

# ON LITERATURE AS LEGAL AUTHORITY

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*“This may prove a worse job than the windmills.”*

—Sancho Panza<sup>1</sup>

## INTRODUCTION

More than a half-century ago, the Kansas Supreme Court declared its independence from literature: “Fortunately,” Justice Burch wrote, “we are not required to base our opinion upon philology or the philosophy of the bards.”<sup>2</sup> Unfortunately for Justice Burch, the bards still haunt many a judicial opinion. Literature is not unique in that respect; many forces extrinsic to law dictate the law’s development. Unprecedented events, scientific and historical discoveries,<sup>3</sup> and changing cultural attitudes constantly test the limits of judicial ingenuity. The Supreme Court has made noteworthy nods to foreign law.<sup>4</sup> The Seventh Circuit looks to economics for inspiration.<sup>5</sup> It comes as no surprise, then, that American

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1. MIGUEL DE CERVANTES SAAVEDRA, DON QUIXOTE DE LA MANCHA 74 (Charles Jarvis trans., Oxford Univ. Press 1999) (1605, 1615).

2. Sparks v. Sparks, 178 P.2d 678, 679 (Kan. 1947) (expressing relief that there was judicial precedent on point).

3. See, e.g., Massachusetts v. EPA, 127 S. Ct. 1438, 1455–56 (2007) (citing recent developments in the study of climate change).

4. See Antonin Scalia & Stephen Breyer, Assoc. Justices, U.S. Supreme Court, Remarks on Constitutional Relevance of Foreign Court Decisions at the U.S. Association of Constitutional Law Discussion at American University (Jan. 13, 2005) (transcript available at <http://www.freerepublic.com/focus/f-news/1352357/posts>). For a likening of the controversial citation of foreign law to the uncontroversial citation of literature, see Ann Althouse, *Innocence Abroad*, N.Y. TIMES, Sept. 19, 2005, at A25.

5. E.g., Tacket v. Gen. Motors Corp., 836 F.2d 1042, 1046–47 (7th Cir. 1987).

judges have occasionally sifted through lines of Dante or Eliot, finding in literature the seeds for new legal doctrines.<sup>6</sup>

The common law's affection for literature is nothing new. Two centuries ago, Sir Walter Scott famously affirmed the importance of literature to a robust and enlightened legal practice.<sup>7</sup> Since then, critics have taken varying attitudes toward bookishness in the learned profession, from revulsion to fond regard.<sup>8</sup> Professor Wigmore once listed the novels he thought the Bar would do well to read.<sup>9</sup> Writing more recently, Judge Posner doubts that literature offers the law meaningful moral guidance,<sup>10</sup> or that literature "is an essential source of either the psychological or the moral knowledge that judges need."<sup>11</sup> Professors Balkin and Levinson observe that the law resists the influence of the humanities in favor of other disciplines, such as the social sciences.<sup>12</sup> Surprisingly, for all this debate, little scholarship has directly addressed judicial citation of the bardic strain.<sup>13</sup>

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6. Professor Smith takes up the use of literary allusion in legal writing at great length, emphasizing its value to the practicing lawyer. MICHAEL R. SMITH, *ADVANCED LEGAL WRITING* 9–73 (2002). For examples of literature used in advocacy and legal education, see *Brief on the Merits for Respondent Paul Bishop, a/k/a Vlad Dracula*, Texas A&M Univ. v. Bishop, 156 S.W.3d 580 (Tex. 2005) (No. 03-0448), and Robert Batey, *Literature in a Criminal Law Course: Aeschylus, Burgess, Oates, Camus, Poe, and Melville*, 22 *LEGAL STUD. F.* 45 (1998), respectively.

7. WALTER SCOTT, *GUY MANNERING* 259 (P.D. Garside ed., 1999) (1815).

8. See, e.g., Gilbert Ray Hawes, *Literature and the Law*, 11 *GREEN BAG* 234 (1899) (fond regard); Manfred Nathan, *Some Literary Judges*, 2 *COMMONWEALTH L. REV.* 116 (1904–1905) (acknowledging "general antipathy to literary lawyers").

9. John H. Wigmore, *A List of One Hundred Legal Novels*, 17 *ILL. L. REV.* 26, 39–41 (1922) (recommending, for example, Henry Fielding's *Tom Jones*, Alexandre Dumas' *Count of Monte Cristo*, and Judge Robert Grant's obscure but judiciously titled *Eye for an Eye*).

10. See RICHARD A. POSNER, *LAW AND LITERATURE* 299–309, 353–64 (1988) (criticizing the legal study of literature, except insofar as it provides examples of good writing).

11. *Id.* at 303.

12. See Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 *YALE J.L. & HUMAN.* 155, 178, 181–86 (2006).

13. Pun intended. Two articles have addressed judicial use of Shakespeare in particular, with only sidelong glances to the Bard as a source of substantive law. See William Domnarski, *Shakespeare in the Law*, 67 *CONN. B.J.* 317 (1993); Jules Gleicher, *The Bard at the Bar: Some Citations of Shakespeare by the United States Supreme Court*, 26 *OKLA. CITY U. L. REV.* 327 (2001). Another paper, published serially, takes stock of mostly ornamental literary allusions in the common law, focusing on South African courts. See Ellison Kahn, *A Literary Peregrination Through the Law Reports*, 114 *S. AFR. L.J.* 229 (1997), 114 *S. AFR. L.J.* 613 (1997), 114 *S. AFR. L.J.* 772 (1997), 115 *S. AFR. L.J.* 222 (1998), 115 *S. AFR. L.J.* 385 (1998), 115 *S. AFR. L.J.* 553 (1998), 115 *S. AFR. L.J.* 775 (1998), 116 *S. AFR. L.J.* 177 (1999); Ellison Kahn, *Three Additions to A Literary Peregrination Through the Law Reports*, 116 *S. AFR. L.J.* 879 (1999). Most recently, a scholar has examined the evolution of the phrase "'deliberate speed' from a poetic conceit into an operative remedial formula," critiquing its failure in the context of *Brown v. Board of Education*, 349 U.S. 294, 301 (1955). Jim Chen, *Poetic Justice*, 28 *CARDOZO L. REV.* 581, 591 (2006).

Sifting through the caselaw yields a diverse (tho' scattered) harvest of old and recent examples.<sup>14</sup> One study confirms over 800 American citations of Shakespeare.<sup>15</sup> Seminal cases on the law of gifts *causa mortis* invoke a provision of Justinian, who expresses his own debt to Homer.<sup>16</sup> In Arizona, the verses of Tennyson provide legal protection for gifts to one's mother, conveying an implicit source of consideration for the completion of the gift:

Happy he  
With such a mother; Faith in womankind  
Beats with his blood, and trust in all things high  
Comes easy to him, and though he trip and fall  
He shall not blind his soul with clay.<sup>17</sup>

Justice Rehnquist opens a dissent in *United Steelworkers of America v. Weber* with a quotation from Orwell's *Nineteen Eighty-Four* to underscore the majority's doublespeak.<sup>18</sup> Justice Brennan, on the other hand, quotes the same book to conclude his dissent in a Fourth Amendment case concerning the legality of aerial surveillance: "BIG BROTHER IS WATCHING YOU, the caption said . . . . In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows."<sup>19</sup>

This Note is a rejection of the argument that poetry, fiction, and drama cannot and should not inform the law. Critics from Plato<sup>20</sup> to Judge Posner<sup>21</sup> have

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14. Electronic research is what makes this study possible; the constraints of the West Key system and other paper indices might have prevented this type of inquiry only a few decades ago. That said, this study is still limited to instances where judges attribute a cited work to its author and the author's name is searchable. For instance, the law reports frequently misprint "marital" as "martial," compromising valiant efforts to locate citations of the Roman author Martial. It must also be said that judicial citation form is not always consistent when it comes to literary sources, and it is frequently impossible to know exactly what edition or translation a judge is citing. In this Note, parenthetical references to literature cited in cases are generally limited by citation information given in the cases.

15. Domnarski, *supra* note 13, at 318.

16. Waugh v. Richardson, 147 S.E. 17, 20 (W. Va. 1929); Leyson v. Davis, 42 P. 775, 785 (Mont. 1895); *cf.* Dexheimer v. Gautier, 34 How. Pr. 472 (N.Y. Sup. Ct. 1867) (Barbour, J., dissenting) (mentioning Homer but not Justinian).

17. Stewart v. Damron, 160 P.2d 321, 325 (Ariz. 1945) (quoting Alfred, Lord Tennyson, *The Princess* pt. vii.) (asserting that the nature of motherly love supports enforcement of a gift to one's mother).

18. United Steelworkers of Am. v. Weber, 443 U.S. 193, 219–20 (1979) (Rehnquist, J., dissenting) (quoting GEORGE ORWELL, NINETEEN EIGHTY-FOUR 181–82 (1949)).

19. Florida v. Riley, 488 U.S. 445, 466 (1989) (Brennan, J., dissenting). In *PGA Tour, Inc. v. Martin*, Justice Scalia makes a passing, pejorative comparison of the majority opinion to the worlds of Orwell's *Animal Farm* and Lewis Carroll's *Alice in Wonderland*. 532 U.S. 661, 705 (2001) (Scalia, J., dissenting).

20. See PLATO, THE REPUBLIC 377b–398b (advocating the censorship of poetry in the ideal city); Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835, 1841–68 (2005) (outlining the "Platonic paradigm" of evicting poetry from the city and allowing it to return only on certain terms).

begrudged the place of literature in the organization of a state; I argue that to some extent, it deserves that place. This Note catalogues the use of literary references by courts to support substantive legal positions. The catalogue of cases unfolds under the lights of several distinct critical approaches. How is literary citation appropriate? Let me count the ways. Part I applies the methods of Classical Rhetoric to demonstrate that literary themes provide a ready supply of personal and emotional authority to the persuasive exercise of judging. Part II explores more specific aspects of literary rhetoric: Narratives, “unwritten” law, and maxims from literature bring powerful lessons of human experience to the judicial field. Part III builds upon Lon Fuller’s theory of the legal fiction to suggest that literature is not only a useful tool for the court, but that it can be a necessary rhetorical shortcut for negotiating the complexities of human existence.

Part IV considers the perspectives of the Law and Literature movement, a modern critical exploration of both law-as-literature and portrayals of the legal world *in* literature that has largely passed over the present topic.<sup>22</sup> Picking up where the modern criticism leaves off, this section addresses the problematic “adjudication” of literary interpretation by the courts and the judicial citation of poetry, fiction, and drama that reflects directly on the law. Finally, Part V examines literary citation against the larger realm of jurisprudence. While allusive jurisprudence has its limits, literature offers judges a source of principles uniquely suffused with the policies of the human endeavor. Literature fills certain voids of argument where history, philosophy, and economics come up short. Literature promises to bring judicial opinions closer to the subjectivity of experience.

For the sake of convenience, this Note adopts an oversimplified, “particularizing”<sup>23</sup> view of literature, referring only to belletristic writing such as poetry, fiction, and drama.<sup>24</sup> There is no treatment of judicially cited nonfiction, history, philosophy, or other such writing. Nonfiction prose genres such as history and philosophy are difficult to distinguish from more conventional sources of persuasive authority used by courts like treatises and law review articles. At the other end of the spectrum, this Note eschews casual, ornamental uses of literature

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21. See POSNER, *supra* note 10, at 301–02; see also Wendy Nicole Duong, *Law Is Law and Art Is Art and Shall the Two Ever Meet?—Law and Literature: The Comparative Creative Process*, 15 S. CAL. INTERDISC. L.J. 1 (2005) (maintaining that law and literature are, in many ways, incompatible creative processes).

22. For an overview of the Law and Literature movement, see Robert Weisberg, *The Law–Literature Enterprise*, 1 YALE J.L. & HUMAN. 1 (1988–1989); see also *supra* note 13 and accompanying text.

23. See Yoshino, *supra* note 20, at 1837–38 (noting that the particularizing typology of literature conflicts with other, broader views of literature-as-letters, both ancient and modern).

24. The term “writing” here even excludes references to cultural touchstones such as music, film, and television. The only excuse for this is pragmatic: Poetry, fiction, and drama exist in the same verbal medium as judicial opinions, so judicial citation of literature falls into a discrete and familiar category of intertextuality. The impact of film on judicial opinion-writing might well merit its own article, as might the impact of biblical texts, avoided here for its obvious Constitutional entanglements.

that do not substantively and thematically advance the reasoning of the court.<sup>25</sup> Nor does this Note address citations of literature where literature itself forms or relates to the basis of the case at hand, as in defamation, obscenity, and copyright actions. The emphasis remains on how the work of authors like Sophocles, Elizabeth Browning, and Ralph Ellison becomes substantive legal authority.

### I. THE RHETORIC OF LITERARY CITATION

The tension between literature and the state, particularly in light of literature's power to seduce, persuade, and subvert the state, is as old a concern as it is fundamental.<sup>26</sup> Whatever it is that makes literature non-legal yet *authoritative* threatens the law's status as a persuasive enterprise and highlights the need for literature to serve, and not usurp, that status.<sup>27</sup> The preliminary analysis of this literary persuasion breaks into three parts: First, the nature of rhetoric; second, how themes of literature stand alone as a rhetorical tool; and finally, what makes those themes effective from a rhetorical standpoint.

The analysis begins with an overview of persuasion itself. The formal study of persuasion is rhetoric.<sup>28</sup> Rhetoric often refers to oratory; a New York decision quotes Milton on this respectable art:

Thence to the famous orators repair,  
Those ancients whose resistless eloquence  
Wielded at will that fierce democratic,  
Shook the arsenal, and fulmin'd over Greece  
To Macedon, and Artaxerxes's throne.<sup>29</sup>

But rhetoric also encompasses persuasive writing, and the act of judging is, in fact, a rhetorical exercise. The opinion of a court must persuade a variety of audiences. It should persuade losing parties and dissenters that the opinion considers their point of view; it should persuade future appellate courts to follow its reasoning; and more broadly, it should impress some sense of justice upon the legal community, the academic community, and the general public.<sup>30</sup> As Professor

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25. Michael Smith has categorized the forms that such references often take. These categories include borrowed eloquence (quoting an apt literary turn of phrase), creative variation (altering a familiar literary turn of phrase), and hyperbole (comparing the facts of a case to exaggerated literary examples). See SMITH, *supra* note 6, at 9–73. These categories do sometimes also describe thematic references, references with more than ornamental value. See Part II.A, *infra*.

26. For a painstaking excavation of this problem in the realm of Platonic philosophy, see Yoshino, *supra* note 20.

27. Cf. *id.* at 1867 (pointing out that the power to seduce—to persuade toward bad ends—implies the power to persuade toward good ends).

28. For a handy introduction to the history of rhetoric, see EDWARD P.J. CORBETT & ROBERT J. CONNORS, *CLASSICAL RHETORIC FOR THE MODERN STUDENT* 489–543 (4th ed. 1999).

29. People on Complaint of Simmons v. Morris, 201 N.Y.S.2d 739, 741 (City Ct. 1960) (quoting MILTON, *PARADISE REGAINED* Book IV) (illustrating why oratory in and of itself is not disfavored by the court).

30. Walker Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U. L. REV. 915, 922 (1961); Patricia Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial*

White has put it, “The excellence of the opinion is . . . an excellence of thought, represented and enacted in language in such a way as to live in the minds of others.”<sup>31</sup>

One may sometimes forget that judges make deliberate and concrete rhetorical efforts. The Anglo-American judge’s habit of clothing outcomes in the voice of undeniable authority obscures his role as a mere rhetorician. When a judge conjures a conclusion with syllogistic aplomb, she appears to discover the law. Underneath the pronouncement is a conscious attempt to forge solid arguments.<sup>32</sup> Judges might well prefer it this way, to let the buttresses of their authority go unnoticed. *Ars est celare artem*—the art is to conceal the artifice.<sup>33</sup>

There is another reason for judges to build their opinions to last: the moral imperative of their office. The persuasive force a judge uses to sustain a just result is akin to the persuasive force of an advocate. Aristotle frames the point thus:

Rhetoric is useful . . . because things that are true and things that are just have a natural tendency to prevail over their opposites, so that if the decisions of judges are not what they ought to be, the defeat must be due to the speakers themselves, and they must be blamed accordingly.<sup>34</sup>

To the extent that judges succeed or fail to persuade future courts of a just result, they themselves become the advocates (Aristotle’s “speakers”). It may be true that some rhetoric is not legitimate, that it seduces more than it persuades. Remember, however, that opposing advocates stand in the same position, and prejudicial rhetoric can be exposed for what it is by opposing counsel or another court.<sup>35</sup> This is one premise of the right to speech itself: the marketplace of ideas.<sup>36</sup> Where the

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*Writings*, 62 U. CHI. L. REV. 1371, 1376 (1995); Gerald Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1561 (1990).

31. James Boyd White, *What’s an Opinion For?*, 62 U. CHI. L. REV. 1363, 1367 (1995).

32. “[O]f all syllogisms . . . those are most applauded of which we foresee the conclusions from the beginning, so long as they are not obvious at first sight . . . or those which we follow well enough to see the point of them as soon as the last word has been uttered.” 2 ARISTOTLE, RHETORIC 1400b (W. Rhys Roberts trans., The Modern Library 1984).

33. Maxim of uncertain origin, resembling a handful of Classical sentiments. See, e.g., QUINTILIAN, INSTITUTIO ORATORIA 9.3.100–102; OVID, ARS AMATORIA 2.313.

34. ARISTOTLE, *supra* note 32, at 1355a.

35. See *infra* notes 195–204 and accompanying text.

36. The marketplace of ideas is best known as a rationale for free expression under the First Amendment, but its premise—that rhetorical free rein tests and approves of the best ideas—is operative in the realm of judicial reasoning.

[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race . . . If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

JOHN STUART MILL, ON LIBERTY 87 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859); see also *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes,

just result prevails, it is because rhetoric prevails. A close relationship emerges between rhetoric and justice, or power and responsibility.

#### *A. The Rhetoric of Literary Themes*

Themes of literature become a source of rhetorical power. The New York Court of Appeals quotes Walt Whitman's *Leaves of Grass* to get at the legislative intent of a statute respecting religious objection to autopsy: "If anything is sacred," Whitman wrote, "the human body is sacred."<sup>37</sup> One Tennessee Court of Appeals relies on an image from Dante's *Inferno* to show that fraud takes many forms and should therefore be broadly defined:

In his fictional account of his journey through hell, Dante Alighieri personified fraud as Geryon, a mythological beast who had the tail of a scorpion, a whelped body like a reptile, hair covered arms and shoulders, and the face of a just and honest man.<sup>38</sup>

Professor Smith has helpfully termed such references "thematic," as opposed to "nonthematic" references, which serve as mere hyperbole or "borrowed eloquence."<sup>39</sup> The Tennessee court uses the substance or idea of the literary work to support the outcome of the case (though a reader may be able to grasp the point of the reference without having read the whole piece of literature).<sup>40</sup> The categories are not mutually exclusive, however. For instance, when a court quotes directly from a work of literature, it cannot avoid "borrowing" the author's eloquence or expression along with the underlying theme or idea. Choice words are often themselves choice insights. Take the Seventh Circuit's quotation of Arthur Miller's *Death of a Salesman* on the need to protect older workers from age discrimination: "'You can't eat the orange and throw the peel away—a man is not a piece of fruit!'"<sup>41</sup> Likewise, in a concurrence, Justice Stevens quotes Oliver Twist, where Mr. Bumble learns of the archaic legal presumption that wives must obey their husbands.

"If the law supposes that," said Mr. Bumble, squeezing his hat emphatically in both hands, "the law is a ass—a idiot. If that's the

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J., dissenting, joined by Brandeis, J.) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .").

37. Liberman v. Riverside Mem'l Chapel, Inc., 650 N.Y.S.2d 194, 196 (App. Div. 1996) (quoting Walt Whitman, *I Sing the Body Electric*).

38. Keith v. Murfreesboro Livestock Mkt., Inc., 780 S.W.2d 751, 754 & n.2 (Tenn. Ct. App. 1989) (quoting DANTE ALIGHIERI, *THE DIVINE COMEDY*, *Inferno*, Canto 17, ll. 7–27).

39. SMITH, *supra* note 6, at 15–51.

40. This assertion seems self-evident, *pace* Professor Smith, who argues that a reader who has not read a literary work will not understand or accept a reference to it. *See* SMITH, *supra* note 6, at 66. In fact, the name of the author coupled with the gist of the reference might have a dangerously profound impact on just such a reader. *See infra* Section II.B.

41. Metz v. Transit Mix, Inc., 828 F.2d 1202, 1205 n.6 (7th Cir. 1987) (quoting ARTHUR MILLER, *DEATH OF A SALESMAN* 82 (1949)).

eye of the law, the law's a bachelor; and the worst I wish the law is,  
that his eye may be opened by experience—by experience.”<sup>42</sup>

The theme of the work is in play; language is not borrowed in a way that neglects the context of the work itself. And yet, the language retains its eloquence (or sass).

### ***B. Aristotle's Logos, Ethos, and Pathos***

The rhetorical trinity of logos, pathos, and ethos appears in the very first pages of Aristotle's *Rhetoric*,<sup>43</sup> and these three modes of persuasion remain a focus of the study of persuasive writing.<sup>44</sup> They are quickly defined: Logos stands for the art of deductive, logical proof. Pathos is the playing (or preying) upon the audience's emotions to put them “in a certain frame of mind.” The rhetoric of ethos relies upon the good character of the speaker or writer to influence others.<sup>45</sup> To the extent that formal logic keeps little outward company with poetry, fiction, and drama (aside from, say, Joseph Heller's oft-cited *Catch-22*<sup>46</sup>), the citation of literature brings ethos and pathos to the fore.<sup>47</sup>

#### *1. Literature as Ethos*

The citation of literature employs ethos on at least three levels: It invokes the authority of the author of the cited literature, it bestows additional authority on that author by the very fact of legal citation, and it may also enhance the judge's image in the eyes of certain readers. In the first case, the name of a classic author or work changes the attitude of some readers, slowing the eye or opening the mind. Robert Frost, Amy Lowell, or William Butler Yeats carry ethos if we believe they joined their literary talent with good sense and moral character, even if only by expanding or beautifying the human experience. One Fifth Circuit case drops names in this way:

The tragic heroism of Willy Loman in *The Death of a Salesman* and the furious sales competition of David Mamet's *Glengarry Glenross* suggest that salesmen such as [plaintiff] come to tolerate management pressures that many would consider to be beyond the pale.<sup>48</sup>

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42. Califano v. Goldfarb, 430 U.S. 199, 223 n.10 (1977) (Stevens, J., concurring) (quoting CHARLES DICKENS, *THE ADVENTURES OF OLIVER TWIST* ch. 51).

43. ARISTOTLE, *supra* note 32, at 1356a.

44. See, e.g., SMITH, *supra* note 6, at 81–173.

45. See ARISTOTLE, *supra* note 32, at 1356a.

46. *Catch-22* is, of course, a byword for that logical, often legal conundrum where “nonexistent choices are the only ones offered.” *Tolbert v. Southgate Timber Co.*, 943 So. 2d 90, 99 (Miss. App. 2006); see also *Stuard v. Stewart*, 401 F.3d 1064, 1069 (9th Cir. 2005) (pointing out the distinction between a Hobson's Choice and a *Catch-22*); *Rhodes v. Robinson*, 408 F.3d 559, 566–67, 569 (9th Cir. 2005) (quoting *Catch-22* at length); *Roberts v. BJC Health Sys.*, 452 F.3d 737, 739 n.3 (8th Cir. 2006) (asserting that the court's holding was not a true *Catch-22* because the court explained its reasoning).

47. For a recapitulation of how ethos and pathos serve legal writing generally, see Michael Frost, *Ethos, Pathos & Legal Audience*, 99 DICK. L. REV. 85 (1994).

48. *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 514 (5th Cir. 1994) (*italics added*).



Aristotle himself places literary figures in the significant (if enigmatic) category of “ancient witnesses.”<sup>49</sup> Literary citation might also imply that a point is too generally accepted to require citation of legal precedent.<sup>50</sup> Dropping the name of a famous author or work is a simple way for judges to reinforce broad assertions.

When the assertion is lifted straight from another work, a judge has no alternative but to cite, and in citing, to invoke the work’s authority. A direct quotation of literature, even non-binding, novelistic literature, requires attribution as a matter of academic honesty.<sup>51</sup> Such attribution bears a striking resemblance to the citation of legal precedent. Far be it from the Anglo-American judge to add her own thoughts to the growth of the law; as much as possible, tradition impels her to cast decisions in terms of what has gone before.<sup>52</sup> Rule 1 of *The Bluebook* reads, “Provide citations to *authorities* so that readers may identify and find those authorities for future research.”<sup>53</sup> Mere attribution of a literary reference in the legal context imparts overtones of authority, compounding the inherent authority of the literary author’s name.

Conversely, while a piece of literature does not in and of itself bind the court in its decision, it gains legal authority by way of the precedential value of the opinion in which it appears. In this way, *Othello* has merged with First Amendment law on libel matters (“[H]e that filches from me my good name / Robs me of that which not enriches him, And makes me poor indeed”).<sup>54</sup> *Antigone* guides courts on the treatment of corpses (“The democracy of death is superior to the edicts of kings . . .” writes one judge, referencing the play).<sup>55</sup> And the Hellenistic poet Theocritus serves, on and off, to bar claims for “wrongful birth” (“For the living there is hope, but for the dead there is none.”).<sup>56</sup> Cited literature becomes woven into the fabric of the law.

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49. See *infra* Section IV.A.

50. An old rhetorical ploy in and of itself. See, e.g., *Latimer v. Hamill*, 52 P. 364, 366 (Ariz. 1898).

51. BLACK’S LAW DICTIONARY 1187 (8th ed. 2004) (defining plagiarism); John M. DeStefano, Op-Ed., *Revealing Our Invisible Guides*, THE HARVARD CRIMSON, Sept. 18, 2000 (quoting Gordon HARVEY, WRITING WITH SOURCES: A GUIDE FOR HARVARD STUDENTS 25 (1996)), available at <http://www.thecrimson.com/article.aspx?ref=101417>.

52. See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 254–56 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000).

53. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1, at 45 (Columbia Law Review Ass’n et al. eds., 18th ed. 2005) (emphasis added).

54. *Spencer v. Kemna*, 523 U.S. 1, 24 n.5 (1998) (Stevens, J., dissenting) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 12 (1990) (quoting WILLIAM SHAKESPEARE, *OTHELLO* act 3, sc. 3)).

55. “‘The democracy of death is superior to the edicts of kings. . . . Sophocles had immortalized Antigone, who vindicated the like sentiment of human nature as a higher law than that of her sovereign.’” *Pollard v. Phelps* 193 S.E. 102, 107 (Ga. Ct. App. 1937) (quoting *Kyles v. S. Ry. Co.*, 61 S.E. 278, 281 (N.C. 1908)).

56. “It is basic to the human condition to seek life and hold on to it however heavily burdened. . . . ‘For the living there is hope, but for the dead there is none.’” *Gleitman v. Cosgrove*, 227 A.2d 689, 693 (N.J. 1967) (quoting Theocritus), *abrogated by* *Berman v. Allan*, 404 A.2d 8 (N.J. 1979). *Gleitman* lives on as good law in Wisconsin. See *Dumer v. St. Michael’s Hosp.*, 233 N.W.2d 372, 377–78 (Wis. 1975).

Finally, a citation of literature may affect a judge's ethos. For a judge to cite literature suggests to readers that she herself is indeed literate. Because the use of a famous author's name lends authority to abstractions, a literary citation may particularly influence a reader who is unfamiliar with the literary work or author. This reader lacks the immediate means to dispute the literature's use and interpretation by the court. When a court succeeds in persuading such a reader, real concerns about the legitimacy of such authority emerge.<sup>57</sup> Aristophanes' play *The Wasps* ridicules the legal excesses of ancient Greece, an odd work to cite for the pedigree of the right to a fair hearing, unless your reader has not read it.<sup>58</sup> Similarly, the Second Circuit errs when it cites Plautus as a "Roman philosopher";<sup>59</sup> Plautus was not a philosopher but another comedic playwright. The problem of one reader's ignorance exacerbates the problem of judicial elitism, reinforcing the importance of cite-checking and scrutinizing non-legal authority.

## 2. Literature as Pathos

The pathos of a literary reference is often not far to seek. In the earlier example from *Oliver Twist*, Mr. Bumble's indignation is rooted in his self-interest. The authorities want to hold him responsible for his wife's actions because the law presumes she acts under his control. His crude instinct toward gender equality resonates ironically with the social concerns of Dickens' age and our own. "Indignation" is the operative word: Aristotle defines the emotion first as "pain caused by the sight of undeserved good fortune," and later more generally as the feeling that attends good and honest people who loathe any kind of injustice.<sup>60</sup> Mr. Bumble feels indignant that a sexist presumption lets his wife go unpunished; the reader might feel indignant that the presumption existed at all.

More overt examples exist. For instance, in *Texas v. Johnson*, Chief Justice Rehnquist uses literature to evoke a certain kind of national pride: pride in the United States flag.<sup>61</sup> He dissents from the majority's holding that flag burning is protected expression under the First Amendment. Quoting over seventy lines collectively of Ralph Waldo Emerson ("Concord Hymn"), Francis Scott Key ("The Star-Spangled Banner"), and John Greenleaf Whittier ("Barbara Frietchie"),<sup>62</sup> Rehnquist's dissent is, to say the least, a naked appeal to sentiment, riding on the emotional content of poetry.

Emotional ploys ensconce themselves elsewhere in the law. Psychological manipulation of the jury is familiar terrain to the trial lawyer.

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57. These concerns prompt Michael Smith to warn writers against citing literature for broad substantive propositions. After all, fiction is fiction. See SMITH, *supra* note 6, at 71. This may be a case of misplaced doubts. See *infra* Part III.

58. "T'was a very acute and intelligent man, whoever it was, that happened to say, / Don't make up your mind till you've heard both sides." *Givens v. Poe*, 346 F. Supp. 202, 207 (W.D.N.C. 1972) (quoting Aristophanes' "legal satire" as historical support for the right to a fair hearing).

59. *Donahue v. Windsor Locks Bd. of Fire Comm'rs*, 834 F.2d 54, 57 (2d Cir. 1987).

60. ARISTOTLE, *supra* note 32, at 1387a–1387b.

61. 491 U.S. 397, 422–25 (1989) (Rehnquist, C.J., dissenting).

62. See *id.*

Narratives can serve as a vehicle for pathos that endows the logical machinery of the law with much-needed human context.<sup>63</sup> Naturally, the emotional effects of literature can be a force for good as well as ill.<sup>64</sup> But, as noted above, if literary pathos is prejudicial in a legal argument, opposing counsel or a reviewing court can expose it and counteract it. The marketplace of ideas works; wholesale condemnation is not necessary.<sup>65</sup> Some scholars have called on courts to employ even more pathos in delivering their decisions.<sup>66</sup>

## II. THE RHETORIC OF NARRATIVE, UNWRITTEN LAW, AND MAXIM

Logos, ethos, and pathos are not the only rhetorical qualities of literature; literature exists in both broader and narrower dimensions. Broadly, literature often takes the narrative form, a vehicle with rhetorical qualities of its own. Literature also embodies a cultural institution, a reference point for unwritten norms of society. More narrowly, literary quotations frequently become familiar, and once familiarized they become another kind of rhetorical touchstone: the maxim. This section addresses each of these qualities in turn.

### A. *Literature as a Source of Narrative*

One critic from the Law and Literature movement, Professor Ferguson, has noted the intrinsic parallel between judicial opinions and narrative itself.<sup>67</sup> A judicial opinion is unavoidably a distillation of complex events.<sup>68</sup> The inferences, the assumptions, and the persuasive goals of the judge all leave their mark on his account of reality. In sum, judges become the moral historians of ordered society: Judges array the past to serve as a normative catalogue of good and evil.<sup>69</sup> The narrative nature of the judicial opinion makes these reductive results more useful and palatable. Ask any student who has experienced the case method in law school—narrative serves as a go-between for reality and the law.

Literary narrative is especially useful to judges who construct the laws of society with reference to complex norms that have gone before. The Law and Literature movement asks poets and critics to learn from the yes–no decisions of the legal world,<sup>70</sup> but literature remains an area where yes–no decisions take a back seat to aesthetics and contradiction is accepted and explored. Like life more

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63. See Yoshino, *supra* note 20, at 1881–82.

64. See *id.* at 1885–94 (arguing that victim-impact statements are an illegitimate use of emotional narrative in the law, but that storytelling has value to the legal academy); Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?*, 18 YALE J.L. & HUMAN. 1, 5 (2006) (calling on the legal profession to become more self-aware in its use of narrative).

65. See *supra* notes 36–38 and accompanying text.

66. For arguments that narrative constitutes a newfangled fourth mode of persuasion (“mythos”) which stands in counterpoise to logos, see Teresa G. Phelps, *Narratives of Disobedience: Breaking/Changing the Law*, 40 J. LEGAL EDUC. 133 (1990); accord *infra* Part II.A.

67. Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 211 (1990).

68. *Id.*

69. *Id.* at 214.

70. Gibson, *supra* note 30, at 919.

generally, literary masterpieces fuel discourse among schools, critics, and society at large. The citation of literature places the court's value judgments before the living bier of human experience. Hence, the U.S. Supreme Court cites Dickens' *Pickwick Papers* as grounds to question an oppressive debt collection technique.<sup>71</sup> In another case, illegally obtained evidence calls to mind the work of *Oliver Twist*, who breaks into a house because his master can't fit through the window.<sup>72</sup>

Sophocles' play, *Oedipus Rex*, has been used to distinguish two forms of regret. The first is regret at unintended, harmful consequences—the type of regret felt by Oedipus, who “not only did not know, but had no reason to know, that he had killed his father and married his mother.”<sup>73</sup> The second is regret for having violated the law, of having intended to cause harmful consequences.<sup>74</sup> Judge Posner himself has ruled that under the sentencing guidelines, Oedipal guilt is insufficient; only one's recognition of criminal responsibility will serve to mitigate a criminal sentence.<sup>75</sup>

Stories resonate with reality outside the courtroom, even more recent reality: A New York Family Court judge, for example, quotes Ralph Ellison's *Invisible Man* to illustrate the marginalization of a juvenile delinquent:

“I am invisible man. [sic] No, I am not a spook like those who haunted Edgar Allan Poe . . . I am invisible, understand, simply because people refuse to see me . . . When they approach me they see only my surroundings, themselves, or figments of their imagination . . . anything except me. It is . . . often . . . wearing on the nerves . . . you doubt if you really exist . . . It's when you feel like this that . . . you ache with the need to convince yourself that you do exist in the real world . . . and you strike out with your fists, you curse, and you swear to make them recognize you. And, alas, it's seldom successful.”

Perhaps a history of our time will someday define the function of the law and its courts as the intervenor between an individual struggling to be recognized as human and the vast bureaucracy which tends to dehumanize him. . . .

[I]t is criminal when we are given a chance to intervene and let it pass us by. The court is here given this opportunity, indeed, the positive statutory duty to do so. . . . [I]t will not allow this opportunity to slip through its fingers.<sup>76</sup>

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71. “Mr. Dickens noted [the cognovit device] with obvious disfavor.” D. H. Overmyer Co. of Ohio v. Frick Co., 405 U.S. 174, 177 (1972) (citing CHARLES DICKENS, *PICKWICK PAPERS* ch. 47).

72. “Such an injunction should issue lest federal agents accomplish illegal results by boosting *Oliver Twists* through windows built too narrow by those Rules for their own ingress.” *Cleary v. Bolger*, 371 U.S. 392, 407 (1963) (Douglas, J., dissenting). In a footnote, Justice Douglas quotes a paragraph from the *Oliver Twist* episode. *See id.*

73. *United States v. Lopinski*, 240 F.3d 574, 576 (7th Cir. 2001).

74. *Id.*

75. *Id.*

76. *In re Carlos P.*, 358 N.Y.S.2d 608, 609 (Fam. Ct. 1974) (quoting RALPH ELLISON, *INVISIBLE MAN* (1952)).

As narratives pass through time, they become recognizable points of reference, in some ways as real and familiar as the facts of the case at issue. As Professor Brooks has pointed out, these narrative reference points have an irreplaceable quality, being “a form of explanation and argument deployed for kinds of meanings that are time dependent and sequential, that do not lend themselves to other kinds of statement.”<sup>77</sup> The passage quoted in the case above comes from the prologue of Ralph Ellison’s book; they set the stage for the start of that narrative just as they set the stage for the court’s conclusion. The court employs a piece of literary narrative, which suggests the whole of the literary narrative, in the making of its own.

### ***B. Literature as Unwritten Law***

The use of norms from literature implicates not only the court’s rhetorical approach, but also its powers of equity. In the *Rhetoric*, Aristotle readily embraces an idea of equity that transcends established law.<sup>78</sup> Incidentally, Aristotle himself invokes literary authority (Sophocles’ *Antigone*) to support his argument: The character Antigone invokes unwritten law when she agitates for the burial of her brother’s corpse.<sup>79</sup> We might say *Antigone* exhibits unwritten law in two senses: the unwritten law at issue in the play<sup>80</sup> and the unwritten law that the play represents in Aristotle and culture at large. The distinction between written and unwritten law is really a distinction between the positive law that communities enact and a residual cultural sense of right and wrong.<sup>81</sup> Enduring literature can become apt evidence of the latter.

Indeed, in modern times the story of *Antigone* continues to support the legal paradigm of honoring the dead, from the Supreme Court on down. In a recent case balancing the policies of the Freedom of Information Act against the sanctity of Vince Foster’s corpse, Justice Kennedy wrote, “The power of Sophocles’ story in *Antigone* maintains its hold to this day because of the universal acceptance of the heroine’s right to insist on respect for the body of her brother.”<sup>82</sup> The Missouri Supreme Court cites *Antigone* on respect for the dead in the belief that literature “reflects human values.”<sup>83</sup> Other examples abound.<sup>84</sup>

Literature alone does not determine justice. Consider the wide, unbridled variety of propositions one might cull from the Great Books, compounded by questions of context and interpretation. Mr. Bumble thinks the law an ass for presuming women inferior to men. Hamlet might disagree.<sup>85</sup> Ibsen, Shakespeare,

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77. Brooks, *supra* note 64, at 5.

78. See ARISTOTLE, *supra* note 32, at 1373b.

79. *Id.* (quoting SOPHOCLES, *ANTIGONE* 456–57).

80. Cf. POSNER, *supra* note 10, at 111–12 (analyzing the “competing visions of justice” represented in Sophocles’ *Antigone*).

81. See ARISTOTLE, *supra* note 32, at 1368b.

82. Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157, 168 (2004).

83. State v. Bratina, 73 S.W.3d 625, 628 (Mo. 2002).

84. E.g., Kellogg v. Office of Chief Med. Exam’r of New York, 735 N.Y.S.2d 350, 355 (Sup. Ct. 2001); Will of Sperling, 400 N.Y.S.2d 279, 281 (Sur. Ct. 1977).

85. “[F]railty, thy name is woman!” WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 2.

Horace, and Euripides illustrate the human urge to visit sins of the fathers upon the sons; the modern court decides whether to continue or reject that tradition.<sup>86</sup> Judge Posner suggests that the “overt moral content” of great literature is the outdated morality of its day,<sup>87</sup> acknowledging that works like *The Iliad* and Shakespeare’s *The Merchant of Venice* humanize their villains in a way that detaches from that morality.<sup>88</sup> The trouble is, the morality of the day and the morality of the author are not so easily separated. According to Judge Posner, “[i]f you read the *Iliad* carefully you can have no doubt that you are meant to think it a fine thing that the Trojans are going to be slaughtered.” But Achilles’ revenge, the climactic slaughter of twelve Trojans in *Iliad* XXI, is the very moment in the poem where the narrator explicitly sides with the Trojans: Achilles “leapt in like some immortal, / with only his sword, *but his heart was bent upon evil actions*, / and he struck in a circle around him.”<sup>89</sup> It is not fine that the Trojans are slaughtered. The narrator is not detached.

The idea that a literary citation offers any kind of “eternal truth”<sup>90</sup> to a judicial opinion raises particular doubts when the courts themselves disagree on a piece of literature’s significance. Take the criminal fraud case of *United States v. Andrews*, in which a United States District Court rested its sentencing departure on metaphorical brimstone, citing Dante on the damnation of the avaricious.<sup>91</sup> The Fifth Circuit reversed, holding that it was not the role of a judge to displace congressionally established sentencing guidelines with a turn-of-the-13th-century poet’s metaphysical musings on Hell.<sup>92</sup>

But if literature is a subjective framework, it is no more so than the law itself. Legal theorists who embrace social sciences as objective but reject literature as too subjective deny the subjectivity in the law that admits of various social-science perspectives. Oliver Wendell Holmes, himself partial to the influence of economics,<sup>93</sup> could not deny the ultimate subjectivity of the law. In fact, he once illustrated the point with a literary reference:

We practice law, not “justice.” There is no such thing as objective “justice,” which is a subjective matter. A man might feel justified in

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86. See, e.g., *Tison v. Arizona*, 481 U.S. 137, 184 & n.20 (1987) (Brennan, J., dissenting) (citing Ibsen, Shakespeare, Horace, and the Book of Exodus); *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 564 (3d Cir. 2002) (citing Euripides, Horace, and Shakespeare); *Woolbert v. Kimble Glass, Inc.*, 54 F. Supp. 2d 539, 543 (W.D.N.C. 1999) (citing *Misenheimer v. Misenheimer*, 325 S.E.2d 195, 198, *reh’g denied*, 334 S.E.2d 778 (N.C. 1985) (citing Euripides and Shakespeare)).

87. See POSNER, *supra* note 10, at 299–302.

88. *Id.* at 304.

89. THE ILIAD OF HOMER XXI.18–20 (Richmond Lattimore, trans., Univ. of Chi. Press 1951) (emphasis added). The Greek phrase where the narrator passes judgment is “κακά δὲ φρεσὶ μῆδετο ἔργα.”

90. See, e.g., Kahn, *supra* note 13, 114 S. AFR. L.J. at 618 (“Truth, the constancy of human nature, and the presence of eternal values become reinforced by literary quotations from authors of high standing.”).

91. 301 F. Supp. 2d 607, 611–12 (W.D. Tex. 2004).

92. See *United States v. Andrews*, 390 F.3d 840, 850 n.23 (5th Cir. 2004).

93. Balkin & Levinson, *supra* note 12, at 156–57, 167.

stealing a loaf of bread to fill his belly; the baker might think it most just for the thief's hand to be chopped off, as in Victor Hugo's *Les Misérables*. The image of justice changes with the beholder's viewpoint, prejudice or social affiliation.<sup>94</sup>

And yet, Victor Hugo can still teach us. A Tenth Circuit opinion cites *Les Misérables* to invalidate the guilty plea of a teenager who accepted forty years in prison for armed robbery without any criminal record or legal advice:

In the great novel, *Les Misérables*, Jean Valjean who had stolen a loaf of bread to feed his sister's children was arrested and sentenced to prison. Victor Hugo, the author, makes the following comment: "There are in our civilization terrible hours. They are those mournful moments when society consummates its withdrawal from and pronounces shipwreck upon a human soul. Jean Valjean was given five years in the galleys."

That was fiction. Here we are dealing with facts, but the human equation runs through it all. In law, as in life, all facts and circumstances must be examined before just conclusions are reached. When the light of reason and the logic of analysis are brought to bear on the facts of record, they preclude any other reasonable conclusion that Lesley did not fully comprehend the need of an attorney and did not intelligently waive his right to court-appointed counsel.<sup>95</sup>

In spite of mutual indeterminacy in literature and the law, courts manage to make normative use of the subjective literary experience.

We trust in a court's intuition, its sense of policy and equity, for the just result. This is the "unwritten law" that pervades our legal system. Aristotle regards equity<sup>96</sup> as a natural force that makes up for the defects, omissions, and inevitable shortcomings of the written law—that is, the legislated code.<sup>97</sup> Today's judge assumes much of the same responsibility. Bench trials were the norm in the English courts of equity,<sup>98</sup> and it is still the spirit of equity that enables judges to move beyond the letter of the law. Literature can become one tool of that equity, a tool of sometimes greater, sometimes lesser strength.

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94. *State v. Streiff*, 673 N.W.2d 831, 839–40 (Minn. 2004) (Anderson, J., concurring) (quoting LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 608 (1991)) (emphasis omitted).

95. *Lesley v. Oklahoma*, 407 F.2d 543, 547 (10th Cir. 1969) (Marvin Jones, J., concurring).

96. ARISTOTLE, *supra* note 32, at 1374b (referring to τὸ ἐπιεικὲς, which translates as "equity," or "fairness").

97. *See id.* at 1374a–1374b.

98. On the absence of juries in equitable claims, see *Feltner v. Columbia Pictures TV*, 523 U.S. 340, 347–48 (1998).

*C. Homer, Browning, and Aristotle: Literature as Maxim*

The Supreme Court of Pennsylvania has cited Homer for the idea that friendship arises in unexpected ways.<sup>99</sup> Somerset Maugham protects criticism as fair use under copyright law: “People ask . . . for criticism, but they only want praise.”<sup>100</sup> Simpler than the narrative paradigm, these examples come closer to a different rhetorical device: the maxim.

Aristotle defines a maxim as a general proposition that advocates a particular course of practical, often moral conduct.<sup>101</sup> Painted in broad strokes, maxims become especially useful to inspire feelings of indignation in hearers, particularly as a preface to argument or when the facts have already been proved.<sup>102</sup> Thus, the Maryland Court of Appeals added a lesson from Jane Austen to a judgment against a fraud plaintiff: “Had Mr. Litty been mindful . . . that ‘(b)usiness . . . may bring money, but friendship hardly ever does,’ he may not have become an appellant in this litigation.”<sup>103</sup> The Army Court of Military Review used the same breed of allusion to uphold an officer’s court-martial for raping his daughter.<sup>104</sup> The court found sufficient evidence to support the guilty verdict in the visceral account of the child’s pain with a line from Elizabeth Browning: “The child’s sob in the silence curses deeper than the strong man in his wrath.”<sup>105</sup>

The richness of literature as a source of maxims is attested by Aristotle’s own illustrations. Six come from the work of the ancient Greek tragedian Euripides, and two from *The Iliad*.<sup>106</sup> At the same time, the good rhetorician deploys maxims with care. Because maxims tend to color outside the lines of reality, they can often contradict one another, much like the canons of statutory construction lawyers use every day.<sup>107</sup> “Look before you leap,” but “he who hesitates is lost.” Aristotle acknowledges this seeming weakness of maxims and actually encourages its exploitation: Invoke one maxim that contradicts another if doing so “will raise your hearers’ opinion of your character or convey an effect of

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99. Bloom v. Selfon, 555 A.2d 75, 77 (Pa. 1989) (quoting THE ODYSSEY) (upholding a bequest to a former in-law).

100. Campbell v. Acuff-Rose Music, 510 U.S. 569, 592 (1994) (quoting SOMERSET MAUGHAM, OF HUMAN BONDAGE 241 (Penguin Books 1992)).

101. See ARISTOTLE, *supra* note 32, at 1394a.

102. *Id.* at 1395a.

103. Dixon v. Process Corp., 382 A.2d 893, 896 n.6 (Md. Ct. Spec. App. 1978).

104. United States v. Clark, 15 M.J. 974, 977 (A.C.M.R. 1981).

105. *Id.* at 977 n.4 (quoting Elizabeth Barrett Browning, *The Cry of the Children*, stanza 13).

106. ARISTOTLE, *supra* note 32, at 1394a–1395a. As noted before, Aristotle regards poets as “ancient witnesses” whose judgments are known to all. *Id.* at 1375b. Note that these witnesses are not subject to cross-examination. See Yoshino, *supra* note 20, at 1845–46 (discussing Plato’s Protagoras).

107. See Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950) (listing out dozens of statutory canons alongside their opposites).



strong emotion.”<sup>108</sup> Taking this approach, a speaker or writer assumes a voice of greater moral authority than that of the maxim itself.

Some literary citations serve as maxims in this counterintuitive manner, as a foil for the legal point being made. Judge Goldberg from the Fifth Circuit Court of Appeals treats Robert Browning this way, in the context of an age discrimination suit:

“Grow old along with me!  
The best is yet to be,  
The last of life, for which the first was made.”

For many elder Americans, Browning’s verse is a cruel jest rather than a reassuring vision. Not only must they face the inexorable advance of nature—they must face the biases of their fellow man.<sup>109</sup>

It is the falsity of the quotation that affirms Judge Goldberg’s argument. Taking Joyce Kilmer’s immortal line, “I think that I shall never see / a poem as lovely as a tree,” a federal district court points out that trees lose their primeval appeal when they become the subject of litigation.<sup>110</sup> Finally, a New York opinion acknowledges Sophocles’ dictum that “There is a point at which even justice is unjust.” The opinion turns on a dime: “However harsh the law is we must abide by it.”<sup>111</sup>

Other axioms in the law suggest the value of these saws. Like canons of construction, they might serve as a vehicle for “public values” to inform judicial reasoning. Both can offer a ray of truth in one context, or sharpen the focus of an opposing point of view in another. If canons of construction provide a framework for interpretive stability, a familiar literary maxim invokes a broader continuity of culture at large.<sup>112</sup>

### III. LITERARY RHETORIC AS A FORM OF LEGAL FICTION<sup>113</sup>

Looking at literary citation as a rhetorical approach reveals many of its pragmatic qualities. Literature combines the appeal of ethos and pathos; it can enrich the judicial narrative as an inductive representation of moral life; it provides some basis for invoking the “unwritten laws” of society; and it can serve up

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108. ARISTOTLE, *supra* note 32, at 1395a.

109. Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 637 (5th Cir. 1985) (quoting Robert Browning, *Rabbi Ben Ezra* (1864)) (citation omitted), *abrogated by* St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

110. County of Westchester v. Town of Greenwich, 793 F. Supp. 1195, 1197 (S.D.N.Y. 1992) (subsequent history omitted).

111. People v. Truppin, 213 N.Y.S.2d 469, 472 (Ct. Gen. Sess. 1961) (quoting Sophocles’ *Electra*).

112. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 914–16 (3d ed. 2001).

113. Many fictional animals inhabit the law, including fictional cats: “Magique’s behavior was innocuous, especially when compared with other cat-created risks widely tolerated by our society. (For an illustration of these other risks in verse, see T.S. Eliot’s *Old Possum’s Book of Practical Cats*.)” Boyer v. Seal, 553 So. 2d 827, 835 (La. 1989).

maxims on the right occasion. But is the citation of literature rhetorically *necessary*?

To start with, literary citation is not the only rhetorical trick courts use. Legal fictions also enable a court to break out of an existing rule of law or moral stricture.<sup>114</sup> The typical legal fiction superimposes an artificial premise upon the facts of the case to lead to the right result under the existing rule. An attractive nuisance “invites” a trespasser, giving the landowner a duty of care that would not otherwise exist.<sup>115</sup> Lon Fuller analogizes such legal fictions to similar methods in math and science, which use illusory concepts of mass and energy and negative numbers.<sup>116</sup> Economics rests on its own set of fictions, with their own limitations. Fuller explains, “The fiction that man is an ‘economic animal’ has great utility when one’s problem is to develop laws of economic behavior; taken as a foundation for ethics it would be disastrous.”<sup>117</sup>

Fuller recognizes that judges write to persuade not only their audiences, but also their own consciences.<sup>118</sup> Inside and out, the judicial process rides on “the desire to keep the form of the law persuasive.”<sup>119</sup> The imprecision of rhetorical technique remains a vital element of judicial decisionmaking. “[R]hetoric is frequently an intellectual shortcut. It is often a matter of the greatest difficulty to frame a satisfactory exposition of reasons that one feels—inarticulately—are sound.”<sup>120</sup> Fuller continues:

The desire to keep the form of the law persuasive is frequently the impulse to preserve a form of statement that will make the law acceptable to those who do not have the time or capacity for understanding reasons that are not obvious—and this class sometimes includes the author of the statement himself.<sup>121</sup>

As Pascal might have said, a judge’s heart has its reasons which reason itself cannot know.<sup>122</sup> Herein lies the nexus with literary citation. A citation of fiction can serve as a proxy for strict reason. That fiction takes on legal authority. And in Fuller’s philosophy, this is a persuasive process that makes up in elegance what it lacks in logical integrity.

Fiction is useful because it can fill in for truth when truth becomes too strange; as Lord Byron wrote (and the Supreme Court quotes): “[T]ruth is always strange, Stranger than fiction.”<sup>123</sup> One might say literature serves as a kind of

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114. LON L. FULLER, *LEGAL FICTIONS* 53 (1967).

115. *Id.*

116. *Id.* at 116–20.

117. *Id.* at 107.

118. *See id.* at 26.

119. *Id.*

120. *Id.* at 27.

121. *Id.*

122. *See* BLAISE PASCAL, *PENSÉES* 158 (Honor Levi trans., Oxford Univ. Press 1999) (1670).

123. *Denton v. Hernandez*, 504 U.S. 25, 33 (1992) (quoting LORD BYRON, DON JUAN, Canto XIV, stanza 101 (T. Steffan, E. Steffan & W. Pratt eds., 1977)) (allegations that seem unlikely are not necessarily frivolous).

camera obscura for truths that are too bright for the law to comprehend directly; that the aesthetic fuses the moral and the real. From the standpoint of professional education, Professors Balkin and Levinson may be right that “[t]he humanities . . . are something that the law enjoys as long as it can afford them,”<sup>124</sup> but it is likewise true that in the practice of law, literature can fill a need. Motherly love,<sup>125</sup> burial customs,<sup>126</sup> national pride,<sup>127</sup> and futuristic dystopias<sup>128</sup> may not welcome other forms of proof. Literature goes places where economics, history, philosophy, statistics, and other disciplines cannot. In these places, literature becomes a necessary crutch for both judge and reader to reckon with the ineffable.

#### IV. LAW AND LITERATURE: THE WAGES OF CRITICISM

The Law and Literature movement has not, on the whole, directly addressed the phenomenon of courts’ citing favorite poems, classic novels, and the like.<sup>129</sup> Some critics use literary classics to argue for or against various legal norms,<sup>130</sup> but otherwise, the Law and Literature movement has mostly restricted itself to two areas: the study of law *as* literature and depictions of law *in* literature.<sup>131</sup> These two foci of the Law and Literature movement—the law as text and depictions of the law in literature—provide more avenues for the exploration of literary citation.

##### A. Interpretive Interlude: Robert Frost and Huckleberry Finn

Like its statutory and common law counterparts, the citation of literature inevitably requires interpretation. Courts constantly wrestle with problems of meaning, of ambiguity, of legislative intent, but the form of literary works and the context that created them pose a different set of interpretive challenges for the courts. If literature reflects human values, it does so in ambiguous, ironic, debatable, and even inscrutable ways.<sup>132</sup>

Literary critics have plied their trade on legal texts;<sup>133</sup> these matters of interpretation become all the more pronounced when it comes to legal citation of literary authority. Judge Posner argues that literature is prone to tendentious use by lawyers.<sup>134</sup> Either Judge Posner rejects the place of rhetoric in the legal sphere (after all, what legal sources *aren’t* prone to tendentious use by lawyers?), or he asks us to draw a distinction between legitimate and illegitimate literary

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124. Balkin & Levinson, *supra* note 12, at 177.

125. *See supra* note 17 and accompanying text.

126. *See supra* note 55 and accompanying text.

127. *See supra* notes 61–62 and accompanying text.

128. *See supra* note 19.

129. *See supra* note 13.

130. *E.g.*, LITERATURE AND LEGAL PROBLEM SOLVING: LAW AND LITERATURE AS ETHICAL DISCOURSE (Paul J. Heald ed., 1998).

131. Weisberg, *supra* note 22, at 1.

132. *Cf.* POSNER, *supra* note 10, at 299–302 (noting that many great works of literature are still appreciated in spite of, rather than because of, their original moral context).

133. *See, e.g.*, JAMES BOYD WHITE, HERACLES’ BOW 77–106 (1985).

134. POSNER, *supra* note 10, at 175 (discussing the danger of focusing too greatly on legal content in works of fiction).

interpretation in the legal world. While sharp distinctions are difficult to draw, courts can misapply literature the same way courts can misapply case law.

Dramatic speech in a literary work can be particularly problematic when courts quote it. Take the cliché “good fences make good neighbors,” which appears in Robert Frost’s poem “Mending Wall.”<sup>135</sup> Numerous cases cite “Mending Wall” for the truth of the maxim that “good fences make good neighbors.”<sup>136</sup> Only a few consider the phrase in context. The poem “Mending Wall” describes an encounter between the narrator of the poem and his neighbor mending the wall between their properties. It is the neighbor who utters, “Good fences make good neighbors,” and the narrator spends the rest of the poem doubting the truth of this statement. Yet, under the Second Circuit’s interpretive adjudication, “Robert Frost counseled that ‘good fences make good neighbors.’”<sup>137</sup> The reference is a transparent attempt to elevate a cliché, a cliché which Frost’s poem as a whole criticizes.

Speech-act theory points out that the very act of writing a novel and the words of the characters inside it drive a wedge between the putative meaning of the work and the intent of the author who wrote it.<sup>138</sup> A similar phenomenon takes place on the legislative side, where the legislative history to an act is distinct from the act itself and may include statements by different legislative “actors.”<sup>139</sup> But legislative history differs in that it has a legislative purpose; when judges directly quote literature, they may not be thinking of an author’s or speaker’s intent. Moreover, the judge appropriates a piece of non-legal literature and imposes upon it the adjudicative intent of the judge; the judge presses the author into judging.

The difficulties of meaning and authorial intent become more pronounced with literature that is remote from contemporary America in time, culture, or geography. Poetry today is a marginalized, academized genre.<sup>140</sup> Should judges interpreting the poetry of Homer or Euripides take into account the standing it enjoyed in ancient Greece as a stylized bardic creation or central religious institution?<sup>141</sup> Should a drinking song by a lyric poet courtier of despotic Athens

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135. ROBERT FROST, COLLECTED POEMS, PROSE, & PLAYS 39 (1995).

136. See, e.g., *Scribner v. Summers*, 84 F.3d 554, 560 (2d Cir. 1996); *Wunder v. Jorgensen*, No. LACV 062983, 2004 WL 3569694, at \*1 (Iowa Dist. Ct. Feb. 6, 2004).

137. *Scribner*, 84 F.3d at 560. Not all courts get it so wrong. See, e.g., *Carr v. Inga*, No. CV030824440S, 2003 WL 22598338, at \*1 (Conn. Super. Ct. Oct. 30, 2003); *Wedlock v. Troncoso*, 712 N.Y.S.2d 328, 331 (Sup. Ct. 2000).

138. See TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION 102–04 (2d ed. 1996) (discussing how speech-act theory refutes the humanist assumption that a literary text represents the voice of the author, though it does so at the risk of dehumanizing the text and its reader altogether); cf. UMBERTO ECO, SIX WALKS IN THE FICTIONAL WOODS 15–25 (1994) (exploring the difference between a story’s author, its points of view, and points of view within points of view).

139. See, e.g., FED. R. EVID. 412 advisory committee’s notes.

140. See generally DANA GIOIA, CAN POETRY MATTER?: ESSAYS ON POETRY AND AMERICAN CULTURE (2002).

141. The foundational authority on the Homeric oral tradition is THE MAKING OF HOMERIC VERSE: THE COLLECTED PAPERS OF MILMAN PARRY (Adam Parry ed., 1971). For a brief account of how intricately Greek drama involves its cultural context, see Shirley A.

bear on the question of temperance policies at the turn of the 20th century in Pennsylvania? (“Fruitful earth drinks up the rain / Trees from earth drink that again, / The sea drinks the air, the sun / Drinks the sea, and him the moon again. / Is it reason then, do ye think, / I should thirst when all else drink?”)<sup>142</sup> What was the place of drinking songs in ancient Greece? Who sang them and to whom? Were the Greeks drinking what the Pennsylvanians were drinking?

This kind of argument—along the lines of Judge Posner’s assumption that the only overt moral content of literature is the morality of its own time<sup>143</sup>—begins to sound too cute. Judges are judges, not literary critics, the author is (perhaps) dead, and literary criticism is not about clear answers.<sup>144</sup> If a judge likes a quotation, why can’t he take the text at its word? The outer limit might be analogous to an abuse of discretion or rational basis standard; courts should take care to invoke literature with at least a rational interpretation in mind.<sup>145</sup>

There are also less forceful ways for a court to present literature in an opinion: Some citations invite the reader to interpret for herself, presenting the work as a narrative archetype or in some way invoking the work as a whole. By laying down the context of an episode from *Les Misérables* or *The Inferno*, a court introduces the literary work on more objective terms, terms which speak to the integrity and legitimacy of the court’s own relationship with the literature. An opinion from Missouri, cited earlier, demonstrates this approach in a case on the lawfulness of abandoning a corpse.

Consider this scene from the American classic, *The Adventures of Huckleberry Finn* by Mark Twain, where Huck Finn and his friend Jim canoe over to a flooded island in the Mississippi. The pair comes upon a house and enters through an upstairs window. At daybreak, they look in the window. Huck, the narrator, describes their adventure:

There was something laying on the floor in the far corner that looked like a man. So Jim says:  
 “Hello, you!”  
 It didn’t budge. So I hollered again, and Jim says:  
 “De man ain’t asleep—he’s dead. You hold still.”  
 He went, and bent down and looked, and says:  
 “It’s a dead man. Yes, indeedy; naked, too. He’s ben shot in the back. I reck’n he’s ben dead two er three days.  
 Come in, Huck, but doan’ look at his face—it’s too

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Barlow and Richard Seaford’s frontmatter to EURIPIDES, *BACCHAE* 1–54 (Christopher Collard ed., Richard Seaford trans., 1996).

142. *In re Ind. County Licenses*, 6 Pa. D. 358, at \*1 (Quar. Sess. 1897) (quoting John Stuart Mill quoting Anacreon, Greek lyric poet of the 6th century B.C.).

143. See POSNER, *supra* note 10, at 299–302.

144. See generally EAGLETON, *supra* note 138, at 1–14.

145. Professor Brooks urges legal actors to scrutinize more closely their own use of narrative. “The more we study modalities of narrative presentation, the more we may be made aware of how narrative discourse is never innocent but always presentational and perspectival . . . .” Brooks, *supra* note 64, at 25. These considerations are compounded when a court uses literary narrative to support its own analytical narrative.

gashly.”

I didn’t look at him at all. Jim threw some old rags over him but he needn’t done it; I didn’t want to see him.

[The narrator then recounts how Huck and Jim made a “good haul” of belongings in the house and then left:] I paddled over to the Illinois shore, and drifted down most a half a mile doing it. I crept up the dead water under the bank, and hadn’t no accidents and didn’t see nobody. We got home all safe.

If Huck Finn and his friend Jim were real 21st century Missourians, might they be facing a D felony for abandonment of a corpse?<sup>146</sup>

The court decided not: Unlawful abandonment of a corpse can only flow from a preexisting duty to the corpse.<sup>147</sup> But by quoting at length, it let the reader judge the literature herself, with the judge’s notions of meaning and authorial intent kept at a safer distance.<sup>148</sup> This is the difference between citing literature as an inspired example or expression for the reader to interpret, and excising a literary reference entirely from its context to elevate the judge’s own argument. In the former case, literature can serve as a repository of human observations, as a chronicle of human struggles, and as a faithful reflection of the irrational complexity of life. In the latter case, a court risks shrouding the Muse in a robe, putting a gavel in her hand, and telling her where to strike.

#### ***B. Literature that Depicts the Law: Charles Dickens and William Shakespeare***

The Law and Literature movement has already picked up on one area of narrative-as-exemplar: literary depictions of the legal world.<sup>149</sup> These depictions, the argument goes, act as a useful reference point for the profession, a more humanistic and realistic take on an abstract system rational discourse.<sup>150</sup> This perspective is not without its critics: Judge Posner (ever the doubting Thomas of Law and Literature) has debated Professor Weisberg over whether its foundations are well-laid, in particular whether literature is concrete and specific enough to shed new light on a legal system that is so deeply absorbed in its own professionalized language and patterns of thought.<sup>151</sup>

Famous literary portrayals of the justice system have directly impacted legal thinking, perhaps because here, lawyers have interpretive expertise. Scholars have culled legal lessons from Horace’s *Sermones*, Melville’s *Billy Budd*, and

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146. State v. Bratina, 73 S.W.3d 625, 626–27 (Mo. 2002) (quoting MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN 65–66 (Washington Square Press 1950) (1884)) (citation omitted).

147. *Id.* at 627–28.

148. By definition, an excerpt lacks context, and to that extent the judge “interprets” the literature by choosing an excerpt, but the more complete the reference is unto itself, the easier it is for a court and its reader to guard against abusive or misleading citation.

149. Weisberg, *supra* note 22, at 1.

150. *Id.* at 17–36.

151. *Id.* at 22–36.

Dostoevsky's *Crime and Punishment*.<sup>152</sup> *Catch-22* is cited as the classic authority on law working to absurdity.<sup>153</sup> The Supreme Court often looks to Dickens' novel *Bleak House* and its cautionary view of the 19th-century British courts of equity, their inhumane torpor, and their oppressive expense.<sup>154</sup> Even Judge Posner relies on *Bleak House* in this regard.<sup>155</sup>

A similar phenomenon surrounds the appearance of legal concepts in Shakespeare's plays—a topic which has already received some attention. As early as 1907, one scholar felt inspired to collect the instances where Shakespeare displays knowledge of legal terms and maxims (many of which track Justinian in addition to the common law).<sup>156</sup> In a more recent book, Daniel Kornstein argues that by drawing on Shakespeare, the Supreme Court affirms Shelley's claim that poets are "the unacknowledged legislators of the world."<sup>157</sup> At least two articles have surveyed the array of cases mentioning Shakespeare in any capacity.<sup>158</sup> A third article joins Kornstein's book in considering what the play *Measure for Measure* can teach the legal profession in the present day.<sup>159</sup> As with Dickens, the Supreme Court itself pulls reflections on the law from Shakespeare, many of them illustrating the conventions of the common law. These include the right to face one's accuser,<sup>160</sup> the value of one's reputation at common law,<sup>161</sup> and the subtle wisdom of requiring both *mens rea* and *actus reus* for a finding of a criminal offense. ("His acts did not o'ertake his bad intent; / And must be buried but as an

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152. See Michèle Lowrie, *Slander and Horse Law in Horace, Sermones 2.1*, 17 LAW & LITERATURE 405 (2005); SUSAN WEINER, LAW IN ART: MELVILLE'S MAJOR FICTION AND NINETEENTH-CENTURY AMERICAN LAW 139–66 (1992); Paul Squires, *Dostoevsky's Doctrine of Criminal Responsibility*, 27 AM. INST. CRIM. L. & CRIMINOLOGY 817 (1936–1937); Edwin Yoder, *Melville's Billy Budd and the Trials of Captain Vere*, 45 ST. LOUIS U. L.J. 1109 (2001).

153. See *supra* note 46.

154. See, e.g., *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 49 n.19 (1994); *Coleman v. Balkcom*, 451 U.S. 949, 958 (1981) (Rehnquist, J., dissenting); *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 757 n.4 (1980); *Codispoti v. Pennsylvania*, 418 U.S. 506, 531 (1974) (Rehnquist, J., dissenting); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 393 (1973) (Burger, J., dissenting); *Scales v. United States*, 360 U.S. 924, 926 (1959).

155. *United States v. City of Chicago*, 870 F.2d 1256, 1257–59 (7th Cir. 1989).

156. WILLIAM LOWES RUSHTON, *SHAKESPEARE'S LEGAL MAXIMS* (1907).

157. DANIEL J. KORNSTEIN, *KILL ALL THE LAWYERS?: SHAKESPEARE'S LEGAL APPEAL* 241–45 (1994).

158. See Domnarski, *supra* note 13, at 317; Gleicher, *supra* note 13.

159. See KORNSTEIN, *supra* note 157, at 35–64; Amy Ross, *Vienna Then and Now: The Impact of Shakespeare's Measure for Measure on the Twenty-First Century Legal Profession*, 46 S.D. L. REV. 781 (2001).

160. See *Lilly v. Virginia*, 527 U.S. 116, 140–41 (1999) (Breyer, J., concurring) (citing WILLIAM SHAKESPEARE, *RICHARD II* act 1, sc.1; WILLIAM SHAKESPEARE, *HENRY VIII* act 2, sc. 1), *cited in* *Crawford v. Washington*, 541 U.S. 36, 60 (2004) (Scalia, J.).

161. See *Spencer v. Kemna*, 523 U.S. 1, 25 n.5 (1998) (Stevens, J., dissenting); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 12 (1990) (quoting WILLIAM SHAKESPEARE, *OTHELLO* act 3, sc. 3).

intent / That perish'd by the way: thoughts are no subjects, / Intent but merely thoughts.”<sup>162</sup>

Back to the ancients: This Note has already discussed the misplaced (though judicially enforced) debt that the right to a fair hearing owes the Greek comedian Aristophanes in his depiction of the ancient Greek legal system.<sup>163</sup> Another court cited the tragedian Euripides’ play *Heraclidae* for the same point: “In case of dissension, never dare to judge till you have heard the other side.”<sup>164</sup> Performed eight years before the debut of Aristophanes’ *Wasps*, this line was perhaps even the butt of Aristophanes’ joke.

But due process owes a far greater debt to a different tragedian who isn’t Greek and isn’t Shakespeare. A number of American courts have cited the Roman moralist and playwright Seneca, in particular a couplet from his play *Medea*: “‘If judgment’s given before both sides are heard, / The judgment may be just, but not the judge.’”<sup>165</sup> The speaker of these lines is the witch Medea.<sup>166</sup> The tyrant Creon is too swift to judge her after his son Jason abandoned her. She utters this sage warning before wreaking gory wrath on Jason’s household.<sup>167</sup> Her comment is subtler than Euripides’. Not only is it a good idea to hear both sides of a dispute, but the judge himself—the process—is morally obligated and culpable if it fails to do so. Whether or not the proper result is reached, the process must have integrity.

Medea’s impact on common law procedure occurred long before the Due Process Clauses of the Fifth and Fourteenth Amendments were written. Almost four centuries ago, Lord Coke announced his decision in *Bagg’s Case*:

And although they have lawful authority either by charter or prescription to remove anyone from the freedom, and that they have just cause to remove him; yet it appears by the return, that they have proceeded against him without hearing him answer to what was objected, or that he was not reasonably warned, such removal is void, and shall not bind the party, *quia quicumque aliquid statuerit, parte inaudita altera, aequum licet statuerit, haud aequus fuerit*, and such removal is against justice and right.<sup>168</sup>

The quoted Latin is nothing other than Medea’s warning to the tyrant, with minor grammatical adjustments.<sup>169</sup> *Bagg’s Case* endures as authority in the United

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162. United States v. Apfelbaum, 445 U.S. 115, 132 n.13 (1980) (quoting WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act 5, sc. 1).

163. Givens v. Poe, 346 F. Supp. 202, 207 (W.D.N.C. 1972); see *supra* Part II.B.

164. Mahaday v. Cason, 222 F. Supp. 2d 918, 922 (E.D. Mich. 2002).

165. See, e.g., Hovey v. Elliott, 167 U.S. 409, 415–16 (1897) (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES \*282 (quoting SENECA, MEDEA)); Penobscot R.R. v. Weeks, 1864 WL 1343 (Me. 1864); Jude v. Sims, 166 S.W. 1048, 1059 (Mo. 1914); State v. Brunelle, 534 A.2d 198, 202 (Vt. 1987); see also Langle v. Kurkul, 510 A.2d 1301, 1307 n.2 (Vt. 1986).

166. SENECA, MEDEA 199–200.

167. *Id.* at 740–1027.

168. Bagg’s Case, (1615) 77 Eng. Rep. 1271, 1279–80 (K.B.). The Latin reference also appears in *Boswel’s Case*, (1606) 77 Eng. Rep. 326, 331 (K.B.).

169. SENECA, *supra* note 166, at 199–200 (“*Qui statuit aliquid, parte inaudita altera, / aequum licet statuerit, haud aequus fuit.*”). Lord Coke throws the relative clause



Kingdom<sup>170</sup> as well as this country.<sup>171</sup> Indeed, it is fundamental to American due process that a judicial decision, however just it may seem, cannot stand if it rests on a procedural infirmity such as the lack of a fair hearing.<sup>172</sup> John Locke even quotes these lines in his *Of the Conduct of the Understanding*.<sup>173</sup> Whether more credit belongs to Seneca or to Lord Coke, the witch's warning has for centuries anchored the traditional "opportunity to be heard" so integral to the Anglo-American legal system. Consult Sir William Blackstone, whose 18th century *Commentaries* quote Seneca's text verbatim.<sup>174</sup> Literature that reflects on the law may become a natural part of the law—a special case where the literary speaker assumes quasi-legislative intent.

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into the future perfect: *statuerit* ("will have decided") for *statuit* ("has decided"). He does the same with the main verb: *fuertit* ("will have been") for *fuit* ("was"). The future perfect here simply indicates simultaneous accomplishment. B.L. GILDERSLEEVE & G. LODGE, GILDERSLEEVE'S LATIN GRAMMAR 163 (Bolchazy-Carducci Publishers, Inc. 2000). Lord Coke also substitutes "*quia quicumque aliquid*" ("because whoever [will have decided] something") for Seneca's "*Qui*" ("He who [has decided]").

170. See, e.g., *Abbott v. Sullivan*, [1952] 1 K.B. 189, 198–99 (citing *Bagg's Case*). The same principle survives in abridged form through the British legal maxim "*audi alteram partem*" ("hear the other side"). See, e.g., *R. v. Diggines*, [1985] Q.B. 1109, 1126, *aff'd*, *Rahmani v. Diggines*, [1986] A.C. 475 (H.L.) (relying on the maxim as a "basic principle of natural justice"); *Wood v. Woad*, (1874) 9 L.R. Exch. 190, 196–97 (relating the maxim to the line from Seneca); cf. *Smith v. The Queen* (1878) 3 App. Cas. 614, 624 (Austl.) (paraphrasing Seneca's lines in Latin).

171. See, e.g., *Cornman v. City of Philadelphia*, 111 A.2d 121, 127–28 (Pa. 1955) (citing *Bagg's Case* and noting the influence of Seneca's *Medea*).

172. E.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 533–34 (2004); *Mathews v. Eldridge*, 424 U.S. 319, 333–35 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 266–71 (1970).

173. JOHN LOCKE, *OF THE CONDUCT OF THE UNDERSTANDING* (Francis W. Garforth ed., 1966) (Section 10: Prejudice).

174. Blackstone puts it thus:

[T]he courts of common law have thrown in one check . . . by making it necessary to *summon* the party accused before he is condemned. This is now held to be an indispensable requisite: though the justices long struggled the point; forgetting that rule of natural reason expressed by Seneca,

*"Qui statuit aliquid, parte inaudita altera,  
aequom licet statuerit, haud aequus fuit."*

A rule, to which all municipal laws, that are founded on the principles of justice, have strictly conformed . . .

WILLIAM BLACKSTONE, 4 *COMMENTARIES* \*279–80. The United States Supreme Court has quoted this passage to enforce due process. See *Hovey v. Elliott*, 167 U.S. 409, 415–16 (1897).

V. LITERARY CITATION AND JURISPRUDENCE<sup>175</sup>

Ultimately, the place of literature in judicial opinions is a question of jurisprudence. At the most general level, one might ask whether society should accept the citation of literature by courts as a means of developing the law. While Federal Rule of Evidence 201 limits judicial notice of the facts of the particular case, no rule or doctrine directly limits judicial notice of *legislative* facts, facts “which have relevance to legal reasoning and the lawmaking process.”<sup>176</sup> It is as legislative fact that a poem or novel advances substantive law.<sup>177</sup>

This issue branches into two subsidiary concerns. First, does literature have a place in the decisionmaking process of a judge? And second, assuming that it does, should judges therefore be accountable for their reading habits? This section proposes that the rhetoric of literary citation can help bridge the divide between the policies and principles inherent in judicial reasoning. Contrariwise, the effectiveness of that rhetoric is predicated upon a triangular relationship between the judge, the literature she cites, and the reader—a relationship that may not always be harmonious.

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175. Thanks to Dante, judges are entitled to reminisce in their opinions: “*D’antico amor senti la Gran potenza[.]*” *Lynch v. Torquato*, 228 F. Supp. 268, 271 & n.2 (W.D. Pa. 1964) (Italian for “Of ancient love I felt the mighty spell”) (quoting Dante, *Purgatorio*, XXX, 39). But who should tell them otherwise? As the writer Juvenal once asked of Plato, who will guard these guardians? *State ex rel. O’Connor v. Davis*, 745 N.E.2d 494, 505–06 (Ohio App. 2000) (citing Juvenal).

176. FED. R. EVID. 201(a) advisory committee’s note (“No rule deals with judicial notice of ‘legislative’ facts. . . . The usual method of establishing adjudicative facts is through the introduction of evidence . . . . Legislative facts are quite different.” (citations omitted)); *cf.* 29 AM. JUR. 2D *Evidence* § 54 (2007) (“Judicial knowledge comprehends information and beliefs relating to human activities, habits, traits, diseases, and propensities.”); Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries*, 47 BUFF. L. REV. 227, 246–48 (exploring judicial notice as the historical and contemporary basis for judicial citation of dictionaries).

177. Judicial notice of legislative facts assumes that the judiciary must rely on disputable points of reference to decide cases effectively. FED. R. EVID. 201(a) advisory committee’s note (“Facts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable. . . . What the law needs at its growing points is more, not less, judicial thinking about the factual ingredients of problems of what the law ought to be, and the needed facts are seldom ‘clearly’ indisputable.” (quoting Kenneth Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in *PERSPECTIVES OF LAW* 82–83 (1964))). Not everyone agrees that it should. John Hart Ely points out that in situations of empirical uncertainty, judges are not necessarily better than legislatures at making broad policy generalizations. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 53 (1980). One might also wonder (in the manner of Judge Posner) what foundation creative writing—always open to interpretation—provides for reasoned legal judgment, and whether better recourse is had to other sources. *See* POSNER, *supra* note 10, at 132–205, 303. One scholar has identified increased citation to non-legal authority generally by lawyers, judges, and law clerks in recent years, owing to the cheap availability of such sources in the information age. Frederick Schauer, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495 (2000). Schauer notes the “delegalization” of law accompanying this trend. *Id.*

*A. Policy and Principle: Agamemnon, Cassandra, and Sherlock Holmes*

A central tension in contemporary legal philosophy exists between policy and principle.<sup>178</sup> Once you accept the disconnect between law and any higher morality, what ideology should inform the law? At opposite ends of the spectrum lie collective goals and individual rights, policy and principle—interests that simultaneously conflict with and depend upon one another.<sup>179</sup> The problem becomes where to find neutral principles that reflect what is just for society in the individual case.<sup>180</sup> At times, literature fuses these strands.

It is impossible to measure the actual impact of literature on judicial reasoning as it takes place. A judge might base a legal conclusion on a literary theme, or she might use that theme to bolster a conclusion already drawn. The rhetorical view of the law, however, provides the way out.<sup>181</sup> The decisional and the expressive become conflated—lawyers might say ‘merged’—when a judge pens an opinion. The reader looks only to the opinion for a judge’s dictates. Insofar as judicial opinions can be said to represent judicial reasoning, then, courts rely on literature as a source of principles.

In his play *Agamemnon*, the Greek tragedian Aeschylus relates the story of King Agamemnon’s return home to Mycenae from the Trojan war.<sup>182</sup> Both he and his wife Clytemnestra have given up marital fidelity,<sup>183</sup> not to mention the fact that Agamemnon sacrificed their daughter to the gods while he was away.<sup>184</sup> Agamemnon’s slave girl Cassandra raves under Apollo’s curse: She has the power of prophecy, but no one will believe her predictions.<sup>185</sup> Cassandra frantically tells the chorus of Agamemnon’s and her own impending doom, but nothing doing.<sup>186</sup> Clytemnestra and her lover murder Agamemnon and Cassandra in the bath.<sup>187</sup> A federal district court cites this play for the idea that “as civilization as a whole has moved forward, people have learned time and again that suppressing speech and conduct deemed contrary to a society’s sense of order merely masks the underlying disorder.”<sup>188</sup> (Things don’t end well for Clytemnestra; in Aeschylus’ next play, her son murders her to avenge his father’s death.<sup>189</sup>)

Whether or not the court’s reading of Cassandra’s situation is justified—it depends on your view of bedecking ancient writing in modern fashions of thought—this citation typifies the use of literature to inlay policy (orderly society)

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178. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 85–130 (1977); ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 1–25 (1975).

179. DWORKIN, *supra* note 178, at 90.

180. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 49–65 (1962). For the implausibility of “neutral principles” in Constitutional decisionmaking, see ELY, *supra* note 177, at 54–60.

181. See *supra* Section III.

182. AESCHYLUS, *AGAMEMNON* 1–39.

183. *Id.* at 950–55, 1431–39.

184. *Id.* at 228–38.

185. See *id.* at 1072–1330.

186. *Id.*

187. *Id.* at 1372–92, 1577–1611.

188. *Loper v. N.Y. City Police Dep’t*, 802 F. Supp. 1029, 1030 (S.D.N.Y. 1992).

189. See AESCHYLUS, *LIBATION BEARERS* 928–29.

with an individual right (free speech). The tragedy becomes the lesson for civilization on its way forward; Cassandra becomes the individual plaintiff in the case. The court uses the literature to take the context of the case at hand and replace it with another, like a law school hypothetical. If Supreme Court justices can use a hypothetical to illustrate the neutrality of a principle,<sup>190</sup> a work of literature might serve the same purpose with added human relevance. To the extent that literature is more subjective than a hypothetical,<sup>191</sup> it squarely confronts the subjective nature—and value—of the principle itself. Literary authority may mark the line between judicial subjectivity, which pervades the law, and judicial arbitrariness, which destroys it.

Is literature always sufficient to sustain the value of a principle? Of course not. By the lights of judicial review, it does work sometimes: A Massachusetts trial judge quoted lines from Tennyson's *Ulysses* to begin her opinion. On appeal, the court held that quoting Tennyson did not evidence judicial bias, that "[t]he literary reference was the judge's stylistic way of stating the theme of her decision, based on the facts she had found."<sup>192</sup> A federal judge refused to heed the government's recommendation to depart downward from sentencing guidelines, referencing Dante's treatment of the avaricious who make money by doing evil.<sup>193</sup> On appeal, the U.S. Circuit Court of Appeals for the Seventh Circuit held that such reasoning, while perhaps superfluous, lay within the trial court's discretionary powers.<sup>194</sup>

Other cases go the other way. The Third Circuit has held that a trial judge did not have adequate authority to act as a media regulator, notwithstanding a citation of Anthony Trollope to the contrary.<sup>195</sup> An older case—from 1841—condemns a lower court's citation of Hesiod; the appellate judge opted to adhere to precedent, as he did "not acknowledg[e] *mythology* to be law nor *Hesiod* to be authoritative on a question of political power in Kentucky . . . ."<sup>196</sup> One court begins its opinion with a catalogue of poets defining "home": Emily Dickenson, Robert Frost, Johann Wolfgang von Goethe, and Christian Morgenstern all get their say.<sup>197</sup> "In legal terms," the court continued, "we demand more than flowery images when we attempt to define what constitutes one's 'home.'"<sup>198</sup>

Even the Supreme Court has vacillated in its regard for a particular piece of literature; first it rejected, later it accepted the wisdom of Sherlock Holmes on a

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190. *E.g.*, *City of Riverside v. Rivera*, 477 U.S. 561, 592–93 (1986) (Rehnquist, J., dissenting).

191. *Cf.* Yoshino, *supra* note 20, at 1887–88 (distinguishing hypotheticals from narratives on the grounds that hypotheticals are plainly "art in the service of a rational enterprise").

192. *Demoulas v. Demoulas Super Markets, Inc.*, 677 N.E.2d 159, 177–78 (Mass. 1997).

193. *United States v. Winters*, 117 F.3d 346, 348 (7th Cir. 1997).

194. *Id.* at 350.

195. *Francis v. People of Virgin Islands*, 11 F.2d 860, 863 (3d Cir. 1926) (citing ANTHONY TROLLOPE, *THE WARDEN*).

196. *City of Louisville v. Hyatt*, 41 Ky. (2 B. Mon.) 177, 180 (1841).

197. *In re Prestwood*, 322 B.R. 463, 464–65 (Bankr. S.D. Fla. 2005).

198. *Id.*

question of statutory interpretation. In Sir Arthur Conan Doyle's story *The Adventure of Silver Blaze*, the famous "dog that did not bark" provides a surprising clue.<sup>199</sup> With respect to the statute at issue in *Church of Scientology of California v. IRS*, Chief Justice Rehnquist held that Congress's failure to "bark"—that is, to provide the legislative history that would have supported the petitioner's interpretation of the statute—provided a clue that petitioner's interpretation was wrong.<sup>200</sup> Strangely, Justice Stewart had held that the opposite was true only seven years before: "In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark."<sup>201</sup>

The Second Circuit has attempted to explain away the discrepancy, arguing that the canon of the "dog that did not bark" should only be applied in limited instances, such as "when Congress simply revises, renumbers, or consolidates a statute, absent a clear expression of legislative purpose."<sup>202</sup> The court reasoned by deepening the analogy to Doyle's story:

[W]hile it is true that the dog guarding the stable where the horse was kept did not bark, this clue was not the first or even the most important one. Other clues included (1) curried mutton, (2) a surgeon's knife, (3) a bit of candle and matches, (4) a milliner's bill, and (5) several lame sheep. But the failure of the dog to bark—its silence when it would ordinarily be heard—was a clue the legendary detective considered in solving the crime. In other words, while the dog's failure to bark would ordinarily and independently hold little significance, in this context, Holmes found it relevant.<sup>203</sup>

The Second Circuit is at pains to develop, distinguish, and preserve this literary reference (even the "several lame sheep") as though it were a precedent not to be disturbed.<sup>204</sup> In fact, it is. Like precedent, literature is distinguishable. Like precedent, literature is instructive. Like precedent, literature provides a context or framework. The court may embrace or reject it, but the framework still leads the legal mind down the paths already trodden and the plans humanity has laid.

In sum, literary citation offers manifold benefits to the judicial project. There is the ethos of Sherlock Holmes. There is the pathos of Cassandra's curse. The dog that didn't bark provides a familiar and intuitive shortcut to understanding

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199. SIR ARTHUR CONAN DOYLE, *THE ORIGINAL ILLUSTRATED 'STRAND' SHERLOCK HOLMES* 305 (Wordsworth Editions 1989) (1887–1927).

200. 484 U.S. 9, 17–18 (1987); *accord* Chisom v. Roemer, 501 U.S. 380, 396 & n.23 (1991); *United States v. Contents of Accounts Nos. 3034504504 & 144-07143 at Merrill, Lynch, Pierce, Fenner, & Smith, Inc.*, 971 F.2d 974, 982 (3d Cir. 1992); *In re Columbia Ribbon & Carbon Mfg. Co.*, 54 B.R. 714, 718 (Bankr. S.D.N.Y. 1985). Note that this is another unusual example of a piece of literature providing the court with logical (as opposed to pathos- or ethos-driven) proof. *Cf. supra* Part II.B.

201. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980); *accord* *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1306 (2d Cir. 1990). Most recently, Justice Scalia has criticized the canon, renaming it the "Canon of Canine Silence." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 73–74 (2004) (Scalia, J., dissenting).

202. *In re Chateaugay Corp.*, 89 F.3d 942, 954 (2d Cir. 1996).

203. *Id.* at 954 n.1 (citations omitted).

204. *See supra* Section IIB.

an abstract concept. And on a broader jurisprudential level, the fabric of literature may vest principles with deeper relevance to the human condition. All of these, one might suppose, play into a court's decision to cite *belles-lettres*. So does a certain brand of judicial elitism.

### ***B. Reading Habits***

To accept judicial citation as useful and desirable leaves certain problems unresolved. First, it leaves the element of ethos—the moral authority of the act of citing an author—out of the equation. Second, it conflates the realm of the aesthetic with the realm of judicial actions that have very real consequences. Even if life imitates art, should life imitate art in the courtroom? Moreover, which art should life imitate, when one literary maxim contradicts another? The battle lines of the culture wars have been drawn, largely over what sort of literary canon—if any—there should be.<sup>205</sup>

Under Article III of the U.S. Constitution and Justice Marshall's decision in *Marbury v. Madison*,<sup>206</sup> the judiciary has enjoyed a role elevated and to some extent removed from the mainstream political arena. But if the judiciary sits largely outside the reach of the political process, should it also sit beyond the reach of mainstream American culture? These are the avenues explored by John Hart Ely, and they need no retreading here, except to note Ely's point that judges tend to belong to a special "reasoning class" in this country.<sup>207</sup> One might also say the "reading" class—a judge cannot fulfill his function without the ability to reason in and about letters, skills one develops through extensive reading.

People who read books—particularly people who read great literature—are something of an insular sect in the age of rapid-fire mass media.<sup>208</sup> The risks of ivory-tower thinking in this context loom large as judges, unlike litigants, do not directly suffer the consequences of the rhetorical approaches they choose in their opinions.<sup>209</sup> Some citations of literature can be pretty oblique.<sup>210</sup> Others are just plain opaque. One bankruptcy judge broke new ground on this front by leaving his literary quotation in Ancient Greek, without any translation: "I am sure that secured creditors [sic] reactions to this analysis is the same as that of Euripides in *Medea* when he said '*khrusos de kreisson murion logon brotois*.'" <sup>211</sup> (The phrase

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205. See generally Thomas Morawetz, *Ethics and Style: The Lessons of Literature for Law*, 45 STAN. L. REV. 497, 514–15 (1993) (reviewing RICHARD WEISBERG, POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE (1992)).

206. 5 U.S. 137 (1803).

207. ELY, *supra* note 177, at 56.

208. Cf. Daniel J. Kornstein, *International Law and the Humanities: Does Love of Literature Promote International Law?*, 12 ILSA J. INT'L & COMP. L. 491, 495–98 (2006) (arguing that in the legal context, reading habits should be tempered with firsthand experience in the world).

209. See SMITH, *supra* note 6, at 26 (quoting BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 342 (1987)).

210. See, e.g., *United States v. Malatesta*, 583 F.2d 748, 751 n.1 (5th Cir. 1978) ("I too am a rare Pattern. As I wander down the garden paths." (quoting Amy Lowell, *Patterns*, in THE OXFORD BOOK OF AMERICAN VERSE 530 (1950))).

211. *In re Brady*, 86 B.R. 166, 171 n.6 (Bankr. D. Minn. 1988).

literally means “and gold is worth more to mortals than ten thousand words,” or rather, “money talks, and bullshit walks.”)

A judge’s taste in books might excite some readers and alienate others. The cases cited in this Note probably evidence a judicial fondness for “classic” literature from a certain canon. Selection bias certainly attends my study,<sup>212</sup> but there is still some evidence that the range of literary writing that serves as authority is relatively narrow. While major authors of the 19th century and prior periods turn up with some frequency in U.S. Supreme Court opinions—Shakespeare on reputational harm,<sup>213</sup> Dickens on debt collection,<sup>214</sup> and Melville on whale extinction<sup>215</sup>—a 2005 search of U.S. Supreme Court cases for the Modern Library’s 100 best novels of the 20th century<sup>216</sup> yielded only a handful of Orwell citations in support of substantive legal positions.<sup>217</sup>

Many other great writers, both classic and modern, go uncited. Creative writing consulted little or not at all in the development of substantive law includes that of Virginia Woolf, Saul Bellow, Sappho, D.H. Lawrence, E.E. Cummings, Ovid, Boccaccio, Toni Morrison, Dorothy Parker, Sylvia Plath, Sir Walter Raleigh, Charlotte Brontë, Anne Carson, William Blake, Henry Wadsworth Longfellow, A.E. Housman, Zora Neale Hurston, Thomas Hardy, and Harriet Beecher Stowe.

Does the citation of a narrow range of “great” books help perpetuate an exclusionist and hierarchical regime of wealth and power?<sup>218</sup> Alas, the Greeks said it best: *khrusos de kreisson murion logon brotois*.<sup>219</sup> Is a certain amount of judicial elitism healthy? Perhaps, especially for those who believe that mainstream mass media works to stultify society and anaesthetize it to its own injustices.<sup>220</sup> Whatever forces shape the literary tastes that influence the judiciary, one might wonder what Professor Wigmore’s reading list for the bar would look like if he compiled one today—indeed, some latter-day scholars have made their own suggestions.<sup>221</sup> As precedent endures, the list of authors that judges cite is bound to grow.

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212. Given the limits of legal research tools, the only way to search for literary citation is author by author.

213. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 12 (1990).

214. *D. H. Overmyer Co. Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 177 (1972).

215. *Japan Whaling Ass’n v. Am. Cetacean Soc.*, 478 U.S. 221, 250 (1986).

216. *Cf.* Richard Bernstein, *19th-Century Novelists, Stop Spinning in Your Graves*, N.Y. TIMES, July 28, 1998, at E2.

217. *Florida v. Riley*, 488 U.S. 445, 466 (1989) (Brennan, J., dissenting); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 219 (1979) (Rehnquist, J., dissenting); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 705 (2001) (Scalia, J., dissenting).

218. *See supra* Part VI.

219. *See supra* note 211 and accompanying text.

220. *See, e.g.*, THEODOR W. ADORNO, *THE CULTURE INDUSTRY* (J.M. Bernstein ed., 1991).

221. *See* Richard Weisberg & Karen L. Kretschman, *Wigmore’s “Legal Novels” Expanded: A Collaborative Effort*, 50 N.Y. ST. B.J. 123 (1978).

### CONCLUSION

Judicial citation of literature to develop the law is nothing new. The common law tradition in America has tolerated the presence of literature for centuries. Sometimes literature informs a dissenting argument; other times, it supports time-honored legal edifices. There are those who would separate literature from the state like oil and water, but the inevitable mixing of these two is hard to deny. My purpose has been to show that this mixing is not just inevitable, but useful and desirable.

Doubtless, literature as law has its limits. Literature does not, by itself, offer normative guidance. Literature does not explain its own meaning. Literature does not crisply calculate the incidence of civil rights violations, or the cost of a monopoly to consumer welfare. The uncertainties of literature may even amplify existing problems in the law itself; interpretive difficulties may be compounded by a complex and unfamiliar literary context. Care must be taken not to cite literature parochially, not to push literature beyond what it can legitimately accomplish.

At the same time, the cases show how much the winedark sea of literature offers to judicial decisionmaking. It gives weight to broad assertions about culture. It allows judges to cloak their hypotheticals with a thoroughly human context. Most fundamentally, it articulates what other disciplines cannot; it conveys reality when reality cannot be scientifically proven, and it illustrates complexity in human terms. In one swoop, literature helps courts appraise the subjectivity of the law with the subjectivity of human experience. Judge Posner suggests that the substance of literature cannot help judges judge,<sup>222</sup> but nevertheless, many times, it does.

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222. POSNER, *supra* note 10, at 281–309.