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The Rhetorical Force of the Law: An Analysis of the Language, Genre and Structure of Legal Opinions

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Abstract

Rhetorical scholars have long advocated for the study of legal discourse because of the "centrality of language in the production, exercise and subversion of legal power."[1] The law's power comes from more than simply its force through proclamations, statutes and speech acts; it is inherent in its constitutive nature, through which courts shape and reflect individual realities and lived experiences. In this dissertation, I account for the force of legal discourse through an analysis of how courts use subtle rhetorical strategies in legal opinions to maintain legitimacy and authority and shape a common understanding of the law. Further, I seek to bring legal and rhetorical scholarship into closer concert by applying both a legal and a rhetorical analysis to multiple corpora, including an entire line of jurisprudence.

Through a discourse analysis of thousands of texts, from across courts (including the US, UK and Navajo Supreme Courts) jurisdictions, and legal topics, I identify key genre features of legal opinions add to the rhetorical force of the discourse. Through a rhetorical analysis of appellate opinions, I examine the ways in which judges choose legal starting points, craft their arguments and anticipate counterarguments, and the effect these choices have on garnering acceptance of legal concepts within primary and secondary audiences. Further, I explore the promise of advocacy as a way to mediate access to the legal process. Finally, my research examines the constitutive nature of the law and attempts to explain how a body of law and its related concepts are shaped through legal discourse. To do this, I trace the inception of privacy law in the US from Warren and Brandeis' *The Right to Privacy* through to current legal conceptions of privacy. Among my findings are that the use of quasi-scientific reasoning and argument structures lend ethos and authority to legal arguments, and that courts use prior discourse in a highly sophisticated manner that deters discussion of legal alternatives. My research adds to an understanding of how the law is shaped by discourse and suggests a tool for non-legal experts to understand the role of prior text in contemporary decisions.

[1] John M. Conley and William M. O'Barr, *Just Words: Law, Language, and Power* (University of Chicago Press, 1998), xi.

Outline of Dissertation

Chapter One: The law is meant to reflect cultural mores and respond to the values of a community as well as shape them. This responsibility inherently positions legal institutions with immense power and the responsibility of accounting for individual perspectives. The constitutive function of the law should not be underestimated, and yet the social aspect of the law is often hidden beneath the guise of institutional detachment. Chapter One explores the constitutive nature of the law and argues for the importance of systematic legal rhetorical analysis to jurisprudential studies.

Chapter Two: Certain genre-based features of legal discourse serve to reify its power by alienating challengers and obfuscating rhetorical choices. Legal texts are written, in the tradition of reasoned elaboration, to appear to be mere reflections and clarifications of clearly established rules. Chapter Two analyzes common tropes of the legal genre to question the transparency of rule application.

Chapter Three: Despite a growing mandate to make legal texts more accessible, thereby enfranchising more people to take part in the democratic process of legal comment, courts are still seen as a foreboding, esoteric and often unwelcome presence. This chapter seeks to understand possibilities for a more community-based justice system, one that takes seriously the charge to make legal language more accessible. It examines documents from the Navajo Supreme Court to understand the extent to which a court can reflect community values.

Chapter Four: Given my findings in chapter Three that the law remains inhospitable to those not well practiced in the law, Chapter Four seeks to understand the role of legal advocacy in helping to balance power dynamics and give voice to the disenfranchised. Through an ethnographic case study with a legal aid organization, Indiana Legal Services, I investigate the extent to which low income clients can participate in democratic processes of legal advocacy and evaluate best practices for empowering clients with a say in their own cases.

Chapter Five: This chapter examines one line of legal jurisprudence that is especially tied to notions of individual sovereignty and autonomy: Privacy. It examines the genesis of the term through its roots in non-legal discourse to account for the ways in which popular concepts can shape the law (and vice versa).

Chapter One: Introduction

Despite the fact that both legal theory and legal practice have been known to be heavily dependent upon techniques of argumentation and eloquence, the two disciplines often take only a cursory approach to understanding or explaining the other. When legal scholarship attends to language and therefore employs linguistics in studying the "grammar" of law, or the philosophy of ordinary language, in outlining the semantics of rule application, these methods have been exercises aimed at asserting or defending the positivistic view that law is an internally defined "system" of notional meanings or of specifically legal values, that it is a technical language and is by and large, unproblematically, univocal in its application. Formalistic (deductive) theories of adjudication can be problematic because they assume that all rhetorical motives are present in the language of legal opinions and that speakers and writers are aware of their motives. Rhetoric, in this view, is deliberate and conscious; while it can deceive, it is yet unconcealed and visible in highly valenced language choices and poetic semantic constructions. Moreover, research into legal language too often ignores the historical and social features of that language.

Rather than studying the actual development of legal linguistic practice, both spoken and written, formalistic theories of the law assume a deductive model of law application in which language is the neutral instrument of purposes peculiar to the internal development of legal regulation and legal discipline. What has been consistently excluded from legal studies, has been the possibility of analyzing law as a specific stratification or register of an extant language system, together with the correlative denial of the heuristic value of analyzing legal texts themselves as historical products organized according to rhetorical criteria. While legal theorists acknowledge the common social experience of legal regulation as a profoundly alien linguistic practice, as control by means of an archaic, obscure, professionalized and impenetrable language, most legal scholars have offered no detailed examination of the peculiar and distinctive character of law as a specific, sociolinguistically-defined, speech community and usage. As James Boyd White argues:

> "law is most usefully seen not, as it usually is by academics and philosophers, as a system of rules, but as a branch of rhetoric; and that the kind of rhetoric of which law is a species is most usefully seen not, as rhetoric usually is, either as a failed science or as the ignoble art of persuasion, but as the central art by

> which community and culture are established, maintained, and transformed. So regarded, rhetoric is continuous with law, and like it, has justice as its ultimate subject. I do not mean to say that these are the only ways to understand law or rhetoric. There is a place in the world for institutional and policy studies, for taxonomies of persuasive devices, and for analyses of statistical patterns and distributive effects. But I think that all these activities will themselves be performed and criticized more intelligently if it is recognized that they too are rhetorical. As for law and rhetoric themselves, I think that to see them in the way I suggest is to make sense of them in a more nearly complete way, especially from the point of view of the individual speaker, the individual hearer, and the individual judge"[1]

This dissertation seeks to develop an awareness of the rhetorical problems inherent in viewing law as a system of communication and of non-communication, as the rhetoric of a particular group or class, and as a specific exercise of power and of power over meaning. In short, I argue that legal discourse, like any other specialized system of language usage, is a social practice and that its texts will necessarily bear the imprint of such practice or organizational background. In attempting to recover the social and political dimensions of legal semantics and textual practice by means of linguistic analysis, I will be further suggesting that an adequate "reading of the law"[2] should treat legal discourse or the legal genre as an accessible and answerable discourse, as a discourse that is inevitably responsible for its place and role within the political and social commitments of its times.

Even within contemporary traditions of legal analysis, circumstantial, anecdotal, intuitive and arbitrary observations and remarks upon the character of legal language are commonplace. These have generally taken the form of comments upon the vocabulary and the syntax of textbook and casebook law, and have also, increasingly, noted the peculiar opacity of legislative drafting. While lawyers often attend to legal language on an everyday basis, and occasionally more systematically through law review articles, no one has systematically related rhetoric and sociolinguistics to legal theory through the examination of an entire line of jurisprudence. Nor would this even have been possible a decade or two,

[1] James Boyd White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life," *The University of Chicago Law Review* 52, no. 3 (1985): 684, https://doi.org/10.2307/1599632.

[2] Or, analysis of the ways in which the law is structured and operates.

before corpus linguistic methods allowed for a breadth of analysis spanning hundreds of years, thousands of documents and millions of words. This is the main contribution of this project: to lay out the historical, legal and political significance of the law through an analysis of its rhetoric and linguistic features using multiple methods ranging from rhetorical analysis to ethnographic study, on a micro-level to examine word choice and a macro-level to account for large trends across time and place. I focus my study on Appellate court opinions using two corpora for my analysis: US privacy law cases and recent Supreme Court opinions from US, Navajo and UK jurisdictions and compare/contrast that with discourse geared at enfranchising legal and socio-politically marginalized groups.

Both conventional linguistics and jurisprudence have viewed their objects of study as being the "systems" or "codes" that govern, respectively, language usage and law application as potentialities rather than empirical actualities. In both disciplines, it has been the abstract imperatives of a notional system that forms the object of synchronic (static) scientific study; actual meaning, actual usage and the diachronic (historical) dimension generally, are largely ignored. Such formalist accounts of language and of legal language are historically and geographically specific and limited. More particularly, viewed historically as a discourse - as linguistic practice first and foremost - the analysis of law as a unitary, formal, language is only one possible account of legal communication. Linguistic analysis is a useful tool for legal study as a sophisticated and quasi-scientific method for analyzing the historical semantics of legal texts.[3] Law, as a linguistic register or as a literary genre, can be described discursively, in terms of its systematic appropriation and privileging of legally recognized meanings, accents and connotations (modes of inclusion), and its simultaneous rejection of alternative and competing meanings and accents, forms of utterance and discourse generally, as extrinsic, unauthorized or threatening (modes of exclusion). To understand this process of linguistic and semantic inclusion and exclusion is to introduce the problem of the relationship of law to power, and to some extent to explain the characteristic modes of legal utterance as social discourse.

This dissertation attempts to describe multiple aspects of legal reasoning, argument and language through an analysis of multiple dimensions of text. At various times, this

[3] Lidia Borisova, "How Plain Is Legal English in Statutes?," *Linguistica* 53, no. 2 (2013): 141; Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (London: Palgrave Macmillan, 1990).

dissertation will either dive deep into particular instances through a micro analysis of particular examples of legal language, or it will attempt to analyze for breadth through an analysis of every example of particular genre for a particular court and jurisdiction in a defined time frame or through an analysis of an entire line of jurisprudence across time.

The guiding research questions are ones of access, power and community, specifically: how does legal discourse afford or deny access? To what extent are members of the legal community aware of the broader social contexts of their use of language and how do/could they account for that awareness in their language and syntax choices? And what implications do language choices have on broader. This project seeks to account for ways that certain voices and schemas are privileged within legal discourse and how certain voices are silenced through, not only the institutional frameworks and formalized inclusion/exclusion to legal participation, but also through more subtle avenues, like coalition and community building, lexical choice or bracketing of discourse.

Constitutive Function of the Law

The most basic philosophies of the law see it as a force that either dictates human behaviors and values or responds to them. In this way the legal system is seen as a force that exists apart from communities rather than a system that helps to structure communities.

In Nomos and Narrative, Robert Cover argues:

> "We inhabit a nomos--a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. The student of law may come to identify the normative world with the professional paraphernalia of social control. The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each Decalogue a scripture"[4]

Rather than interacting with the normative framework that exists outside our *corpus juris*, those who are responsible for shaping the law, Cover argues, conceive of the law as imposing

[4] Robert M. Cover, "Nomos and Narrative," *Harvard Law Review* 97 (November 1, 1983): 4.

its values upon its legal subjects. James Boyd White takes issue with the way in which the interaction is traditionally framed, where "the law is a part (and in fact the entire bureaucratic system, private as well as public), tends to be regarded, especially by lawyers, managers, and other policy-makers, as a machine acting on the rest of the world; the rest of the world is in turn reduced to the object upon which the machine acts."[5] He argues that, what the bureaucratic model fails to account for is the way in which "the process of law is at once creative and educative" as those who "create" the law are responsible for more than just the creation of a new set of legal expectations, they must be responsive to the needs of the community they serve. Policymakers are themselves bound by cultural expectations in that "[t]hose who use this language are perpetually learning what can and cannot be said, what can and cannot be done with it, as they try – and fail or succeed – to reach new formulations of their positions."[6] In this sense, policymakers are not only tasked with responding to popular appeals, but must work to collaboratively shape normative beliefs held by constituents. New laws are built into existing frameworks and must be at least minimally in accord with jointly held beliefs. As Habermas contends, laws and moral frameworks are concomitant but independent systems that work to shape community values. Law must look to these values to establish its legitimacy.[7]

In few places in the law is this more apparent than with Constitutional Jurisprudence, theories that lead us to an understanding of what are distinctly American human rights, as enshrined in the Bill of Rights. In this dissertation, I look to privacy law to test theories of the constitutive nature of the law. Our notions of a liberal democracy are tied to principles of autonomy and self-fulfillment that are reliant on at least a minimal guarantee of privacy in our interactions with each other and the state.[8] Privacy has been discussed as a general framework that encompasses notions of decisional autonomy, personal space, "the right to

[5] James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Univ of Wisconsin Press, 1989), 30.
[6] White, 35.
[7] *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Reprint edition (Cambridge, Mass.: MIT Press, 1998).
[8] Lino A. Graglia, "'Constitutional Theory': The Attempted Justification for the Supreme Court's Liberal Political Program," *Texas Law Review* 65, no. 4 (March 1, 1987): 789.

be left alone,"[9] and an interest in keeping one's thoughts and ideas "secret."[10] In many cases, these rights are seen as so fundamental that when new laws or government action is seen to impinge on these rights, public outcry requires response, even though our notions of privacy are not so well codified to dictate that these government actions be deemed inherently violative of the law. Legal and popular rhetoric in these instances has the double duty of analyzing and responding to the schism that erupts between the "corpus juris" and normative notions of intrinsic privacy rights.

James Boyd White argues for a view of the law that recognizes its constitutive nature. He says, "The legal speaker always acts upon the language that he or she uses; in this sense legal rhetoric is always argumentatively constitutive of the language it employs."[11] The story of how privacy law is built from and builds upon popular descriptions of privacy helps us to understand the ways in which the notion of "privacy" is employed in different circumstances to different rhetorical ends. Moreover, any discussion of current popular notions of privacy must include a discussion of the ways in which normative values interact with legal structures to build a robust conceptual framework.

According to Robert Cover, "A legal tradition is … part and parcel of a complex normative world." In the same way that laws are influenced by popularly held normative views, our conceptions of the value of privacy are shaped by the law and the conversation surrounding the development of privacy law. Formal laws combine, interact, and often conflict with our normative values to build a mythos of privacy and these "myths establish the paradigms for behavior." Popular and legal rhetoric works to "build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic" and can challenge notions of available action within certain parameters.[12] In this sense, no law exists in a vacuum. Its validity will be judged against a backdrop of what is possible. Meaning must thus be derived from a larger understanding of the myth.

This is the work of the court; to balance the law that is written against the set of realities that give it interpretive substance. Just as the court relies on precedent to guide its

[9] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (December 15, 1890): 193–220.
[10] Daniel J. Solove, "A Taxonomy of Privacy," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, February 16, 2005), http://papers.ssrn.com/abstract=667622.
[11] White, *Heracles' Bow*, 1989, 32.
[12] Cover, "Nomos and Narrative," 9.

jurisprudence, normative frameworks are guided by set of events, guiding principles and shared mythology that brought them to be. As Cover explains, "[t]he normative meaning that has inhered in the patterns of the past will be found in the history of ordinary legal doctrine at work in mundane affairs…in apologies for power and privilege and in the critiques that may be leveled at the justificatory enterprises of law."[13]

We cannot forget that our laws are always subject to interpretation. As Cover explains, "The normative universe is held together by the force of interpretive commitments - some small and private, others immense and public. These commitments - of officials and of others - do determine what law means and what law shall be."[14] The law, therefore, does not exist outside our understanding of it. We may understand a personal desire to be free from undue intrusion and we may ascribe that desire to some "inherent" right of "freedom" or "autonomy" but in order to justify our needs to those with whom our needs may conflict, we ascribe deeper significance to the role those needs play in a wider context.

[13] Cover, 9.
[14] Cover, 7.

Chapter Two: Legal Discourse as Genre

Legal discourse has been intricately linked with rhetorical acumen since, at least, the days of Gorgias and Plato.[15] And yet modern legal education has tended to treat the law as a set of rules or institutional constraints that are more a product of systems of logic than of rhetorical invention. Lawyers and legal scholars, who in practice understand the rhetorical nature of the law, will often gloss over its rhetoricality when analyzing legal histories. Too often undue weight is given to official histories and justifications from the courts, without a rigorous analysis of underlying motivations. This arhetorical view of the law is problematic not only for its failure to account for the power of words to sway legal lines of reasoning but also because it may place too much emphasis on the inevitability and predictability of the course of lines of jurisprudence within the legal system.

Conversely, among rhetorical scholars, legal texts can be analyzed as though they exist outside entrenched legal genre constraints, without acknowledging the institutional structures from within which they operate. This approach may overestimate the power of rhetoric to influence the trajectory of the law. Often, there is a failure to account for the divide between traditional justifications for the way the courts operate and the way critics say they operate. Much of this divide comes from the contest "between formalism, which asserts the absolute autonomy of the juridical form in relation to the social world, and instrumentalism, which conceives of law as a reflection, or a tool in the service of dominant groups." The result is an analysis that fails to account for important features of legal writing as a genre and may underestimate both the constraints and the affordances offered by the rich history of legal writing practices.

Moreover, legal reasoning if often analyzed as though it is synonymous with logical reasoning. Legal argument scholars apply formal logic to legal rules to show the importance of rule application to logical reasoning. In "Logic for Law Students: How to Think Like a Lawyer," federal appellate judge Ruggero J. Aldisert and his coauthors argue that "Logic is the lifeblood of American law" because of the centrality of the rules of logic in structuring legal arguments.[16]

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[15] Sharon Crowley and Debra Hawhee, *Ancient Rhetorics for Contemporary Students* (Pearson/Longman, 2004).
[16] Ruggero J. Aldisert, Stephen Clowney, and Jeremy Peterson, "Logic for Law Students: How to Think Like a Lawyer," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2007), 1, http://papers.ssrn.com/abstract=966597.

They say that "thinking like a lawyer" entails "employing logic to construct arguments."[17] Further, they argue that law should be read as composing a highly structured legal reasoning scheme where "the syllogism lies at the heart of legal writing"[18] and "urge all law students to get in the habit of thinking in syllogisms."[19] Timothy Zinnecker, in an article that purports to expand on Aldisert's reading of syllogism in legal reasoning, applies principles of deductive reasoning to legal arguments based in statutory law.[20] Zinnecker examines and applies the rules of argumentation promulgated by Aldisert to case law in the context of secured transaction law (a subset of jurisprudence that gets its laws primarily from statute, rather than from case law). He argues that this application is an effective form of reasoning and thereby extends Aldisert's reasoning schema to cases involving statutory law. These scholars represent a traditional way of thinking about how judges and lawyers create and understand legal arguments. In a sense, this school of thought considers legal reasoning to be akin to a science, one that must hold certain truths up and expose them to the light of reasoning. In this view, legal trajectories are predictable, courts make decisions based on logical principles and share their reasoning transparently with an audience who is well prepared to understand and/or challenge that reasoning.

And yet rhetorical scholars are beginning to question the transparency of legal argumentation and logic and have argued that legal texts trade on just such a reputation to deny rhetoricality. Michael Wells argues, "Analysis of a Supreme Court opinion ordinarily begins from the premise that the opinion is a transparent window into the Court's thinking, such that the reasons offered by the Court are, or ought to be, the reasons that account for the holding. Scholars debate the strength of the Court's reasoning, question or defend the Court's candor, and propose alternative ways of justifying the ruling." Treating the court's argument as a transparent explanation of its reasoning can serve to: (1) heighten the court's ethos, as it presents itself as clear thinking, rational and transparent and (2) quiet dissent because reasoned elaboration and the rule of law seems apolitical. In this sense, words and

[17] Aldisert, Clowney, and Peterson, 1.
[18] Aldisert, Clowney, and Peterson, 5.
[19] Aldisert, Clowney, and Peterson, 7.
[20] Timothy R. Zinnecker, "Syllogisms, Enthymemes and Fallacies: Mastering Secured Transactions through Deductive Reasoning," *Wayne Law Review* 56, no. 4 (2010): 1581.

language are seen to be transmitters of reasoning – not rhetorical devices capable of sparking invention and altering lines of reasoning.

Despite the apparent divide between jurisprudential studies that attempt to formally account for legal reasoning and rhetorical theories of language that argue for the inherent political nature of legal speech, there does exist a vibrant scholarly community that seeks to bring awareness of the role that language has in our conceptions of the law. The law and literature movement, which took root in the 1970's, is credited as the first major undertaking to study law as an artifact of a literary and rhetorical process.[1] But as recently as 2009, prominent Constitutional law scholar Erwin Chemerinsky argued that there is a notable absence of analyses of appellate opinions from both rhetorical and legal scholarship. He recommends that we should analyze at least a select few Supreme Court cases rhetorically because of the importance these decisions have in our daily lives. Despite their reputation as being hermeneutic studies into the law, appellate opinions take sides and make arguments. Chemerinsky argues that conservative judges are increasingly becoming more explicitly activist and more rhetorical. I argue that every Supreme Court case is worth of study and should be analyzed rhetorically. I will study, not only the cases of "judicial activism" but also the cases of "judicial conservatism" to see how justices make their case.[2] Further, I seek to bring rhetorical legal study further into concert with traditional legal genre studies to understand how generic conventions of legal writing can be viewed as a rhetorical act.

Bhatia, who has systematically studied genres within legal discourse, defines genre in accordance with Swales[21] as:

> "a recognizable communicative event characterized by a set of communicative purpose(s) identified and mutually understood by the members of the professional or academic community in which it regularly occurs. Most often it is highly structured and conventionalized with constraints on allowable contributions in terms of their intent, positioning, form and functional value. These constraints, however, are often exploited by the expert members of the discourse community to achieve private intentions within the framework of socially recognized purpose(s). "[22]

[21] John Swales, *Genre Analysis: English in Academic and Research Settings* (Cambridge University Press, 1990).
[22] Vijay Kumar Bhatia, *Analysing Genre: Language Use in Professional Settings* (Longman, 1993), 13.

Legal discourse is theorized to be influential in terms of the propagation of concepts and ideas[23] and in terms of identity building and consensus-making.[24] It is also highly influenced by prior discourses.[25] To understand how legal concepts shape and are shaped by non-legal discourses, it is important to understand its intertextual and interdiscursive practices.

On the most basic level, legal discourse, and especially the genres of legal briefs and appellate opinions, is said to be dense with intertextual reference because of its citation practices and standards of precedent.[26] According to Fairclough, legal memos, briefs, court filings and opinions generally follow a standard of citation that lends itself to highly routinized and formalistic intertextual chains as prior cases are entextualized by subsequent discourses.[27] This is one way in which, as Wetlaufer claims, legal writing obfuscates its rhetoricality. Legal arguments are made through the voices of others in a highly ritualized form of dialogicality, where the author generally attempts to claim that she is merely fairly representing the articulations of judges, who in their prior rulings are now binding latter discourses.[28] Foucault describes this phenomenon as an independence achieved through dependence.[29] Jurisprudential ethos is established through highly ritualized callbacks to prior discourse (i.e. precedence) much as a scholar uses a literature review to establish credibility and key into a discourse community. But the law's reliance on precedence takes this a step further such that new common law is often not seen as breaking new ground. In a sense, judges never speak with their own voices. They use the words of prior legal discourse to

[23] Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field," *Hastings Law Journal* 38, no. 5 (July 1, 1987): 814; Daniel J. Solove, *Understanding Privacy* (Harvard University Press, 2008).
[24] James Boyd White, *Heracles' Bow : Essays on the Rhetoric and Poetics of Law*, Rhetoric of the Human Sciences (University of Wisconsin Press, 1985); Maurice Charland, "Constitutive Rhetoric: The Case of the 'Peuple Québécois,'" *Quarterly Journal of Speech* 73, no. 2 (May 1, 1987): 133.
[25] M. M. Bakhtin, *The Dialogic Imagination: Four Essays*, ed. Michael Holquist, trans. Caryl Emerson, Reprint edition (University of Texas Press, 1982); Per Linell, "Discourse across Boundaries: On Recontextualizations and the Blending of Voices in Professional Discourse," *Text* 18, no. 2 (1998): 143–157, https://doi.org/10.1515/text.1.1998.18.2.143; Norman Fairclough, "Intertextuality in Critical Discourse Analysis," *Linguistics and Education* 4, no. 3 (1992): 269–93, https://doi.org/10.1016/0898-5898(92)90004-G.
[26] Linell, "Discourse across Boundaries"; Fairclough, "Intertextuality in Critical Discourse Analysis."
[27] Norman Fairclough, *Language and Power* (Longman, 1989).
[28] Gerald B. Wetlaufer, "Rhetoric and Its Denial in Legal Discourse," *Virginia Law Review* 76, no. 8 (November 1, 1990): 1545–97.
[29] Michel Foucault, *Power/Knowledge : Selected Interviews and Other Writings, 1972-1977* (Pantheon Books, 1980).

represent their own in a way that makes the heteroglossic nature of the discourse highly visible. [30]

Not only do legal briefs and opinions display elements of heteroglossia[31] when they directly cite prior discourses in the forms of case and statutory law, but this heteroglossia extends when certain legal phrases and concepts are adopted by a variety of speakers who come into contact with the legal system. For example, in order to stand up to the scrutiny of Fifth Amendment challenges, police officers have chosen to adopt, nearly verbatim, "Miranda rights" language from Miranda v. Arizona. This example further shows how familiar some prior legal discourses have become, as anyone who watches crime dramas could probably recite Miranda warnings from memory.

While Miranda warnings provide an easily demarcatable category of prior legal discourse, the intertextual nature of legal discourse (nor of any discourse) does not begin and end with direct quotation. It is commonly recognized that certain legal practices form deeply entrenched legal genres and create expectations based on understandings of these practices. This "interdiscursivity" as Barbara Johnstone and others have termed it,[32] gets replicated by subsequent speakers as they attempt to account for expectations of these discourse practices. This notion is especially significant to my understanding of how legal discourse infuses political and popular discourse because incomplete understandings of this interdiscursivity which may result from being legal outsiders, can create imperfect appropriation. When non-legal experts attempt to appropriate legalese, it can result in the speaker being less comfortable speaking, and in a poor reception of the message, as the discourse which attempts to mimic legalese falls short.

Interdiscursivity practices can be found not just in word choice but in argumentation schema as well. Legal argumentation is often categorized as highly syllogistic in nature statute or case law forms a major premise, facts of the case form a minor premise, and the conclusion is found by an application of the law to the facts. Legal writing theorists praise legal writing for its connection to formal logic. However, just like legalese, this argumentation structure is not

[30] I borrow Bakhtin's term, heteroglossia, to refer to the multitude of voices that appear within a particular text. While all language has this feature, some texts are more self-consciously multivocal. I argue that such is the case with legal opinions. In Chapter 5, I examine the degree to which Supreme Court opinions rely on prior discourse to make novel arguments.

[31] Bakhtin, *The Dialogic Imagination*.

[32] Barbara Johnstone, *Discourse Analysis /*, 2nd ed., Introducing Linguistics ; (Blackwell, 2008).

necessarily available to all speakers who wish to employ it. Theories of interdiscursivity inform my understanding of the primacy of legal argument inside and outside legal circles and help to explain why some arguments may not be heard.

In addition to the ways language shapes the law and vice versa, legal discourse is influential in the shaping of what Thibault calls "thematic formations." Thematic formations are concepts that arise out of recontextualization of a concept without explicit reference to the antecedent, but which borrows heavily from it. For example, the right to privacy is formed thematically around a set of concepts from discourse about rights and constitutionalism. An American right to privacy as it is popularly conceptualized today is closely tied to the Fourth Amendment, which protects against unreasonable searches and seizures by state actors. Little protection is offered against private actors. As such, in the US, rights to privacy are often conceptualized as rights we hold against the government, even among those who may not understand the legal implications of the Fourth Amendment. To illustrate, let's take the example of someone using an Android cell phone and using Google services. He may freely give over personal information to Google, who then sells that information to other private actors. The Google user may feel no intrusions of privacy until that information is subsequently handed over to the government. This framing only makes sense in light of the backdrop of Constitutionalism, where privacy rights have been said by courts to apply only against state actors.

In "The Force of Law," Bourdieu argues that legal concepts and schema propagate popular, legal and political discourses as a result of a complex system of juridical capital. Institutional constraints, conventions and incentives have helped to form a self-reverential system that not only has a part in defining the orthodoxy, but in shaping doxa as well. As such, legal discourses influence not only the way we think and talk about legal concepts, but non-legal ones as well. As we can see in the above example, privacy is not an exclusively legal concept, but understanding of it is framed, at least partially, by legal structures. It is far from self-evident that privacy as one understands it today is guaranteed by Constitutional amendments that refer to unlawful searches, self-incrimination, and equal protection (Fourth, Fifth and Fourteenth Amendments). The entextualization of the Amendments and the application of those texts to privacy jurisprudence is not without an actor. Jan Bloomaert

argues that analysis itself is recontextualization.[33] If recontextualization, as John Oddo has argued, never merely represents texts, it transforms them,[34] then legal discourse necessarily transforms the texts it seeks to analyze. While this may seem commonsense to rhetorical scholars, it does call into question the traditional conception of the courts as mere "interpreters" of the law and of practicality of a true separation of powers.

Law's Resistance to Rhetorical Inquiry

The concepts of legal tradition as continuity, and of law as based upon custom or upon practice derived from years of the slow accumulation of legal thought are established themes of legal history. For legal scholarship, the past has a pre-eminent role as the source of legal authority. Although the inception of legal "science" as an object of study, that is as the study of law as an independent or autonomous subject matter, is often traced to modern legal education from American law schools like Harvard and Yale in the nineteenth century,[35] the study of law dates back to ancient times. The first law schools were established specifically for the purposes of studying ancient manuscripts, and 'for the doctors of the new study the books of Justinian were sacred books, the sources of authority from which all deductions were to be made.[36] The absolute and canonic authority of the text, the presupposition, common to both jurisprudence and theology, that certain texts were to be comprehended as containing a complete and integrated body of doctrine, was central to the scholastic method of the glossators: "As in the case of theology, the written text as a whole, the Corpus Iuris Civilis, like the Bible and the writings of the Church Fathers, was accepted as sacred, the embodiment of

[33] Jan Blommaert, *Discourse: A Critical Introduction* (Cambridge University Press, 2005).
[34] John Oddo, "Discourse-Based Methods Across Texts and Semiotic Modes: Three Tools for Micro-Rhetorical Analysis," *Written Communication* 30, no. 3 (July 1, 2013): 236–75, https://doi.org/10.1177/0741088313488071.
[35] See, e.g. Neil Duxbury, *Patterns of American Jurisprudence* (Clarendon Press, 1997).
[36] Pure Theory of Law, 72.

reason."[37] The jurists task was that of making sense of a series of texts which were objectively given and authoritatively laid down. No attempt was to be made to question the rationality, the utility or the historical and social conditioning of those legal or scriptural authorities. From its very beginnings in the 12th century, the "science" and study of law was to treat its object as an autonomous body of written doctrine which was to be philologically reconstructed and handed down by an elite group of jurists. While the 19th and 20th centuries have witnessed several attacks upon the orthodoxies of legal exegesis, and while historical and realistic tendencies within legal studies have to some extent challenged the formalistic assumptions resident within the dominant pedagogy of legal science, the greatest successes of modern jurisprudence have been precisely characterized by the re-assertion of the autonomy of law.

The influence of the science of law has travelled largely unacknowledged into the methodology and practice of contemporary legal positivism. In the words of a recent critique of positivist theories of law application: Formalism is not an antiquated theory of merely historical interest. The claims of contemporary theorists are not isolated instances of an impoverished legal education. Formalism survives because it is, prima facie, "the theory of adjudication required by our ideals about the rule of law." [38] It is still taught in law schools, lawyers and judges still communicate as though there is a science to be learned, and it pervades the mythos of legal reasoning, both by jurists and by those who seek greater knowledge of legal institutions.

Legal Formalism

The generic development of contemporary legal formalism has a long, and fairly well-documented history. Of central concern was the idea of analyzing law as a self-contained system of norms, which was independently identifiable or internally guaranteed, without reference to any content, usage or history of the rules that comprised the system. It was a science of the form of law and significantly enough it shared many features in common with a Saussurian science of linguistics. In this vein, Hans Kelsen's theory of the grammar and hierarchy of the legal order was even more in philosophy than was the Saussurian conception

[37] I. Kant: Critique of Pure Reason (1887) London, at 504.
[38] M. S. Moore: The Semantics of Judging (1981) Southern California Law Review 151,166.

of linguistics. Kelsen's *The Pure Theory of Law*, however, purported to be scientific, objectivist and universalistic. It aims at the "totality of law in its objective validity and seeks to conceive each individual phenomenon in its systematic context with all others - to conceive in each part of the law the function of the total law... The law is an order, and therefore all legal problems must be set and solved as problems of order. In this way legal theory becomes an exact structural analysis of positive law, free of all ethical-political value judgments."[39] Thus to create a unified system of law, the object of this science was to be specifically constructed so as to exclude the elements of subjectivity inherent in historical and particular facts. The question, therefore, is how and to what effect in terms of content and substantive practice this aim was to be achieved.[40]

While evolutionary studies of legal development enjoyed considerable success, substantial inroads had also been made by the Hegelian "Philosophy of Right" and by the Marxian conception of historical materialism and of the historicity of legal ideology. Although these theories all constituted separate and distinctive challenges, they did combine, in the name of very different conceptions of historical development and political practice, in opposing the positivist thesis of the autonomy of the legal object. The centrality of history was deemed to preclude the possibility of any social science. These historical studies tended to conflate facts and values, as Chaim Perelman and L. Olbrechts-Tyteca would understand them[41]. As I will argue in subsequent chapters treating legal discourse as a scientific pursuit is inherently problematic. One can never separate bare facts of a case or of a legal history with their associated values. In legal scholarship, this is often attributed to a hermeneutic challenge – as though we simply do not have enough access to the truths or facts of a situation to fully understand how to translate it to a new question of law.

Kelsen argued that "a glance at the traditional science of law, in its nineteenth and twentieth century developments shows plainly how far removed from the requirement of purity

[39] Hans Kelsen, *Pure Theory of Law* (The Lawbook Exchange, Ltd., 2005).
[40] Kelsen's major methodological innovation was that of the introduction of a Kantian methodology to the study of law. The formalist orthodoxies of legal philosophy and particularly of the exegetical study of adjudication, were being increasingly challenged in the latter half of the nineteenth century by the rise of historical jurisprudence.
[41] CHAÏM PERELMAN et al., *The New Rhetoric: A Treatise on Argumentation* (University of Notre Dame Press, 1969), https://www.jstor.org/stable/j.ctvpj74xx.

the science was"[42] During this time, the scientific analysis of law (to the extent that one could argue that it was scientific in its formalism) gave way to an analysis of law that simply applied formal logical structures onto legal arguments to understand the internal validity of the argument.[43] To understand why the "law as a science" metaphor is ill-equipped to explain jurisprudential movements, I turn to a common legal argument organizational schema, IRAC.

IRAC/CREAC

While legal writing manuals[44] and law review articles[45] discuss legal text fairly consistently in terms of typical genre features, they tend to prescribe, rather than describe textual features, which does not account for the living language of the law.

In legal writing classes, law students are taught the IRAC (or increasingly, CREAC) method of legal analysis. Issue; rule; application; conclusion (or: conclusion; rule; explanation; application; conclusion)[46]. IRAC is conceived of as more than just an organizing principle for legal writing, it is said to be an organizing principle to help lawyers think through cases. Mezter argues that mastery of the IRAC method is key to thinking like a lawyer. He says: "while there is some value to IRAC as merely an organizational tool, I would like to impress upon students

[42] The most glaring issue was the failure to distinguish the question of the formal validity of the normative order, a question generally thought to be the place of logic, from that of the content of particular laws, a question of a theological, ethical or political nature. The former question was the subject matter of legal science, a discipline which for Kelsen should be wholly given over to the study of the systemic characteristics of the legal order conceived as a grammar and hierarchy of norms. It was, as stated, a structural theory of law and goes hand in hand with an emotivist theory of ethics and the axiomatic rejection of the possibility of any causally based historical science of law.
The basic premise of Kelsen's "epistemology of the scientific outlook" is the rejection of "the transcendental entities of antecedent metaphysics" and their replacement by the theory that: "Cognition cannot be merely passive in relation to its objects; it cannot be confined to reflecting things that are somehow given in themselves ... Cognition itself creates its objects, out of materials provided by the senses and in accordance with its immanent laws. It is their conformity to laws which guarantees the objective validity of the results of the process of cognition ... The ideal of objectivity emerges as dominant."(Kelsen). Therefore we also find the prevalence of logic and the tendency to relativism .

[43] For a discussion of why such an analysis inevitably proves faulty, see my discussion of the syllogistic mode of reasoning in Chapter 3.

[44] See, e.g. Bryan A. Garner, *Legal Writing in Plain English: A Text with Exercises* (University of Chicago Press, 2001).

[45] See, e.g. Mark K. Osbeck, "What Is 'Good Legal Writing' and Why Does It Matter?," *SSRN Electronic Journal*, 2011, https://doi.org/10.2139/ssrn.1932902.

[46] [IRAC is simply an acronym for organizing a legal argument that involves a description of the Issue;, an explanation of the legal Rule an Application of that rule to the facts of the case; and finally, a statement of your Conclusion.]

intending to practice law, especially litigation, that IRAC is much more than an organizational structure. IRAC is an important mental exercise that forces an author to a deeper understanding of the legal issues at stake. Understanding IRAC is indispensable for sifting through hundreds of cases to find the one that most helps your case." More pragmatically, he says, "IRAC is the key to success on law school exams, the bar exam, and a successful career in litigation." IRAC is the method by which lawyers engage in syllogistic reasoning. The components match up to premises in a syllogism.

Further, Metzer explains that rigorous application of the IRAC method forces lawyers to clearly define the issues and identify areas of contention. Much like applying a stasis analysis, using IRAC allows lawyers to key in on the component of a case that is the source of contention. For example, two attorneys may disagree about the state of the law (the rule) or about how the law applies to the particular fact situation of the instant case (application), which would lead to different outcomes (conclusion). "part of the value of IRAC is to force you to engage in the mental exercise of distinguishing Rule from Application thereby crystallizing the source of dispute."

Syllogistic mode of reasoning

The difficulty that that Formalist theories of the law have in accounting for uncertainty or human values, is not limited to any one ontological theory of law or legal argumentation. Even scholars who would count themselves in the Realist camp, would be hard pressed to explain to law students how to create legal arguments without following some of the precepts of Formalism. Proponents of the traditionally taught legal reasoning argumentation structure argue that case law operates much as a philosophical syllogism[47] not unlike the classic "Socrates is mortal" example.[48] And yet, conceiving of the law as reducible to formal logic misses what is most challenging about legal argumentation: uncertainty.

Legal formalists argue that applying case law is scientific in nature and can be encapsulated in formal models of logical reasoning. In "Legal Reasoning with Argumentation

[47] In traditional legal models of reasoning, the major premise is comprised of the applicable legal rule; the minor premises are the facts of the case that apply to the rule; the conclusion states in some way whether we should find in favor of [x defendant or y plaintiff] based on the major and minor premises.

[48] The syllogism is structured as follows: "All men are mortal / Socrates is a man / Therefore, Socrates is mortal," where Socrates is a class of being that could be categorized as a man, therefore he must share the quality of being mortal. The first two premises are true and the conclusion follows from those premises.

Schemes," Thomas F. Gordon and Douglas Walton describe several argumentation methods which appear in legal reasoning and which follow a model of argumentation scheme "closer to the concept of an argument in philosophy, as tuples of the type (list[premise], statement) where list[premise] denotes the type of a list of premises, and the statement is the conclusion of the argument. A premise is either a statement, exception or assumption."[49]

Similarly, in "Logic for Law Students: How to Think Like a Lawyer," federal appellate judge Ruggero J. Aldisert and his colleagues argue that "Logic is the lifeblood of American law. In case after case, prosecutors, defense counsel, civil attorneys, and judges call upon the rules of logic to structure their arguments. Law professors, for their part, demand that students defend their comments with coherent, identifiable logic. By now we are all familiar with the great line spoken by Professor Kingsfield in The Paper Chase: "You come in here with a head full of mush and you leave thinking like a lawyer." What is thinking like a lawyer? It means employing logic to construct arguments.[50] Further, they argue that law should be read as composing a highly structured legal reasoning scheme. They say, "It is no exaggeration to say that the syllogism lies at the heart of legal writing."... "We urge all law students to get in the habit of thinking in syllogisms. When briefing a case as you prepare a class assignment, the skeleton of the deductive syllogism should always poke through in your description of the case's rationale."[51]

Zinnecker responds to Aldisert. He examines and applies the rules of argumentation promulgated by Aldisert in the context of secured transaction law (a subset of jurisprudence that gets its laws primarily from statute, rather than from case law). He argues that applying principles of deductive reasoning to legal arguments based in statutory law is an effective form of reasoning. Zinnecker and Aldisert represent entrenched theories about how legal argument operates: that good legal reasoning follows a formulaic logical pattern that resembles a syllogism and that legal argumentation makes that legal reasoning apparent. In this vein, legal argument that "devolves" from syllogism to enthymeme can be explained as perversions of the law attributable to rhetorical trickery.

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[49] Thomas Gordon and Douglas Walton, "Legal Reasoning with Argumentation Schemes," in *Proceedings of the 12th International Conference on Artificial Intelligence and Law*, ICAIL '09 (ACM, 2009), 137–46, https://doi.org/10.1145/1568234.1568250.

[50] Aldisert, Clowney, and Peterson, "Logic for Law Students."

[51] Aldisert, Clowney, and Peterson, 7.

The purported primacy of syllogism over enthymeme in logic and argument studies is not limited to legal argumentation scholars. In "Argumentation Schemes and Enthymemes," Walton and Reed argue that treating "so-called enthymemes, or arguments with missing (unstated) premises or conclusions" like syllogistic arguments is problematic[52] They systematically analyze ten cases to not only illustrate the problem with re-creating unstated premises, but also to provide a system that will aid argument theorists in doing so in critique. Similar to Govier, Walton and Reed locate the problem with missing premises in their reconstruction, but also implicitly extend blame to the authors of "weak arguments." However, rarely can any argument grounded in law or policy explicitly state (or even identify) all premises. Any law student can recognize the inherent problems that arise when one applies fact patterns of legal disputes to rules of law. This is the beginning of a more robust understanding of the role enthymeme can play in everyday legal reasoning[53].

Adeodato argues that traditional legal thought that disparages the use of the enthymeme is inconsistent with a constitutive nature of the law (although he does not use the term "constitutive") He argues that the enthymeme, or the rhetorical syllogism, is misunderstood by those who view legal reasoning as no more than hermeneutics, understanding how the law is meant to apply to the current circumstances. He argues that "[i]t is generally not a conscious strategy on the part of the so called official legal agents (judges, prosecutors, state attorneys, lawyers, plaintiffs), which seem to believe that the decision before the concrete case is in fact produced by the previous general norm enunciated by the system."[54] Further, citing Bernard Jackson, he argues that " the…general legal norms (reflected in the major premise) do not 'refer' at all to the facts of cases brought under them (reflected in the minor premise)."[55] Adeodato evaluates claims that connect enthymemes to

[52] Gordon and Walton, "Legal Reasoning with Argumentation Schemes," 339.

[53] Legal scholars recognize that case facts rarely fit perfectly within legal rules, but many jurisprudential scholars would still argue that facts can be known and applied consistently and that a failure to do so is a failure of the human component of reasoning and argumentation. A more rhetorical approach to legal argumentation would take the contingent nature of truths as one of its starting points. While this dissertation does not directly address the contingent nature of truths, it should be noted that this author would subscribe to the idea that a failure to accurately account for "truth" is not merely a flaw of language to be overcome by successful rhetors, it is inherent in the nature of the human condition.

[54] João Maurício Adeodato, "The Rhetorical Syllogism (Enthymeme) in Judicial Argumentation," *International Journal for the Semiotics of Law* 12, no. 2 (June 1, 1999): 136, https://doi.org/10.1023/A:1008998121097.

[55] Adeodato, 136.

manipulation by the court, be it deliberate or unintentional, to build a more robust discussion of the enthymeme and bring it out of the shadow of the syllogism in legal scholarship.[56]

In explaining how syllogisms work in legal arguments, Aldisert gives several reconstructions of arguments that, in his view, follow the syllogistic form. For example, he lists several cases that deal with Constitutional rights to privacy, such as *Griswold and Roe v. Wade*. He reconstructs the argument in *Griswold v. Connecticut* as:

> **Major Premise:** A law is unconstitutional if it impacts the zone of privacy created by the Bill of Rights.
>
> **Minor Premise:** The law banning contraceptives impacts the zone of privacy created by the Bill of Rights.
>
> **Conclusion:** Therefore, the law banning contraceptives is unconstitutional.[57]

However, these sentences do not appear as written in the opinion. The Court must work to establish what Aldisert has listed as the major premise. In fact, the Court specifically states that "The association of people is not mentioned in the Constitution nor in the Bill of Rights" (Griswold).

Aldisert gives another example, rooted in privacy law to examine the use of syllogism in legal argumentation. He represents Justice Blackmun in his *Roe v. Wade* opinion:

"This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

And argues that "[i]mplicit within Justice Blackmun's statement is the following syllogism:

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[56] Macagno and Damele argue that implied premises can be used rhetorically, to garner assent from an audience who would either dispute the premises, or who would argue with their validity in some way. Contrary to what some scholars have suggested, enthymemes are not used only when the audience would agree to/does agree with the claims or values that are missing from the argument, that is that they are not used exclusively when there is common ground between the rhetor and the audience. Enthymemes can be effective in shifting the burden of proof to the audience. The audience must not only fairly reconstruct the argument, but also refute it.

[57] Aldisert, Clowney, and Peterson, "Logic for Law Students," 5.

> **Major Premise:** The right of privacy is guaranteed by the Fourteenth or Ninth Amendment.
>
> **Minor Premise:** A woman's decision to terminate her pregnancy is protected by the right of privacy.
>
> **Conclusion:** Therefore, a woman's decision whether to terminate her pregnancy is protected by the Fourteenth or Ninth Amendment.

He explains, "[t]he ideas are floating around in Judge Blackmun's sentence, but it requires some work on the reader's part to parse them into two premises and a conclusion."[58] Here, Aldisert's representation seems to be fairly easy to track, although one might argue that this is not the line of reasoning that holds the most weight in the piece. So, this case is not particularly problematic for syllogistic study, but other cases require more work on the part of the analyst to reconstruct.

Aldisert, Clowney, and Peterson recognize that in reconstructing legal arguments, "sometimes it's more than a matter of rearranging sentences and rephrasing statements to match up with the syllogistic form. Sometimes a legal writer doesn't mention all parts of the syllogism, leaving you to read between the lines"[59] Further, they maintain that "often, enthymemes are used for efficiency's sake. If a premise or conclusion is obvious, then the writer can save her precious words to make less obvious points."[60]

Enthymematic Logic and Argument

While Aldisert's discussion of the legal syllogistic argument may provide some guidance about how to structure "the easy cases," those where the lawyer's job is to argue whether her client's facts fit under a well-established rule that apparently governs under the circumstances, syllogistic argument may not be the most appropriate way to think about how more complex legal arguments are made.

> Justice Cardozo estimated that at least nine-tenths of appellate cases "could not, with the semblance of reason, be decided in any way but one" because "the

[58] Aldisert, Clowney, and Peterson, 7.
[59] Aldisert, Clowney, and Peterson, "Logic for Law Students." at 7
[60] Aldisert, Clowney, and Peterson, 8.

> law and its application alike are plain," or "the rule of law is certain, and the application alone doubtful." After more than four decades on the bench, Judge Aldisert can confirm that Justice Cardozo's statement remains true today. In the language of logic, this means that practicing lawyers spend most of their time worrying about the minor premises of syllogisms (i.e., can the facts of the case be fit into the territory governed by a particular rule?).

Aldisert explains that in law school, students are "asked to concentrate on the ten percent (or less) of cases that can't be resolved so easily."[61] These cases, he argues, fall toward inductive generalization, which he describes as "a form of logic in which big, general principles are divined from observing the outcomes of many small events."[62] However, I find each of these views problematic when applied to Supreme Court decisions.

The "Socrates is mortal" syllogism seems simple enough where there is no question about what constitutes a man and under which circumstances men are mortal. But such rules are not always so clear-cut in legal reasoning. Certainly, in lower court decisions many of the rules may seem much simpler to apply. Rarely is there any question about what constitutes murder in a criminal trial, or whether a certain set of facts, if they turn out to be true, constitute the definition of murder. In these simple cases, the syllogistic analogy likely works well.

It would be akin to classifying Socrates as a man or cats as mammals. The work would be in proving that that the creature in question began life as a boy (as in the case of Socrates) or has four legs and purrs (as in the case of the cat). However, in Supreme Court cases, the classification is almost always a point of contention. We might be arguing over whether a woman or a transgendered individual should be considered a "man," or a duck-billed platypus a "mammal." The Supreme Court's job is generally to deal with the duck-billed platypuses.

In a 2012 case involving the police's placement of a physical GPS tracking device on the appellant's vehicle, *United States v. Jones,* the Court itself wrestled whether to predicate its finding on traditional 4th Amendment search and seizure law, or the less clearly defined privacy protections read into the penumbra of various Constitutional amendments.

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[61] Aldisert, Clowney, and Peterson, 12.
[62] Aldisert, Clowney, and Peterson, "Logic for Law Students."

The crux of the distinctions between the majority and concurring opinions in *U.S. v. Jones* was whether a trespass was necessary to find a violation. As the Court explains, "Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century."[63]

> **Major Premise:** The Fourth Amendment provides in relevant part that"[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."
>
> **Minor Premise:** It is beyond dispute that a vehicle is an "effect" as that term is used in the Amendment.
>
> **Conclusion:** We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a "search."

This line of reasoning seems to match up fairly well with a syllogistic reading, until one takes into account the arguments made by the parties to the case and the other Justices in the concurrences.

For example, one alternative argument supplied by the Government appellees is alluded to in the majority opinion:

> "The Government contends that several of our post-Katz cases foreclose the conclusion that what occurred here constituted a search. It relies principally on two cases in which we rejected Fourth Amendment challenges to "beepers," electronic tracking devices that represent another form of electronic monitoring. The first case, Knotts, upheld against Fourth Amendment challenge the use of a "beeper" that had been placed in a container of chloroform, allowing law enforcement to monitor the location of the container. We said that there had been no infringement of Knotts' reasonable expectation of privacy since the information obtained--the location of the automobile carrying the

[63] US v. Jones, 132 S. Ct. 945 (Supreme Court 2012).

> container on public roads, and the location of the off-loaded container in open fields near Knotts' cabin--had been voluntarily conveyed to the public."[64]

The majority takes it for granted that the interests governed by Knotts are different from those in play in Jones. This becomes an important implied premise to the larger enthymematic argument that the concurrences reconstruct from the majority opinion.

The majority opinion reconstructs a second alternate theory of the case from the concurrence:

> "The concurrence begins by accusing us of applying "18th-century tort law." Post, at 1. That is a distortion. What we apply is an 18th-century guarantee against un- reasonable searches, which we believe must provide at a minimum the degree of protection it afforded when it was adopted. The concurrence does not share that belief. It would apply exclusively Katz's reasonable-expectation-of-privacy test, even when that eliminates rights that previously existed."

Enthymeme in Citizen's United

The *Citizens United* decision employs quasi-logical language in the form of a quasi-logical proof and presentational persuasive strategies. The excerpt begins with the following enthymeme:

> **Conclusion:** The law before us is an outright ban, backed by criminal sanctions.
>
> **Premise:** Section 441b makes it a felony for all corporations--including nonprofit advocacy corporations--either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election.
>
> **Implied premise (controversial):** laws that restrict communications within 30 days of a primary election and 60 days of a general election are outright bans.
>
> **Implied premise (non-controversial):** laws that result in felonies are criminal sanctions.

[64] US v. Jones, 132 S. Ct.

The argument seems reasonable, and the conclusion seems to follow logically from the premises, but there seems to be a rhetorical strategy in leaving the implied premise, "laws that restrict communications within 30 days of a primary election and 60 days of a general election are outright bans" unstated. Whether the law qualifies as an outright ban has a significant impact on the outcome of the case, and is an unsettled issue. By incorporating the implied premise into the logical argument, it is harder to challenge because it acts as a sort of presupposition.

Using the enthymeme above as a starting point, the Court further elaborates on the argument. It uses the conclusion it has just reached to form examples that appear to deductively flow from the logic of the enthymeme:

> **Deductive conclusions resulting from argument above:** Thus, the following acts would all be felonies under §441b: The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U. S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech.

The court signals that these examples are logical deductive extensions of Its earlier argument through the use of the word "thus," which signals a conclusion in the logical sense. In an interesting move, the Court, after listing its examples, then synthesizes those examples into an inductive categorical statement:

> **Inductive conclusion resulting from examples above:** These prohibitions are classic examples of censorship.

So, after setting up examples that can, arguably, be deduced, the Court then makes an inferential claim about their relationship to principles of free speech, namely censorship. At the same time, the use of the term "classic" to refer to the examples has the effect of elevating these examples to the position of uncontested (and therefore uncontestable) first principles.

The second paragraph of the excerpt follows a similar quasi-logical form. It begins with a conclusion and then introduces the premises. It begins:

Conclusion: Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak.

This conclusion, in addition to being supported by the evidence presented in the paragraph is further given credence by a citation to authority: See McConnell , 540 U. S., at 330–333 (opinion of Kennedy , J.). The Court offers one stated premise, which begs another, implied premise, to support the conclusion.

Premise: A PAC is a separate association from the corporation.

Implied premise: A separate association creates a meaningful distinction from the original corporation in terms of speech rights.

It then offers a restatement of the original conclusion, which it identifies as a conclusion through the use of the word "so":

Conclusion: So the PAC exemption from §441b's expenditure ban, §441b(b)(2), does not allow corporations to speak.

The Court strengthens the force of its overall conclusion on this point by stating it twice, while failing to mention what might be seen as a contentious implied premise. In a case where the Court is arguing for personhood for corporations, the issue of whether a PAC is sufficiently aligned with a corporation to allow that an outlet for speech is an important one. It was the subject of much of the Appellee's brief, but receives no mention in this "proof."

The Court employs a presentational rhetorical strategy in the way that it demonstrates the burden imposed by the regulation. Logically speaking, the Court lists some of the burdens faced by PACs in order to provide evidence for its minor conclusion that "PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations." But the sentence structure tends to give the statement a quality of onerousness that might help to prove Its point that the laws are burdensome. It compiles a fairly lengthy list of "burdens" suffered by a PAC into one, unbroken sentence that is parallel in form and reads like a laundry list:

For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days.

After demonstrating the burdens faced by the PAC, the Court emphasizes this point by interjecting: "And that is just the beginning" before introducing a block quote of similar burdens faced by PACs.

The Court's highly planned prose employs interesting rhetorical strategies to more effectively analogize the instant case with those that have come before. It does this while engaging a quasi-logical style that emphasizes its conclusions (which will ultimately become law) while minimizing (by omitting from the logical "proof") the contentious minor premises It uses to reach those conclusions.

The legal reasoning in this passage, as well as others in the opinion, tends to follow the classic CREAC/IRAC model of legal reasoning. I find the conclusion to be: "The law before us is an outright ban, backed by criminal sanctions." "Section 441b makes it a felony for all corporations--including nonprofit advocacy corporations--either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election" constitutes a premise, or a sub-conclusion. In order for the argument to function however, I have supplied two missing premises, one which I argue would be controversial, and one that would not. The non-controversial premise is: "laws that result in felonies are criminal sanctions." The controversial premise is "laws that restrict communications within 30 days of a primary election and 60 days of a general election are outright bans."

I argue that missing premises such as these effectively change the analysis of the law, and put it within the realm of relatively better established laws. For instance, by labeling this restriction as an outright ban, it brings the analysis into the realm of prior restraint. Prior restraint is almost always (uncontroversially) struck down as undue burdens on free speech. If, by counter example, the court had analyzed the electioneering communications as commercial speech, the class of laws under which the facts of *Citizen's United* were evaluated would have been more favorable to an analysis that the law was Constitutional.

In "Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation," Berger identifies several possible rhetorical choices the court could have made in deciding the fate of campaign finance regulation. One of the most interesting is an analysis using the commercial speech doctrine. This line of reasoning is conspicuously absent from the analysis of the case, and also from

the criticism of the reasoning. The lack of attention to a possible line of analysis interests me in this project because it might signal the effectiveness of the majority's argument.

This is a key point in the way that legal reasoning works. In moving from a class to a member, there are rhetorical choices in how the class and membership are represented. This may arise as a starting point for argumentation, or it may arise from the linkage in the argument. When the linkage in the argument is not explicitly stated, the audience is left without a concrete deductive analysis. Not only must it supply its own premises, but it must also understand what legal alternatives there could have been. In the aftermath of the Citizen's United decision, many commenters took the Justices on their own terms, rather than discussing alternate lines of legal reasoning upon which the case could have been decided.

If, as I argue, legal argumentation is not simply a transparent application of rule to law, following precise procedures of legal reasoning, then these subtle logical "sleights of hand" must serve some rhetorical purpose. One such purpose can be found in the constitutive function of the law. Its function of responding to, shaping and reifying social values can not only shape cultural outcomes, but it can also re-inscribe the court's ethos.

Constituting Power and Connecting with Community

Power and community can be interrelated concepts in rhetorical analysis; power dynamics and institutional roles shape communities, which in turn, either reinforce or challenge those power relationships through discourse. While power is popularly discussed as being either inherent or negotiable, it is best understood as a combination of the two.[65] "Institutionally conferred power" is the result of institutional rules, policies or traditions that grant one person the power to perform certain duties or rights, or which allow one person to perform a role in relation to other discourse participants. "Situationally negotiated power" is less static and less formally bestowed. It emerges within dynamic interpersonal relationships and may change as discourse participants engage in power-constructing exercises of discussion and verbal negotiations.

Cues as to how power serves to act in a communication may be read by the way in which participants employ linguistic "hedges," or intensifiers. Hedges can signal that a

[65] Johnstone, *Discourse Analysis /*, 130.

speaker does not wish to overplay his institutionally conferred power in a particular situation, and perhaps by hedging, increase the potential success of his argument by those who may come to the situation with greater institutional power. Similarly, intensifiers may serve to strengthen his argument by asserting a sort of surety.

Issues of power and community play important roles in the text of the *Citizens United* decision. Few would question the institutional authority of the Supreme Court, but it is interesting that the word choice from the decision invokes an awareness of that power. That the Supreme Court may choose to display its institutional power in an opinion may be unsurprising, but the way in which it articulates the power of the justice system as a potentially oppressive force (arguably) in order to garner identification with the oppressed may be.

While the use of present tense is common in many forms of legal writing, the almost exclusive use of simple present tense combined with the active voice lend an air of authority and an ahistorical timelessness to the selection. In the following excerpt, I have **bolded** verbs in the present tense and italicized conditional verbs. It is interesting that the court uses the conditional to state that a particular act would be a crime (as opposed to stating that it is a crime), but then proceeds to use the present tense to describe those crimes (instead of the future or conditional). This departure has the effect of distancing the "crime" from the "act."

> The law before us **is** an outright ban, backed by criminal sanctions. Section 441b **makes** it a felony for all corporations—including nonprofit advocacy corporations—either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election. Thus, the following acts *would* all be felonies under §441b: The Sierra Club **runs** an ad, within the crucial phase of 60 days before the general election, that **exhorts** the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association **publishes** a book urging the public to vote for the challenger because the incumbent U. S. Senator supports a handgun ban; and the American Civil Liberties Union **creates** a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech. These prohibitions **are** classic examples of censorship.

8)Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak. 9)See McConnell , 540 U. S., at 330–333 (opinion of Kennedy , J.). 10) A PAC is a separate association from the corporation. 11)So the PAC exemption from §441b's expenditure ban, §441b(b)(2), does not allow corporations to speak. 12)Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with §441b. 13)PACs are burdensome alternatives; 14)they are expensive to administer and subject to extensive regulations. (15)For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days. 16)See id. , at 330–332 (quoting MCFL , 479 U. S., at 253–254).

17)And that is just the beginning. 18)PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur:

The use of active voice and simple present creates a "present-ness" that helps to intensify the urgency of threat for what Kennedy will reason to be an unconstitutional law. I have numbered the independent clauses (as above) and isolated the subject/verb to show voice.

1) The law is (simple present active voice)
2) Section 441b makes (simple present active voice)
3) acts would be (conditional active voice)
4) The Sierra Club runs (simple present active voice)
5) the National Rifle Association publishes (simple present active voice)
6) the American Civil Liberties Union creates (simple present active voice)
7) These prohibitions are (simple present active voice)
8) Section 441b is (simple present active voice)
9) See (Imperative)
10) A PAC is (simple present active voice)
11) the PAC exemption does not allow (simple present active voice negative)
12) a PAC could (conditional)
13) PACs are (simple present active voice)
14) they are (simple present active voice)

(15) PAC must, forward, keep, preserve, file, report (simple present active voice)
16) See (imperative)
17) that is (simple present active voice)
18) PACs must file (modal verb)

In order to understand how the power of the law is identified and constructed in the text, I studied the words that invoked a sense of force. I have **bolded** those words and phrases which I identify with an expression of power. I have *italicized* those phrases which I read as groups of words that invoke a sense of community identity or that might engender identification with specific social group.

> The law before us is an **outright ban**, backed by **criminal sanctions**. Section 441b makes it a **felony** for all corporations—including *nonprofit advocacy* corporations—either to expressly **advocate the election** or **defeat** of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election. Thus, the following acts would all be **felonies** under §441b: The *Sierra Club* runs an ad, within the **crucial** phase of 60 days before the general election, that **exhorts** the public to **disapprove** of a Congressman who favors **logging** in national forests; the *National Rifle Association* publishes a book **urging** the public to vote for the **challenger** because the incumbent U. S. Senator supports a **handgun ban**; and the *American Civil Liberties Union* creates a Web site **telling** the public to vote for a Presidential candidate in light of that candidate's **defense** of free speech. These **prohibitions** are classic examples of **censorship.**[66]

Justice Kennedy's language in this passage sets up a relationship of authority. The law is constructed as powerful and in stark opposition to "non-profit advocacy corporations" through his use of terms like "outright ban," "criminal sanctions," "felony," "prohibitions," and "censorship." The terms "outright ban" and "criminal sanctions" convey particular legal significance with respect to First Amendment law, which could only be effectuated through their use or the use of a near synonym, but whether a sanction is a felony, would not carry with it any additional legal significance. Beyond the "plain meaning" of the text,[67] there is a

[66] *Citizens United v. Federal Election Commission*, 558 U.S. 310.
[67] "Plain meaning" is a term used regularly in legal analysis. I attempt to employ that idea here, without commentary about whether "plain meaning" can ever be apparent.

subtle reinforcement of the way the law is constructed as a powerful force through Kennedy's word choice in regard to the examples he uses. As I will explore later in this dissertation, the terms used throughout the examples would not implicate any specific legal doctrine, but serve only to convey a mood of authority. This is accomplished not only through the use of words whose meaning denotes a force of the law, but also through a subtle aggregation of active voice, power imagery and the use of the present tense.

Corporations are not portrayed in the above passage as merely powerful *commercial* entities or interest groups with vast financial resources, but as interest communities with compelling reasons for free communication. Each of the examples is a "nonprofit advocacy corporation" rather than a multi-national commercial corporation, and the three groups chosen for example have different ideologies and would appeal to different audiences. The National Rifle Association is generally aligned with conservative values, the American Civil Liberties Union with progressive values and the Sierra Club is an environment group that manages to be fairly bi-partisan. But beyond their political ideologies, their groups signify some sense of community: Kennedy is discussing a "Club," an "Association," and a "Union." This appeal to community for the purpose of audience identification with the "victim" in this case is discussed in more detail below.

The Court also identifies and helps establish its own community through its writing. Even in this short excerpt from a much longer opinion, the Court uses language that positions itself within its "discourse community" of legal scholars. The Court's identity as legal institution is reinforced throughout the selected passages through its use of legal terminology, reference to its own prior decisions, and its use of the pronoun "us" to refer to the unified, legal body that is tasked with deciding the case.

The following words and phrases, in **bold**, are ones that invoke a distinctly legal or bureaucratic tone. This tone lends voice to the law's identity. Those that are ***italicized and bold*** are also legal in nature, but could be seen as terms of art and do not have any ready, non-technical jargon equivalents to serve the same purpose in the text. In other words, they convey specific legal meaning that would not be easily reproducible by substituting non-legal terms. <u>Underlined</u> words are non-jargon terms for which a more technical term could have been substituted easily.

> The ***law*** before us is an outright ***ban***, backed by **criminal sanctions**. **Section 441b** makes it a **felony** for all ***corporations***—including ***nonprofit***

advocacy *corporations*—either to expressly **advocate** the election or defeat of candidates or to broadcast ***electioneering communications*** within 30 days of a primary election and 60 days of a general election. Thus, the following **acts** would all be **felonies** under **§441b:** The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U. S. Senator supports a **handgun ban**; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech. These **prohibitions** are **classic examples of censorship**.

Section 441b is a ***ban on corporate speech*** **notwithstanding** the fact that a PAC created by a corporation can still speak**. See McConnell , 540 U. S., at 330–333 (opinion of Kennedy , J.).** A PAC is a separate association from the corporation. So the PAC **exemption** from **§441b's expenditure ban, §441b(b)(2),** does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the **First Amendment** problems with **§441b.** PACs are burdensome alternatives; they are expensive to administer and subject to extensive **regulations**. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, ***preserve*** receipts for three years, and file an organization statement and report changes to this information within 10 days. See id. , at 330–332 (quoting MCFL , 479 U. S., at 253–254).

And that is just the beginning. PACs must file detailed monthly reports with the **FEC**, which are due at different times depending on the type of election that is about to occur:

While administrative burdens on speech have a special designation and treatment within the law, the way in which such burdens are listed and described as affecting a corporation, as detailed in the passage above, serves to position corporations as an entity that is somehow similar to "ordinary citizens." The burden on speech in this context is not a formal burden as the term is traditionally understood in First Amendment jurisprudence as a sort of

administrative censorship, but as a burden of time and energy. Those who decry the meddling hand of big government may be especially offended by the description of the extra paperwork needed to track the flow of money into and out of a corporation under the statute, but only if they see this paperwork as somehow relevant to their lives.

Kennedy, therefore, constructs the identity of two oppositional forces: big government on one hand, and special interest groups on the other. Instead of depicting corporations as unnamed, bureaucratic entities, he humanizes them; they are particularized and aligned with distinct social groups. Readers may feel affinity toward The Sierra Club, the National Rifle Association or the American Civil Liberties Union. In feeling an affinity to the group, the reader may identify as one of a set of people who may be targeted by this oppressive and restrictive law.

Simultaneously, the law of the government is portrayed as unsympathetically bureaucratic in nature. In First Amendment cases, the traditional mode of inquiry is to compare the interest of the government to the interest of the speaker. The government must have a "compelling" interest in limiting the free expression of individuals in order to uphold any restriction on speech. In the passage above, however, the government is not portrayed as a group with interests, but as an oppressive force in direct opposition to important community groups. This does more than just shift the discussion away from a legally tenuous discussion of compelling state interests, it serves to further align reader interests away from those of the government. Much of the popular outcry against the decision was a result of issue of interest and identity. Those who oppose the decision feel that their interests are more aligned with the government's interest in fair elections than with a corporation's interest to "speak" freely. Kennedy's use of bureaucratic jargon to shape the identity of the government as distant and regimented in this passage can therefore be seen as an attempt to shape the way in which readers view their community, whether they identify more with the American democratic community or individual interest groups.

An analysis of the placement of the words in bold shows that words that invoke power and dominance and/or bureaucracy are generally clustered around discussion of the law or government, whereas nontechnical, and more value-neutral words are used in close proximity to Kennedy's discussion of nonprofit advocacy groups. If the reader is assumed to understand any notion of balancing of interests in First Amendment jurisprudential analysis, she will be subtly influenced by way words of power are used to describe the law. This serves to further

shape the reader's sympathy toward and identification with "corporations" rather than the government.

The portrayal of the government as a bureaucracy is further effected in this passage through the description of the requirements of corporations to follow prescribed procedures for tracking money donated to political campaigns. The description of the process is crafted as a particularly onerous one, and one that seems to serve no purpose other than to serve bureaucratic government interests. Adjectives and adverbs such as "promptly" and "detailed" add emphasis to the burden imposed on corporations under the statute, while the phrase "And that is just the beginning" editorializes the onus of the statutory requirements:

> For example, every PAC must appoint a treasurer, forward donations to the treasurer **promptly**, keep **detailed** records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days. See id. , at 330–332 (quoting MCFL , 479 U. S., at 253–254).
>
> **And that is just the beginning**. PACs must file **detailed** monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur:

This language can be justified in that it helps to show the burden placed on speech through the law at issue, but it also helps to paint corporations as victims of complicated rules of government administration.

This analysis shows that legal reasoning, despite popular assertions to the contrary, is neither self-evident nor transparent. Nor could any reasoning ever be completely transparent. Before any syllogism is set down on paper, the author of that syllogism must draw on a multitude of preconceived notions, beliefs and ideologies. To say any syllogistic form of reasoning represents a complete world would be a lofty and exaggerated oversimplification. And yet, this type of legal reasoning often seems to its reader to be a complete representation of every consideration that went into a decision. The human component is almost inconsequential, as the law dictates individual outcomes. Subtle textual cues engender adherence and obfuscate rhetorical nature of legal "reasoning." One of the most important ways that legal language constitutes assent is through the building of a discourse community that is dedicated to this type of highly rational, and highly rationalized form of communication.

In this way, legal writing both signals connection to community and reinforces the law's force within those communities.

Chapter Three: Discursive Accessibility

The force of the law[68] comes not only from the way in which language from court opinions engenders assent to it but also from the ways in which legal language can dictate access through a highly formalistic set of rules and inaccessible language and archaic jargon. The legal community is defined through a common education and bar membership but legal education does more than ensure a common knowledge base, it trains us to "think like lawyers" and in doing so, to replicate the practices of thinking and speaking that are entrenched in the law. While this is not a unique feature of a legal discourse community,[69] it can help to reify linguistic and rhetorical practices that can marginalize outsiders to the community.

Legal discursive accessibility is a noted concern among legal and rhetorical scholars.[70] Lawyers, judges and lawmakers are often criticized for a reliance on oblique verbiage and exclusive language that can serve to distance laypeople from legal documents and proceedings.[71] The plain English movement in the law seeks to remedy what is seen as a hostile inaccessibility to legal documents caused by needlessly technical or archaic word choice and overly complex syntax[72] But despite legislative reforms that mandate plain English in certain contexts, many laypeople are still frustrated by the opacity of many legal documents. This can be especially vexing for those who come before the court but may not fully understand court proceedings or rulings. A critical question that rhetorical scholars must address is the extent to which rhetorical choices in legal documents serve to exclude certain voices and

[68] Bourdieu, "The Force of Law."
[69] Martin Nystrand, *What Writers Know: The Language, Process, and Structure of Written Discourse* (New York: Academic Press, 1982); Swales, *Genre Analysis*.
[70] Graham Hubbs, ed., *Pragmatism, Law, and Language*, 1 [edition]., Routledge Studies in Contemporary Philosophy 53 (New York: Routledge, Taylor & Francis Group, 2014); David Mellinkoff, *The Language of the Law.* (Little, Brown, 1963).
[71] John M. Conley, *Just Words : Law, Language, and Power*, Language and Legal Discourse (University of Chicago Press, 1998); Peter Meijes Tiersma, *Legal Language /* (University of Chicago Press, 1999).
[72] Kali Jensen, "The Plain English Movement's Shifting Goals," *The Journal of Gender, Race, and Justice* 13, no. 3 (April 1, 2010): 807; Roslyn Petelin, "Considering Plain Language: Issues and Initiatives," *Corporate Communications: An International Journal* 15, no. 2 (May 11, 2010): 205–16, https://doi.org/10.1108/13563281011037964.

views from the law. Therefore, I examine published legal opinions from the perspective of linguistic accessibility.

For my analysis, I have looked at a corpus of hundreds of opinions from three Supreme Court jurisdictions - U.S., Navajo and U.K. - across time to compare linguistic complexity from the past, present and ultimately make predictions about and recommendations for the future. I survey these texts using metrics for the standards of plain language set out in Conn. Gen. Stat. § 42-152 to analyze the extent to which the courts are serving the public through their speech. First, it does so through an analysis of syntactic complexity, as understood both by the statute and using digital tools developed to measure complexity. Second, it analyzes word usage for difficult-to-comprehend words as defined both by the statute and by linguistic tools. I then compare each of the three Courts in terms of the accessibility to the texts by laypeople. I compare these texts across time to account for the trajectory of the language in Supreme Court Opinions. Finally, an analysis is given of the fit of the language of the Plain English statute to give an accurate representation of how accessible a text is.

Within the legal writing community, the plain language movement is often viewed as a well-meaning but naïve, failed experiment. However, even though the movement may not have met its laudable goals, it has certainly had an effect on the language of the law. The movement is said to start with Law Professor David Mellinkoff's 1963 book, *Language of the Law*. The movement gained followers in the legal academy and eventually within diverse political circles as well. In 1972 and 1978, Presidents Nixon and Carter (respectively) passed legislation requiring that regulations "be written in layman's terms." By 1979, as the movement gains momentum and begins to be taught in law schools, legal manuals such as *Plain English for Lawyers* by Richard Wydick are published. But beginning in the 1980s, the movement loses steam as lawyers begin to understand that plain language in legal documents like contracts can be problematic. Not only are there potentially wider ranges of interpretation of terms of a contract written without reliance on legalese and terms-of-art, but using plain language can level the playing field between lawyers and non-lawyer consumers. So, the voluntary plain English movement is said to fail. There are glimmers of hope for the movement, however, as federal agencies begin to take seriously the burden on citizens of legal documents. In addition to codes relating to specifying the time burden placed on citizens, the Plain Writing Act of 2010 required federal agencies to produce documents in plain language.

The logical next step for the plain language movement was to embrace technologies that can further simplify the interactions between legal and public spheres. With the digital Revolution comes increasing access to digital sources of statutes and cases. Increasingly, access to resources is free and open to the public. In addition to these primary sources, there is also increasing access to mediated commentary and explanation of the law, where trained lawyers explain some part of the law to a non-legal audience.

While I view these digital resources as a benefit the lay public, generally, I do not see them as the Panacea to equal access that they are often touted. I do see increased access to primary and secondary sources about the law as a way for the public to more fully interact with a legal public sphere. But, as we know, the lay public has both formal and informal restrictions on full participation in the legal process. Formally, there are restrictions of professionalization which prevent members of the public from participating in certain legal forums. But more critical is the lack of access to the reasoning structures and informal embedded rules of the law that makes it nearly impossible for lay people to "think like lawyers" and therefore fully participate in the legal process.

The Law as Text

Statutes and regulations are written in a way that is notoriously hard for outsiders to read and understand[73]. But, some legal theorists argue that statutes are necessarily complex because they carry with them the force of the law.[74] They must be precise, using verbose definitions and archaic terms of art in order to be specific enough to hold weight. Lawyers and judges must understand the statutes. They can then act as intermediaries, translators of sorts, explaining how the law will affect their clients' daily lives.

In manuals teaching statutory construction and interpretation, authors argue that every comma placement is vital,[75] and that every phrase should be constructed so as to only

[73] Tiersma, *Legal Language /*; Garner, *Legal Writing in Plain English*.
[74] Robert A. Katzmann, *Judging Statutes* (Oxford University Press, 2014); Kent Greenawalt, *Statutory and Common Law Interpretation* (OUP USA, 2013); Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West, 2012).
[75] Susan J. Hankin, "Statutory Interpretation in the Age of Grammatical Permissiveness: An Object Lesson for Teaching Why Grammar Matters," *All Faculty Publications*, 2009.

offer one interpretation.[76] Legal writing scholar Susan Hankin uses cases involving the close interpretation of statutory language to illustrate to her students the importance of the Oxford comma. For instance, she uses the case *People v. Walsh*, which involved the interpretation of New York's animal cruelty statute. The defendant was charged with failing to seek veterinary care for his ailing cat; he defended the charge, in part, by arguing that the statute did not require him to provide veterinary care to his animal. The relevant language prohibits animal owners from "depriv[ing] any animal of necessary sustenance, food or drink." The defendant argued that this language, particularly the words, "necessary sustenance," did not include medical care. In responding to the People's counter-argument that "sustenance" is meant to refer to more than food or drink, the court embraced the mandatory serial comma rule:

> The grammatical construction of the clause "or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink" indicates that "necessary sustenance" is "food or drink." ... Was [sic] the statute intended to list three separate types of deprivation it would have read "... sustenance, food, or drink ..." For example, in an author's dedication "to my parents, the Pope and Mother Theresa", the absence of a comma between "Pope" and "and" indicates that the author's parents are the Pope and Mother Theresa and not that a separate dedication was being made to each of the three. "Three or more items in a series should be separated by commas." Evidently, the clause "... necessary sustenance, food or drink, or ..." is not a series or a list.[77]

In Reading the Law: the Interpretation of Legal Texts, Antonin Scalia and Brian Garner argue that "textualists" must pour over legal language[78] to understand the correct interpretations of the law and that proper grammar and punctuation is imperative to foreclose ambiguities.[79] Moreover, to avoid unintended interpretations of the law, statutes must also be as concise as possible. No extraneous clauses should be included. Legal opinions, on the other hand, have

[76] Garner, *Legal Writing in Plain English*.
[77] Walsh, 2008 WL 724724, at *2
[78] They argue that non-legal language can also lead to ambiguities in interpreting the law. For instance, would a burrito be considered a "sandwich."
[79] Scalia and Garner, *Reading Law*.

no such restrictions. While it is true that legal opinions do carry the force of the law in their holding, much of our understanding of the holding comes from the dicta, which does not have the force of law.

Judges and justices are often aware of the wider audience their opinions will reach. In fact, some very quotable quotes have come from the dicta of court cases, such as: "Taxes are what we pay for civilized society, including the chance to insure."[80] Moreover, some judges are known for their language. Justice Scalia took pride in his use of language. And federal circuit court judge Learned Hand is perhaps better known for his turns of phrase than he is for his rulings. For example, in almost a direct response to Holmes' ruling, Hand states, "Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.[81]

So, if, in the tradition of reasoned elaboration, judges seek to control subsequent discourse about their rulings and as such are free to explain their rulings at length, knowing they will be read by both jurists and laypeople, one might expect these opinions to be accessible to a lay audience. However, on closer examination, we can see that opinions are still unfriendly to legal outsiders. As important a question as "how is the law written" is "what are the possibilities?" In other words, is there something particular to the law that requires that it be impenetrable? What other options have courts taken to increase the accessibility of their texts?

My prior work with Navajo attorneys in Arizona led me to consider the affordances for language of the Navajo court. The Supreme Court of the Navajo Nation is unique because it must balance multiple languages, cultures and systems of rules. Most significantly, its jurisdiction is always under scrutiny The Navajo Nation court system is the largest and most established tribal legal system in the world. Since the landmark 1959 U.S. Supreme Court decision in *Williams v. Lee* that affirmed tribal court authority over reservation-based claims, the Navajo Nation has been at the vanguard of a far-reaching, transformative jurisprudential movement among Indian tribes in North America and indigenous peoples around the world to retrieve and use traditional values to address contemporary legal issues.

[8080] Oliver Wendell Holmes, Jr. Compania General De Tabacos De Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 100, dissenting; opinion (21 November 1927)

[81] Learned Hand, Helvering v. Gregory, 69 F.2d 809, 810-11 (2d Cir. 1934).

Navajo Nation Supreme Court Justice Raymond Austin, in his book, Navajo Courts and Navajo Common Law, A Tradition of Tribal Self-Governance, contends that the Navajo Courts are self-conscious of the constitutive nature of legal representation as the courts must simultaneously act as arbiters of community values, common law creators, upholders of the US legal system and governors of tribal sovereignty.[82] He sees his role as part jurist, part activist as he has been involved in the movement to develop tribal courts and tribal law as effective means of modern self-government. Community, he argues, is foundational to every case he hears and he argues that Navajo history and foundational concepts are key to understanding modern legal issues. He explains that key Navajo foundational concepts like "Hózhó (harmony), K'é (peacefulness and solidarity), and K'éí (kinship)" are "adapted and applied by Navajo judges in virtually every important area of legal life in the tribe."[83] Further, he contends that tribal courts are important institutions of indigenous self-governance that "draw on traditional precepts to achieve self-determination and self-government, solve community problems, and control their own futures."[84]

The differences in the courts based on jurisdiction provided a natural environment by which to study differences in language that emerge between sub-genres of legal opinions. Specifically, I asked: What differences in language and syntax exist between genres of Navajo, UK and US Supreme Court decisions? What trends exist across courts and across time? What can we learn about linguistic and legal accessibility through analysis of different jurisdictional genres? To understand rhetorical and linguistic choices, I analyzed documents from these three jurisdictions.

The Corpus

My corpus began with over 1,000 .pdf documents between the three courts. I cleaned up the text in the documents using Optical Character Recognition software (OCR) and manual adjustments where necessary, converted them to text files and renamed the files according to my naming convention. The corpus contained 101 Navajo Supreme Court opinions from 2011-2017 which were culled to 97 for digital analysis. I removed the smallest files, as these

[82] Raymond D. Austin, *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance* (Univ Of Minnesota Press, 2009).
[83] Austin.
[84] Austin, Raymond Darrel. 2009. Navajo courts and Navajo common law: a tradition of tribal self-governance. Minneapolis: University of Minnesota Press.

tended to have more heading than text of the opinion. The resulting files contained 328,810 words. I also began with 403 US Supreme Court opinions from 2011-2017 which were culled to 394 for digital analysis. From this sub-corpus, I removed largest and smallest files to maintain a reasonable range of word count. The resultant sub-corpus contained 3,820,131 words. Finally, I selected all but the largest and smallest files from a set of 476 UK Supreme Court opinions from 2011-2017. That sub-corpora contained 7,093,213 words.

Method One: Syntax and Semantics

I first employed digital methods to analyze the syntax and semantics of the corpora. This was a multi-phased analysis whereby I looked at each text on a macro-level through the lens of a computer-aided linguistic analysis using the following tools: DocuScope, RTextTools, L2SCA, the Stanford Sentence Parser and a K-Means clustering algorithm.

Generic Conventions: Lexical and Syntactic Complexity

In order to apply a rigorous standard of linguistic accessibility, I looked to the plain language laws. I narrowed in on the Connecticut plain language law (Conn. Gen. Stat. § 42-152) because it offered guidelines that were clear and operationalizable. The statute reads:

> CONNECTICUT PLAIN LANGUAGE LAW
>
> Conn. Gen. Stat. § 42-152
>
> - Standard of plain language
>
> (a) Standard. Every consumer contract entered into after June 30, 1980, shall be written in plain language. A consumer contract is written in plain language if it meets either the plain language tests of subsection (b) or the alternate objective tests of subsection (c). A consumer contract need not meet the tests of both subsections.
>
> (b) Plain language tests. A consumer contract is written in plain language if it substantially complies with all of the following tests:
>
> (1) It uses short sentences and paragraphs; and
>
> (2) It uses everyday words; and
>
> (3) It uses personal pronouns, the actual or shortened names of the parties to the contract, or both, when referring to those parties; and

(4) It uses simple and active verb forms; and

(5) It uses type of readable size; and

(6) It uses ink which contrasts with the paper; and

(7) It heads sections and other subdivisions with captions which are in boldface type or which otherwise stand out significantly from the text; and

(8) It uses layout and spacing which separate the paragraphs and sections of the contract from each other and from the borders of the paper; and

(9) It is written and organized in a clear and coherent manner.

(c) Alternate objective tests. A consumer contract is also written in plain language if it fully meets all of the following tests, using the procedures described in section 42-158:

(1) The average number of words per sentence is less than twenty-two; and

(2) No sentence in the contract exceeds fifty words; and

(3) The average number of words per paragraph is less than seventy-five; and

(4) No paragraph in the contract exceeds one hundred fifty words; and

(5) The average number of syllables per word is less than 1.55; and

(6) It uses personal pronouns, the actual or shortened names of the parties to the contract, or both, when referring to those parties; and

(7) It uses no type face of less than eight points in size; and

(8) It allows at least three-sixteenths of an inch of blank space between each paragraph and section; and

(9) It allows at least one-half of an inch of blank space at all borders of each page; and

(10) If the contract is printed, each section is captioned in boldface type at least ten points in size. If the contract is typewritten, each section is captioned and the captions are underlined; and

(11) It uses an average length of line of no more than sixty-five characters.

Some of the provisions of the law were more applicable to a reading of legal opinions than were others. Therefore, I focused in on the following guidelines for analysis:

"(1) The average number of words per sentence is less than twenty-two; and

(2) No sentence in the contract exceeds fifty words; and

(3) The average number of words per paragraph is less than seventy-five; and

(4) No paragraph in the contract exceeds one hundred fifty words; and

(5) The average number of syllables per word is less than 1.55; and

(6) It uses personal pronouns, the actual or shortened names of the parties to the contract, or both, when referring to those parties"

Key takeaways about register, diction, style

Opinions have a more complicated syntactic structure then is typical for many English language public-facing documents. In my analysis the US Supreme Court cases had an average word count of approximately 34 words per sentence and employed a complex syntax. The syntactic complexity measurement ranged between the bottom 20 to 40% compared to control text language, depending on the scale used to measure complexity. They were also high on the academic scale, as analyzed by Docuscope, high on reasoning and high on public law when compared to the other corpora I studied. One reason that the word count is relatively low is because the legal citations made extensive use of textual citations which tend to read as short sentences and skewed the average word count down. It was difficult to control for word count without including citations because textual citations can vary so much it would be difficult to remove them without altering the overall sense of the Supreme Court opinions.

Below is a sample text that illustrates my overall findings:

US Supreme Court Sample text: *This lawsuit began in October 2013, after the then-Governor of Virginia signed into law a new congressional redistricting plan (which we shall call the "Enacted Plan") designed to reflect the results of the 2010 census. Three voters from Congressional District 3 brought this lawsuit against the Commonwealth. They challenged the Enacted Plan on the ground that its redrawing of their district's lines was an unconstitutional racial gerrymander. The Members of Congress now before us intervened to help defend the Enacted Plan.*

Navajo Supreme Court opinions had a much lower average word count of approximately 22 words per sentence as compared to the US cases. They had a moderately complex syntax, depending on the scale, falling in the bottom 25 to 60% for syntactic complexity. They were high on the academic scale and high on place names as identified by Docuscope.

> Navajo Supreme Court Sample text: *The pleadings filed by CCSD also raised the issue of (3) whether this Court has jurisdiction over this matter. At oral argument the Court, as a preliminary matter, reminded the parties that the Court has on two occasions held that the Navajo Nation has jurisdiction over State school districts located on Navajo leased lands and within the territorial boundaries of the Navajo Nation. The first case involved this same district, ONLR ex rel. Bailon v. Cent. Consolo Sch. Dist. No. 22,8 Nav. R. 501 (Nav. Sup. Ct. 2004) and the other case involved school districts in the Arizona portion of the Navajo Nation, Cedar Unified Sch. Dist. V. NNLC and Red Mesa Sch. Dist. v. NNLC, Nos. SC-CV-53-06 and SC-CV-54-06, (Nav. Sup. Ct. November 21, 2007). Thereupon, counsel for CCSD apologized for raising the issue and proceeded with arguments on the merits. CCSD thus concedes this Court's jurisdiction over this matter and that the jurisdiction issue is res judicata in this Court.*

My analysis of the UK Supreme Court cases shows them to be the most complex linguistically of all the corporate I studied. Their average word count was the highest at about 42 words per sentence. They had a highly complex syntax, depending on the scale ranging from the bottom 15 to 20% of syntactic complexity. They were also high on the academic scale and syntactic complexity as determined by Docuscope.

> UK Supreme Court sample text: *The appellants' case in both proceedings is that the issues now before the Supreme Court are inadmissible or non-justiciable on their merits by reason of , principles governing state immunity and/or foreign act of state. More specifically, the , appellants submit that the claims are based on conduct where the prime actors were , foreign state officials, and they either implead the foreign states or would require the , English courts to adjudicate upon foreign acts of state. I use the phrase "foreign act of , state" loosely at this point to cover various*

bases on which it is submitted that the , English court cannot or should not adjudicate upon proceedings against the United , Kingdom, its authorities or officials when the proceedings would also involve , adjudicating upon the conduct of a foreign state, even though state immunity is not , established on the part of the United Kingdom and the relevant foreign state is not , impleaded in the proceedings. The appellants submit that the principles governing , foreign act of state dovetail naturally with those governing state immunity, and that , underpinning both are conceptions of mutual international respect and comity. That , said, there are, as will appear, also differences, not least that state immunity is firmly , based on customary international law, whereas foreign act of state in most if not all of , its strands has been developed doctrinally in domestic law.

Both the United States and the United Kingdom Supreme Court cases employee long, complex sentences with multiple clauses per sentence or T unit. They were more likely to use generic stand-ins for parties to the case such as the terms defendant or plaintiff rather than family names to describe persons coming before the court. They were lexically dense with significant legal jargon as compared to control corpora of New York Times articles.

The Navajo Supreme Court cases employed simpler, shorter average sentences with fewer Clauses per sentence or t unit as compared to the US or UK cases. They tended to use the names of participants longer into the text of the opinion then did the US or UK Supreme Courts. Where US Supreme Court cases typically only referred to a party to the case by their family name during the recitation of the facts of the case, Navajo Supreme Court cases we're more likely to refer to a party to the case by their family name throughout the entire document.

It should be noted that the Navajo Supreme Court cases were also lexically dense and contained a significant amount of legal jargon as compared to the New York Times articles corpora but they were syntactically simpler than either the US or the UK Supreme Court documents.

Method Two: Keyword Analysis

My second methods for analyzing these documents was a keyword analysis. I began by searching common N-grams through the program Antconc and then compared the corpora to

each other to determine significance in relationship to the three corpora. For example, legal terms tended to show up disproportionately in each of the three corpora as compared with New York Times corpus, but different legal terms showed up more often within a particular subset of my legal documents. I compared N-grams of different sizes (to account for both unique phrases and keywords). The most significant results were from unigrams (1-grams). The following table shows significant keywords for each of the three corpora I analyzed in order of significance as measured by number of appearances relative to the entire corpora of the combined Supreme Court cases from all three jurisdictions.

Position	United States	Navajo	United Kingdom
1	% [my replacement key for any number] [85]	navajo	scotland
2	s	nation	seems
3	u	and	recognised
4	at	n	me
5	see	court	mrs
6	v	nav	strasbourg
7	states	we	reference
8	opinion	ct	house
9	united	c	international
10	state	this	ehrr
11	j	council	eu
12	federal	sup	referred
13	congress	r	defence
14	cite	election	authorities
15	a	on	tribunal
16	id	hearing	offence
17	%d	our	lords
18	that	filed	wlr
19	dissenting	appellant	paragraph
20	but	no	concerned
21	circuit	district	claimant
22	f	family	directive
23	ante	sc	breach
24	ing	people	uk

[85] Though the "%" is not a significant keyword in and of itself (it did not actually appear often in the documents), the fact that numbers were much more likely to be represented in the US cases is significant.

25	here	cv	qc
26	statute	oha	my
27	does	appellee	said
28	g	motion	ac
29	inc	matter	relation
30	because	child	ltd
31	tion	jurisdiction	european
32	amendment	order	secretary
33	ibid	office	parliament
34	b	pursuant	section
35	supra	petition	convention
36	majority	board	kingdom
37	concurring	petitioner	paras
38	clause	parties	lj
39	con	commission	article
40	syllabus	shall	para
41	appeals	authority	lord
42	brief	notice	compatible
43	those	for	interim
44	certiorari	legal	eia
45	court	shirley	pointed
46	patent	justice	australia
47	%a	writ	constable
48	pp	resolution	homelessness
49	jury	by	annex
50	claims	stated	lmuk
51	even	op	agreed
52	ment	laws	aims
53	constitutional	further	recoverable
54	ca%	dine	pakistan
55	petitioners	may	whic
56	dissent	due	french
57	agency	nea	deputy
58	constitution	record	scots
59	more	are	occupier
60	government	slip	put
61	stat	custody	afghanistan
62	one	president	icr
63	class	filing	centre
64	claim	action	margin
65	tax	through	possibility

66	t	non	difficulty
67	post	seanez	dwelling
68	ed	over	directives
69	thus	tribal	loan
70	power	committee	undertaking
71	quoting	chief	organisation
72	co	appellants	flat
73	thomas	courts	supplied
74	could	children	devolution
75	pre	issued	sums
76	crime	december	eg
77	scalia	trial	islands
78	than	rock	authorisation
79	offense	government	steyn
80	when	october	acquired
81	app	window	founded
82	omitted	rule	france
83	search	january	sheriff
84	like	appellees	remuneration
85	marks	associate	turkey
86	california	ii	homeless
87	would	file	privy
88	only	concerning	italy
89	text	issues	scr
90	health	without	hra
91	al	yazzie	excluded
92	same	code	commissioners
93	supreme	july	expression
94	texas	counsel	sum
95	plaintiff	must	cjeu
96	ninth	governmental	miss
97	suit	find	arise
98	epa	therefore	welsh
99	today	nha	cj
100	e	tso	entitled
101	commerce	mexico	deportation
102	quotation	fundamental	nationals
103	holding	attorney	deprivation
104	new	transcript	deed
105	market	rules	published
106	employees	initiative	acquisition

107	drug	final	submission
108	also	grazing	reached
109	defendant	request	persecution
110	et	fees	paragraphs
111	alito	school	collins
112	use	release	plc
113	fourth	business	poca
114	supp	will	disproportionate
115	penalty	denied	damage
116	internal	complaint	disclosure
117	per	days	tenants
118	sixth	review	phillips
119	copyright	p	framework
120	death	dismissal	fairchild
121	com	mr	albeit
122	about	its	ich
123	first	title	directions
124	race	within	accounts
125	defense	day	programme
126	instead	cause	wheelchair
127	plaintiffs	bail	aspect
128	tions	ofthe	vulnerable
129	fed	her	wa
130	speech	november	divisional
131	sotomayor	address	receiver
132	sentencing	discretion	armed
133	fifth	forth	main
134	plurality	additionally	hm
135	example	decision	jewish
136	corp	matters	sea
137	american	members	terrorism
138	just	college	rent
139	plan	written	patient
140	florida	findings	wilson
141	racial	indian	benedetti
142	sex	benally	latter
143	senate	before	behaviour
144	so	august	observations
145	officers	party	point
146	fraud	legislative	recognise
147	curiam	candidate	professor

148	reading	citing	walker
149	most	amicus	ie
150	abortion	reconsideration	carnwath
151	dis	upon	incompatible
152	habeas	supreme	habitual
153	many	administrative	interference
154	religious	probate	direction
155	year	respondent	borough
156	respondents	judicial	nicholls
157	relief	appeal	pursuer
158	homas	support	toulson
159	conviction	actions	insured
160	water	process	dust
161	rev	hearings	laid
162	university	required	ground
163	city	begay	regions
164	statutes	rpi	reed
165	limitations	dismiss	cpr
166	michigan	failed	retention
167	roberts	civil	trustees
168	air	bi	insurer
169	recess	all	summarised
170	ferc	presiding	occupation
171	bankruptcy	land	wider
172	d	immunity	forces
173	art	kayenta	hmrc
174	interstate	sovereign	vtb
175	requirement	provide	echr
176	breyer	raised	tier
177	ann	judge	nationality
178	who	specifically	authorised
179	cal	response	iraq
180	political	petitions	upper
181	every	note	disease
182	rico	while	insolvency
183	alien	joe	ecr
184	wholesale	jurisdictional	minister
185	crimes	regarding	claimants
186	less	dinÃƒÂ© (a misread of Dinae)	subsection
187	makes	grant	mesothelioma
188	burden	npea	lloyd

189	coverage	proceeding	rodger
190	nothing	officer	payable
191	alabama	has	insurers
192	equal	amendments	parliamentary
193	sion	contract	suicide
194	%th	ordered	ministry
195	sales	asserts	nuisance
196	cf	abuse	articles
197	income	june	refugee
198	benefits	administration	ewhc
199	medicaid	opportunity	kerr
200	dec	original	illegality

Analysis of Language in the Three Corpora

The language differences between the three corpora signal some of the differences in the values of the courts, their procedures and the level of access participants have to the courts. Navajo Court documents were more likely than the US or UK documents to show lexical significance in terms of named actors and were less likely to refer to those actors with pronouns after they'd been named. This could indicate that the courts place more value on the human component of a legal case. I hesitate to ascribe too much rhetorical significance to this phenomenon, however. For example, I've found in a cross analysis of non-legal texts that the Navajo tend to use fewer pronouns generally. In future research, I'd like to do a more systematic comparison between Navajo legal discourse and non-legal discourse. The significance of named actors can be partially attributed to the fact that the Navajo courts are more likely to see the same actors (or have appellants who share the same last name). This does not entirely explain the significance of the last names, however, as the Navajo courts were still more likely to refer to a defendant by their name than with the term "defendant."

The Navajo opinions were also more likely to have significant place names. While some of this significance can be ascribed to their more compact jurisdiction, the court still signaled placeness in a way that was unique to the Navajo system. For example, the Navajo Court was more likely to refer to the cardinal directions in their statements of facts, which is reflective of the community value of direction and placeness. The locations were also more likely to be discussed in terms of fact patterns, rather than just as jurisdictional issues, as was the case with the US or UK Supreme Court documents.

There are several reasons placeness could be important to the Navajo Supreme Court. First, direction and location are important to the Navajo people and the Court's naming of location in its cases could reflect that importance.[86] But it could also be a reflection of the relatively smaller boundary of the Navajo nation, as locations are more likely to re-appear in multiple cases.

Most striking in my analysis were not the differences in syntactic complexity nor word usage. Most striking were the similarities in genre between US Courts and Navajo courts. For instance, Navajo cases, like US cases are organized in roughly the same way. They begin with a syllabus, a statement of facts of the case and then go on to reason through the ruling, ending with a statement of their ruling. Many credit this similarity to the US court system as being proof-positive of the sophisticated nature of Navajo self-governance. Navajo legal scholars note how seamlessly Navajo courts weave Navajo common law into the greater US system. This shows, they argue, that the Navajo have created a court system on their own terms. I argue that the remarkable similarity across genres is the result of three driving socio-political powers: First, the need for Navajo to assert political control over their own destinies in the face of a powerful, competing government that looks about traditional tribal customs with suspicion. Second, that this same court system struggles to this day in asserting jurisdiction over its members against federal and state courts. This becomes a powerful incentive for Navajo Courts to establish their ethos through their ability to replicate Anglo courts. Third: the education of tribal lawyers in non-tribal law schools helps to reify non-Navajo jurisprudential systems.

Courts who take seriously their role to make the legal system more accessible have made strides in linguistic accessibility, as can be seen in the progression from the UK courts to the Navajo courts. While none of the legal discourse would hold up to the Plain Language Statute, those courts who make it a priority to be more accessible have made strides in doing so.

While my analysis of the linguistic differences between the UK, US and Navajo Supreme Courts suggests that linguistic access to the courts is potentially becoming more democratic, the fact remains that even a highly educated person who had no formal education in the law or a good working knowledge of legal language would likely struggle to understand

[86] For an interesting discussion of this phenomenon, see *Dine Bahane : The Navajo Creation Story"* (University of New Mexico Pres , 1984).

a court proceeding, to say nothing of the average person who might find themselves before a court. Advocacy and representation is built into the legal system. As far back as Ancient Greece, those who found themselves before a tribunal would avail themselves of a representative who had more finely tuned rhetorical skills or a better command of law than they.

Chapter Four: Mediated Language and Access to Justice

Mediation of Language and Representation in the Court

The constitutive nature of the law means a collapsing of the traditional divisions of epidictic, forensic and deliberative.[87] Jurists take seriously the charge that courts do more than merely "interpret" the law, they must apply the law to lived experiences and weigh in on its justice in the context of real people and real lives.[88] For this deliberative aspect of justice to have any weight, individuals must be able to tell their stories; they must be able to explain how the law affects their lives and have their experiences reflected in the path that legal precedent takes.

Anyone who has worked with clients can tell you that legal issues are narrow, for some clients, frustratingly so. Certain issues that clients see as real and important controversies are not considered legal issues and are therefore outside the preview of the court.[89] This bracketing of discourse can further serve to alienate those who are traditionally disenfranchised from the legal process. Expert biases can blind us to those issues because a large part of our training involves internalization of a focus on key legal questions. Clients and lay audiences may become frustrated or confused by the law's narrow focus which may cause them to drop out of the legal or political process for fear of lack of agency.

One response to this perceived lack of agency has been to share legal expertise with a wider audience, with the aim of not only fostering dialogue but also empowering non-lawyers to act within the system on their own behalf. I have studied the efforts by a legal aid organization in rural Indiana to bring greater access of pertinent legal information to low-income people.

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[87] Doug Coulson, "Law as Epideictic: The Complex Publics of Legal Discourse." In Rhetoric's Change (Parlor Press, 2018".)

[88] When weighing the constitutionality of certain laws, judges may entertain (in addition to a facial challenge) an-as applied challenge. An as-applied challenge is one "under which the plaintiff argues that a statute, even though generally constitutional, operates unconstitutionally as to him or her because of the plaintiff's particular circumstances." Tex. Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 518 (Tex. 1995)

[89] For instance, when I worked with the Tenants Assistance Project in Indiana, clients facing eviction would want to explain how they had been mistreated or harassed by their landlords. But unless such mistreatment amounted to constructive eviction, those complaints would not be entertained in a courtroom. Instead, I learned to ask questions of notice and payment (was sufficient notice given? Was partial payment accepted and if so, under what terms?).

One common justification for the judiciary is as site where the general public can interact with, comment on, argue against, challenge or assert laws that affect it.[90] Under this theory, the courts are not merely interpreters of the law, but are mediators between individuals, organizations and bureaucracy. I argue that, thus theorized, courts are spaces for deliberative democratic processes in action – where *policies in theory* interact with *laws as experienced* and where the governed can weigh in on debates about the fairness and justice of rules and regulations. A central tenet to this system is that the courts should affirm a notion that all are equal before the law – that, for example, low-income individuals are heard and respected to the same degree as multi-national corporations.

However, the courts are increasingly facing the realities that socio-political considerations find their way into the courtroom and are beginning to adapt to some of these realities. The Supreme Court officially recognized a right to counsel for certain felony cases in 1963 in *Gideon v. Wainwright*, and has been expanding this right gradually in subsequent years, but even with a guarantee of counsel, none would argue that the poor experience the justice system in the same way as the rich. There are those who argue that similar protections should apply to civil cases because the power differential is just as great when, for example, low-income consumers must protect themselves from debt collectors. It is this power differential that I am most interested in examining.

I examine whether legal aid clients are empowered to a greater extent in their dealings with their attorneys. Nancy Fraser argues that "[o]ne task for critical theory is to render visible the ways in which societal inequality infects formally inclusive existing public spheres and taints discursive interaction within them" (121). It is important for my understanding of the role of the legal system, therefore, to examine to what degree representation is able to negotiate or transform inequalities of status, education and ability.

The traditional legal model of advocacy generally assumes that a group professionalized in legal discourse is better prepared to engage in rational debate[91] (e.g. lawyers) and so is charged with speaking for their clients. The role of the legal aid lawyers in this scenario is complicated. Lawyers are part of a community of their own: they are ethically and professionally constrained in their advocacy due to their role as officer of the court. In

[90] (Summers, 1977; Elhauge, 1991; Graglia, 1987; Levin, 1983)

[91] Habermas, Jürgen, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Reprint edition (MIT Press, 1998).

fact, some legal aid attorneys I interviewed have expressed that they do not always consider themselves to be 100% aligned with the goals of their advocacy, as they may think of their role as one of acting as an intermediary between the interest of the client and the court. I am interested in studying the ways in which a community is formed around common problems in a legal sense (broadly) and how the power dynamics of this situation play out in the negotiations of roles and responsibilities within a legal aid organization. I am interested in exploring how this system works, whether it is consistently employed and to what degree it is effective. Moreover, I am interested to what degree an organization built on an advocacy model attempts to go beyond mere representation and form a cohesive public that deliberates about goals and agendas, responds to external conditions and works together to influence outcomes.

The agonistic deliberative model does not entirely eschew consensus and agreement. In fact, Gutmann and Thompson begin note the importance of the principle of generality to their model of deliberation. As they describe it, the principle of generality encompasses the universal drives and desires we all share and that would apply to any person in our particular circumstances (1996). Generality is a way of applying a normative standard across contexts. When answering the question, "What counts as a moral argument in deliberative democracy?," their answer places the locus of deliberative morality in the principle of generality.[92] They say that the "most rudimentary criterion-sometimes called generality-is one that deliberative democracy shares with most moral and political theories… Moral arguments apply to everyone who is similarly situated in the morally relevant respects…Their claims, if fully developed, would impute rights and wrongs, or ascribe virtue and vice, to anyone who is similar in the respects that the argument assumes to be morally significant."[93] This assumes some universality of moral questions but does not remove these questions from the realm of re-assessment.

Unlike a Rawlsian analysis where participants would hypothetically agree to the same basic principles, in an agonistic dialogic model, initial disagreement is integral to a properly functioning system. In fact, Gutmann and Thompson have built disagreement into the very fiber of the dialogic model. Their system "would promote extensive moral argument about the

[92] Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Harvard University Press, 2009).
[93] Gutmann and Thompson, 14.

merits of public policies in public forums, with the aim of reaching provisional moral agreement and maintaining mutual respect among citizens."[94] Argument and disagreement are important to the process, as long as they come from a place that offers "basic liberty, basic opportunity, and fair opportunity" and are met with three principles at the core of the dialogic model, "reciprocity, publicity, and accountability"[95] Reciprocity, or the dialogic equivalent to the "veil of ignorance" attempts to insure that decisions are made apart from pure self-interest. Key to achieving reciprocity are certain preconditions: each participant must regard every other person as an equal party, reasons given during the dialogic process must be moral in terms of the principle of generality and the focus must be on what is morally relevant in particular instances, not just for particular people. Thus, "according to deliberative reciprocity, citizens honor a basic duty of civility to one another when they accept the fact of reasonable pluralism and try to discern principles that can be assessed and accepted by individuals who are committed to a wide range of different ways of life."[96]

These forms of reciprocity cannot exist where individuals from different stations of life cannot interact with laws or the political sphere. This is one of the great promises of the justice system. Challenges can be made to political decisions based on how those decisions affect individuals. In this sense, agonism and disagreement become, not obstacles to be overcome, but vital preconditions to understanding the force of the law. Giving a voice to disagreement is enshrined in the adversarial legal model.

It has been argued that disagreement is both necessary and too-often ignored in many forms of democracy. Non-deliberative theories "are surprisingly silent about the need for ongoing discussion of moral disagreement in everyday political life. As a result, we suffer from a deliberative deficit not only in our democratic politics but also in our democratic theory. We are unlikely to lower the deficit in our politics if we do not also reduce it in our theory."[97]

Even within a dialogic model, there can be a preference for critical-rational debate and a discounting of the experiences of those unlike ourselves. This leads to the problem I alluded to earlier in this chapter about silencing voices. If some discourse is bracketed away from the

[94] Gutmann and Thompson, *Democracy and Disagreement*.
[95] Gutmann and Thompson, 12.
[96] Jeffrey K. Tulis and Stephen Macedo, *The Limits of Constitutional Democracy* (Princeton University Press, 2010), 8.
[97] Gutmann and Thompson, *Democracy and Disagreement*, 12.

debate, some individuals will not feel like they are able to "get their day in court" and will be unable to influence the law as it applies to them. Dialogic models built on either a critical-rational model or on purely interest-based deliberation may not incorporate lived experiences and therefore may discount evidence from personal narrative imbued with emotion or pathetic appeals.

Agonistic deliberation, therefore, is a key component to a functioning democratic system. Many scholars assume that the courts foster agonistic debate because they are fundamentally adversarial in nature. However, agonism requires more than mere debate; opposing viewpoints are necessary but not sufficient to insure agonistic deliberation. "Agonism demands that one simultaneously trust and doubt one's own perceptions, rely on one's own judgment and consider the judgments of others, think for oneself and imagine how others think" (Roberts-Miller 2007, 135).

Local publics provide an opportunity to study the way in which difference is accounted for in deliberation. Specifically, the organization at the heart of this study, Indiana Legal Services, operates in a space between the courts and the public. It is uniquely situated to bring together the voices of the dominant, public bureaucratic institutions and individuals affected by the policies they enact.

Dialogue and Deliberation at Indiana Legal Services

To better understand the degree to which legal advocacy and representation groups can empower individuals to take place in the agonistic deliberative aspects of the law, I studied communications from Indiana Legal Services and coded the documents for markers of empowerment, transformation and intercultural communication. I chose to examine these elements because they are linked with the goals of the organization and help to identify instances of agonistic dialogue. Indiana Legal Services states that its mission is "to use [its] resources to provide poor people with a wide variety of aggressive, quality legal services which will effectively help them to gain equal access to the courts; empower them to control their lives; and impact on [sic] the major causes and effects of poverty" ("ILS Mission Statement," 2014) It does so through representation, impact litigation, advocacy and outreach.

In *Beyond Legislative Advocacy: Exploring Agency, Legal, and Community Advocacy*, Marcela Sarmiento Mellinger argues that legal advocacy groups such as ILS can be effective alternatives to traditional legislative advocacy as they operate within systems that have as

their ultimate goal transformation other than sheer policy modification. My analysis in this chapter aims to continue this research and explore the ways in which ILS balances its goals of policy change, impacting the causes and effects of poverty in its community, and "Ensuring Equal Access to Justice" (ILS Website) through direct representation of indigent clients.

Within Indiana Legal Services the organization are what I have identified as two sub-groups. One group is composed primarily of paid staff (attorneys, paralegals and administrative assistants) and long-term volunteers (law student interns, volunteer attorneys and other long-term volunteers); I refer to this group as "staff" throughout. The other group is composed primarily of clients, potential clients, community members and short-term volunteers; I refer to this group as "clients" throughout. Staff tends to have more say over the trajectory of the organization. It also positions itself as serving clients. Clients tend to be the recipients of aid. I have included short-term volunteers within the category of clients because many of them began as clients show vestiges of the way they formerly interacted with staff.

Empowerment

One criticism levied on representational advocacy is that it mutes the authentic voices that are a party to a disagreement and couches deliberation in the dominant discourse.[98] Key to my inquiry, therefore, was the extent to which ILS clients are empowered to speak. Are they full participants in the deliberation, or are they silenced by a discourse and a way of thinking that is unfamiliar or inaccessible to them?

Indiana Legal Services has as a major goal of its organization to "empower [poor people] to control their lives."[99] This is a broader goal than mere competent representation in legal proceedings. Through my conversations with Managing Attorney Jamie Andree, I learned that ILS envisions itself as an organization that fulfills the role of not only attorney but occasional social worker as well. Andree expressed to me that much of the assistance ILS can offer the community is not entirely legal in nature. It often consists of connecting people to need-based assistance organizations, providing information about programs and services that

[98] Patricia Roberts-Miller, *Deliberate Conflict: Argument, Political Theory, and Composition Classes*, 1st edition (Southern Illinois University Press, 2007).
[99] "ILS Mission Statement"

might help lift callers out of poverty and educating the community about their rights and responsibilities with respect to business practices and government programs.

Though my access to client communications was limited to that which was publicly available (for reasons of confidentiality), I did analyze markers of empowerment through the lens of the client. In other words, my inquiry was not "did attorneys feel that they were empowering clients," but "is there evidence in the language that the attorneys are treating clients as though they have power within the relationship?" I sought to answer whether clients and volunteers are empowered through the interaction with ILS either a) in dealings with ILS; b) in legal dealings; and/or c) outside the context of ILS or their cases. I have reproduced some representative findings about empowerment in Table A, below.

Indiana Legal Services communication showed some markers of empowerment through the strategies of providing for client agency, agenda setting in representation, agenda setting in outreach and procedural empowerment.

Jamie Andree reiterated that attorneys were limited in their representation of clients by the Indiana Rules of Professional Conduct, which dictate that the client determine the desired outcome, but leave room for the attorney to dictate the means of reaching the outcome. In practice, however, clients often defer to counsel for outcomes as well. Andree suggested that this is because clients lack the requisite legal knowledge to determine for themselves what possible outcomes might be. She explained that, at the beginning of the relationship, there is good deal of deliberation between staff and client to arrive at a feasible outcome. Further, because ILS has limited recourses, it is able to deny representation to those whom it deems do not have an understanding of a realistic outcome.

Beyond the end goal of representation, Andree suggested that the attorneys do see a role for their clients within the attorney-client relationship. Partially due to limited resources and partially due to an underlying principle of inclusion at ILS, clients are expected to work on their own and with their attorneys on their own case. This is slightly unusual in terms of representation, as attorneys generally do not ask clients to do the sort of support work asked of ILS clients.

In an informational brochure, ILS sets out the expectations it has of its clients. Under the heading "After I Get A Lawyer, What Should I Do?," It suggests:

> Be honest with your lawyer. If you lie to your layer, he cannot do his job. When you meet with your lawyer, bring whatever paperwork you have related to the

> problem your lawyer is trying to solve. If you do not understand what your lawyer has done, ask questions until you do. Be on time for appointments and for court. Also, stay in touch. Give your lawyer your current phone number and address" (Expect)

ILS clients are routinely asked to gather records from opponents to litigation (discovery), gather depositions in the form of letters from witnesses and fill out and submit legal documents to the court. In practice, this serves to empower clients, not through an authentic voice within the system, but as a form of education in the law and courts. It can also serve to create transparency and trust between client and attorney and even client and the legal system.

ILS did exhibit markers of empowerment in its overall agenda-setting goals outside the scope of individual representation. In its manual, it specifically creates a space to adapt to the changing needs of its clients. It states, "Legal issues which affect large numbers of low-income persons may be brought to our attention in a number of ways, including by community organizations, clients, discussions with other casehandlers and staff members" (ILS Manual). According to Andree, however, the organization is not always as pliable and responsive to client and community needs as she would like. She says that she feels restrained sometimes by the overarching goals of the organization, by its Board of Directors and its funders. Not only are their limits on its resources, there are also some areas that are seen as less politically desirable, even though there may be a need.

One area to which the Bloomington office of ILS (but not the larger organization) responded was to the needs of men in family law cases. One of the attorneys in Bloomington, Thomas Frohman, saw a void in representation that was not covered by other organizations in representing men in custody and divorce cases. The new representation, arguable, helped to create a dialogue In an area of the law where men are not traditionally thought to be in need of special services. This is the sort of representation that agonistic deliberation requires: both sides of the debate must have equal access.

Of course, ILS is restrained not only by political consideration, but by financial ones[100] as well. The manual states, that "[g]iven the inadequate number of attorneys and paralegals serving the poor and the need for the poverty community and their advocates to be able to

[100] What Aristotle term as technical v. atechnical constraints

deal directly with the legal system, there is a significant role to be played by community organizations and their members so they may become effective advocacy organizations" (ILS Manual). While this may be more of a policy in theory than in fact, it does indicate a limitation on the scope of representation. For example, ILS conducts significant outreach that would not be considered strictly legal advice and publishes non legally-oriented pamphlets, such as: the following about how to maintain a home:

> "Your home is often the biggest investment you will make. It is important to keep your home safe and in good repair. Often, small problems can lead to bigger ones if you do not fix the problems early. It may save you money and time to fix small repairs as they come up. If you cannot afford to make the repairs, you can check in your area to see if any agencies offer free or low-cost home repairs. You could contact churches, schools that have a vocational e d u c a t i o n program, Veterans Administration, Community Action Programs, District Area Aging Agencies, the Boy Scouts, or local charitable organizations. If your repair is small, you may be able to get it done through one of these agencies. You will probably have to hire a professional home repair contractor for larger repairs" (Repair)

The biggest impediment I saw in terms of fostering true agonistic deliberation was in agenda setting within individual cases. There is a severe lack of parity between the courts and ILS's clients in that the clients must deliberate using the rules of the court. According to Andree, this means that challenges to laws that unfairly burden low-income people may not get heard at all. If they are heard, they are only heard in the language of the court through the use of impact legislation.

TABLE A: Empowerment

	Strategies	Features	Examples
Clients, Volunteers and Community Members as Agents	Client Agency	• Outcomes are governed by the client, inasmuch as is possible • Clients are tasked with responsibility for outcomes	Clients are responsible for initiating contact (universally, even when case workers provide referrals).
	Agenda Setting in Representation	• Clients determine the scope of representation • Clients determine desired outcomes	In low-income tax cases, clients choose whether to file CNC "currently not collectible" or OIC "offer in compromise"

	Agenda Setting in Outreach	• Clients/communities have a say in the mission of the organization • Clients/communities help determine outreach goals • Clients/communities help with the means of outreach • There are active roles for low-income people to participate and make decisions	"ENROLLING A CHILD IN SCHOOL WHEN YOU ARE NOT THE CHILD'S CUSTODIAL PARENT" [Non-legal outreach pamphlet] (Enrolling) "The school says I need to have a legal guardianship from a court. Do I need this? You do not need to get a legal guardianship through a court to get the child enrolled, if you meet the requirements listed above and have filled out the form. Make sure you have filled out the form properly and give it to the school" (Enrolling) Recognition of importance of name change petitions to certain members of the community (especially transgendered individuals and victims of domestic violence).
	Procedural Empowerment	• There are institutionalized accommodations to help those who would be otherwise unable to participate • Ad-hoc accommodations are also made when a need has been demonstrated	"Intake restrictions that prevent access to the application process discourage the rational distribution of resources and limit access according to arbitrary factors. Second, limiting access to the regular intake system tends to force applicants' cases into an emergency posture which, when presented to our offices, have a more disruptive effect upon the orderly processing of work and place the client in a more precarious position. Third, unduly restricted intake hours create a special burden upon the poorest of our clients, who have made special efforts to get to the office or to a telephone and who may have spent their last quarter calling our office. Fourth, restrictions on intake hours understandably create resentment in the client community, that group of people whom we must always count on to be our chief allies. Finally, the amount of time an office should be open for intake is, in part, a function of client demand" (ILS Manual)

Transformation

If agonistic deliberation is concerned with more than just the outcomes of debates, if it is seen as a way to transform the agon, to foster growth and understanding, then there are

implications for both sides of a deliberation. Roberts-Miller says that "agonal rhetors emphasize the importance of being able to shift perspectives, and not simply as a way to consider arrangement, but as inherent to thinking" (2007, 126). In an ideal deliberative space, then, parties to the deliberation would display transformation.

I analyzed transformation in terms of empowerment from the perspective of the client; equally important is transformation from the perspective of ILS staff. I see this as key for two primary reasons: first, the staff, in its representative capacity, must be able to adequately express the views of its clients. This means more than just restating a client's claims; it means understanding the client's experiences and desires. Second, inasmuch as ILS is working as a deliberative space, staff must acknowledge difference in perspectives. Sometimes that will entail the staff defending a position that might be contrary to a client's position. Even in this instance, agonism requires a transformation, not only of argument, but of ways of thinking.

To understand the degree to which ILS staff undergoes a transformation, I coded for indications that ILS staff members mitigate the pre-existing power relationship between attorney and client through working and communicating with their community of clients and volunteers. Communications from ILS staff showed indicators of strategies to engender goal-setting accommodations, outcome accommodations and membership or hierarchy accommodations. These are high-level indicators of transformation because they indicate a shift from the traditional role of the attorney in her relationship with her client.

My interviews with Jamie Andree showed that attorneys do not always feel like partners in their day-to-day interactions with their clients. She indicated that attorneys often feel frustrated by less than responsive clients and by clients who do not seem to be invested in outcomes. However, she said that the staff at ILS does undergo a gradual transformation through its interactions with clients because it gains a deeper understanding of the root causes of its client's legal problems. This increased understanding has shaped the goals of the organization, as it realizes that the legal problem may only be one small aspect of conflict in the client's life. I have reproduced a sample of indicators of transformation in Table B, below.

The fact that the organization now recognizes at least as many non-legal agentive priorities as legal ones speaks to the transformation that occurs between staff and client in the process of representation.

TABLE B: Transformation

	Strategies	Features	Examples
Indiana Legal Services Staff as Agents	Goal-setting accommodations	• Evidence of agenda setting based on shared concerns • Reflection of need in mission statements • Request for feedback in agenda-setting	"Casehandlers should recognize the limitations on their time and take care not to promise to do things for clients that the casehandler may not be able to do or that the clients could do for themselves." (ILS Manual) "Fresh Asparagus" and "Payday Loan" blog posts acknowledge non-legal agentive goals (ILS Website)
	Accommodating outcomes	• Outcomes are not pre-determined • Recognition of new possibilities for positive outcomes • Accommodation of non-goal oriented outcomes including new understanding, dialogue and learning opportunities • Staff works to understand client needs in representation • Staff works with clients in a partnership	Shift in focus from CNC to OIC based on client feedback (Interview with Managing Attorney) A good interview has at least three primary objectives and ILS casehandlers are expected to strive for them. These objectives are: a. to obtain a solid understanding of all the relevant facts; b. to obtain a solid understanding of the client's goals or perceived goals; and c. to establish a good relationship with the client." (ILS Manual)
	Membership/ hierarchy accommodations	• Membership is open to those with common problems • Positions are not pre-determined	"Who Volunteers? Volunteers come from local communities and represent a varied cross-section of people and backgrounds. All share a dedicated

		• There are active roles for low-income people to participate and make decisions • Attorneys are not solely responsible for outcomes	interest in helping low-income persons gain equal access to justice. Volunteers are homemakers, students, retired persons, teachers, nurses, persons working full or part time, and YOU! They are busy people who share their skills, time, and talents to help the lives of others."

Account for Difference; Engage in Intercultural Deliberation

Key to an understanding of whether ILS is able to move beyond the critical-rational model of deliberation so prevalent in legal circles and engage in a more agonistic model that accepts a wider range of evidence and premises for argumentation is whether the language of the dialogue itself accounts for difference. The Bloomington office of ILS tends to see clients who are different from the members of the staff in terms of class, race, nationality, background and education. Most important to our understanding of the deliberative space is the difference in education. The staff is comprised predominantly of college educated (largely law school educated) professionals, whereas the clients tend to come from rural communities and may not have a high school education.

While there is evidence that the legal register has been modified so aid client understanding, a surprising finding of this study is that the critical-rational model of reasoning tends to predominate discussions. For example, on November 13, 2014, ILS attorney, Victoria Deak posted the following on the ILS website (reproduced in its entirety, but comments added in brackets, bolded):

> It makes sense that lots of people who search for a legal site do so because they have a specific legal question. Often, something is happening to them (or a family member/friend) and they want some information. Sounds harmless enough. So why don't why just answer the questions that users send? [**Indicates acknowledgement of another perspective, responds to question**]

There really is a great answer to that. You may not like it that much, [indication of non-rational response] but if you think about it, it makes sense. [followed by suggested rational response] The reason we cannot answer legal questions boils down to two very important words that attorneys say a hundred times a day when talking with their clients: it depends. Just about ANY legal question you can ask regarding a specific situation will require that the answer start with the words "it depends". For example, someone sends a note to ILS that says, "The ceiling in my apartment just fell on my brand new, expensive television. The owner must owe me a new television. How do I get her to buy it?"

Situation sounds simple, right? We could jump right in and talk about small claims court and how to file a case, etc. But that wouldn't be a good answer. If an attorney had that potential client sitting with her and was able to ask a few more questions, the attorney may learn that the apartment manager wrote a letter to the client about the water leak a few weeks before and specifically identified where the problem was, that they were fixing it but to move anything valuable away from the area until the management informed the residents that everything was repaired. Then the client tells the attorney that he knew there was a problem when the ceiling paint started to stain and then little drops of water started coming down. Despite this, the client put the new television directly under the water leak. [discussion of possible complications]

Those additional facts change things (quite) a bit. A person has a requirement to try and mitigate the damages. That means if you know there is a leak and you are even warned about it, you need to try and NOT have your property get damaged – for example, do NOT put the television there!

Even if you believe you are providing all the facts when you write a question to us, it is possible that the attorney will need more information. [privileges knowledge of the law above recitation of the facts] The very first rule that we as attorneys are required to obey is "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the

representation." If the attorney failed to get all the necessary facts, she would NOT be providing competent representation and could face disciplinary action. More importantly, the client would not have adequate legal assistance.

The bottom line is that we WANT to make sure we provide the best help we can, and I think the potential clients want that too. So, please try to understand why we say we cannot answer specific questions."

This blog post illustrates two things: first, the staff responds to questions in a manner that models the critical-rational deliberative model. Second, at times the staff portrays the role of the attorney in the attorney-client relationship as one of mediator of rationality, responding to arguably non-rational requests and questions by the client. This post also shows some features of the line that the ILS staff walks in its representation of its clients. The staff does have access to some professional knowledge to which the client does not have access; the client seeks answers from the staff in its role as legal professional, and the goals of representation may not always suit the client – they are necessarily mitigated by what is possible within a preexisting legal framework.

TABLE C: Accounting for Difference

	Strategies	Features	Examples
Evidence in Dialogue	Accommodating register	• "Legal speak" by lawyers is used self-consciously and with an analysis of audience understanding • Identification of parties is negotiated rather than based on preconceptions of identity	"What is a Warrant of Habitability? This is basically a promise that the landlord will keep a rental home in such a condition that the home can be safely lived in. The tenant also must keep the rental home in a livable condition." (ILS Website)
	Adapted register	• Register of clients is adapted to expectations of the attorneys and the situation	

	Acknowledgement of Difference	• Differences in situations outside representation are taken into account • Accommodations are made that show understanding of differing circumstances	"WHAT IS A LAWYER? Also called an attorney, a lawyer is someone who has completed law school, passed a bar exam, and is licensed b [sic] the state to help solve legal problems. There are many things a lawyer can help you do, such as write will, file a divorce, and represent you in court" (Expect) "Legal Service Agencies provide legal services for civil (non-criminal) law matters" (Expect)

Implications for Liberal Democracy - Participants

The American model of liberal democracy should take seriously its charge of protecting vulnerable classes. In the traditional sense, vulnerable populations are essentially voiceless through a self-perpetuating cycle of marginalization. They are thought to be in need of special protection and are therefore limited in the ways in which they can participate in political decision-making. This is closely tied with the concept of fundamental, unalienable liberal rights. This is perpetuated in the attorney-client relationship, where the attorney may inhabit a place of privilege with respect to the low-income client in the eyes of the court and the client. The attorney's role is to represent a vulnerable class of people, but yet may reify traditional power structures that marginalize that group. I adapt a definition of "vulnerable" rooted in democratic theory. In discussions of public responsibility, "the concept of vulnerability is sometimes used to define groups of fledgling or stigmatized subjects, designated as 'populations.'"[101] Vulnerability is typically associated with victimhood, deprivation,

[101] Martha Albertson Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition," *Yale Journal of Law and Feminism* 20 (n.d.): 24.

dependency, or pathology.[102] In the courts, vulnerability due to poverty, age, race gender and education can lead to less-than-full political participation.

Implications for Agonistic Deliberation - Participants

These concerns highlight some of the conceptual impediments a dialogic model that is openly amenable to policy modification and friendly coercion. Martha Fineman says, "the view that the proper role of the state is one of restraint and abstention is politically powerful…the rhetoric of non-intervention prevails in policy discussions, deterring positive measures designed to address inequalities."[103] Her conclusion, however, is not that the state should maintain its laissez-faire policies, but that it must honestly evaluate the situation and work to correct inequalities.

Dialogic democracies take as a condition for their legitimacy the precept that every person subjected to the governance of a democracy should share responsibility for decision-making. Ironically, however, few proponents of dialogic models argue that no topic should be off-limits for discussion. In this way, the way in which the two models of democracy deal with vulnerable ideas and populations can be similar. I argue for a dialogic model of democracy in which vulnerable members of society are incorporated as full-fledged participants in discussions about the issues that concern them the most. Keeping all members and ideas available for debate is essential to fully realize the vision of a well-functioning democracy.

Ideologically, only those facing these difficult choices are fully capable of making realistic decisions. If the goal of dialogic models of democracy is to reach some sort of truth, then surely no philosophical ideal can be reached without the input of those most affected.

Pragmatically, we do not protect the vulnerable by excluding their input from public discussion. To classify a group of citizens as being in need of protection proves the case. If they can have no role in the decision-making, they will always fall prey to those who are "looking out for their best interests." The best way to protect their interests is to transform them into active and engaged members, participating fully in the dialog.

The process of deliberation can help shape those who are involved. While we may start off from radically different positions, the "characteristics of moral arguments we find in actual

[102] Fineman.
[103] Fineman.

political debate provide the basis for developing the normative principles with which we assess the ongoing debates. These features of moral disagreement themselves point toward a deliberative way of dealing with the disagreement."[104] If the agonistic deliberative democracy model is to tackle these questions, it must accept that even the vulnerable should have a voice. This is problematic, conceptually if we assume certain vulnerabilities in the classic sense among the populace. The issues of power differentials would make the playing field so inherently unequal, it might do those vulnerable populations a huge disservice. If, however, we redefine the term "vulnerable" to describe "a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility, " then we can reconceptualize the vulnerable as not only more able to protect their own rights but as vital to understanding the heart of the issues we discuss.[105] Under this framework, "[v]ulnerability thus freed from its limited and negative associations is a powerful conceptual tool with the potential to define an obligation for the state to ensure a richer and more robust guarantee of equality than is currently afforded under the equal protection model."[106]

Even proponents of dialogic models of democracy are far too willing to exclude these same groups of people, but for ostensibly different reasons. Many deliberative or dialogic models of democracy privilege rational, traditionally masculine forms of argument and discount calls to emotion entirely. Iris Marion Young contends that "by restricting their concept of democratic discussion narrowly to critical argument, most theorists of deliberative democracy assume a culturally biased conception of discussion that tends to silence or devalue some people or groups."[107] (Young 1997, 60). This silencing of non-critical argument styles could have potentially devastating chilling effects on those who already feel like outsiders in the political structure. It is vital for any regime change to acknowledge the marginalized populations.

Even if we assume an intrinsic benefit in recognizing alternate forms of speech and reasoning, we need to agree on some set of starting points for recognizing valid arguments.

[104] Gutmann and Thompson, *Democracy and Disagreement*.
[105] Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition," 5.
[106] Fineman, 5.
[107] Bourdieu, "The Force of Law," 814.

The dialogic model is often critiqued for being vulnerable to a breakdown in communication.[108] However, even if we begin from vastly different starting points, we might still be able to develop common patterns of speech through the process. This is a critique of the paradigm, process and structure of the model, but it points to another common critique of the dialogic model of democracy: the feasibility of consensus.

Looking first to our initial positions, it is apparent that we cannot change our starting points through dialog. We all come from radically different economic backgrounds and have experienced the world in different ways. If, arguendo, starting points are radically different, this begs the question as to whether there are immutable, universal human rights. For any type of meaningful democracy to work we would either need to adjust the starting points[109] or allow for more leeway within our discussion of these rights contextually. If these are important rights that not everyone is sharing, the disadvantaged should be able to place additional conditions on the dialog. "Deliberative theorists, moreover, tend inappropriately to assume that processes of discussion that aim to reach understanding must either begin with shared understandings or take a common good as their goal."[110] In fact, I argue that agonism works better than many other models precisely in the areas where there is no common understanding.

Despite the differences in initial situations, there must be some recognition or goal of common understanding through the dialogic process. Public deliberation "is a combination of careful problem analysis and an egalitarian process in which participants have adequate speaking opportunities and engage in attentive listening or dialogue that bridges divergent ways of speaking and knowing"[111] Deliberation and reciprocity cannot exist where attitudes remain isolated and unaffected. The common good, as a broadly defined ideal, should be a goal. It must be understood that the process should be transformative. If participants are not necessarily economically in a better place after deliberations, they should be spiritually (or culturally, philosophically or politically) better off for having participated. Research has shown that "deliberation directly reinforces participants' deliberative habits and skills, and it

[108]This is a serious critique of the process as, if we were to take the analogy to the extreme, we could see that a dialogic model would most certainly fail if the participants spoke different languages.
[109] Vast redistribution of wealth is traditionally against liberal principles.
[110] Iris Marion Young, "Feminism and the Public Sphere," *Constellations* 3, no. 3 (1997): 340–63, https://doi.org/10.1111/j.1467-8675.1997.tb00064.x.
[111] Young.

indirectly promotes common ground and motivation by broadening participants' public identities and heightening their sense of political efficacy"[112] While it may not feasible to make everyone satisfied with every result, a goal to work toward might be happiness maximization or avoidance of worst scenarios. This is not to be understood as the only valid purpose of deliberation, but it might be an accessible goal to facilitate communication.

Liberal democracies fear disproportionate social and political status, as they may disrupt the system. Thus, theorists often challenge coercion as a legitimate instrument of the political process and the rhetoric expounds the fallacy of neutrality in Liberal Democracies. All political processes necessarily involve imposition of power and the exclusion of some people. To provide fair representation, the democratic process has to incorporate and account for coercive techniques. It is not realistic to attempt to neutralize power, but we can work to keep current power structures from being hardened and immutable. In his book *The Digital Person*, Daniel J. Solove argues that "legal and social structures are products of design" and that law can define the power relationships in society in the same way that architecture of a building can be designed to determine how people interact. He said this architectural metaphor "captures how legal regulations - or the lack thereof - structure social interaction as well as the degree of social control and freedom in a society."[113] This is more effectively done if we are honest about the way power affects the political process.

The analysis of the way in which communication occurs between participants at Indiana Legal Services sheds some light on the power of the law to shape discourse. Even where participants desired the same broad outcomes and where there was evidence of collaborative agenda-setting, there is also evidence of a systematic discounting of one sub-group's perspective through the reification of traditional power dynamics and access to elite knowledge.

Pragmatically, a dialogic model helps to shape the populace and encourages shifting power dynamics. If we accept a Foucaultian, co-constitutive relationship to power, to take the power-less out of the political would only serve to more firmly define those power relationships (Foucault 1979). Additionally, the agendas would necessarily reaffirm the primacy of some

[112] Stephanie Burkhalter, John Gastil, and Todd Kelshaw, "A Conceptual Definition and Theoretical Model of Public Deliberation in Small Face—to—Face Groups," *Communication Theory* 12, no. 4 (2002): 398–422, https://doi.org/10.1111/j.1468-2885.2002.tb00276.x.
[113] (Packer 2009, 235).

values over others. Liberalism in a sense is self-fulfilling. For Foucault "perception has no causal primacy of ontological pre-existence" but neither does an imagined abstracted process of conceptualization. Foucault does not separate perception from conceptualization: "produced simultaneously are the object, the mode of perception, and the concept, after which come competing explanatory theories" (Foucault 1979, 125).

There are implications for consensus if "[t]he object [of discourse] does not await in limbo the order that will free it and enable it to become embodied in a visible and prolix objectivity; it does not preexist itself, held back by some obstacle at the first edges of light. It exists under the positive conditions of a complex group of relations" (Foucault 1979, 45). If, through our dialog, we shape possible outcomes, the process itself should be a primary goal. Dialogic agonists accept transformation as a desirable outcome and thus have to assent to coercion as a tool of the process.

What should be the "end result" in a dialog? In terms of general political dialogue, many "theoretical writings have suggested variants of four different values as critical to speech protection: individual development, democratic government, social stability, and truth."[114] We must separate notions of eternal truths and objective knowledge from the dialogic model, if not for reasons of verity, than because the concept is destructive to the process itself. If we allow ourselves to enter into a debate with the end goal being to come to an ontological truth about the nature of the law, then the same power relations will emerge. Those who have more of the types of knowledge, education and experiences that have traditionally made a person valuable to society will be granted a larger role in the political process. If however, our decisions are conceived as a sequence of intermediary decisions, highly contingent and closely tied not to the truth but to an understanding of kairos, then we are more likely to consider multiple viewpoints.

In a postmodern world, we may be more willing to accept less clearly-defined modes of truth, but for a proper dialogic model to work, we have to go beyond moral relativity in the customary sense. Reciprocity requires that we consider viewpoints far different from our own. It promises us that we will be better off politically if we can share stories and grow from the experience. But reciprocity is fundamentally concerned with our recognition that the moral

[114] Thomas Emerson, "First Amendment Doctrine and the Burger Court," *California Law Review* 68 (1980): 423.

correctness of a given act can be seen from another view point. If we are only willing to listen, we will be persuaded.

Chapter Five: The Rhetoric(ality) of Privacy

If, as I argue in previous chapters, the law as a rule or a force is subject to rhetorical influence by those who argue and decide the law, then how do we understand the cumulative effect of those influences? Unlike a particularly rousing speech, which might rally a group present to hear the speech to some immediate action, legal arguments are necessarily more constrained by the genre of legal writing. So, it would be a mistake to examine any one legal case in isolation and ascribe rhetorical significance to the arguments made within it to singlehandedly alter the course of history. Just as modern approaches to historiography seek to understand that individual actors are, at most, lynchpins in greater movements, any modern approach to legal rhetorical scholarship must look beyond individual instances of rhetorical speech to the larger movements to which they belong.

James Boyd White argues that the constitutive nature of the law is not unidirectional. That is, it both reflects and directs larger social movements. In this way, legal texts are necessarily dialogical and heteroglossic. Individual cases can provide interesting materials for accounting for a particular *Zeitgeist* or for ushering in a new cultural paradigm, but they still belong to a larger cultural context and necessarily respond to earlier court cases. These key cases have been studied by legal scholars, historians, cultural anthropologists, sociologists and rhetorical scholars alike as unique examples of the way in which the law is embedded in culture and a context. The landmark case, *Miranda v. Arizona*[115] provides an interesting case study in how courts may have been especially cognizant of social movements and on the rhetorical significance of key facts about a case. Miranda was the groundbreaking case that led to what are now called "Miranda rights." The ruling held that suspects in a criminal case must be advised of their constitutional rights, such as the right to be silent and to have an attorney present when being questioned. Legal scholars[116] have noted that the Court had signaled prior to hearing Miranda that it may be expanding Fifth Amendment rights against self-incrimination. Historical scholars found that the court had actively looked for a case with a sympathetic defendant to expand these rights. The issue for the Court was not a legal one: it could stand on firm legal ground when it held that a person must be advised of their rights for them to be able to knowingly consent to abdication of those rights when they confess to a crime.

The issue for the Court was a rhetorical one: it had to worry about how its message would be received. Because Miranda dealt with a due process claim, it meant that the court would not be finding the defendant innocent of the charges brought against him based on the facts of the case. It would be extending constitutional protections to someone who could very

[115] 384 US 436 (1966)
[116] cite

well be guilty of whatever crime they were accused of. Finding a procedural due process issue would likely mean letting that person go free. It is well established that the court wanted to make this argument with a sympathetic defendant. It, therefore, chose to grant cert to not one, but four cases where defendants confessed to a crime and chose Miranda as the named party.

Miranda also shows that it is difficult to ascribe too much rhetorical import to any one case. Sometimes individual cases are but convenient stand-ins to reflect a larger cultural phenomenon. As such, it is important to understand the multitude of cultural, historical, legal and rhetorical factors that go into shaping a law over the course many years and multiple iterations. Legal and historical scholars have attempted to account for the genesis of a law and its evolution over time by studying codified records of statutes over time, often beginning as early as Hammurabi's code. While such a longitudinal study is useful for understanding what the law was at a given time, it does little to illuminate the cultural significance of the law or the cultural phenomenon that preceded and succeeded that law. Therefore, I take, as object of study, a relatively new legal and philosophical concept, namely the right to "privacy." Privacy, as a legal right, is arguably still in its nascent stages. The term privacy was generally not used for any legal right anywhere across the globe before the late nineteenth century. As a legal term of art in the US, it traces its origins to an 1890 law review article by Warren and Brandeis called *The Right to Privacy*.

More than a century after the Warren and Brandeis article was published in the Harvard Law Review, legal scholars and privacy advocates still struggle with concepts of privacy and their application. The issue, I argue, resides in the conflict between the "corpus juris," or the codified law, and the language and mythos of a society, or "narratives in which the corpus juris is located by those whose wills act upon it."[117] The word "privacy" in the US is often linked with "rights" and "laws" (either man-made or natural), but the way in which we imagine privacy as a philosophical concept is intricately linked with our legal rights (and vice versa).

Privacy's constitutional beginnings from the "penumbra"[118] of constitutional protections signal its importance to democratic sovereignty in the United States. As privacy comes to be recognized, it is as a concept that is a necessary precondition to the Bill of Rights. In order to have a philosophical bases for freedom from unnecessary governmental restraint or intrusion into our freedoms of assembly, religion, personal property or homes, we must

[117] Cover, "Nomos and Narrative," 9.

[118] Privacy is said to have evolved from the "penumbra" of Constitutional rights, derived, by implication, from other rights explicitly protected in the Bill of Rights. These rights have been identified through a process of "reasoning-by-interpolation", where specific principles are recognized from "general idea[s]" that are explicitly expressed in other constitutional provisions. Glenn H. Reynolds, "Penumbral Reasoning on the Right," *University of Pennsylvania Law Review* 140, no. 4 (April 1992): 1333, https://doi.org/10.2307/3312405.

have some underlying protection against more general intrusions. Thus, the right to privacy serves as a check to unrestrained governmental power.

Privacy rights have arisen as a disjointed set of remedies that respond to various torts, such as trespass, eavesdropping, and defamation. However, our normative framework for evaluating whether a privacy right has been violated is discussed in more holistic terms; privacy feels like a definable and immutable concept.[119] Ruth Gavison contrasts "Our everyday speech" about the concept of privacy with legal notions of privacy in an attempt to come to terms with the apparent dichotomy.[120] She argues that popular demands for greater privacy protections have resulted in a piecemeal framework of laws that constitute privacy rights in the form of torts (one individual against another), constitutional law and statute. And while the general public sees privacy rights as a fairly uniform framework of protections that either exist currently or should exist within the law, legal scholars have been quick to point out that many of the issues we see as privacy issues are actually framed quite differently within the law. As she points out, "Commentators have argued that privacy rhetoric is misleading: when we study the cases in which the law (or our moral intuitions) suggest that a "right to privacy" has been violated, we always find that some other interest has been involved.[121] But to ignore the way in which the public constitutes the right to privacy would be to disregard a driving force in privacy legislation.

Brief History of Privacy Law

The constitutional right to privacy, "the First Amendment [...] penumbra where privacy is protected from governmental intrusion," (Griswold v. Connecticut) is a right unlike any other in American legal history. It grew up, not from a set of enumerated legal protections, but as a concept of a right to which society felt it should be entitled. Privacy law was written in the space between certain enumerated rights in the Bill of Rights. The First, Third, and Fourth Amendments each make reference to a limited privacy right (privacy of beliefs, the home, and person and possessions, respectively), but more general guarantees of privacy from government intrusion have been read into the Fourteenth Amendment by the Supreme Court. That privacy is essentially written into the constitution over a century later provides a unique case in which to study the power of language to influence legal precedent and on the constitutive nature of the law in its ability to respond to changing cultural values.

Privacy law is unique in that we can trace its legal origins in constitutional law in America primarily to one man, Louis Brandeis: the article he wrote with fellow attorney Samuel Warren, "The Right to Privacy," would come to be cited in nearly every foundational privacy law

[119] Ruth Gavison, "Privacy and the Limits of Law," *The Yale Law Journal* 89, no. 3 (January 1, 1980): 422.
[120] Gavison, 423.
[121] Gavison, 422.

case; his reasoned dissent in Olmstead v. United States as a Supreme Court Justice would become the basis for privacy law as we know it. Brandeis was able to tap into a national zeitgeist and helped to bring privacy law in concert with expectations of notions of privacy many saw as superior to the laws on the books (or lack thereof) (Post). In these ways, Brandeis' writings helped to define the country's concept of privacy law and shaped a narrative that we still employ to argue for privacy law protections.

Notions of privacy pre-date the American legal system. In fact, we built our initial conceptions of privacy on the European tradition. Scholars have argued that England is "the birthplace of privacy" (Aries 5). In the common law that we borrowed from our former colonizer, the new laws of the United States began to build our own set of piecemeal legal privacy protections (Solove; Post). Constitutional scholar Jack Rakove notes that "a broad consensus reigned" in the early days of American jurisprudence "on the principles of government." He argues, "Government existed for the good of the many, and to protect the liberty, property, and equal rights of the citizen" (Rakove, 19). We should therefore have the freedom to pursue our own interests and direct the course of our own lives, insofar as we do not infringe upon the rights of others. While this concept may not be clearly articulated in our corpus juris, there is a corresponding popular notion of the primacy of autonomy to a liberal democracy. Rakove goes on to argue that "axioms do not solve problems… the entire enterprise of constitution making in revolutionary America centered on determining which forms of republican government were best suited to securing the general principles all accepted" (Rakove 19).

However, these common law torts fell vastly short of a unified theory of formal privacy rights. Privacy law has famously been erected from the penumbra of rights afforded by the Constitution in, I argue, an attempt to respond to popular notions of privacy rights that might be said to have been born out of a notion of "natural rights." The legal notion of a right to privacy began, it is widely credited, with an 1890 article in the Harvard Law Review (Post 647). The article, written by Samuel Warren and Louis Brandeis, focuses on "the right to be let alone" (in the words of Judge Cooley). Brandeis and Warren begin their argument with a discussion of intellectual property rights, citing a British case from 1849 in which etchings made by Prince Albert and Queen Victoria were protected not just from reproduction, but from description and cataloging. The right implicated by the moratorium on any parlaying of description did not comport with notions of intellectual property rights rooted in protecting the economic interest an artist or scientist has in his or her work. Warren and Brandeis argued that where traditional property rights were not adequate, there was some other principle, not yet stated as legal edict, which would ensure that certain "indecencies" being perpetrated would not go unpunished. They called this the "right to privacy," construing it to have the power to protect the property of man's spirit, feelings, and intellect--an addition to the existing protections given to tangible property.

Brandeis and Warren outlined the basis for a privacy tort in civil law, but expressed a desire "that the privacy of the individual should receive the added protection of the criminal law. The original, six-part standard that Brandeis and Warren proposed can be seen to form the basis for torts relating to defamation, libel and slander:

(1) The right to privacy does not prohibit any publication of matter which is of public or general interest.

(2) The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel.

(3) The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.

(4) The right to privacy ceases upon the publication of the facts by the individual, or with his consent.

(5) The truth of the matter published does not afford a defense.

(6) The absence of "malice" in the publisher does not afford a defense.

It is important to note that two distinct lines of reasoning spring up out of The Right to Privacy; the first is the common law tort remedy that directly traces its roots to the article and the case history described in the article. These invasion of privacy torts protect individuals from unwarranted intrusion by other individuals, and are classified as protections of information privacy. Because of the competing, and preemptive claims of free speech rights found in the First Amendment, privacy torts have been diminished significantly over the past few decades (Solove).

The second line of reasoning is embodied in a Constitutional right to privacy that is read into (primarily) the Fourth and Fourteenth Amendments. The Constitutional right to privacy protects citizens from unlawful governmental intrusion into their affairs and covers both information and decisional privacy. Almost forty years after the Brandeis-Warren article, the United States Supreme Court ruled in Olmstead that tapping an external telephone line without a warrant was not a violation of the Fourth Amendment, as the Amendment could not be enlarged "beyond the possible practical meaning of 'persons, houses, papers, and effects,' or so applying 'searches and seizures' as to forbid hearing or sight (465) in instances where the search took place outside the house. Brandeis' dissent took issue with the majority's dismissal of what Brandies saw as growing desire of citizens for increased privacy protections. He cited his own law review article as evidence for this popular notion of privacy. He maintained that privacy law must adapt to meet the needs of the country as articulated in his article. In his dissent, Brandeis argued that "clauses guaranteeing to the individual protection against specific abuses of power, must have a ... capacity of adaptation to a changing world" (472). In a move that would help to secure the place of privacy law in the Constitution's "penumbra," Brandeis grounds the constitutional right to privacy in the Framer's intent. They

recognized, he argues, the significance of man's spiritual nature, of his feelings and of his intellect; they knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things; they sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations; they conferred, as against the Government, the right to be let alone--the most prehensile of rights and the right most valued by civilized men (478).

Katz v. United States[122] would formally grant a Constitutional right to privacy decades after Brandeis' dissent in *Olmstead.*[123] *Katz* draws heavily on Brandeis' iteration of the right to privacy, citing both the Harvard Law Review article and the *Olmstead* dissent. The Court found a right to privacy where the petitioner's phone call in a public telephone booth was eavesdropped on through the use of high-tech listening devices. Thus, the Court expanded the conception privacy rights to private conversations that take place in public. The majority found that "the Fourth Amendment protects people, not places" (351) and so expanded the Fourth Amendment right against unreasonable searches and seizures to include locations outside the home.

The privacy rights that are attributed to the *Katz* decision actually come from Justice Harlan's concurrence, wherein he laid out a two prong test for evaluating privacy interests. In order for a right to privacy to be found, " there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable" (361). This test was formally adopted by the majority in *Smith v. Maryland* in 1979 and generally guides privacy rights discussions in the recent line of privacy rights cases decided on Constitutional grounds.

Defining Privacy

The right to privacy, as a legal concept, arises out of a disjointed set of rights: everything from intellectual property rights, to the right against forced quartering of soldiers in the home. Historically, there is little to no consensus among legal, political or philosophical scholars as to what privacy is, where it is located, or even whether it should be protected in the law. Information Privacy law scholar Daniel Solove has called privacy “a concept in disarray” and many legal treatments of privacy still largely focus on creating satisfying definitions that can account for its fragmented history in American law.

To understand the importance of defining privacy, I begin with an introduction to the way the concept is generally theorized in legal and political circles. Generally, there are two major strands of jurisprudence related to privacy: information privacy and decisional privacy.

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[122] *Katz* granted a privacy protection that extended beyond the home (and thus beyond the protection of traditional common law torts such as trespass). The holding in *Katz* was that the Fourth Amendment protects people, not places and therefore people had an expectation of privacy against the government, even in public places like a phone booth.

[123] *Olmstead* found no general privacy protections, though the dissent previewed a future reversal.

Information privacy is often spoken of in terms of "control" and incorporates legal issues of trespass, defamation, and searches and seizures. The term "information privacy" is a relatively new one and is meant to distinguish this line of jurisprudence from decisional privacy. Decisional privacy is often spoken of in terms of "autonomy" and "choice," and incorporates legal issues of abortion and marriage rights.

The overall findings of my corpus analysis of privacy law cases finds that privacy begins as a right of physical space and likeness. Pre-1950, privacy is akin to being free from peeping eyes. It is both a right against government and a right against individuals. Decisions like Katz bring privacy into the realm of constitutional rights. In the late 50's through the 60's, privacy becomes more synonymous with autonomy. It becomes the right to personal decisions, but it is still linked with physical space or physical body.[124] During the 70's, 80s, and 90s, privacy becomes more linked with autonomy. Here we see jurisprudence establishing a right to association (e.g. marriage and sex). Post 9/11 – privacy becomes information privacy almost exclusively -- until the marriage cases resurface and the new makeup of SC begins to revisit ideas from what I've identified as the second and third eras of privacy cases.

To account for these distinct lines of reasoning, privacy law scholarship post 1970 generally tends to promote a multi-pronged definition of privacy, highlighting difference between the rights rather than continuity among them. Daniel Solove and Fred Cate, two of the pioneers of the term "information privacy," tend to locate definitions of privacy in the historical legal record. They argue that what we mean by privacy shifts as our collective attention shifts from one important political issue of privacy to another. For example, post 9/11 and post USA Patriot Act, the term "privacy" most often refers to information privacy, whereas in the 1960's it was much more likely to refer to decisional privacy.

Legal Scholars Benjamin Bratman and Ken Gormley have also created their own taxonomies of privacy. These taxonomies do not divide privacy between information and decisional privacy, however. They locate the distinctions in the justifications for privacy and in the laws granting privacy protections. Gormley proposes five species of privacy that each expand on the notion of privacy as the right to be let alone in different contexts.

Despite these separate strands of jurisprudence, privacy is still conceived of as a single concept, having its legal origins in the penumbra of constitutional protections formed by the shadow of rights laid out in the First, Fourth, Fifth and Fourteenth Amendments.

The definition of the right to privacy as "The Right to Be Let Alone" comes from *The Right to Privacy* by Warren and Brandeis, who themselves borrowed it from a decision from Justice Thomas Cooley. It then reappears nearly a half century later in Brandeis' dissent in *Olmstead* and subsequently gets cited in nearly all legal privacy scholarship from the mid-20th century to today. However, as pervasive as the definition of privacy as "the right to be let

[124] For example abortion and birth control.

alone" is, it is by no means the only definition in circulation. It has, however, framed discussions of the importance of privacy for theories of personhood and autonomy.

In addition to Warren and Brandeis' definition, there are a few others that could have powerful impacts on the place of privacy in political discussions. Of particular importance is the way that privacy can be framed as a positive right, even though it is often conceived of as a negative right. As Fred Cate explains, privacy is generally framed in terms of negative rights: that is it is a right to be free *from* excessive governmental intrusion. But it is the right *to* privacy, which implies some sort of a positive right. If we have a positive right to privacy, that could have very different outcomes politically. No longer must we wait for privacy violations to occur before we can assert our right to privacy, we may proactively seek assurances of privacy. This may necessitate certain entailments like shelter and information security.

One often overlooked or overtly dismissed definition of privacy that will be important for my understanding of the concept as it relates to my research is the definition proposed by Jed Rubenfeld. Rubenfeld has theorized privacy as a right to not have one's life totally determined by a progressively normalizing state. This definition brings information privacy ideals of control over information into greater concert with personhood and autonomy definitions seen in decisional privacy justifications. It also provides an alternative view of the role of the state with respect to privacy and helps explain the contemporary American focus on state actors as potential privacy violators.

More important for the way I think about privacy as it relates to legal and political discourse is that Rubenfeld's definition builds on Foucault's notions of imposed homogeneity. Foucault, in *Discipline and Punish*, argues that examination and surveillance are key tools of discipline that produce a normalizing force that ensures compliance and imposes homogeneity. Foucault argues that it is the normalizing gaze that allows institutions to classify and punish deviance.

The focus on deviance and normalization sheds new light on *Katz*' test for the expectation of privacy. In *US v. Katz*, Harlan's dissent lays out a two pronged test for whether the court will find a privacy interest. Expectations of privacy must be both subjectively and objectively reasonable. First, the privacy interest must be one that petitioner subjectively expects to have, and second, it must be one that society is prepared to accept as legitimate. The "objectively reasonable" standard explicitly brings to light the norming function of legal analysis.

The *Katz* expectation of privacy test is unique in law in that it specifically situates legal protections in expectations, which explicitly calls for a dialogue. This language of expectations implies its own rhetoricality. James Boyd White and Maurice Charland's conceptions of constitutive rhetoric are useful to understand this rhetoricality. White describes a constitutive nature of law that both shapes and reflects cultural values. In theory, the *Katz* test could be satisfied by a survey of the American population any time there is a question as to whether a

petitioner had a reasonable expectation of privacy. If there is a consensus that each individual would have expected privacy in that situation, then there would exist an objective expectation of privacy (this method would assume no inherently normalizing force, as it would simply be a collection of personal preferences). However, this brings us back to a definition of privacy: if legal, political and sociological scholars generally agree that the term is problematic, how can there be an objectively reasonable expectation of privacy? Is objective expectation just a measure of individual subjective expectations?

The answer, for the courts at least, turns out to be "no." Generally, expectations are found by analogy to the facts of earlier decisions. Here, the court specifically constitutes a norm. And in so constituting, helps to define a norm for all of us. Sotomayor's concurrence in *Jones* is an exception to this general rule, as it attempts to wrestle with a different standard: one that is forward looking rather than retrospective.

Satisfying definitions of privacy, like definitions of democracy, liberty or freedom are often illusive, but may gain some rhetorical force in their lack of concreteness. To the extent that privacy is a concept linked to autonomy, liberty and democratic freedom, it has the potential to be a particularly furtive area for the study of the constitutive nature of law.

Re-defining Privacy as the Counterpart to Security

If privacy is such a foundational right that it is found to be a necessary precondition to all other Constitutional rights, then political actors must surely face a rhetorical nightmare if they seek to limit the protections of privacy. And yet, privacy protections have been under attack for as long as they have been recognized. They have been seen for decades as an impediment to law enforcement practices. Police officers and prosecutors decry when key evidence is thrown out on a "technicality" (like the police conducting a warrantless search). Limiting privacy protections through federal statutes has traditionally been a politically fraught enterprise.[125] While the public understands the importance of law enforcement activities, they have generally not been willing to give up fundamental freedoms in order to advance law enforcement agendas.

The narrative surrounding the right to be free from unwarranted governmental intrusion into personal affairs undergoes a shift in times of "emergency," however. [126] After the 9/11 attacks, the Bush Administration began to couch privacy interests in terms of security. One could not, the reasoning suggested, be secure against acts of terror while maintaining secrecy and autonomy in one's affairs. While few would argue against the notion

[125] For instance, in the 1990s several types of legislation to increase airport security and mandate pen registers on telephones were defeated because the intrusion into privacy rights was seen to be too invasive.
[126] Murray J Edelman, Constructing the Political Spectacle (Chicago: University of Chicago Press, 1988), 20.

that the events of 9/11 prompted a nationwide shift in the paradigm of "domestic security," the ongoing rhetoric of "crisis" had a dramatic influence on the focus on the importance of security measures, even when in direct conflict with individual privacy concerns. Further, the Bush Administration, through their classification of the 9/11 events as a "crisis" shaped the narrative and created a state of exception that relaxed jurisprudential notions of individual liberties.

Murray Edelman argues that the pronouncement of an event as a "crisis" has serious implications for the receptiveness of certain arguments. He says:

> The terms "problem" and "crisis" are inducements to acquiesce in deprivations. For most people they awaken expectations that others will tolerate deprivations. "Problem" connotes a condition that is resistant to facile solution because it stems from entrenched institutional features or entrenched character flaws. Those who are untouched by it, those who benefit from it, and those who suffer from it all learn that it is likely to continue. A "crisis," by contrast, heralds instability; it usually means that people must endure new forms of deprivation for a time. In the conventional view, then, problems are chronic (though curable in principle) and crises are acute; but the distinction turns out to be arbitrary when the catalysts of crises are examined.[127]

The classification of an issue as either a "crisis" or a "problem," therefore, limits our responses to it and dictates, at least in part, the sorts of rhetoric we are willing to consider. As Kenneth Burke reminds us: "a way of seeing is also a way of not seeing."[128] So, once an issue is classified as a crisis, it generates certain responses. Crises are immediate and imperative. They demand our time and attention, but do not lend themselves to deliberative consideration to the same degree as solving "problems" might.

Thus, the rhetoric and policies of the Bush Administration after 9/11 helped to create a state of exception where Americans accepted deprivations of privacy for what was promised to be a limited duration. International security issues were framed as "crises," not endemic to a failed security network, or a result of failed international diplomacy, but a temporary "glitch in the system" which allowed for a tragedy to occur. The crisis of the attacks helped to frame the boundaries of the "problem." Bush's State of the Union speech following the attacks responded to an undercurrent of dissatisfaction with diplomacy during his tenure and sought to rally international forces to his side. As Edelman argues, "People with credentials accordingly have a vested interest in specific problems and in specific origins for them" (20). Political conflicts are discussed in a way that tends to turn the focus on to problems that inspire solutions that are in line with political interests in terms of "authority, status, profits,

[127] Murray J Edelman, *Constructing the Political Spectacle* (Chicago: University of Chicago Press, 1988), 31.
[128] Kenneth Burke, *A Rhetoric of Motives /*, California ed. (University of California Press, 1969), 49.

and financial support" while simultaneously "denying these benefits to competing claimants" [129]. Post 9/11, privacy interests were portrayed as being in direct conflict with security interests, and of course, in this time of "crisis," security interests must be seen as the priority.

Bush's rhetoric capitalized on what Edelman refers to as "a competition for attention among the problems that are publicly discussed." Edelman explains, "As some [problems] come to dominate political news and discussion, others fade from the scene" [130]. Foreign crises are particularly well suited to this purpose; Edelman argues that "the most frequent application of this principle [of direct competition] lies in the capacity of foreign threats to diminish attention to domestic conditions." Further, a focus on foreign crises can help leaders "maintain[] a supportive following by focusing attention on foreign threats that divert concern from unsolved domestic troubles" (Edelman, 1988, p. 28) One way that the Bush Administration was able to successfully divert attention away from the domestic issue of increased executive power, was through the focus on international security.

To refer to the problems resulting from the 9/11 attacks as mere competition for the nation's other ills in the months following the attack would be to devalue the impression of the event on the hearts and minds of the American public, and to dismiss the impact it had on the national conversation. However, the duration of the rhetoric of terror suggests that the trope of terrorism became a valuable one for the administration. A national narrative was beginning to take shape that would ultimately prove useful to those who would seek to shift focus away from issues of governmental intrusion into privacy.

On September 21, 2001, ten days after the attacks, George W. Bush addressed the nation and the world in an effort to rally support for new measures to combat terrorism. He framed the issue as a global one:

> This is not, however, just America's fight. And what is at stake is not just America's freedom. This is the world's fight. This is civilization's fight. This is the fight of all who believe in progress and pluralism, tolerance and freedom. We ask every nation to join us. We will ask, and we will need, the help of police forces, intelligence services, and banking systems around the world (Guardian).

Further, the issue is framed as a global crisis. The attack on America is imputed to the rest of the world as an imminent threat to global security:

> Perhaps the NATO Charter reflects best the attitude of the world: An attack on one is an attack on all. The civilized world is rallying to America's side. They understand that if this terror goes unpunished, their own cities, their own citizens may be next. Terror, unanswered, can not only bring down buildings, it

[129] Edelman, *Constructing the Political Spectacle*, 20.
[130] Edelman, 28.

can threaten the stability of legitimate governments. And you know what - we're not going to allow it. (Guardian)

According to the reasoning of the speech, in order to take up the fight against terrorism, not only would the "world" need to cooperate with U.S. efforts, but as would soon become apparent in his later addresses, "civilization" would also have to overlook some intrusions into privacy in the interest of combating security failures.

In this speech, President Bush begins to lay the groundwork for the privacy/security dichotomy, the superior term always being security. He says, "the only way to defeat terrorism as a threat to our way of life is to stop it, eliminate it, and destroy it where it grows. Many will be involved in this effort, from FBI agents to intelligence operatives to the reservists we have called to active duty." This speech begins to describe the coordinated effort to combat terrorism that would eventually result in passage of the Patriot Act.

An international interest in the privacy laws of the United States would develop in response to international surveillance efforts. The Bush administration would pass the Patriot Act, a law that would reduce impediments to government surveillance and, hence, have the practical effect of circumscribing expectations of privacy. Russ Feingold, in one of the few speeches to directly question the President's valuation of security over personal liberties including privacy, took the President to task for his agenda of exceptionalism. In a statement from the Senate floor on October 25, 2001, he responded to the president's demands, saying "Mr. President, even in our great land, wartime has sometimes brought us the greatest tests of our Bill of Rights." He then went on to list times in American history when crises were used to expand executive power and limit individual rights, including the arrest of "13,000 civilians" during the Civil war for those who were found "discouraging volunteer enlistments, or resisting militia drafts," the revocation of mail privileges of a Milwaukee newspaper during the First World War over anti-war articles (""), and the World War II internment of "more than 110,000 people of Japanese origin, as well as some roughly 11,000 of German origin and 3,000 of Italian origin" (Feingold[131]).

Feingold directly responds, not only to Bush's call for a state of exception following the 9/11 attacks, but also to the President's call for a united global security initiative. He calls on the global audience to remember what can happen when individual liberties are "temporarily" restricted in times of crisis. Feingold, thus, frames the "problem" as the long-term problem of governmental intrusion into personal liberty, rather than the immediate crisis of deficient security measures.

Feingold recruits the same foreign citizens to his cause that Bush would hope to enlist in the global war on terror. He reminds them that, in times of crisis, the United States has not

[131] Gary Lawson, "What Lurks Beneath: NSA Surveillance and Executive Power," *Boston University Law Review* 88 (2008): 375.

always been a friend to foreign citizens and governments. He tells them, "Earlier this year, I introduced legislation to set up a commission to review the wartime treatment of Germans, Italians, and other Europeans during that period" (Feingold). He goes on to describe meeting with groups of German-Americans where they compared their plight during World War II to that of the Japanese who faced internment, and ends the story with a plea: "I hope, Mr. President, that we will move to pass this important legislation early next year. We must deal with our nation's past, even as we move to ensure our nation's future" (Feingold). Feingold, through his use of historical analogy is drawing his own connections between the national identity and the implications for current policy. He is also tapping into a national conception of progress; that we learn from past transgressions and make more informed decisions in the future.

President Bush was careful to keep the discussion one of the competing values of privacy and security when he asked congress to extend the Patriot Act beyond its original, limited authorization. When the President gave his speech before congress in 2005, the nation was beginning to raise suspicions about the intrusions upon privacy that were becoming the focus of increased media scrutiny.[132] He couches the debate as one of security in a time of terror and war. He said:

One of the first actions we took to protect America after our nation was attacked was to ask Congress to pass the Patriot Act. The Patriot Act tore down the legal and bureaucratic wall that kept law enforcement and intelligence authorities from sharing vital information about terrorist threats. And the Patriot Act allowed federal investigators to pursue terrorists with tools they already used against other criminals (NY Times).

The "legal and bureaucratic wall" to which President Bush refers is, arguably, made up of information privacy and security protections that were meant to keep executive police power in check .

The issue is framed as non-exceptionalism in an exceptional time. In other words, Bush tries to describe the Act as a way to allow intelligence forces the same measure of freedom in pursuing terrorists as police have in capturing "criminals." He does not mention the effect these increased policing powers will have on those who are not suspected of committing any crime, much less a terrorist act. During this time, the National Security Agency (NSA) was conducting wide-spread surveillance on conversations that U.S. citizens had with those abroad. No particularized suspicion was needed to intercept these conversations. Later, the program would be expanded to cover conversations among individuals that took place entirely within the nation's borders (Kitrosser, Jordan).

Bush also appeals to ideals of consensus-building. Because the Patriot Act was passed with an overwhelming majority in the Senate when it came to a vote for initial authorization

[132] (For a discussion about how some surveillance techniques were scrutinized, see https://www.eff.org/deeplinks/2007/10/qwest-ceo-nsa-punished-qwest-refusing-participate-illegal-surveillance-pre-9-11).

shortly after September 11, 2001, Bush suggests that there is wide-spread support for reauthorization. He says, "Congress passed this law with a large bipartisan majority, including a vote of 98 to 1 in the United States Senate" and frames the Act as a success because, in his words, it "has accomplished exactly what it was designed to do" (NY Times).

And finally, he continues to couch the security/privacy debate in terms of crisis. He stresses that the Patriot Act, which is "protecting American liberty and sav[ing] American lives" is in danger because "key provisions of this law are set to expire in two weeks" (NY Times). If the Patriot Act is not reauthorized, within two weeks, the text of Bush's speech would have one believe, there is a serious threat of a return to the crisis that led to the initial authorization of the Patriot Act.

By continuing to allude to a global crisis of terror, Edelman would argue, Bush is able to engender more sympathy with his cause. At the same time, he begins to discuss security issues as ongoing "problems," the solution to which is the re-authorization of the Patriot Act.

Nearly a decade after Bush's impassioned plea to re-authorize the Patriot Act, a shift in the way we discuss the security/privacy binary is beginning to take hold. Edward Snowden's leaks of the NSA surveillance efforts have garnered increased scrutiny over the U.S.'s global security efforts as they relate to spying on foreign and domestic targets. In fact, ZD net has proclaimed that "The U.S. government mass surveillance scandal may be the biggest ongoing story of the year."[133]

The attention given to NSA surveillance highlights competing popular notions of privacy and security in relation to executive action[134] and suggests that framing questions of personal liberty in relation to issues of national security may be an effective way to engender support for increased surveillance of lawful citizen actions. Polls show that Americans are conflicted about the actions that were authorized, in part, through the Patriot Act as well as the events that brought about their discovery in the media [135].

The discussion of the massive amounts of surveillance that is readily available with a minimal amount of effort or expense highlights the importance of the construction of privacy

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[133] Zack Whittaker for Zero Day | November 22 and 2013-- 23:00 Gmt, "NSA Mass Surveillance Leaks: Timeline of Events to Date," ZDNet, accessed December 15, 2013, http://www.zdnet.com/nsa-surveillance-leaks-timeline-7000023535/.

[134] Scott Clement, "Poll: Most Americans Say Snowden Leaks Harmed National Security," *The Washington Post*, November 21, 2013, sec. Politics, http://www.washingtonpost.com/politics/poll-most-americans-say-snowden-leaks-harmed-national-security/2013/11/20/13cc20b8-5229-11e3-9e2c-e1d01116fd98_story.html; Neal Katyal and Richard Caplan, "Surprisingly Stronger Case for the Legality of the NSA Surveillance Program: The FDR Precedent, The," *Stanford Law Review* 60 (2008 2007): 1023; Adam Gabbatt, "Edward Snowden a 'hero' for NSA Disclosures, Wikipedia Founder Says," the Guardian, accessed November 23, 2014, http://www.theguardian.com/world/2013/nov/25/edward-snowden-nsa-wikipedia-founder; "Former NSA Chief Compares Snowden to Terrorists," accessed December 15, 2013, http://politicalticker.blogs.cnn.com/2013/12/01/former-nsa-chief-compares-snowden-to-terrorists/.

[135] Clement, "Poll."

rights as being tied to our "expectations." In addition to privacy being couched in terms of expectations that "society is willing to accept" (as discussed above in relation to security), the ready availability of technology that makes us increasingly vulnerable to constant monitoring would seem to impinge on our subjective expectation that our actions are still private. And yet, there seems to be some quality of privacy that most would argue should be protected, even if we do not expect it to be so.

A further complication of the legal/popular privacy dichotomy arises from the distinction the law makes between private actors and the government. Privacy is often framed as a quality that one can possess and guard against all other actors[136]. One would feel equally exposed whether the government or a neighbor breaks into his house, performs a search or publishes secret information about him. And yet the remedies would differ depending on the actor.

Similarly, the law makes a distinction between information that is "secret" and that which is public. In some instances, information which a person voluntarily discloses, even to one person, no longer has any privacy protections. This distinction seems inimical to popular conceptions of private information as something that can be shared between two individuals.

In her dissent to US v. Jones, Justice Sotomayor begins to reconcile expansive, popular notions of privacy with the limited way in which privacy is dealt with in the law. She sides with the majority (and prior case law when she "agree[s] that a search within the meaning of the Fourth Amendment occurs, at a minimum, '[w]here, as here, the Government obtains information by physically intruding on a constitutionally protected area.'" But she goes on to argue for a more expanded view of privacy intrusion, even in cases where no physical intrusion occurs and begins to question what impact changes in technology will have on society's expectation of privacy. She says, "I would take these attributes of GPS monitoring [that it creates data in the aggregate] into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements. I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on." These questions reflect ones that the general public is asking, and can be seen as a deliberate step to bring privacy law into greater concert with more general privacy values.

Sotomayor further argues that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties." She says that the approach "is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out

[136] Christopher Slobogin, "Proportionality, Privacy and Public Opinion: A Reply to Kerr and Swire," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, May 7, 2010), http://papers.ssrn.com/abstract=1601935.

mundane tasks." More importantly, it is ill suited to deal with a conflicting set of normative values held by much of the country that insists that there is a significant difference between voluntarily disclosing information to one individual or group and allowing that information to be broadcast on a wider scale, or monitored by the government. This difference is not accounted for in current privacy law, which dictates that voluntary disclosure to a third party negates any privacy interest, except in certain cases related to wiretapping and similar intrusions. She says:

> I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.

Here, Justice Sotomayor is giving a nod to the conflicting values of privacy held by the legal community and the greater public and is beginning to align competing conceptions of privacy. She addresses public concern that what we disclose to one party, we effectively disclose to the world; a legal issue that will only become more problematic with the increasing pervasiveness of technology.

Sotomayer also questions the narrow grounds on which the majority bases its decision: that placing a GPS tracker on the respondent's vehicle constituted a trespass. She points out that popular notions of privacy do not make a distinction about whether an agent trespasses in order to place an electronic device through which our every action is tracked. The privacy concern is that of the tracking, not the minor trespass.

Privacy law scholars have hailed this concurrence as a preview of a new direction in privacy law [137]. They maintain that, unless the Court is willing to adapt to changes in technology, we will cease to enjoy any expectation of privacy in the digital arena ("What Is the Essential Fourth Amendment?).

Privacy in Legal Discourse

[137] Slobogin.

If the law does constitute itself, if it simultaneously shapes and is shaped by community ideals and values, how can predict and account for the trajectory of the law? In order to track one line of jurisprudence, I have endeavored to analyze on both a micro and a macro level how privacy has evolved as a legal concept and how that concept is rooted in discourse. Thus, I conducted a two-part analysis. First, I examined closely three of the most significant Supreme Court Cases on Information Privacy: *Olmstead v. United States, Katz v. United States, and United States v. Jones* and traced the roots of the legal conception of privacy from the oft cited law review, *The Right to Privacy.* Second, I used my findings from my first analysis to inform a corpus analysis of every major US privacy law decision.

Just as research on language structure has led to an emphasis on the crucial role of context and language use in organizing how language in general conveys meaning, studies of the ways written texts carry meaning in human societies have similarly demonstrated the importance of contextual analysis to understanding the significance of these texts. However, following initial work that simply emphasized the importance of context to textual interpretation, recent work is "in the midst of a radical reformulation wherein 'text,' 'context,' and the distinction between them are being redefined."[138] As part of this reformulation, researchers like Bauman, Briggs, and Silverstein have questioned a clear-cut division between text and context, casting doubt on the utility of such a reified and static conceptualization.[139] Rather, building from a new framework centered on language pragmatics, scholars analyzing written and other texts now focus on processes, analyzing "contextualization" of texts rather than "context," "entextualization" (the process by which texts are created) rather than "text." The action discussed under the rubric of entextualization is a first step in the process by which text is recontextualized; it is "the process of rendering discourse extractable, of making a stretch of linguistic production into a unit— a text —that can be lifted out of its interactional setting. A text, then, from this vantage point, is discourse rendered decontextualizable." It follows that the word "text" in this sense can refer to units derived from spoken as well as written discourse, as with a myth that is passed down through oral tradition.

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[138] Elizabeth Mertz, "Legal Language: Pragmatics, Poetics, and Social Power," *Annual Review of Anthropology* 23 (1994): 435.

[139] Horowitz, Tamara, and Elizabeth Mertz. The Language of Law School : Learning to Think Like a Lawyer, Oxford University Press USA - OSO, 2007.

This new approach to the study of textuality allows researchers to examine the dynamic process through which interpreters invoke features of texts in creating and shaping their contexts of use. Here text does not exist entirely apart from context, as something that is then acted upon by contextual factors; rather, features of the text influence and form a part of interpretive context. This new approach problematizes the creation of texts as detachable chunks of discourse, asking about the process by which speakers segment discourse into texts that can then be removed from one context (decontextualized) and put into another (recontextualized). Note, as well, that the move to examine process also highlights human agency to a greater degree, reminding us always that texts are created and recreated through people's actions and interpretations.

One need only think of the process by which legal texts become precedents to understand this approach. An important aspect of the authority of the legal opinions issued by U.S. courts is their appeal to prior cases as precedents. Thus, a judge writing a new legal opinion will commonly draw on previous cases; each citation or quote is essentially a claim that this new decision rests on previously established principles and law. It would be possible to understand the text of a case that is invoked as precedent as a statically conceived entity that exists apart from context— a chunk of case law easily extracted and placed in various settings. This kind of static model might indeed proceed to consider the role of context, but it would begin by assuming the unit of analysis— the precedent— as prefigured, defined apart from its contexts. Even if the meaning of that static text is thought to depend on some aspects of context— typically the "original" context of its writing— the precedent would nonetheless be thought to exist apart from any subsequent invocation. Instead, the new reformulation emerging from linguistic studies would understand the creation and use of precedent as a complex interactive process wherein our very perception of the original text as a precedent depends on a segmentation of some part of the precedential text that removes it from its setting in the prior case and recontextualizes it in a subsequent legal case. It is in a very real sense not a precedent until it is reconstituted as such. In this creative process, the precedential text as it is now conceptualized is in one sense recreated and reconfigured. At the same time, aspects of the precedential text (including features of the prior context it is deemed to carry with it) now shape the new textual context in which the prior text is being invoked. There is a blurring of the line between text and context. Interestingly, legal actors' self-understanding of this process vacillates between a fairly naïve conception (in which the

new opinion is really just taking a set precedent from the older case) and one that accepts the idea that invocation of precedent involves an inevitable transformation at some level.

Key Supreme Court Cases

Legal discourse is uniquely situated to test theories of how meaning of prior discourse is shaped through context. Its relationship to precedent has implications for intertexuality that go beyond mere citation. In legal opinions, concepts are entexualized and adapted to meet new legal challenges; shades of meaning are scrutinized to provide guidance for legal outcomes. To be accepted as legitimate, legal writing must conform to formal rules regarding entextualization and replication of language. For example, courts are restricted by rules of stare decisis which dictate which prior texts carry the force of law in a particular jurisdiction,[3] and each jurisdiction has its own rules regarding what may even be uttered in a courtroom or in a legal pleading.

In fact, one may argue that a court case itself is a process of recontextualization, where participants apply meaning from prior utterances (laws in the form of statutes, court decisions and the common law) to current situations. As Blommaert argues, "Analysis is entextualization – it is, in other words, also part of a text trajectory" [140]. The interaction between the law and the current fact pattern in a case can be seen as a formal process by which to apply theories of intertexuality. Recent work has examined the roles of intertextuality in reported speech generally [141] and in relation to federal hearsay rules and the excited utterance exception to those rules [142]. My research seeks to expand this line of inquiry into written legal documents to begin to answer the questions: "How is legal precedent entextualized within judicial opinions and what consequences are there for legal understanding of these texts? How does the multi-vocal nature of the law serve to reinforce institutional power and garner assent?"

To address these questions, I employ methods of assessing intertextuality as theorized by Bakhtin. Specifically, I apply Fairclough's methods of intertextuality analysis and Blommaert and Urban's work on entextualization to frame the research. Urban describes entextualization as "the process of rendering a given instance of discourse a text, detachable from its local

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[140] Blommaert, *Discourse*, 64.

[141] Greg Matoesian, "Intertextual Authority in Reported Speech: Production Media in the Kennedy Smith Rape Trial," *Journal of Pragmatics* 32, no. 7 (2000): 879–914, https://doi.org/10.1016/S0378-2166(99)00080-6.

[142] Jennifer Andrus, "The Development of an Artefactual Language Ideology: Utterance, Event, and Agency in the Metadiscourse of the Excited Utterance Exception to Hearsay," *Language & Communication* 29, no. 4 (2009): 312.

context," which differs from replication in that entextualization "is primarily a matter of seeming." This "travelling" across discourses [143] shapes meaning for both the prior text and the one that is created from its use.

Using these theories of entextualization, I analyze instances of intertextuality in three Supreme Court privacy law cases that were vital to my earlier understanding of the Rhetoric of Privacy Law (see Chapter Four), and find that specific prior texts command a large proportion of the legal opinions. The opinions make extensive use of direct quotations, citation of prior cases and reference to legal concepts derived from prior case law and legal scholarship. To analyze how a text is entextualized, I track the way in which the Fourth Amendment is taken up variously as a text, a concept, and a law through the examination of the context surrounding its use and finds that the Court engages "The Fourth Amendment" to different ends to justify its reasoning in the instant case.

For my analysis, I examined four texts: one law review article, Warren and Brandeis' "The right to Privacy," and three Supreme Court opinions, Olmstead v. United States, Katz v. United States, and United States v. Jones, each dealing with similar subject matter, namely whether United States citizens have a right to privacy in their affairs with regard to governmental intrusion. Each work can be generally labeled "legal discourse," although the law review article is of a different genre than the three legal opinions. Each work was written by an attorney or justice for a primarily legal audience.

My inquiry was focused on forms of intertextuality within the works. I initially analyzed each piece and categorized my findings based on the following four types of intertextuality:

1. **Direct quotes**: phrases, sentences and paragraphs that were taken verbatim from prior texts. These were set apart with quotation marks and included a citation to the prior text.
2. **Citations**: paraphrases or summary of prior texts that included reference to the prior text that were not set aside with quotation marks. Legal writing convention dictates that citations be footnoted.
3. **Internal references**: references to earlier parts of the opinion or references to pleadings within the case history. These may or may not have received a formal citation.

[143] Blommaert, *Discourse*.

4. **Un-cited references**: references to prior texts that did not receive a formal citation. For example, the Fourth Amendment would often be referenced as a text, but would not receive a formal in-text or footnoted cite.

In the Katz majority opinion, I found 66 instances of intertextuality as described above (direct quotes, citations, internal references and un-cited references). These accounted for the majority of the text, although I could not determine an exact percentage because, with the exception direct quotations, there is no clear marker where an instance of intertextuality begins and ends. I documented 72 instances of intertextuality in the Olmstead case and 32 in "The Right to Privacy."

After separating each instance of cited or un-cited reference, I categorized them by subject to analyze the referent and examine the extent to which similar prior texts were used to similar or different ends among the studied case law. Finally, I narrowed my research to one focused on the discussion of the Fourth Amendment in the texts.

Before I had begun my analysis, I had expected to find fewer citations and direct quotes in the early privacy law case, Olmstead than in the Katz opinion. I had hypothesized that because there was no case law, the justices would rely more on "reasoning" and less on appeals to prior case law. My results actually showed the opposite. In the Olmstead case, a larger percentage of the text was taken up by quotes, including fairly long block quotes, than in the Katz case. I found the smallest ratio of direct quotation to un-cited text in the law review article.

Direct Quotes and Legal Principles

Where direct quotes are used in the two opinions I examined, they are generally used to show a particular legal principle, whereas paraphrasing with citation was more often used to show distinguishing facts of prior cases. For example, the following quotations from the Katz opinions are used to demonstrate legal principles from prior case law:

- "Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause'"
- "the Constitution requires 'that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . .'"

- "'Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes,'"
- "the Court stated: 'The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.'"
- "'the long-standing practice of searching for other proofs of guilt within the control of the accused found upon arrest,'"
- "Although '[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others,' Warden v. Hayden, 387 U. S. 294, 298-299, there seems little likelihood that electronic surveillance would be a realistic possibility in a situation so fraught with urgency."
- "A search to which an individual consents meets Fourth Amendment requirements, Zap v. United States, 328 U. S. 624, but of course 'the usefulness of electronic surveillance depends on lack of notice to the suspect.' Lopez v. United States, 373 U. S. 427, 463 (dissenting opinion of MR. JUSTICE BRENNAN)."

A similar move is made in Olmstead. Justice Taft included several long, direct quotes to help establish legal principles. For example, when discussing certain Fourth and Fifth Amendment principles, he uses the words of Justice Bradley from a former Court to discuss the limits of the Amendments.

"The court held the Act of 1874 repugnant to the Fourth and Fifth Amendments. As to the Fourth Amendment, Justice Bradley said (page 621):

'But, in regard to the Fourth Amendment, it is contended that, whatever might have been alleged against the constitutionality of the acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them. That is so; but it declares that, if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production, for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of. It

is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting, and, to this extent, the proceeding under the Act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution in all cases in which a search and seizure would be, because it is a material ingredient, and effects the sole object and purpose of search and seizure.'"

The Jones opinion uses numerous shorter citations to elaborate general principles of law:

- "The net result is that GPS monitoring--by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track--may "alter the relationship between citizen and government in a way that is inimical to democratic society."United States v. Cuevas-Perez,640 F.3d 272, 285 (C.A.7 2011) (Flaum, J., concurring).
- "Rather, even in the absence of a trespass, 'a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable. 'Id., at 33,121 S.Ct. 2038; see also Smith v. Maryland,442U.S.735, 740-741, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979);Katz v. United States,389U.S.347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring)."
- "In that case, Lord Camden expressed in plain terms the significance of property rights in search-and-seizure analysis: '[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.' Entick, supra, at 817."

Paraphrased Citations and Legal Dicta

Whereas general legal principles are more likely to be quoted and set apart with quotation marks, reference to "dicta" from prior opinions is more likely to be paraphrased. The following non-quoted citations are used to distinguish facts of prior cases (bracketed numbers refer to footnoted citations in the original text).

From Katz:

- "No less than an individual in a business office,[10] in a friend's apartment,[11] or in a taxicab,[12] a person in a telephone booth may rely upon the protection of the Fourth Amendment."
- "It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry, Olmstead v. United States, 277 U. S. 438, 457, 464, 466; Goldman v. United States, 316 U. S. 129, 134-136,
- Even electronic surveillance substantially contemporaneous with an individual's arrest could hardly be deemed an "incident" of that arrest.[20]
- And, of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent.[22]

From Olmstead:

- "In Silverthorne Lumber Company v. United States, 251 U.S. 385, the defendants were arrested at their homes and detained in custody. While so detained, representatives of the Government without authority went to the office of their company and seized all the books, papers and documents found there."
- "In Amos v. United States, 255 U.S. 313, the defendant was convicted of concealing whiskey on which the tax had not been paid. At the trial he presented a petition asking that private property seized in a search of his house and store 'within his curtilage,' without warrant should be returned."
- "In Gouled v. The United States, 255 U.S. 298, the facts were these: Gouled and two others were charged with conspiracy to defraud the United States. One pleaded guilty and another was acquitted. Gouled prosecuted error."

From Jones:

- "More recently, in Soldal v. Cook County, 506 U.S. 56, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992), the Court unanimously rejected the argument that although a "seizure" had occurred "in a `technical' sense" when a trailer home was forcibly removed, id., at 62, 113 S.Ct. 538"
- "The second 'beepe'" case, United States v. Karo, 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984), does not suggest a different conclusion. There we addressed the question left open by Knotts, whether the installation of a beeper in a container amounted to a search or seizure. 468 U.S., at 713, 104 S.Ct. 3296. As in Knotts, at the time the beeper was installed the container belonged to a third party, and it did not come into possession of the defendant until later. 468 U.S., at 708, 104 S.Ct. 3296."
- "Finally, the Government's position gains little support from our conclusion in Oliver v. United States, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984), that officers' information-gathering intrusion on an "open field" did not constitute a Fourth Amendment search even though it was a trespass at common law, id., at 183, 104 S.Ct. 1735."
- "Quite simply, an open field, unlike the curtilage of a home, see United States v. Dunn, 480 U.S. 294, 300, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987), is not one of those protected areas enumerated in the Fourth Amendment. Oliver, supra, at 176-177, 104 S.Ct. 1735. See also Hester v. United States, 265 U.S. 57, 59, 44 S.Ct. 445, 68 L.Ed. 898 (1924)."

The distinction between the ways in which legal principles are discussed versus the way in which facts are distinguished may be traced to a traditional distinction in the law between a legal holding and dicta. Traditional legal thought states that the holding, or the legal principle that comes out of a particular case, may only amount to a sentence or two in a legal opinion that may span 20-30 pages. The rest, the discussion of the facts of the case at hand and the analysis of how it fits into prior case law, is considered dicta. While dicta may be useful in drawing analogies that may help to define general principles of law, it is not, itself, law. Nor is it thought to be binding on lower courts.

Several scholars have begun to challenge this distinction as it is traditionally defined.[144] They point to studies that show that lower courts consider dicta when making decisions, and consider dicta binding in over 99% of cases in federal district and appellate courts.[145] Further, analysis of lower court decisions shows that courts often quote or cite to dicta as though it is law.[146] However, while recent scholarship suggests that the distinction may be meaningless in the context of legal precedent, my findings suggest that justices still consider a distinction between fact and legal principle when choosing how to represent the words of others from prior case law.

Representations of the Fourth Amendment

The most striking revelation that came from my reading of intertextuality within the texts was the way in which concepts of the "Fourth Amendment" were taken up by the authors. Strikingly, neither the Fourth Amendment, the constitution nor the rights now associated with the Fourth Amendment were mentioned in the Warren and Brandeis article. I say this is striking because "The Right to Privacy" is considered by most privacy law scholars to have been the genesis for privacy law in the United States. In fact, "The Right to Privacy" is referenced by the majority in Katz. Justice Stewart credits the Warren and Brandeis article for representing and giving definition popular notions of the proposition that "the protection of a person's general right to privacy [...is] his right to be let alone by other people." While the justices in the Olmstead and Katz case may have borrowed notions of a right to privacy from the famous Harvard Law Review article, the way in which the Fourth Amendment is discussed tells a richer story of how that concept is codified into law.

The Fourth Amendment is talked about in several distinct ways in the Katz and Olmstead opinions; most prominent among them is: as a text that could be quoted, summarized or paraphrased, as a principle of law, or as a school of jurisprudential thought about the Amendment. It is also personified in certain instances and is said to "protect" and "govern."

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[144] David Klein and Neal Devins, "Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making," *William and Mary Law Review* 54, no. 6 (May 1, 2013): 2021; Marc McAllister, "Dicta Redefined," *Willamette Law Review* 47 (2011 2010): 161.

[145] Klein and Devins, "Dicta, Schmicta."

[146] McAllister, "Dicta Redefined."

The second time the Fourth Amendment is mentioned in the Olmstead case, it is quoted in its entirety. Justice Taft writes:

> "The Fourth Amendment provides -- 'The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.'"

In this instance, the Fourth Amendment is acting as a "text." The language is quoted without any other context of case law or jurisprudential schools of thought, and the analysis that follows is an interpretation of that text. For example, in Olmstead, Justice Taft writes, "The language of the Amendment can not be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office" and "The Amendment itself shows that the search is to be of material things -- the person, the house, his papers or his effects" (Olmstead 464). Here, he is bringing attention to the Fourth Amendment as a written text, and is highlighting the words of the Amendment for his analysis of the law.

The text of the Fourth Amendment is not similarly quoted in the Katz majority opinion. Instead, its meaning is derived from the analysis of several cases that have some bearing on the Fourth Amendment (as discussed below). However, the full text is quoted in Justice Black's dissent. Justice Black explicitly references the Fourth Amendment as a text and attempts to interpret it as such. He says, "While I realize that an argument based on the meaning of words lacks the scope, and no doubt the appeal, of broad policy discussions and philosophical discourses on such nebulous subjects as privacy, for me the language of the Amendment is the crucial place to look in construing a written document such as our Constitution." In this passage, Justice Black is bringing back the notion of the Fourth Amendent as a text, rather than as a legal principle. He then quotes the text of the Amendment, saying:

"The Fourth Amendment says that 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized' (Katz [147]

[147] Harlan, Katz v. United States (HARLAN, J., Concurring Opinion), 389 U.S. 347 (U.S. Supreme Court 1967).

And then he analyzes the Amendment as a text, stating:

> The first clause protects 'persons, houses, papers, and effects, against unreasonable searches and seizures . . . .' These words connote the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both. The second clause of the Amendment still further establishes its Framers' purpose to limit its protection to tangible things by providing that no warrants shall issue but those 'particularly describing the place to be searched, and the persons or things to be seized.' A conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized. In addition the language of the second clause indicates that the Amendment refers not only to something tangible so it can be seized but to something already in existence so it can be described. Yet the Court's interpretation would have the Amendment apply to overhearing future conversations which by their very nature are nonexistent until they take place. How can one 'describe' a future conversation, and, if one cannot, how can a magistrate issue a warrant to eavesdrop one in the future? It is argued that information showing what is expected to be said is sufficient to limit the boundaries of what later can be admitted into evidence; but does such general information really meet the specific language of the Amendment which says 'particularly describing'? Rather than using language in a completely artificial way, I must conclude that the Fourth Amendment simply does not apply to eavesdropping (Katz(*Katz v. United States*, 1967) 366).

Black analyzes the text of the Amendment clause by clause ("The first clause protects ... The second clause of the Amendment still further establishes its Framers' purpose ... In addition the language of the second clause indicates ...). He talks about "language," "words" and "interpretation" in a way that shows that he is explicitly referring to the Fourth Amendment as a text.

Similarly, in Jones, The Fourth Amendment is first analyzed as a text. Scalia says: "The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to 'the right of the people to be secure against unreasonable searches and seizures'; the phrase 'in their persons, houses, papers, and effects' would have

been superfluous." He also quotes the text of the Amendment and makes distinctions based on wording: "The Fourth Amendment provides in relevant part that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.' It is beyond dispute that a vehicle is an 'effect' as that term is used in the Amendment. United States v. Chadwick, 433 U. S. 1, 12 (1977)."

Scalia's and Black's extended discussions of the Fourth Amendment as a text proved the exception to the rule that the Fourth Amendment is most often discussed in other terms, however. In Olmstead, Justice Taft frames the discussion thusly, "It will be helpful to consider the chief cases in this Court which bear upon the construction of these Amendments" and then goes on to a discussion of prior cases having bearing on the interpretation of the Fourth Amendment. This becomes a sort of hybrid mode of situating the Fourth Amendment partially as an extant text and partially as a line of reasoning. Taft says:

> "The statute provided an official demand for the production of a paper or document by the defendant for official search and use as evidence on penalty that by refusal he should be conclusively held to admit the incriminating character of the document as charged. It was certainly **no straining of the language to construe** the search and seizure **under the Fourth Amendment** to include such official procedure" [148] (emphasis added).

Here the text of the Fourth Amendment is referred to as "language," but an interpretation is said to occur "**under** the Fourth Amendment" rather than about the Fourth Amendment. If Taft were treating the Fourth Amendment as a text in this context, one would expect the sentence to read "It was certainly no straining of the language to construe the search and seizure provisions **of** the Fourth Amendment to include such official procedure," or some similar construction. The construction of Taft's sentence seems to refer to the Fourth Amendment as reaching somehow beyond the language of the statute to some doctrine not entirely encapsulated within the text of the Amendment.

A common way to discuss the Fourth Amendment in the Katz, Jones and Olmstead cases was as a principle of law. Justice Taft discussed an action as "a violation of the Fourth and Fifth Amendments" [149] as being "in violation of the constitutional rights of the defendant,"

[148] Olmstead v. United States, 277 US 438 (Supreme Court 1928).
[149] Olmstead v. United States, 277 US at 460.

[150] and as "a violation of the Fourth Amendment" [151]. Similarly, in Katz, Justice Stewart refers to a "violation of the Fourth Amendment." And he quotes the Petitioner's brief that laid out an issue of the case as, "Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution."

The principle is constructed as being a law that can be violated and as a standard that can protect people. Justice Taft refers to "the Fourth Amendment as a principle of protection" [152]. Similarly, Justice Stewart lays out some of the "protections" afforded by the Amendment. He says:

- "the Fourth Amendment protects people, not places"
- "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"
- No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment . (Katz 351) (Footnotes omitted)
- "[W]e [do not] believe that Katz, by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home. . . ." Id., at 180, 89 S.Ct. 961." [153]
- "no Fourth Amendment violation occurred" [154]
- "Katz, the Court explained, established that 'property rights are not the sole measure of Fourth Amendment violations'"[155]

Finally, the Fourth Amendment is often employed as a shorthand way to refer to a jurisprudential school of thought. In these cases, acts may occur "within" the Fourth Amendment, as in:

[150] Olmstead v. United States, 277 US at 460.
[151] Olmstead v. United States, 277 US at 461.
[152] Olmstead v. United States, 277 US at 460.
[153] US v. Jones, 132 S. Ct. at 950.
[154] US v. Jones, 132 S. Ct. at 951.
[155] US v. Jones, 132 S. Ct. at 951.

- "This was held an unreasonable search and seizure within the Fourth Amendment" [156].
- "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment) (Katz 353).
- "The Amendment deserves, and this Court has given it, a liberal construction in order to protect against warrantless searches of buildings and seizures of tangible personal effects. But until today this Court has refused to say that eavesdropping comes within the ambit of Fourth Amendment restrictions. See, e. g., Olmstead v. United States, 277 U. S. 438 (1928), and Goldman v. United States, 316 U. S. 129 (1942)" (Katz 367) (from Black's dissent)
- "Consistent with this understanding, our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century. Kyllo v. United States, 533 U.S. 27, 31, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001)" [157].
- "It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be" ([158].

In these instances the Court is justifying whether to apply the Fourth Amendment when considering the legality of a particular act. However, the phrasing "within" rather than, for example "under" in the sentence, "This was held an unreasonable search and seizure within the Fourth Amendment" seems to suggest a reference to a larger body of text than just the language of the Amendment.

The ways in which judicial opinions use the words of others to state, define and refine the law have broad implications for entextualization theory, legal interpretation and legal writing pedagogy. That legal writing is rife with citations is unsurprising; what is significant is the way in which the same citation may take several forms within the same text.

[156] Olmstead v. United States, 277 US at 464.
[157] US v. Jones, 132 S. Ct. at 950.
[158] Olmstead v. United States, 277 US at 459.

The Fourth Amendment is taken up in several different contexts: as a static text, as a mutable principle and as an agreed-upon school of jurisprudential thought. In fact, the same quotation will be taken up in different ways within the same opinion. References to the Fourth Amendment are often first quoted from the text of the amendment, then used in a quotation from a prior case, and then used as an uncited reference within the reasoning about the outcome. That same quote is often also taken up by the dissent to clarify a point or distinguish a ruling.

The distinction of how a text is employed within a legal opinion is not generally a source of study for lawyers or law students. Theories of entextualization could greatly expand our understanding of complex constitutional theories. More explicitly referring to function of text Could be useful and potentially beneficial to lawyers and law students. In fact, this sort of re-entextualization is part of "thinking like a lawyer," but it is not explicitly taught in law schools.

Further, tracing the instances of intertextuality over several cases spanning a century shows that entextualization is becoming increasingly more sophisticated. Quotes are more often shorter, using less context and assuming more background knowledge about legal principles. If this research were repeated on a larger scale, it could help to aid understanding of how legal concepts get codified and could help students parse out important distinctions between the law as it is represented in a case holding and the sort of "legal mythology" that surrounds the use of legal concepts, terms and principles.

Corpus Analysis of the 4th Amendment: Federal Appellate and Supreme Court cases

For part two of my analysis, I examined 401 federal appellate cases with a total of 1,775,953 words. The fourth amendment was referenced by name 2528 (2470) times. Of those 2528 (2470) times,

Out of 178 cluster types, the “fourth amendment” was followed by a verb in 38 cluster types. The most common clusters included verbs such as: provides (99), requires (18), depends (19), guarantees (15) and apply/applies (13).

When the fourth amendment provides, it generally either provides an intelligible articulation of a law (as in “Fourth Amendment provides for ‘people to be secure in their persons, houses, papers and effects against unreasonable searches . . . and [that] no warrant

shall issue but upon probable cause.'") or it provides some actual physical need such as protection or sanctuary, as in "the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view"). See the table below for more examples.

Opinion Text	Reference
Fourth Amendment provides for "people to be secure	fedcase (3).txt
fourth amendment provides that "the right of the	fedcase (21).txt
Fourth Amendment provides protection to the owner of	fedcase (21).txt
Fourth Amendment provides protection [**16] to the owner of	fedcase (29).txt
Fourth Amendment provides that "[t]he right of	fedcase (32).txt
Fourth Amendment provides that "the right of the	fedcase (59).txt
Fourth Amendment provides, in relevant part, that the "	fedcase (88).txt
fourth amendment provides [**14] no protection from a "search"	fedcase (91).txt
Fourth Amendment provides protection to the owner of	fedcase (107).txt
Fourth Amendment provides "the right of the people	fedcase (114).txt
fourth amendment provides protection to the owner of	fedcase (141).txt
Fourth Amendment provides protection for the contents of	fedcase (184).txt
Fourth Amendment provides: The right of the people	fedcase (209).txt
Fourth Amendment provides "no protection to 'a wrongdoer'	fedcase (235).txt
Fourth Amendment provides that "the right of the	fedcase (271).txt
Fourth Amendment "provides sanctuary for citizens wherever they	fedcase (327).txt
Fourth Amendment provides, in pertinent part, that "[t]	fedcase (336).txt
Fourth Amendment provides that "the right of the	fedcase (362).txt
Fourth Amendment provides that: The right of the	fedcase (378).txt

In this example, we see the work of statutory interpretation being taken on by the Fourth Amendment, rather than by the court. The Fourth Amendment takes the role of actor, often with a quote to follow. This distances the human actor significantly. In these cases, the lower courts are quoting other courts whose decisions are binding. The court's ruling would have as much force of law as ascribing the action to the Fourth Amendment, but yet the court is all but

removed from the discussion. This is not true only for Fourth Amendment cases. Where legal principles are well-established, the principles become the actors.

The court, in these cases, does occasionally reference interpretation. In the privacy law cases, however, the interpretation was never said to have explicitly applied to the Fourth Amendment (See table, below)

plaintiff's claims, our task is to **interpret** the state's law as we predict	fedcase (9).txt
Act Rule and Expressio Unius together to **interpret** the plain meaning of a statute). Since	fedcase (9).txt
omitted), we must be cautious not to **interpret** the exemptions so broadly that they "tend	fedcase (18).txt
117 (1991) ("We presume that the power authoritatively to **interpret** its own regulations is a component of	fedcase (22).txt
. L. Rev. 199 (1971); William Cohen, Congressional Power to **Interpret** Due Process and Equal Protection, 27 Stan. L.	fedcase (33).txt
the videotapes. However, we are bound to **interpret** the statute as it was written at	fedcase (64).txt
we cannot say it is unreasonable to **interpret** "relevant and necessary," as that phrase is	fedcase (68).txt
." It is not unreasonable for OPM to **interpret** its regulation as requiring a greater showing	fedcase (68).txt
that the OMB's Privacy Act Guidelines **interpret** these subsections to provide for damages "[w]	fedcase (79).txt
seclusion. Under New Jersey law, courts must **interpret** undefined policy terms according to their "plain	fedcase (87).txt
of his or her duties. So to **interpret** the exception would limit its application immeasurably.	fedcase (109).txt
whatever. There are two possible ways to **interpret** the concurrence. First, because some people employ	fedcase (117).txt
maintain there will be no need to **interpret** the collective bargaining agreement in the course	fedcase (137).txt

argue that it will be unnecessary to **interpret** the collective bargaining agreement because the issue	fedcase (137).txt
the information in the public records. We **interpret** Question 30 to be asking only for information	fedcase (144).txt
Information Act, and the judicial decisions which **interpret** and apply it, evidence a strong public	fedcase (172).txt
.S. 352, 372 (1976). Thus, we are called upon to **interpret** the Exemption 6 balance between the employees' privacy	fedcase (173).txt
not charged with a special duty to **interpret** either the Privacy Act or the FOIA,	fedcase (173).txt
' names and addresses. Our charge is to **interpret** statutes as they are written, and not	fedcase (173).txt
, Circuit Judge. This appeal requires that we **interpret** the extent to which the "routine use"	fedcase (179).txt
, a Medical Review Officer shall "review and **interpret**" the test, "examining alternate medical explanations for	fedcase (181).txt
already subject. Id. We had occasion to **interpret** Von Raab in Harmon. That case involved	fedcase (181).txt
and has no bearing on how we **interpret** the meaning of "RCS"--is defined as "	fedcase (184).txt
, the Department warns that were we to **interpret** the Privacy Act as extending to non-	fedcase (219).txt
.C. § 2252A(b)(2). [**13] As in Richardson, we **interpret** § 2252A(b)(2) to mean that the qualifying	fedcase (220).txt
not charged with a special duty to **interpret** either the Privacy Act or the FOIA,	fedcase (231).txt
seem anomalous that the FLRA and [**33] OPM **interpret** such similar language differently (especially as both § 7114(	fedcase (231).txt
Act. Thus, the IRS would have us **interpret** subsection (e)(7), for example, as requiring that	fedcase (247).txt

pragmatic approach suggested by Katz, as we **interpret** that decision, is to treat the action	fedcase (252).txt
the drafters of the statute. Cases which **interpret** "intercept" support this conclusion. For example, in	fedcase (256).txt
this case does not require, that we **interpret** Exemption (d) (5) so expansively. We merely must	fedcase (264).txt
silentio. For all of these reasons, we **interpret** 5 U.S.C. § 552a(d)(1) to give	fedcase (277).txt
. 680, 685-86, 103 S. Ct. 3274, 77 L. Ed. 2d 938 (1983). We therefore **interpret** § 552a(g)(1)(D) to permit claims predicated	fedcase (277).txt
don't find that he abandoned." We **interpret** that statement as a ruling that the	fedcase (295).txt
. Brown, 579 F.3d 672, 677 (6th Cir. 2009). When courts **interpret** the Guidelines, they may apply [*499] "the traditional	fedcase (312).txt
applies. 5 U.S.C. § 552(a)(4)(B). We **interpret** FOIA exemptions narrowly because "disclosure, not secrecy,	fedcase (324).txt
and other extrinsic material when required to **interpret** a statute which is ambiguous[.]"). But courts	fedcase (351).txt
1041, 1051 (9th Cir. 2007) (en banc) ("Moreover, courts generally **interpret** similar language in different statutes in a	fedcase (351).txt
, experience, or familiarity with street jargon to **interpret** coded phrases. But the fact that a	fedcase (358).txt
and other extrinsic material when required to **interpret** a statute which is ambiguous[.]"). But courts	fedcase (367).txt
1041, 1051 (9th Cir. 2007) (en banc) ("Moreover, courts generally **interpret** similar language in different statutes in a	fedcase (367).txt
. AT&T further argues that, should we **interpret** the statute to allow a corporation to	fedcase (379).txt
statute, the court's "task is to **interpret** the words [**10] of [the statute] in light	fedcase (398).txt

Generally, these interpretations are temporally contemporaneous with the instant case. In other words, the court is describing its current role as interpreter. This move is often made to draw attention to a critical interpretive act. The call to interpretation often occurs in one of the three following ways:

1. To signal that a party to the case has asked for a particular interpretation of the law, as in "Thus, the IRS would have us **interpret** subsection (e)(7), for example, as requiring that.."
2. To draw attention to an established method of interpretation, as in "We **interpret** FOIA exemptions narrowly" and "courts generally **interpret** similar language…"
3. To explain their finding in the instant case, as in "As in Richardson, we **interpret** § 2252A(b)(2) to mean that the qualifying…" Usually interpretations are applied to statutes, but occasionally they are applied to case law.

The last case (numbered 3, above) is the rarest in my findings, but it does point to a self-reflective expression of the role of the court in interpreting statutes and (much more rarely) case law.[159] The court signals a division between the judiciary and the legislative branch in that it often inserts itself as an actor in interpreting statutes. That the court generally does not describe its action of interpreting prior case law as interpretation is an important feature of legal opinions and one that influences the ethos of the court and its institutional voice. The lack of transparency about interpreting prior courts' decisions points to the fact that the court portrays itself as a unified, institutional force that has perfect knowledge of what it has said in the past.

[159] This is generally true of the US Supreme Court or state Supreme Courts that are looking to prior decisions. It is less often true for lower state and district courts.

Chapter Six: Conclusion

The force of the law is often conceived of in binary terms: the law is either all-powerful, potentially arbitrary, and unyielding, or it is defenseless to resist its own inertia. It is either made up of human actors with prejudices who make the law whatever they say it is, or it is a bureaucratic system with no soul that is blind to the human component that gets tangled up in its web. The truth, as we all know but sometimes forget, lies somewhere in between. Individual actors do carry out the will of the law, and by extension their own will, but they must do so within certain boundaries. Rhetoric is important, but so is history, convention and precedent. The central aim of this dissertation is to examine the tension between law's inertia and the power an individual actor (or actors) have in shaping the trajectory of the law. In short, this dissertation attempts to account for multiple aspects of the power of law and the way in which language and legal discourse can influence the force of the law.

Historical context is important for understanding both the affordances and limitations of legal reasoning. The history of reasoned elaboration as a method by which judges explain legal principles, reinforce prior law and garner adherence to new interpretations of the law provides a template of sorts for how iterations of legal holdings can unfold. Central to this tradition is the reliance on quasi-scientific reasoning meant to mimic the structure of the logical syllogism. This convention places certain restrictions on legal reasoning because it requires judges to show a measure of transparency in their reasoning processes to justify their decisions. Legal argument scholars argue that this transparency is a central component of good legal reasoning. The syllogistic mode of reasoning is built into the method by which law students and new lawyers are taught to make legal arguments - and this reasoning is said to lie at the heart of legal decision-making. The quasi-scientific nature of this "logical" way of reasoning helps to solidify the court's legitimacy as a dispassionate observer and applier of legal rules to new fact patterns.

Reasoned elaboration and syllogistic modes of reasoning also serve to reinforce theories of the law based in formalism, or the idea that a judge's role in the court is akin to that of a scientist who seeks to understand laws of nature and apply those laws to particular instances. While few, if any, jurisprudential scholars would count themselves amongst the pure formalists, formalism does underpin the way that legal reasoning and writing are taught in school. This serves to reinforce the idea that legal reasoning is transparent and scientific.

But, as I show in chapter 2, there is a chasm between pure syllogism and enthymeme when applied to argument schemas. And failing to understand that difference can reify misunderstandings about the role of a judge and applying the law.

In fact, this belief in syllogistic reasoning hides the rhetorical nature of the argument by minimizing, or even wholly ignoring important unstated premises. Contrary to notions of enthymematic reasoning as a shortcut for syllogistic reasoning when the premises are commonly understood and uncontroversial, in legal argumentation, enthymematic reasoning can be used when the premises are highly contestable to move past areas of deep contention and focus on parts of the decision that are less controversial. Perhaps even more important than the fact that legal opinions do operate via enthymematic reasoning is that they are popularly understood as representing complete legal arguments (syllogisms) with every important point laid out for analysis.

Because legal opinions look like transparent, closed systems, those who would disagree with the ultimate conclusions of a quart tend to interact with the decision on its own terms. In other words, even when an ultimate decision is contentious, engaging in reasoning as it does, the court is able to foreclose avenues of dissent. This is true even with highly controversial decisions that garner a large public outcry. For example, with the Court's decision in *Citizens United*, the analysis before the decision differed fundamentally from the analysis after the decision was handed down. Legal analysts engaged with the reasoning schema laid out by the court and presented counter-arguments to the points made by the court. This has a significant rhetorical impact on public adherence to the decision because the court was able to shape discussion to match terms more favorable to the Court's reasoning.

That the law is deeply concerned with its own legitimacy is fundamental to our understanding of the rhetorical nature of legal decisions. Since its decision in *Marbury v. Madison*, the court has been wrestling with its role in upholding the law. This deep concern for the Court's own legitimacy is tied up with Boyd's notion of the constitutive nature of the law. In Chapter Three, I examined ways in which courts can be seen as members of their own communities, reinforcing shared beliefs and upholding common values. These values can be seen in language choices that run through entire corpora of legal decisions.

But a more subtle way of reinforcing the Court's legitimacy can be seen in issues of accessibility. Courts, while typically physically open to participation in their proceedings, often have high burdens for entry due to linguistic barriers. These barriers to entry and participation

ensure that fewer voices are accounted for in courtroom proceedings and that some arguments are just not heard. I argue that linguistic accessibility is part and parcel to legal access and that the justice system must take steps to encourage greater participation in the legal process. One such step has traditionally been a guaranteed right to counsel, a right which has been expanding since the mid twentieth century. In Chapter Four, I examine the extent to which the advocacy model can serve this purpose and the limitations on the degree to which it can represent a client's interests.

The advocacy model can greatly improve a client's access to the judicial system, but it relies upon quality representation and a method of counseling clients that extends past a focus on narrow issues, as defined by the court. Effective advocacy takes its cues from the clients and responds to client needs. In any manner of representation, however, there is a distancing effect that occurs between the client and the legal process. This distancing can serve to bracket important issues away from the purview of legal proceedings and can interfere with full participation in and access to the legal system. Full participation is important, not only to ensure justice in individual cases, but to account for a wider variety of voices in the process of creating common law.

As I explore in Chapter Five, the history of the law and the context of legal cases has a long-ranging impact on its trajectory. If a group or groups of people are systematically excluded from its discourse, it could have long ranging implications for our fundamental rights. For example, privacy has evolved from a privilege for the relatively wealthy landowners (when privacy was tied exclusively to trespass), to a guarantee of at least minimal security and autonomy for traditionally disenfranchised groups of people like women and LGTBQ individuals. Such a transformation can only be possible when the disenfranchised can be heard and when they can express how the law affects them.

The methods of computer-aided linguistic analysis have opened up new avenues of understanding not just the rhetorical implication of individual cases but the force of the law more generally to affect broader changes in society. However, one of the strengths of this method of analysis (breadth) can also be a weakness if it lacks the deep analytical framework for understanding broad trends. This dissertation has attempted to mitigate this contention by employing both a macro-analysis to identify broad rhetorical phenomena and micro-analysis to analyze fine detail in context. But one of the dangers in such a study is that it will over-emphasize the strengths of either method. My continuing research in this area involves

identifying more unique genre features of legal writing, and analyzing them across broad corpora of legal opinions. Additionally, although my research suggests a tool for understanding the intricacies of prior text in legal opinions, the pedagogical implications are, as yet, untested.

This research does task the legal community with becoming more aware of language use and the affect that linguistic choices may have on democratic participation in legal discourse. We must understand the force of the law as a material force that has long reaching impacts on cultural values. An ethical participant in legal discourse must understand the responsibility that a voice in the legal discourse community takes on when it speaks on behalf of others and it must attempt to account for the multitude of voices it represents.