-Tyteca. *The New Rhetoric: A Treatise on Argumentation*, trans. John Wilkinson and Purcell Weaver. Notre Dame: University of Notre Dame Press, 1971.
- Peters, John Durham. *Courting the Abyss: Free Speech and the Liberal Tradition*. Chicago: University of Chicago Press, 2005.
- _____. "Majority Views NSA Phone Tracking as Acceptable Anti-terror Tactic." *Pew Research* (Jun 10, 2013). Retrieved from <http://www.people-press.org/2013/06/10/majority-views-nsa-phone-tracking-as-acceptable-anti-terror-tactic/>.
- _____. "Public Remains Divided Over the Patriot Act." *Pew Research* (Feb 15, 2011). Retrieved from <http://www.pewresearch.org/2011/02/15/public-remains-divided-over-the-patriot-act/>.
- Pezzullo, Phaedra C. "Resisting 'National Breast Cancer Awareness Month': The Rhetoric of Counterpublics and Their Cultural Performances." *Quarterly Journal of Speech* 89.4 (Nov. 2003): 345-365.
- Pfister, Damien Smith. "Introduction to Special Issue: Public Argument/Digital Media." *Argumentation & Advocacy* 47.2 (Fall 2010): 63-66.

- _____. "The Logos of the Blogosphere: Flooding the Zone, Invention, and Attention in the Lott Imbroglio." *Argumentation and Advocacy* 47 (Winter 2011): 141-162.
- Pinaire, Brian. "The Essential Kafka: Definition Distention, and Dilution in Legal Rhetoric." *University of Louisville Law Review* 46. 1 (Fall 2007): 115-156.
- Posner, Richard A. *Economic Analysis of Law*. Boston: Little Brown, 1973.
- _____. "An Economic Analysis of Sex Discrimination Laws." *The University of Chicago Law Review* 56.4 (Autumn, 1989): 1311-1335.
- _____. "An Economic Approach to Issues of Religious Freedom." *The University of Chicago Law Review* 56.1 (Winter, 1989): 1-60.
- _____. "An Economic Approach to the Law of Evidence." *Stanford Law Review* 51.6 (Jul, 1999): 1477-1546.
- _____. "An Economic Approach to Legal Procedure and Judicial Administration." *The Journal of Legal Studies* 2.2 (Jun., 1973): 399-458.
- _____. *The Economics of Justice*. Cambridge: Harvard University Press, 1981.
- _____. "An Economic Theory of the Criminal Law." *Columbia Law Review* 85.6 (Oct., 1985): 1193-1231.
- _____. "The Federal Trade Commission." *The University of Chicago Law Review*, 37.1 (Autumn 1969): 47-89.
- _____. *Frontiers of Legal Theory*. Cambridge: Harvard University Press, 2001.
- _____. "The Future of Law and Economics: Looking Forward." *University of Chicago Law Review* 64.4 (Autumn 1997): 1129-1165.
- _____. *How Judges Think*. Cambridge: Harvard University Press, 2010.
- _____. *Law and Literature*, 3rd ed. Cambridge: Harvard University Press, 2009.
- _____. *Overcoming Law*. Cambridge: Harvard University Press, 1996.
- _____. "The Path Away from Law." *Harvard Law Review* 110.5 (Mar., 1997), 1042.
- _____. *Pragmatism, Law, and Democracy*. Cambridge: Harvard University Press, 2005.
- _____. *The Problematics of Moral and Legal Theory*. Cambridge: Belknap Press, 1999.

- _____. *The Problems of Jurisprudence*. Cambridge: Harvard University Press, 1993.
- _____. "A Program for the Antitrust Division." *The University of Chicago Law Review* 38.3 (Spring 1971): 500-536.
- _____. *Public Intellectuals: A Study of Decline*. Cambridge: Harvard University Press, 2002.
- _____. "The Right of Privacy," *Georgia Law Review* 12.3 (Spring 1978): 393-422.
- _____. *Sex and Reason*. Cambridge: Harvard University Press, 1992.
- _____. "A Theory of Negligence." *The Journal of Legal Studies* 1.1 (Jan. 1972): 29-96.
- Poulakos, John. "From the Depths of Rhetoric: The Emergence of Aesthetics as a Discipline." *Philosophy and Rhetoric* 40.4 (2007): 335-352.
- _____. "Rhetoric and Civic Education: From the Sophists to Isocrates," in *Isocrates and Civic Education*, ed. Takis Poulakos and David J. Depew. Austin: University of Texas Press, 2004.
- _____. *Sophistical Rhetoric in Classical Greece*. Columbia: University of South Carolina Press, 1995.
- Poulakos, Takis and David Depew, eds. *Isocrates and Civic Education*. Austin: University of Texas Press, 2004.
- Primus, Richard A. "Canon, Anti-Canon, and Judicial Dissent." *Duke Law Journal* 48.2 (Nov., 1998): 243-303.
- Prinze, Jesse J. *Gut Reactions: A Perceptual Theory of Emotion*. Oxford: Oxford University Press, 2006.
- Proffitt v. Florida*, 428 US 242 (1976).
- Pullum, Stephen J. "Common Sense Religion for America: The Rhetoric of the Jewish Televangelist Jan Bresky." *The Journal of Communication and Religion* 15.1 (1992): 43-54.
- Rahdert, Mark. "Tracking Katz: Beepers, Privacy and the Fourth Amendment." *Yale Law Journal* 86 (1977): 1461-1508.
- Rawls, John. *Justice as Fairness: A Restatement*, ed. Erin Kelly. Cambridge: Belknap Press, 2001.
- _____. *Political Liberalism*. New York: Columbia University Press, 1993.

_____. *A Theory of Justice*. Cambridge: Harvard University Press, 1971.

Ray, Angela G. and Cindy Koenig Richards, "Inventing Citizens, Imagining Gender Justice: The Suffrage Rhetoric of Virginia and Francis Minor." *Quarterly Journal of Speech* (2007): 375-402.

Rayfield, Jillian. "Steve King: It was a Compliment to say Immigrants are Like Dogs," *Salon* (Sept. 7, 2012). Retrieved from http://www.salon.com/2012/09/07/steve_king_it_was_a_compliment_to_say_immigrants_are_like_dogs/.

Raz, Joseph. (ed.) *Practical Reasoning*. Oxford: University of Oxford Press, 1978.

Reid, Thomas. *Essays on the Intellectual Powers of Man*, ed. Derek Brooks. University Park: Pennsylvania State University Press, 2002.

_____. *An Inquiry into the Human Mind, on the Principles of Common Sense*" in *The Works of Thomas Reid, D.D., Vol. I*, 8th ed. Edinburgh: James Thin, 1985.

Risen, James and Laura Poitras. "N.S.A. Gathers Data on Social Connections of U.S. Citizens." *New York Times* (Sep. 28, 2013). Retrieved from <http://www.nytimes.com/2013/09/29/us/nsa-examines-social-networks-of-us-citizens.html>.

Robbins, Kristen Konrad. "Philosophy v. Rhetoric in Legal Education: Understanding the Schism Between Doctrinal and Legal Writing Faculty." *Journal of the Association of Legal Writing Directors* 3 (Fall 2006): 108-28.

Rodriguez-Velasco, Jesús. "Theorizing the Language of Law." *Diacritics* 36 (Fall-Winter 2006): 64-86.

Roberts v. Louisiana, 428 US 325 (1976).

Rorty, Richard. *Objectivity, Realism, and Truth: Philosophical Papers, Vol. 1*. Cambridge: Cambridge University Press, 1991.

_____. *Philosophy and the Mirror of Nature: Thirtieth Anniversary Edition*. Princeton: Princeton University Press, 2009.

Rosen, Jeffrey. "The Dissenter, Justice John Paul Stevens," *The New York Times* (Sept. 23, 2007). Retrieved from <http://www.nytimes.com/2007/09/23/magazine/23stevens-t.html>.

Rountree, Clarke (ed.). *Brown v. Board of Education at Fifty: A Rhetorical Perspective* Oxford: Lexington Books, 2005.

- _____. "Instantiating 'The Law' and its Dissents in *Korematsu v. United States*: A Dramatistic Analysis of Judicial Discourse," *Quarterly Journal of Speech* 87.1 (Feb. 2001): 1-24.
- _____. *Judging the Supreme Court: Constructions of Motives in Bush v. Gore*. East Lansing: Michigan State University Press, 2007.
- _____. "On the Rhetorical Analysis of Judicial Discourse and More: A Response to Lewis," *Southern Communication Journal* 61.2 (1995): 166-173.
- _____. "Setting the Stage for *Brown v. Board of Education*: The NAACP's Litigation Campaign against the "Separate but Equal" Doctrine," in *Brown v. Board of Education at Fifty: A Rhetorical Perspective*, ed. Clarke Rountree. Oxford: Lexington Books, 2004.
- Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*, 980 F.2d 449, 455 (7th Cir. 1992).
- Russomanno, Joseph A. "'The Firebrand of My Youth': Holmes, Emerson and Freedom of Expression." *Communication Law & Policy* 33.5 (2000): 33-59.
- Ryan, Alan. *John Dewey and the High Tide of American Liberalism*. New York: W.W. Norton & Co., 1997.
- Safford Unified School District v. Redding*, 557 U.S. 364 (2009).
- Sammons, Jack L. "A Rhetorician's View of Religious Speech in Civic Argument." *Seattle University Law Review* (Winter 2009): 367-387.
- _____. "Reflections on Legal Writing: Legal Writing Scholarship, Making Strange, and the Aesthetics of Legal Rhetoric." *Mercer Law Review* 61 (Spring 2010): 925-942.
- Samuelsohn, Darren. "George W. Bush Critics Turn Wrath on President Obama," *Politico* (Jun 7, 2013). Retrieved from <http://www.politico.com/story/2013/06/george-w-bush-haters-turn-wrath-on-obama-92388.html>
- Sandel, Michael J. *Democracy's Discontent: America in Search of a Public Philosophy*. Cambridge: Harvard University Press, 1996.
- _____. *Public Philosophy: Essays on Morality in Politics*. Cambridge: Harvard University Press, 2005.
- Santa Ana, Otto. "'Like an Animal I was Treated': Anti-Immigrant Metaphor in US Public Discourse." *Discourse & Society* 10.2 (Apr., 1999): 191-224.
- Scalia, Antonin. "Dissents." *The Organization of American Historians Magazine* 13.1 (1998): 18-23.

- Schiappa, Edward. "Analyzing Argumentative Discourse from a Rhetorical Perspective: Defining 'Person' and 'Human Life' in Constitutional Disputes over Abortion." *Argumentation* 14.3 (Aug. 2000): 315-332.
- Schmidt v. Sullivan*, 914 F.2d 117, 118 (7th Cir. 1990).
- Schuette v. Coalition to Defend Affirmative Action* 572 U.S. _____ (2014).
- Schwitzgebel, Eric and Joshua Rust. "The Moral Behavior of Ethicists: Peer Opinion." *Mind* 118 (Oct., 2009): 1043-1059.
- Scimia, Donna. "A Common Sense Approach to Reducing Liability in Today's Workplace." *Employee Relations Law Journal* 33.2 (Autumn 2007): 23-29.
- Seneca. *De Clementia*, in *Seneca: Moral Essays*, v. I, trans. John W. Basore. Cambridge: Harvard University Press, 1928.
- Shaman, Jeffrey M. "Justice Scalia and the Art of Rhetoric." *Constitutional Commentary* 28.2 (Fall 2012): 287-292.
- Shapiro, Fred R. "The Most-Cited Legal Scholars." *Journal of Legal Studies* 29.1 (2000): 409-426.
- Shenkman, Rick. "Ignorant America: Just How Stupid are We," *Alternet* (July 1, 2008). Retrieved from http://www.alternet.org/story/90161/ignorant_america%3A_just_how_stupid_are_we.
- Showalter, Elaine (ed.) *The New Feminist Criticism: Essays on Women, Literature, and Theory*. New York: Pantheon, 1985.
- Siegel, Neil S. "Interring the Rhetoric of Judicial Activism." *DePaul Law Review* 59 (Winter 2010): 555-599.
- Sigelman, Lee Colin Martindale, and Dean McKenzie. "The Common Style of *Common Sense*." *Computers and the Humanities* 30 (1997): 373-379.
- Simon, David. "We are Shocked, Shocked..." *The Audacity of Despair* (June 7, 2013). Retrieved from <http://davidsimon.com/we-are-shocked-shocked/>.
- Sinsheimer, Ann. "The Ten Commandments as a Secular Historic Artifact or Sacred Religious Text: Using *Modrovich v. Allegheny Country* to Illustrate How Words Create Reality." *University of Maryland Law Journal of Race, Religion, Gender, and Class* 5 (Fall 2005): 325-349.

- Slevin, Peter. "In Filling Supreme Court Vacancy, Obama Looks for a Jurist with Empathy." *Washington Post* (May 13, 2009). Retrieved from http://www.washingtonpost.com/wp-dyn/content/article/2009/05/12/AR2009051203515_2.html?sid=ST2009051203561.
- Smith, Justin E.H. "The Delights of Disgust." *The Chronicle of Higher Education* (January 14, 2013). Retrieved from <http://chronicle.com/article/The-Delights-of-Disgust/136537/>.
- Smith, Tom W. "Public Attitudes toward Homosexuality." *NORC/University of Chicago* (September, 2011). Retrieved from http://www.norc.org/PDFs/2011%20GSS%20Reports/GSS_Public%20Attitudes%20Toward%20Homosexuality_Sept2011.pdf.
- Solomon, Robert C. *The Passions: Emotions and the Meaning of Life*. Indianapolis: Hackett, 1993.
- Stanghellini, Giovanni. *Emotions and Personhood: Exploring Fragility, Making Sense of Vulnerability*. Oxford: Oxford University Press, 2013.
- State v. Norman*, 378 SE 2d 8 (1989)
- Stillion Southard, Bjorn F. "Prudential Argumentation and John Marshall's Opinion in *Marbury v. Madison* (1803)." *Argumentation & Advocacy* 44.1 (Summer 2007): 1-17.
- Stone, Geoffrey R. *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*. New York: W.W. Norton & Company, Inc., 2004.
- Strossen, Nadine, et al., "Left Out in the Cold? The Chilling of Speech, Association, and the Press in Post-9/11 America: A Symposium." *American University Law Review* 57 (June 2008): 1203-1271.
- Strother, David B. "Polemics and the Reversal of the 'Separate but Equal' Doctrine," *Quarterly Journal of Speech* 49.1 (Feb. 1963): 50-56.
- Struever, Nancy. "Rhetorical Definition: A French Initiative." *Philosophy and Rhetoric* 42 (2009): 401-423.
- Sullivan, William M. *Reconstructing Public Philosophy*. Berkeley: University of California Press, 1986.
- Sunstein, Cass R., ed. *Behavioral Law & Economics*. Cambridge: Cambridge University Press, 2000.
- _____. *A Constitution of Many Minds: Why the Founding Document Doesn't Mean What It Meant Before*. Princeton: Princeton University Press, 2009.
- _____. *Democracy and the Problem of Free Speech*. New York: The Free Press, 1993.

- _____. *Designing Democracy: What Constitutions Do*. Oxford: Oxford University Press, 2001.
- _____. *Going to Extremes: How Like Minds Unite and Divide*. Oxford: Oxford University Press, 2009.
- _____. *Infotopia: How Many Minds Produce Knowledge*. Oxford: Oxford University Press, 2006.
- _____. *One Case at a Time: Judicial Minimalism on the Supreme Court*. Cambridge: Harvard University Press, 2001.
- _____. "On the Expressive Function of Law," *University of Pennsylvania Law Review* 144.5 (May, 1996): 2021-2053.
- _____. *On Rumors: How Falsehoods Spread, Why We Believe Them, What Can Be Done*. New York: Farrar, Straus and Giroux, 2009.
- _____. *Republic.com 2.0*. Princeton: Princeton University Press, 2009.
- _____. *The Second Bill of Rights: FDR's Unfinished Revolution—And Why We Need It More Than Ever*. New York: Basic Books, 2004.
- _____. *Simpler: The Future of Government*. New York: Simon & Schuster, 2013.
- _____. *Why Societies Need Dissent*. Cambridge: Harvard University Press, 2005.
- Sunstein, Cass R., et al. *Are Judges Political?: An Empirical Analysis of the Federal Judiciary*. Washington, DC: Brookings Institution Press, 2006.
- Sunstein, Cass R. and Adrian Vermeule. "Conspiracy Theories: Causes and Cures." *The Journal of Political Philosophy*, 17.2 (2009): 202-227.
- Swartz, Omar. "Codifying the Law of Slavery in North Carolina: Positive Law and the Slave Persona." *Thurgood Marshall Law Review* 285 (2003-2004): 285-310.
- _____. "Defending Labor in *Commonwealth v. Pullis*: Contemporary Implications for Rethinking Community." *Holy Cross Journal of Law and Public Policy* 8 (2004): 79-98.
- Tahin, Gabor. *Heuristic Strategies in the Speeches of Cicero*. Radstock, UK: Springer, 2014.
- _____. "Rhetorical Heuristics: Probabilistic Strategies in Complex Oratorical Arguments." *Argumentation* 25.1 (2011): 1-21.
- Terdiman, Richard. "Translator's Introduction," in "The Force of Law: Toward a Sociology of the Juridical Field," *Hastings Law Journal* 38 (Jul. 1987): 805-811.

- Terrill, Robert. "Protest, Prophecy, and Prudence in the Rhetoric of Malcolm X." *Rhetoric & Public Affairs* 4.1 (2001): 25-53.
- Terry v. Ohio*, 392 U.S. 1 (1968)
- Thaler, Richard H. and Cass R. Sunstein. *Nudge: Improving Decisions about Health, Wealth, and Happiness*. New York: Penguin, 2008.
- Thaler, Richard H., Cass R. Sunstein, and John P. Balz. "Choice Architecture," in *The Behavioral Foundations of Public Policy*, Eldar Shafir, ed. Princeton: Princeton University Press, 2013: 428-439.
- Thompson, Wayne N. "Aristotle as a Predecessor to Reid's 'Common Sense'." *Speech Monographs* 42 (Aug. 1975): 209-220
- Toobin, Jeffrey. *The Nine: Inside the Secret World of the Supreme Court*. New York: Knopf, 2008.
- Toulmin, Stephen. *The Uses of Argument*. Cambridge: Cambridge University Press, 1958.
- Travis, Shannon. CNN Poll: Quarter Doubt Obama Was Born in U.S.," August 4, 2010.
- Tribe, Laurence H. *The Invisible Constitution*. Oxford: Oxford University Press, 2008.
- Tuana, Nancy. "The Speculum of Ignorance: The Women's Health Movement and Epistemologies of Ignorance." *Hypatia* 21.3 (Summer 2006): 1-19.
- Tversky, Amos and Daniel Kahneman. "Judgment Under Uncertainty: Heuristics and Biases." *Science* 185 (1974): 1124-1131.
- United States v. Jones*, 565 U.S. ___, 132 S. Ct. 945, 955 (2012)
- United States v. United States District Court for the Eastern District of Michigan Southern Division*, 407 U.S. 297 (1972)
- Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001).
- Urofsky, Melvin I. *The Warren Court: Justices, Rulings, and Legacy*. Santa Barbara: ABC-CLIO, 2001.
- U.S. Senate Hearing 109-158, "Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Supreme Court," Washington, DC: GPO (Sept. 12, 2006). Retrieved from <http://www.gpo.gov/fdsys/pkg/CHRG-109shrg23539/content-detail.html>.

- “U.S. Surveillance: Unchecked and Unsupervised,” *Brennan Center for Justice* (Nov. 6, 2013). Retrieved from <http://www.brennancenter.org/analysis/us-surveillance-unchecked-and-unsupervised>.
- Vaughan, Stephanie A. “Persuasion Is An Art . . . But It Is Also an Invaluable Tool in Advocacy.” *Baylor Law Review* 61 (Spring 2009): 635-682.
- Vico, Giambattista. *The First New Science*, ed. Leon Pompa. Cambridge: Cambridge University Press, 2002.
- Wallace, Mike and Alison Wray. “The Fall and Rise of Linguists in Education Policy-making: From ‘Common Sense’ to Common Ground.” *Language Policy* 1 (2002): 75-98.
- Walzer, Arthur E. “Teaching ‘Political Wisdom’: Isocrates and the Tradition of Dissoi Logoi,” in *The Viability of the Rhetorical Tradition*, ed. Arthur E. Walzer, Janet M. Atwill, and Richard Graff. Albany: State University of New York Press, 2005.
- Warner, Michael. *Publics and Counterpublics*. New York: Zone Books, 2005.
- Warnick, Barbara. “The Rational and the Reasonable in the AIG Bonus Controversy.” *Argumentation & Advocacy* 46.2 (Fall 2009): 98-109.
- Warren, Samuel D. and Louis D. Brandeis. “The Right to Privacy.” *Harvard Law Review* 4.5 (Dec. 1890): 193-220.
- Waterman, Shaun. “Terror Watch List Grows to 875,000.” *The Washington Times* (May 3, 2013). Retrieved from <http://www.washingtontimes.com/news/2013/may/3/terror-watch-list-grows-875000/>.
- Wechsler, Herbert. “The Nationalization of Civil Liberties and Civil Rights.” *Texas Quarterly* 12.2 (1970).
- _____. “Toward Neutral Principles of Constitutional Law.” *Harvard Law Review* 73 (1959): 1-35.
- Weill, Susan. “Conserving Racial Segregation in 1954: *Brown v. Board of Education* and the Mississippi Daily Press.” *American Journalism* 16.4 (Fall 1999): 77-99.
- Weisberg, Robert. “Proclaiming Trials as Narratives: Premises and Pretenses,” in *Law’s Stories: Narrative and Rhetoric in the Law*, ed. Peter Brooks and Paul Gewirtz. New Haven: Yale University Press, 1996: 61-83.
- West, Robin. “Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner.” *Harvard Law Review* 99 (Dec. 1985): 384-428.

- _____. "Sex, Reason, and a Taste for the Absurd." *Georgetown Law Journal* 81 (1993): 2413-2455.
- Westberg, Daniel. *Right Practical Reason: Aristotle, Action, Prudence in Aquinas*. Oxford: Clarendon Press, 1994.
- White, G. Edward. "Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension." *California Law Review* 80 (1992): 391-467.
- _____. *Justice Oliver Wendell Holmes: Law and the Inner Self*. Oxford: Oxford University Press, 1993.
- White, James Boyd. *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law*. Madison: University of Wisconsin Press, 1989.
- _____. *Justice in Translation: An Essay in Cultural and Legal Criticism*. Chicago: University of Chicago Press, 1990.
- _____. *The Legal Imagination*. Chicago: University of Chicago Press, 1973.
- _____. "'Meanings Can Never Be the Same': Reflections on Language and Law." *Rhetoric Society Quarterly* 21.3 (Summer 1991): 68-77.
- _____. *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community*. Chicago: University of Chicago Press, 2004.
- Williams, Rhys H. and Susan M. Alexander. "Religious Rhetoric in American Populism: Civil Religion as Movement Ideology." *Journal for the Scientific Study of Religion* 33.1 (Mar. 1994): 1-15.
- Windsor v. United States*, 419 U.S. 938 (1974).
- Wing, Nick. "Nancy Pelosi Booed, Heckled Over Edward Snowden, NSA Comments at Netroots Nation 2013." *Huffington Post* (Jun 22, 2013). Retrieved from http://www.huffingtonpost.com/2013/06/22/nancy-pelosi-booed_n_3484062.html.
- Wohl, Victoria. "A Tragic Case of Poisoning: Intention Between Tragedy and the Law." *Transactions of the American Philological Association* 140 (Spring 2010): 33-70
- Wolf v. Colorado*, 338 U.S. 25 (1954)
- Woodson v. North Carolina*, 428 US 280 (1976)
- Wrightsmann, Lawrence S. *Judicial Decision Making: Is Psychology Relevant?* New York: Kluwer Academic, 1999.

- _____. *The Psychology of the Supreme Court*. Oxford: Oxford University Press, 2006.
- Wu, Tim. *The Master Switch: The Rise and Fall of Information Empires*. New York: Knopf, 2010.
- Yin, Tung. "Jack Bauer Syndrome: Hollywood's Depiction of National Security Law." *Southern California Interdisciplinary Law Journal* 17 (2009): 279-300.
- Young, Ralph F. (ed.) *Dissent in America: The Voices That Shaped a Nation*. New York: Pearson Longman, 2009.
- Zagacki, Kenneth S. "Constitutive Rhetoric Reconsidered: Constitutive Paradoxes in G. W. Bush's Iraq War Speeches." *Western Journal of Communication* 71.4 (Oct. 2007): 272-293.
- Zarefsky, David. "Turning Points in the Galesburg Debate," *Argumentation & Advocacy* 46.3 (Winter 2010): 140-149.
- Ziegler, Mary. "The Framing of a Right to Choose: *Roe v. Wade* and the Changing Debate on Abortion Law." *Law & History Review* 27.2 (Summer 2009): 281-330.