THE COMMITTED LEGAL WRITER

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> *It is on the day that we can conceive of a different state of affairs that a new light falls on our troubles and our suffering and that we decide that these are unbearable.*
>
> *Jean-Paul Sartre*[1]

The law is once again facing a legitimacy crisis—one brought into full relief during Justice Kavanaugh's confirmation hearings, wherein the future of the independent judiciary was, if not decimated, at least hotly debated. Though this current crisis may be novel in its precise implications, such crises are not new. Indeed, skepticism concerning the legitimacy of the law and the act of lawyering has been leveled at the profession from its beginnings, both from the outside and from within. Nevertheless, the divisiveness of our current political and social climate has given the issue fresh meaning. How can legal practitioners and participants respond to this crisis without perpetuating a cycle of cynicism? This Article argues for an increased reliance on several skeptics of the law—William Shakespeare and Simone de Beauvoir among them—to propose a model of "committed legal writing." This Article draws on these classic thinkers to help understand what contemporary

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[**] J.D., 2019, Drexel University Thomas R. Kline School of Law. Many thanks to the editors who have worked hard on this piece, and to all who have taken the time to read it.

[1] JEAN-PAUL SARTRE, BEING AND NOTHINGNESS 561 (Hazel E. Barnes trans., Washington Square Press 1992) (1943).

legal actors—and legal writers in particular—can do to realign legal practice and reconnect it with law's human element.

Introduction

If there was any profession Plato hated more than law, it was poetry. In the *Republic*, for instance, Plato constructs his ideal city, the one most capable of creating a just and happy citizenry, and famously banishes poets—Homer, in particular—from within its walls.[2] Poetry is incompatible with the just state, he argues; societies and individuals must be ruled by reason, not by rhetoric.[3] According to Plato, to be enthralled by the poetic imagination is to be a slave to emotion.[4] Freedom, for Plato, is achieved through the careful dissection of the principles underlying our beliefs—not through poetic imagination.[5]

Although "hate" is too strong a word. There is also a deep admiration for the poetic imagination running throughout Plato's work.[6] The mere fact that Plato wants all poets expelled points to his respect for the power of the poetic imagination.[7] In contrast to

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[2] PLATO, REPUBLIC, at 595b (C.D.C. Reeve ed., G.M.A. Grube trans., Hackett Publ'g Co. 2d ed. 1992) (c. 380 B.C.E.) (banishing imitative poets from the just city, arguing that "all such poetry is likely to distort the thought of anyone who hears it, unless he has the knowledge of what it is really like, as a drug to counteract it").

[3] *Id.* at 277–78[606d1–607b2].

[4] *See id.*

[5] *See id.* at 278[607b2–c6].

[6] *See, e.g.*, *id.* at 76[397e9–398a3] ("It seems, then, that if a man, who through clever training can become anything and imitate anything, should arrive in our city, wanting to give a performance of his poems, we should bow down before him as someone holy, wonderful, and pleasing, but we should tell him that there is no one like him in our city and that it isn't lawful for there to be."); PLATO, GORGIAS, at 9[452d6] (Donald J. Zeyl trans., Hackett Publ'g Co. 1987) (c. 380 B.C.E.) (arguing, through the character of Gorgias, that the rhetorical arts are "the source of freedom for mankind itself").

[7] *See* Christopher Janaway, *Plato and the Arts*, *in* A COMPANION TO PLATO 388, 388 (Hugh H. Benson ed., 2006) ("[Plato's] enterprise of persuading the reader of the primacy of rational argument does not rely solely on the use of rational argument. To supplant tragedy and Homer he uses rhetoric, myth, wordplay, poetic metaphor, and dramatic characterization. . . . If Plato is 'of all philosophers the most poetical' he is so in the service of leading us, by poetry's means of persuasion, to philosophy proper, a place from which we may begin to understand and evaluate poetry and all the arts." (quoting Sir Philip Sidney, *A Defense of Poetry*, *in* MISCELLANEOUS PROSE OF SIR PHILIP SIDNEY 107 (K. Duncan-Jones & J. van Dorsten eds., 1973))).

modern theories of aesthetic "distance," where the audience is deemed fundamentally separate and detached from the work of art,[8] Plato contends that "it is in the power of much of the greatest art to *command* an emotional absorption that is destructive of rational detachment."[9] Poetic rhetoric is dangerous precisely because it works upon us and molds our characters in profound and often unappreciated ways.[10]

In addition to the poets, there is another type of rhetorician Plato finds troubling: lawyers, known in ancient Athens as "sophists"—teachers of rhetorical persuasion.[11] Unlike poets, however, sophists are not treated with distrustful reverence; Plato merely distrusts them.[12] This might be because the original sin of the nascent Athenian legal world was the trial and death of Socrates, Plato's mentor and friend. Socrates was condemned in an Athenian court for "corrupting the young" a charge resulting from his attempts to teach Athenian citizens to question the status quo.[13] According to Plato, the "justice" achieved in a courtroom has little to do with truth; it is defined primarily by the skillfulness of an advocate's ability to persuade.[14] The skilled use of rhetoric gives sophists power over the imaginations of others, and this power becomes suspect to the extent that it is not guided by principles of truth and justice and is used solely as a means for winning arguments.[15] Thus, while sophists are not barred from Plato's ideal republic, they are constantly tested throughout his dialogues and, as James Boyd White has noted, found wanting.[16]

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[8] STEPHEN HALLIWELL, THE AESTHETICS OF MIMESIS: ANCIENT TEXTS AND MODERN PROBLEMS 89–90 (2002).

[9] *Id.* at 90.

[10] *See* PLATO, REPUBLIC, *supra* note 2, at 276[605b1–c2].

[11] The use of the term "lawyer" here is anachronistic, as explained in more detail in Section I.A below. Athens did not have a legal profession, but rather orators and teachers of public speaking—sophists—who would instruct students in the art of winning arguments. *See infra* Section I.A.

[12] *See* Bruce McComiskey, *Disassembling Plato's Critique of Rhetoric in the* Gorgias *(447a–466a)*, 10 RHETORIC REV. 205, 205 (1992) (noting "Plato's overt distrust of the sophists in general").

[13] *See infra* Section I.A.

[14] *See* PLATO, GORGIAS, *supra* note 6, at 16[457d4–458a8].

[15] *See id.*

[16] *See* JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 215 (1985). Perhaps the most forceful example of this is found in the *Gorgias*, a dialogue between Socrates, representing the philosophers, and Gorgias, representing the rhetoricians. The *Gorgias* is a no holds barred approach to the distinctions between philosophy and rhetoric. *See id.* ("In the *Gorgias* Plato examines rhetoric . . . by contrasting

Were Plato alive today, he might be both pleased and stunned by the way the rhetorical arts of poetry and law have developed. Professional poets—far from being the irrational influencers so feared in the *Republic*—are now largely relegated to ivory towers.[17] The legal profession, on the other hand, has ascended to seats of unfathomable power while, in many ways, seeking to disassociate itself from its rhetorical roots.[18] With the ascent of legal formalism in the nineteenth century,[19] the law was characterized as a science, a system of rules, and judges and lawyers became mediums charged with executing the law's demands. [20] To some formalists, the appeals to passion characterizing the rhetorical enterprise could be eliminated from law entirely, making judging a "mechanical" procedure of deductive (and objective) reasoning.[21]

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it with dialectic . . . . He asks of each activity what it means from the point of view of the practitioner: what kind of life he can have, what character, what knowledge, what community with others. At every stage the life of the rhetorician is found wanting, and wanting from every imaginable point of view—intellectual, practical, moral, psychological, political, and so on.").

[17] *See* David Orr, *Poets, Academia: A Couplet in Conflict*, N.Y. TIMES (May 30, 2009), https://www.nytimes.com/2009/05/31/weekinreview/31orr.html (describing the contemporary intertwining of poetry and academia). *But cf.* Steven L. Winter, *Death Is the Mother of Metaphor*, 105 HARV. L. REV. 745, 749–50 (1992) (describing poet Wallace Stevens's relationship to the study of law and legal language).

[18] *See* James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 685 (1985) (arguing that influences from the Judeo-Christian tradition, which "saw the law as a set of authoritative commands," and from the contemporary institutional sociology tradition worked to create an understanding of the law as "a body of more or less determinate rules, or rules and principles, that are more or less perfectly intelligible to the trained reader").

[19] *See* Morton J. Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251, 254–57 (1975).

[20] *See id.* at 251.

[21] Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 607 (1908). *But see* BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 27–43 (2010) (arguing that the fears of Pound and other legal scholars about increasing legal formalism in the nineteenth and early-twentieth centuries were greatly exaggerated). It is worth noting that few contemporary "formalists" adhere to a strong mechanical view of the judicial role. *See* Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 LEGAL THEORY 111, 111–13 (2010) (arguing that contemporary formalists, such as Robert Bork or the late Justice Antonin Scalia, apply a more "sophisticated" version of legal

Legal formalism has long had its skeptics and denouncers,[22] and for good reason. As legal scholar Roscoe Pound argued in 1908, a mechanical reliance on formalism often results in the "petrifaction" of the law,[23] noting—in the spirit of Socrates—that once our legal "[c]onceptions are fixed," their "premises are no longer to be examined. Everything is reduced to simple deduction from them. Principles cease to have importance. The law becomes a body of rules. This is the condition against which sociologists now protest, and protest rightly."[24] And yet, as Pound himself intimated, the attempts of legal formalists to characterize law as a science were intended as a means of strengthening the legitimacy of the legal enterprise: if law was not a science, then it was merely "a system of enforcing magisterial caprice, however honest, and however much disguised under the name of justice or equity or natural law."[25] Legal formalism thus reflects one stage in law's evolution from a rhetorical discipline ruled by passion and caprice to the deliberative, democratic, and collaborative enterprise that most of us want to believe forms the bedrock of a civil and civilized society.

But while the law has certainly evolved since Socrates was condemned in an Athenian courtroom, concerns about the legitimacy of the law and its power to manipulate and be manipulated have by no means disappeared. On October 6, 2018, for instance, Justice Brett Kavanaugh was confirmed to the Supreme Court, amid unprecedented public protest.[26] Kavanaugh's confirmation hearings were mired in sexual assault allegations and accusations of partiality, and the senators registering their confirmation votes struggled to be heard over protestors' cries of "I do not consent"[27] and "We will not

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formalism); *see also* Hans-Peter Haferkamp, *Legal Formalism and Its Critics*, *in* THE OXFORD HANDBOOK OF EUROPEAN LEGAL HISTORY 928, 928 (Heikki Pihlajamäki et al. eds., 2018) (developing and critiquing the various ways formalism has been used as "a vague, polemic catchphrase, to describe a large number of different problems in a variety of contexts").

[22] *See* Haferkamp, *supra* note 21 (discussing various different critical approaches to legal formalism).

[23] Pound, *supra* note 21, at 606.

[24] *Id.* at 612.

[25] *Id.* at 605.

[26] Sheryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html.

[27] Jesse Byrnes, Jordain Carney & Juliegrace Brufke, *Protestors Interrupt Final Vote on Kavanaugh, Screaming Opposition*, HILL (Oct. 6, 2018),

forget."[28] During the hearings concerning Dr. Christine Blasey Ford's sexual assault allegations against Justice Kavanaugh, he railed against the Democratic establishment, arguing that the allegations against him were "a calculated and orchestrated political hit fueled with apparent pent-up anger about President Trump and the 2016 election."[29] Outside the Senate walls, people stormed the steps of the Supreme Court itself[30]—a building that has, since 1949, been off-limits to public protest.[31] As the crowd began pounding on the Supreme Court doors, the police erected a barricade,[32] providing both a physical and a symbolic barrier between the anger and frustration of the people and the reasoned discipline of the rule of law.

The disillusionment and unrest accompanying Justice Kavanaugh's confirmation[33] reminds us that the legal world, yet

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https://thehill.com/homenews/senate/410236-protesters-interrupt-final-vote-on-kavanaugh.

[28] Herb Jackson & Deborah Barfield Barry, *Protestors Disrupt Final Vote to Confirm Brett Kavanaugh as a Supreme Court Justice*, USA TODAY (Oct. 6, 2018), https://www.usatoday.com/story/news/politics/2018/10/06/brett-kavanaugh-confirmation-protesters-disrupt-final-vote/1549760002/.

[29] *E.g.*, Aaron Blake, *Brett Kavanaugh Just Got Remarkably Angry—and Political—for a Supreme Court Nominee*, WASH. POST (Sept. 27, 2018), https://www.washingtonpost.com/politics/2018/09/27/brett-kavanaugh-just-got-remarkably-angry-political-supreme-court-nominee/?utm_term=.73823fce982e.

[30] Kalhan Rosenblatt, *Protesters Pound the Doors of the Supreme Court Following Kavanaugh Confirmation*, NBC NEWS (Oct. 6, 2018), https://www.nbcnews.com/politics/supreme-court/protests-build-capitol-hill-ahead-brett-kavanaugh-vote-n917351.

[31] Pete Williams, *Supreme Court Rebuffs Challenge to Protest Limits*, NBC NEWS (May 16, 2016), https://www.nbcnews.com/news/us-news/supreme-court-rebuffs-challenge-protest-limits-n574651.

[32] Rosenblatt, *supra* note 30.

[33] In addition to further igniting public protests against his confirmation, this political acrimony led to a petition signed by thousands of law professors expressing grave concerns about Justice Kavanaugh's ability to be a neutral arbiter of disputes, *see* Opinion, *The Senate Should Not Confirm Kavanaugh, Signed, 2,400+ Law Professors*, N.Y. TIMES (Oct. 3, 2018), https://www.nytimes.com/interactive/2018/10/03/opinion/kavanaugh-law-professors-letter.html, with similar critical remarks made by a former Supreme Court Justice, *see* Adam Liptak, *Retired Justice John Paul Stevens Says Kavanaugh Is Not Fit for Supreme Court*, N.Y. TIMES (Oct. 4, 2018), https://www.nytimes.com/2018/10/04/us/politics/john-paul-stevens-brett-kavanaugh.html.

again, faces a legitimacy crisis.[34] But it is not only this type of major crisis that erodes confidence in the law both from the public and from practitioners; every day, contemporary advocates are faced with more mundane, and yet ever-present, barriers to legal entry. In addition to navigating the deep-seated beliefs of judges, advocates often face procedural machinations that keep their clients out of court, justiciability doctrines that prevent courts from reaching the merits of a case, and a myriad of other legal mechanisms that keep disputes from being heard. While some uses of these mechanisms no doubt further the ends of justice and dispute resolution, others raise the fear—shared by Plato, the formalists, and others—that legal results may be driven less by rational legal principles, and more by the idiosyncratic disposition of the decision maker.[35] In the end, many of these fears concerning the legitimacy of the law are fears about *power*: that those with the power to decide someone else's fate will use that power unwisely or unjustly, resulting in a corrosive effect on our legal system.[36]

This Article does not attempt to solve these problems of power and legitimacy, but rather begins from the premise that the problems are, in a sense, unsolvable. As long as human beings are responsible for creating, interpreting, and implementing the law, our legal systems are likely to remain susceptible to misuses of power and their accompanying legitimacy concerns. But today, as politicians continue to try to line the federal bench with party stalwarts,[37] public cynicism

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[34] *See* Jak Allen, *Kavanaugh 'Circus' Is a Disaster for an Independent Judiciary*, CONVERSATION (Oct. 4, 2018), http://theconversation.com/kavanaugh-circus-is-a-disaster-for-an-independent-judiciary-104375.

[35] *See* KEITH J. BYBEE, ALL JUDGES ARE POLITICAL—EXCEPT WHEN THEY ARE NOT 20–22 (2010) (describing public suspicions of judicial hypocrisy); *cf.* Keith J. Bybee, *The Rule of Law Is Dead! Long Live the Rule of Law!*, *in* WHAT'S LAW GOT TO DO WITH IT? 306, 307 (Charles Gardner Geyh ed., 2011) ("Many of the same polls that reveal a significant public belief in the political nature of judicial decision-making also indicate a substantial public faith in the impartiality of judges.").

[36] While it is not self-evident that failures of a decision maker to engage, for whatever reason, with the exigencies presented by the litigants in a given legal dispute should constitute an "abuse" or "misuse" of power, this Article proceeds on the assumption that the resolution of disputes is the primary aim of the legal system, and thus that in most cases, when a decision maker acts contrary to the goal of resolving a dispute, she is misusing her legal power.

[37] *See* Thomas Kaplan, *Trump Is Putting Indelible Conservative Stamp on Judiciary*, N.Y. TIMES (July 31, 2018),

concerning the neutrality of our arbiters has reached uncomfortable heights.[38] This cynicism, resulting from the feeling that sides were chosen before the dispute even began, inevitably affects legal professionals as well, and can result in deep feelings of powerlessness.

Responding to this concern, this Article asks a more modest question: How might those of us in the legal profession respond to concerns about power and illegitimacy without giving up hope and descending into cynicism? More specifically, is there a role for legal writers to play in these moments? It argues that we can once again look to the profession's rhetorical roots, and it relies on and seeks to refashion past thinkers who have themselves confronted skepticism, Simone de Beauvoir, Jean-Paul Sartre, and William Shakespeare among them, to explore a model of "committed" legal writing—an approach to legal writing that attempts not only to disrupt static modes of legal reasoning, but also to restore a sense of commitment to legal practice more generally.

Part I explores in greater detail the problems fueling many skeptical accounts of the law, relying on ancient, literary, and contemporary examples to develop what we see as the concern. Part II draws on examples from philosophy and literature to explore how philosophers and poets have suggested using writing to combat illegitimacy, cynicism, and even despair. It begins by discussing the existentialist philosophy of Simone de Beauvoir and Jean-Paul Sartre—particularly their notion of "committed literature"—to offer an understanding of the writer's role; this paradigm's emphasis on voice, identification, and freedom offers a helpful tool for approaching the task of legal writing, most notably as an antidote to illegitimacy and immobilizing skepticism. Part II then looks to Shakespeare—a "committed"[39] writer himself—using examples from several of his plays,[40] including *King Lear* and *Measure for Measure*, to theorize

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https://www.nytimes.com/2018/07/31/us/politics/trump-judges.html.

[38] *See Confidence in Institutions*, GALLUP, https://news.gallup.com/poll/1597/confidence-institutions.aspx (last visited Dec. 4, 2019) (noting that in 2019, only 24% of the population had a great deal/quite a lot of confidence in the American criminal justice system, and only 38% had a great deal/quite a lot of confidence in the Supreme Court).

[39] As discussed below at *infra* p. 21, "[t]he committed writer understands both that the social world is fundamentally a human creation and that she has entered a world that is already created."

[40] Although this Article refers to Shakespeare by male pronouns, there is a compelling argument that the works attributed to Shakespeare's authorship may very well have been written by Emilia Bassano, a woman "[b]orn in London in 1569 to a family of Venetian immigrants—musicians and

about what we might mean by a committed legal writer. Part III examines how committed legal writing might work in context by considering examples of "committed" advocates and jurists whose work helps disrupt their readers' complacency and offer an alternative, arguably more humane solution to the legal issues at stake.

I. A Deep History of Skepticism

Tracing the contours of the law's contemporary legitimacy crisis is difficult, not merely because the crisis is complex and multifaceted,[41] but because we are living within it. Courts, advocates, and litigants are still finding the words to describe—and legal theories to address—our current moment.[42] We do not have the benefit of

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instrument-makers who may have been Jewish." Elizabeth Winkler, *Was Shakespeare a Woman?*, ATLANTIC, https://www.theatlantic.com/magazine/archive/2019/06/who-is-shakespeare-emilia-bassano/588076/ (last updated June 7, 2019, 6:33 PM (ET)).

[41] *See, e.g.*, Luis Fuentes-Rohwer, *Taking Judicial Legitimacy Seriously*, 93 CHI.-KENT L. REV. 505 (2018) (discussing generally our current judicial legitimacy crisis); Russell Hittinger, *A Crisis of Legitimacy: A Response to Critics*, 44 LOY. L. REV. 83 (1998) (citing the trajectory of the Supreme Court's constitutional jurisprudence as creating the current legitimacy crisis); Orna Rabinovich-Einy, *The Legitimacy Crisis and the Future of the Courts*, 17 CARDOZO J. CONFLICT RESOL. 23 (2015) (citing the breakdown between formal and informal judicial processes as contributing to the current legitimacy crisis).

[42] Consider, for instance, the praise and criticism Judge Rosemarie Aquilina faced for her handling of former Olympic gymnast physician Larry Nassar's sentencing, after he pleaded guilty to sexually abusing the young female gymnasts he was supposed to be treating. *See, e.g.*, Rachel Marshall, *The Moment the Judge in the Larry Nassar Case Crossed a Line*, VOX (Jan. 25, 2018), https://www.vox.com/the-big-idea/2018/1/25/16932656/judge-aquilina-larry-nassar-line-between-judge-advocate-sentencing. Judge Aquilina "vow[ed] to let every victim speak," allowing the sentencing courtroom to become "a cathartic forum that . . . emboldened dozens of women who had remained silent to come forward with accounts of abuse by Dr. Nassar." Scott Cacciola, *Victims in Larry Nassar Abuse Case Find a Fierce Advocate: The Judge*, N.Y. TIMES (Jan. 23, 2018), https://www.nytimes.com/2018/01/23/sports/larry-nassar-rosemarie-aquilina-judge.html. Though undoubtedly unconventional, it is difficult to appraise the legitimacy of Judge Aquilina's approach given the myriad ways the #MeToo movement seeks to reframe and refashion our conventional institutions.

hindsight. Still, we can look to the past because in some sense the legitimacy concerns we face today are the same concerns that have plagued the legal profession from its beginning, namely, power and its abuse.[43] The following sections explore instances of ancient and historical skepticism toward the use of power in the legal profession to help frame some of our contemporary concerns.

A. A History of Skepticism

One of the hallmarks of our legal tradition is the availability of an impartial forum to settle the merits of our disputes.[44] The impartiality of the legal decision maker[45] is essential to the legitimacy of the law, for obvious reason: if the results of a legal dispute are determined not by its merits, but by the preferences of the decision maker, the practice of law becomes nothing more than the implementation of "magisterial caprice."[46] Nevertheless, the goal of impartiality has perhaps been betrayed as often in our history as it has been achieved,[47] and the fear of our legal decision makers being swayed by prejudice or self-interest has fueled centuries of skepticism toward the legal profession more generally. Indeed, Plato—one of many chroniclers of ancient Greece's nascent legal system—was particularly

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[43] Like legitimacy, power, too, is a complicated subject. Power structures our society and our legal system in obvious and nonobvious ways, Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31 (2016), and an extensive body of literature has developed discussing the relationship between power and the law, Kate Andrias, *Confronting Power in Public Law*, 130 HARV. L. REV. F. 1 (2016); Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400 (2015); K. Sabeel Rahman, *(Re)Constructing Democracy in Crisis*, 65 UCLA L. REV. 1552 (2018).

[44] *See* DOUGLAS E. EDLIN, COMMON LAW JUDGING: SUBJECTIVITY, IMPARTIALITY, AND THE MAKING OF LAW 7 (2016) (noting four factors essential to the practice of common law judging: individuality, impartiality, independence, and intersubjectivity).

[45] *Id.* at 22 (defining "impartiality" as "the absence of any personal stake or bias (or the genuine appearance of any personal stake or bias) in a case that could prevent the litigants from being treated fairly by the court").

[46] *See* Pound, *supra* note 21, at 605.

[47] The instances of this are too numerous to mention in a footnote. Nevertheless, here are a few examples. *See, e.g.*, Hirabayashi v. United States, 320 U.S. 81 (1943); Ozawa v. United States, 260 U.S. 178 (1922); Downes v. Bidwell, 182 U.S. 244 (1901); Pace v. Alabama, 106 U.S. 583 (1883), *overruled in part by* McLaughlin v. Florida, 379 U.S. 184 (1964); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

skeptical of lawyers, or, to be more exact and less anachronistic, their early iteration: the ancient Greek sophists and orators.[48]

Skepticism concerning the rhetorical nature of the legal profession has been intertwined with the development of the law. While the law would not become an actual "profession" until the reign of Roman Emperor Claudius, [49] contemporary advocacy still resembles in part the practice of ancient Greek oratory, in which individual litigants (or a trained orator, appearing free of charge as a "friend" on the litigant's behalf[50]) would attempt to persuade a jury to rule in the litigant's favor in any given case.[51] Although Athenian law proscribed paying an advocate to appear on one's behalf,[52] with the development of the Greek alphabet a new vocation emerged: logography, or speechwriting.[53] Familiar with the law and trained in rhetorical persuasion, logographers would write speeches for litigants for a fee,[54] and the litigants would then memorize those speeches and

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[48] *See* John Dillon, *Introduction* to THE GREEK SOPHISTS, at ix–xii (John Dillon & Tania Gergel trans., Penguin Books 2003).

[49] Elizabeth A. Kovachevich & Geri L. Waksler, *The Legal Profession: Edging Closer to Death with Each Passing Hour*, 20 STETSON L. REV. 419, 420 (1991) (noting that Claudius was the first to decree that Roman advocates could accept fees for their services); JOHN CROOK, LAW AND LIFE OF ROME 90 (1967) (noting that in ancient Rome, "[t]he main rule, going back to a law of 204 BC, was that barristers were not allowed to take fees," but that Claudius allowed advocates to take fees, setting a maximum fee at ten thousand sesterces).

[50] Michael Gagarin, James R. Dougherty, Jr. Centennial Professor Emeritus, Univ. of Tex. at Austin, Law and Oratory in Classical Athens, at the Brigance Forum Lecture, Wabash College, Crawfordsville, Ind., at 4 (Sept. 20, 2010), https://www.wabash.edu/academics/uploads/art/Gagarin%20Lecture.pdf (text of lecture published online by Wabash College with the author's permission at https://www.wabash.edu/academics/rhetoric/forumpresenters); *see* Roscoe Pound, *What Is a Profession? The Rise of the Legal Profession in Antiquity*, 19 NOTRE DAME L. REV. 203, 224 (1944) ("In the beginning, the patron advised his client and supported his client's case or defended him because these were duties the patron owed to one dependent upon him. In consequence, when regular advocacy arose the assistance rendered to suitors in the forum was gratuitous.").

[51] Gagarin, *supra* note 50, at 4.

[52] Anton-Hermann Chroust, *Legal Profession in Ancient Athens*, 29 NOTRE DAME L. REV. 339, 341 (1954).

[53] Gagarin, *supra* note 50, at 4.

[54] *See* Emily Wilson, *The Trouble with Speeches: The Birth of Political Rhetoric in an Ancient Democracy*, NEW REPUBLIC (Apr. 26, 2013), https://newrepublic.com/article/112861/birth-political-rhetoric-ancient-

recite them word for word at their trials.[55] As classicist Michael Gagarin has noted:

> When success or failure depended entirely on a single speech, the ability to speak well must have been a crucial factor in gaining a favorable verdict, and it is not surprising that the help of a logographer was highly valued. And because of this, some have argued that Athenian law was nothing but rhetoric—the more skillful speaker, or more skillful logographer, would win the case regardless of guilt or innocence.[56]

Though Gagarin and others have gone on to describe the ways in which the sources of Athenian law did in fact restrain the power of rhetoric,[57] this dichotomy between rhetoric and the law raises a legitimacy concern still relevant to our contemporary legal profession—that our legal conclusions are based on nothing more than the skillfulness of an advocate's ability to persuade, or worse, the whimsy or caprice of a jury or judge.[58] This was certainly one of Plato's concerns; he spends many of his dialogues discussing the inadequacies of the sophists, a brand of ancient Greek educator who focused primarily on teaching the rhetorical art of persuasion.[59] He contrasts the rhetorician's ability to manipulate the emotions of a listener with the philosopher, who appeals to reason and attempts to ascertain truth, rather than merely win an argument.[60]

Not only was the teaching of sophistry in conflict with the nascent subject of philosophy—which was concerned, according to Plato, with reason rather than rhetoric—but sophistry was also responsible, to some extent, for the death of Plato's great friend and mentor, Socrates. In 399 B.C.E., Socrates was condemned, at the age of seventy, to death in an Athenian court.[61] He was charged with

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democracy (describing the money made by Greek orator Demosthenes, "a successful private speechwriter").

[55] Gagarin, *supra* note 50, at 4; Pound, *supra* note 50, at 213 ("[T]he average [ancient Athenian] litigant employed a speech-writer or logograph who, for a fee, drew up a speech and turned it over to his client. The client learned it by heart and delivered it before the tribunal.").

[56] Gagarin, *supra* note 50, at 5.

[57] *Id.* at 6–14.

[58] *See* Pound, *supra* note 21, at 605.

[59] *See, e.g.*, PLATO, GORGIAS, *supra* note 6; PLATO, REPUBLIC, *supra* note 2; PLATO, PROTAGORAS (Stanley Lombardo & Karen Bell trans., Hackett Publ'g Co. 1992) (c. 428–347 B.C.E.).

[60] PLATO, REPUBLIC, *supra* note 2, at 166–67[493a5–c5].

[61] Debra Nails, *The Trial and Death of Socrates*, *in* A COMPANION TO GREEK AND ROMAN POLITICAL THOUGHT 323, 323 (Ryan K. Balot ed., 2009).

"corrupting the young" and "not believing in the gods in whom the city believes,"[62] offenses employed in various forms throughout our legal history to punish those who fail to conform with the status quo. Indeed, Socrates was one of many ancient Athenian citizens brought to court on similar charges; 399 B.C.E. was marked by "a wave of religious fundamentalism that brought with it a steep rise in the number of impiety cases in Athenian courts."[63]

The charges against Socrates were brought by Meletus, the son of a poet, who then served as "both plaintiff and prosecutor in Socrates' case."[64] He, along with two other orators, Anytus, the son of a sophist, and Lycon, argued that Socrates deserved death for teaching his students to revere reason over the Greek gods.[65] Socrates responded with a speech on the nature of wisdom, tearing apart the premises and conclusions of the orators line by line.[66] But it was not enough: the jury sided with the orators, finding Socrates guilty of both corruption and atheism.[67] Socrates's concerns with jury verdicts, as relayed by Plato and expressed to various companions both before and after the trial, echo Pound's concerns about formalism.[68] As philosopher Debra Nails recounts in her discussion of Plato's *Theaetetus*,

By the strict letter of the law, Socrates [was] guilty of not believing in the vengeful Olympian gods of the Athenians and the poets, thus his jury is persuaded to a true judgment by the orator Lycon and the skilled litigant Anytus, if not by the feckless Meletus. But the result is legalistic justice, not justice itself; it reflects a correct judgment, but not knowledge.[69]

While the court did give Socrates the option of avoiding death, Socrates refused to do so, and drank hemlock soon after the trial in the company of his friends and students.[70]

Our legal systems have advanced in several respects from the ancient Greek trial. Indeed, the process of Greek justice (or lack thereof) was refined in the ancient Roman system to impose greater

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[62] PLATO, *Apology*, *in* FIVE DIALOGUES: EUTHYPHRO, APOLOGY, CRITO, MENO, PHAEDO 21, 28[24b] (John M. Cooper ed., G.M.A. Grube trans., Hackett Publ'g Co. 2d ed. 2002).
[63] Nails, *supra* note 61, at 323.
[64] *Id.* at 324; *see also* Chroust, *supra* note 52, at 340–42 (describing the process of bringing suit in ancient Athens).
[65] Nails, *supra* note 61, at 323.
[66] PLATO, *Apology*, *supra* note 62, at 22–39[17a–35d].
[67] *Id.* at 41[38b–c].
[68] *See supra* notes 23–25.
[69] Nails, *supra* note 61, at 327–28 (citing to the discussions between Socrates and Theaetetus prior to the former's trial).
[70] *Id.* at 335–36.

limitations on the use of legal power. While the system certainly still tolerated "appeals to the passions, prejudice or emotions,"[71] the Romans allowed for legal professionals—lawyers and judges—with expertise in the legal issues at stake, and would come in later years to develop a process of appeal.[72] Still, the death of Socrates serves as a reminder of a threat that continues to plague the modern legal profession, namely, the fear that law rests not on reason and the pursuit of impartial justice but is instead merely a guise for power—the power of words, of juries, of jurists.

A later example is similarly illustrative. *Measure for Measure* was the last of William Shakespeare's comedies.[73] Written sometime around 1604,[74] the play tells the story of a fictionalized Vienna gone to seed. The Duke, the city's ruler, has stopped enforcing the city's laws, and now the community does whatever it wants, unhampered by the threat of punitive consequences.[75] As the Duke himself admits, the laws of the city have become "more mocked than feared," and "[l]iberty plucks Justice by the nose."[76]

With a plan to fix his lawless city, the Duke absconds (or at least pretends to do so), leaving his deputy Angelo to rule in his place.[77] Angelo accepts the role, determined "not [to] make a scarecrow of the law."[78] To this end, Angelo sentences Claudio—by all appearances a relatively upstanding young citizen—to death under an obscure statute criminalizing sex out of wedlock.[79] Though Claudio's sister Isabella undertakes a fervent mission to persuade Angelo that the sentence is unjust, Angelo does not waver.[80] For Angelo, it is not he who has condemned Claudio to die, but rather the law itself. Thus, when Isabella visits Angelo to ask and then beg him to take mercy on

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[71] Edward J. White, *Lawyers of Ancient Rome*, 92 CENT. L.J. 407, 409 (1921).
[72] O.E. Tellegen-Couperus, *Did the Senate Function as a Court of Appeal in the Later Roman Empire?*, 53 LEGAL HIST. REV. 309, 310–11 (1985).
[73] Ronald R. MacDonald, Measure for Measure*: The Flesh Made Word*, 30 STUDIES IN ENG. LITERATURE, 1500-1900, at 265, 265 (1990) ("It is generally conceded that *Measure for Measure* is Shakespeare's last comedy, properly speaking . . . .").
[74] *See* J.W. Lever, *The Date of* Measure for Measure, 10 SHAKESPEARE Q. 381, 381–88 (1959) (discussing historical evidence relating to the writing of *Measure for Measure*).
[75] *See* WILLIAM SHAKESPEARE, MEASURE FOR MEASURE, act 1 (S. Nagarajan ed., Penguin Books 1998).
[76] *Id.* at act 1, sc. 3, at 27–29.
[77] *See id.* at act 2, sc. 1.
[78] *Id.* at act 2, sc. 1, at 1.
[79] *Id.* at act 2, sc. 1, at 80–82.
[80] *Id.* at act 2, sc. 1, at 31.

her brother, he responds: "It is the law, not I, condemn your brother. / Were he my kinsman, brother, or my son, / It should be thus with him; he must die tomorrow."[81] The rule of law must be enforced, and "[Claudio] must die."[82]

In the character of Angelo, Shakespeare echoes Plato's concerns about the legitimacy of the legal profession. Isabella diagnoses the issue in their first meeting:

> But man, proud man,
> Dressed in a little brief authority,
> Most ignorant of what he's most assured;
> His glassy essence, like an angry ape,
> Plays such fantastic tricks before high heaven,
> As make the angels weep; who, with our spleens,
> Would all themselves laugh mortal.[83]

Though Angelo professes to believe only in the rule of law, his failure to recognize the unique exigencies of Claudio's situation reveals to Isabella the depth of his arrogance: while Angelo believes himself to be implementing justice, he fails to understand what "justice" truly means. For Isabella, the fundamental purpose of the legal system is not only to resolve disputes, but to do so in a way that recognizes and deals appropriately with the unique exigencies presented by the litigants—a purpose Angelo, blinded by power and the "rule of law," is incapable of understanding.

The extent to which Angelo lets power corrupt his administration of the law is evident later in the play, when he asks Isabella to return to his room to further discuss her brother's situation.[84] He promises to release her brother if she will sleep with him:

> Admit no other way to save his life,
> As I subscribe not that, nor any other,
> But in the loss of question, that you, his sister,
> Finding yourself desired of such a person,
> Whose credit with the judge, or own great place,
> Could fetch your brother from the manacles
> Of the all-binding law; and that there were
> No earthly mean to save him, but that either
> You must lay down the treasures of your body
> To this supposed, or else to let him suffer:
> What would you do?[85]

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[81] *Id.* at act 2, sc. 2, at 80–82.
[82] *Id.* at act 2, sc. 1, at 31.
[83] *Id.* at act 2, sc. 2, at 117–23.
[84] *Id.* at act 2, sc. 4, at 51–54.
[85] *Id.* at act 2, sc. 4, at 88–98.

Isabella refuses. She "will proclaim thee, Angelo; look for't: / Sign me a present pardon for my brother, / Or with an outstretched throat I'll tell the world aloud / What man thou art."[86] And here Angelo lays bare his real devotion to justice:

> Who will believe thee, Isabel?
> My unsoiled name, th' austereness of my life,
> My vouch against you, and my place i' th' state,
> Will so your accusation overweigh,
> That you shall stifle in your own report,
> And smell of calumny.[87]

Even more blatantly than in Plato's rendering of the trial of Socrates, Shakespeare blurs the line between power and the law, questioning the motivations of those responsible for administering justice, and drawing out the legitimacy problems that result when an advocate can no longer rely on her ability to persuade because no one is listening.[88]

B. The Contemporary Concern

Shakespeare's fictionalized account of Vienna's justice system offers a glimpse into the ways in which a decision maker's self-interest can supersede his or her decision-making function. But while his Vienna is in many ways deeply reminiscent of our current culture, where power still frequently operates to silence abuse and keep courts from addressing injustice,[89] it is nevertheless a foreign world. To be sure, power still works to keep individuals from pursuing and achieving justice; in recent cases of sexual assault, women have declined to report criminal behavior due to the fear of backlash,[90] or,

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[86] *Id.* at act 2, sc. 4, at 151–55.
[87] *Id.* at act 2, sc. 4, at 154–59.
[88] *See* Amy Ross, *Vienna Then and Now: The Impact of Shakespeare's* Measure for Measure *on the Twenty-First Century Legal Profession*, 46 S.D. L. REV. 781, 808 (2001).
[89] *See* Chai R. Feldblum & Victoria A. Lipnic, *Breaking the Silence*, HARV. BUS. REV. (Jan. 26, 2018), https://hbr.org/2018/01/breaking-the-silence.
[90] *See* Nathan Bomey & Marco della Cava, *Sexual Harassment Went Unchecked for Decades as Payouts Silenced Accusers*, USA TODAY (Dec. 1, 2017), https://www.usatoday.com/story/money/business/2017/12/01/sexual-harassment-went-unchecked-decades-payouts-silenced-accusers/881070001/; Lyn Yonack, *Sexual Assault Is About Power: How #MeToo Campaign Is Restoring Power to Victims*, PSYCHOL. TODAY (Nov. 14, 2017), https://www.psychologytoday.com/us/blog/psychoanalysis-unplugged/201711/sexual-assault-is-about-power.

as discussed further below, have been disbelieved by a police force unwilling to prosecute respected members of a community.[91] Nevertheless, unlike in Shakespeare's Vienna, we have more sophisticated processes governing the administration of justice, processes that are intended, to some extent, to prevent prejudice and self-interest from infecting decisions.

The American legal system and American government more generally were constructed with these power concerns in mind.[92] "[A]ll men having power ought to be distrusted to a certain degree,"[93] James Madison declared, and so ambition would counteract ambition: powers were separated to check one another,[94] the federal judiciary was insulated from political influence,[95] and litigants were offered the promise of appellate review.[96] Indeed, our contemporary legal system has developed sophisticated doctrines and processes, both formal and informal, intended to cabin abuses of legal power. Appellate review is one such feature, allowing a legal body distanced from the trial to determine whether the lower court performed its function impartially. At the trial level, judgments notwithstanding the verdict give judges the ability to overrule or amend jury verdicts resting on dubious legal grounds.[97] More informally, reviewing courts will (although generally only in extreme cases) explicitly chide a lower court for acting *ultra vires*.[98] Further, and perhaps most importantly,

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[91] *See* German Lopez, *Why Didn't Kavanaugh's Accuser Come Forward Earlier? Police Often Ignore Sexual Assault Allegations*, VOX (Sept. 19, 2018), https://www.vox.com/policy-and-politics/2018/9/19/17878450/kavanaugh-ford-sexual-assault-rape-accusations-police; Ken Armstrong & T. Christian Miller, *When Sexual Assault Victims Are Charged with Lying*, N.Y. TIMES (Nov. 24, 2017), https://www.nytimes.com/2017/11/24/opinion/sunday/sexual-assault-victims-lying.html.

[92] *See* The Federalist No. 10 (James Madison).

[93] James Madison, July 11, 1789 in The Avalon Project: Madison Debates (Yale L. Sch. Lillian Goldman L. Lib., ed., 2008), http://avalon.law.yale.edu/18th_century/debates_711.asp.

[94] Torsten Persson, Gerard Roland & Guido Tabellini, *Separation of Powers and Political Accountability*, 112 Q.J. ECON. 1163, 1163 (1997).

[95] U.S. CONST. art. III, § 1; The Federalist No. 78 (Alexander Hamilton) ("The complete independence of the courts of justice is peculiarly essential in a limited Constitution.").

[96] U.S. CONST. art. III, § 2.

[97] FED. R. CIV. P. 50(b).

[98] *See, e.g.*, Harris v. Lafayette LIHTC, 85 N.E.3d 871, 878–79 (Ind. Ct. App. 2017) (upbraiding lower court for not acting "as a neutral, impartial decision maker").

our judicial norm of giving reasons for a decision is itself a vital check on a court's ability to impose its own preferences in any given dispute.[99] While these and other devices may have faults of their own, they do offer some check on abuses of legal power.

And yet the problem persists.[100] As with Angelo in *Measure for Measure*, a version of Madison's fear—that our judges and juries will be "animated by considerations of passion or self-interest"[101] rather than by the desire to engage with and resolve the dispute at hand—continues to plague the modern legal profession. Justice Kavanaugh's confirmation hearings, for instance, placed this fear in very stark (and very public) relief. While Dr. Christine Blasey Ford's harrowing descriptions of her sexual assault epitomized contemporary concerns about the ways in which abuses of power have been silenced by our social and legal structures, [102] Justice Kavanaugh's opening statements railing against Senate Democrats raised a separate fear: that the individuals with the most power—those with the ability to

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[99] Deborah S. Gordon, *Trusting Trust*, 63 U. KAN. L. REV. 497, 533–37 (2014) (citing and discussing sources on importance of judicial reason-giving); *see also* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 658 (1995) ("[G]iving reasons is a way of opening a conversation" which ultimately can make "the subject of the decision feel[] more a part of the decision, producing the possibility of compromise and the respect for a final decision that comes from inclusion."); Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 1002–05 (2008) (explaining why providing reasons enhances judicial legitimacy); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1372 (1995) ("One of the few ways [judges] have to justify our power to decide matters important to our fellow citizens is to explain why we decide as we do."); Nancy A. Wanderer, *Writing Better Opinions: Communicating with Candor, Clarity, and Style*, 54 ME. L. REV. 47, 49–52 (2002) (describing how clearly written and well-reasoned judicial opinions are foundational to American jurisprudence). *But see* Schauer, *supra*, at 657 ("[R]eason-giving can . . . be seen as contingent rather than necessary, a style of decisionmaking with disadvantages of excess commitment that might at times outweigh its advantages.").

[100] Although beyond the scope of this essay, an extensive body of literature exists discussing contemporary power disparities between governing bodies and between citizens. *See, e.g.*, ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2001); Daryl J. Levinson, *Looking for Power in Public Law*, 130 HARV. L. REV. 31 (2016).

[101] PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 1 2009).

[102] *See supra* notes 90–92 and accompanying text.

determine what the law means—will fail to be impartial.[103] Though members of the judiciary have themselves tried to allay this concern, [104] it nevertheless grows more pressing with each administration, as politicians' fears concerning the politicization of the judicial branch become self-fulfilling prophecies,[105] with federal judges selected not for their experience and expertise, but for their political viewpoints.[106]

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[103] *See* Sabrina Siddiqui, *Kavanaugh's Angry Testimony Raises Doubts over Future Impartiality*, GUARDIAN (Oct. 3, 2018), https://www.theguardian.com/us-news/2018/oct/02/kavanaugh-impartial-justice-testimony.

[104] *See* Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge'*, N.Y. TIMES (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html?module=inline (describing Chief Justice John Roberts' rebuke of President Trump's efforts to delegitimize the federal judiciary, noting that "[w]e do not have Obama judges or Trump judges," but rather "an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them"). *But see* Marc A. Thiessen, *Chief Justice Roberts Is Wrong. We Do Have Obama Judges and Trump Judges*, WASH. POST (Nov. 23, 2018), https://www.washingtonpost.com/opinions/chief-justice-roberts-is-wrong-we-do-have-obama-judges-and-trump-judges/2018/11/23/ee8de9a2-ef2c-11e8-8679-934a2b33be52_story.html?utm_term=.c2c0cd3eb6fa (articulating the opposing position). The growing partisan divide has impacted more than judicial nominees; according to one Pew Research Center Poll, "'[i]deological silos are now common on both the left and the right," and "[p]eople with down-the-line ideological positions—especially conservatives—are more likely than others to say that most of their close friends share their political views." PEW RES. CENTER, POLITICAL POLARIZATION IN THE AMERICAN PUBLIC: HOW INCREASING IDEOLOGICAL UNIFORMITY AND PARTISAN ANTIPATHY AFFECT POLITICS, COMPROMISE AND EVERYDAY LIFE 7 (June 12, 2014), http://www.pewresearch.org/wp-content/uploads/sites/4/2014/06/6-12-2014-Political-Polarization-Release.pdf. The divide affects more than just political beliefs: "Liberals and conservatives disagree over where they want to live, the kind of people they want to live around and even whom they would welcome into their families." *Id*. Indeed, polarization has "reached record levels" within the culture as a whole. *Id*.

[105] *See* Thiessen, *supra* note 104.

[106] *See* Carl Hulse, *Political Polarization Takes Hold of the Supreme Court*, N.Y. TIMES (July 5, 2018), https://www.nytimes.com/2018/07/05/us/politics/political-polarization-supreme-court.html; Kevin Schaul & Kevin Uhrmacher, *Analysis: How Trump Is Shifting the Most Important Courts in the Country*, WASH. POST (Sept. 4, 2018),

Legitimacy concerns arise in more mundane contexts as well. Recent research has confirmed the myriad ways in which all participants in the legal system—jurors, judges, attorneys, witnesses, investigators—are influenced by a number of psychological, physiological, and social factors traditionally considered irrelevant to the decision-making process.[107] Consider, for instance, the famous tenet of legal realism: "The law is what the judge ate for breakfast."[108] Researchers have noted a similarly unnerving consequence of the judicial eating schedule: one empirical study of judicial parole rulings found that judges are more likely to simplify their decisions and deny a prisoner's request for parole as their glucose levels drop and mental fatigue kicks in. [109] Although less visible than the confirmation hearings of a Supreme Court justice, these situations raise a similar fear, namely, that decision-making power will be used unwisely, ignorantly, or even perversely. It is Madison's fear, and Shakespeare's, and Plato's: that those who have power ought to be distrusted (and, according to some, *must* be distrusted[110]), to some degree.[111]

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https://www.washingtonpost.com/graphics/2018/politics/trump-federal-judges/?utm_term=.8c03778abe20; Jason Zengerle, *How the Trump Administration is Remaking the Federal Courts*, N.Y. TIMES (Aug. 22, 2018), https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html.

[107] *See, e.g.*, Frederick Schauer, *Is There a Psychology of Judging?*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 103, 103–20 (David Klein & Gregory Mitchell eds., 2010); Neal Devins & Will Federspiel, *The Supreme Court Social Psychology, and Group Formation*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 85, 85–100 (David Klein & Gregory Mitchell eds., 2010).

[108] *See* Willard L. King, *Breakfast Theory of Jurisprudence*, 14 DICTA 143, 143 (1937) ("One theory that is dinned into the public mind by the current newspapers and magazines, and even by some college professors, is that a study of the politics and personality—yes, even of the comparative personal wealth—of the judges who now sit upon [the Supreme Court] is of more importance in predicting their decisions than an examination of the Constitution or of the law governing its interpretation."); Matthew Liebman, *Who the Judge Ate for Breakfast: On the Limits of Creativity in Animal Law and the Redeeming Power of Powerlessness*, 18 ANIMAL L. 133, 134 (2011).

[109] Shai Danziger, Johnathan Levay & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PRODEEDINGS NAT. ACAD. SCI. U.S. 6889, 6892 (2011).

[110] *See id.*

[111] Note, however, that advocates will often try to use the passion and self-interest of juries and judges (real or perceived) to their clients' advantage,

Attorneys are trained to be skeptics. The Socratic method—a dialogic pedagogical style that "has long been a defining element of American legal education"[112]—teaches law students to question their own assumptions about the world, laying bare the limits of their knowledge in order to foster critically-minded advocates.[113] And there will always be a role for healthy skepticism in the legal system because it teaches students to engage critically with established principles. This skeptical worldview differs fundamentally, however, from the sort of skepticism advanced by Plato, Shakespeare, and others, and fostered by our contemporary debates over the impartiality—intended or unintended—of legal actors. While the former sort of skepticism encourages engagement, the latter can easily lead to an attitude of "why bother," eroding confidence in the law.[114] When judges, for instance, appear as nothing more than clever individuals disguising self-interested decisions in the form of a legal argument, the goal of dispute resolution is fundamentally undercut. But is corrosive skepticism inevitable, and if it is, what tools might legal professionals use to combat it, or at least stem its tide?

II. Fostering Commitment Through Disruption

The works of some prominent legal skeptics (and non-lawyers), Simone de Beauvoir, John Paul Sartre, and William Shakespeare, offer a potential response to the question of how we confront a skepticism that borders on cynicism. The existentialists provide a theoretical framework for the concept of commitment and, more precisely, committed writing. The Shakespearean character of the fool

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because that is what they are both paid to do and, within bounds, encouraged to do in the name of zealous advocacy.

[112] *See* Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 113 (1999) (discussing the rise and refashioning of the Socratic method at Harvard, where the method originated).

[113] *See* Roger C. Cramton, *Ordinary Religion of the Law School Classroom*, 29 J. LEGAL ED. NO. 3, at 247, 248 (1978) (describing the unarticulated orthodoxy of the law school classroom).

[114] *See* Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 284, 291 (2003) ("The issue of gaining public compliance [with law enforcement] has gained heightened attention for several reasons. One is that confidence in the institutions of the legal system has declined, and people are less likely to express 'trust and confidence' in law and legal authorities than in the past. This declining confidence in law and legal authorities may lead to declining feelings of obligation to obey the police, the courts, and the law, raising the possibility that compliance may be increasingly problematic." (citation omitted)).

(or clown) provides an apt touchstone for how an able lawyer can confront seemingly insurmountable, and potentially illegitimate, sources of power.

A. An Existential Crisis

Philosophy—a discipline, as noted, closely connected with the development of the law—has often served as a guidepost for the legitimacy concerns of legal thinkers. [115] Detailing the depth of philosophical influence and contribution to the legal profession is well beyond the scope of this Article. Nevertheless, meaningful answers to current crises might be found in one philosophical tradition infrequently cited by legal academics: existentialism. In particular, this tradition—with its obsessive focus on freedom, responsibility, authenticity, and commitment—may help us understand the role legal writers might play in responding to illegitimacy concerns in the legal profession.

Although pivotal in the development of twentieth-century philosophy, existentialism has had little influence on the American legal tradition. [116] It is easy to see why: the penchant of some existentialists—Jean Paul Sartre in particular—for paradox and ambiguity [117] makes the tradition less readily accessible to a legal world built largely on clarity and rules. Still, one of existentialism's basic premises—that existence precedes essence or, in other words, that human existence is fundamentally characterized by choice, or "self-making-in-a-situation," [118] "has consequences for how we understand our legal lives."[119] As legal scholar Dwight Newman has argued,

> When our study becomes the human individual and we become more attentive to the human individual, we

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[115] *See, e.g.*, RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018); H.L.A. HART, THE CONCEPT OF LAW (3d ed., 2012); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (2d ed., 2011); LON L. FULLER, THE MORALITY OF LAW (1969); RONALD DWORKIN, LAW'S EMPIRE (1986).

[116] Dwight Newman, *Existentialism and the Law—Toward a Reinvigorated Law and Literature Analysis*, 63 SASK. L. REV. 87, 87–88 (2000) (noting that "for some reason, existentialism has never achieved a significant place at the table in discussions of legal and jurisprudential issues").

[117] *See* Claudia Card, *Introduction: Beauvoir and the Ambiguity of "Ambiguity" in Ethics*, *in* THE CAMBRIDGE COMPANION TO SIMONE DE BEAUVOIR 3 (2003) (noting that Beauvoir "rejected the search for universal principles to distinguish right from wrong").

[118] EMIL M. FACKENHEIM, METAPHYSICS AND HISTORICITY 37 (1961).

[119] Newman, *supra* note 116, at 115.

> look at our institutional dealings with each other more closely. When our finding is human freedom and we become more aware of our human freedom, we have a new responsibility in the face of institutions that perpetuate injustice. When our conclusion is human responsibility and we face squarely the anguish of our responsibility, we know that we need to act against injustice.[120]

The existentialist tradition emphasizes that our legal institutions are fundamentally *human* institutions, built on and sustained by human choices.[121] Thus, the legitimacy problems that plague our legal institutions are in some sense inevitable: no matter what procedures we institute, as long as individuals, acting on their own or in a collective, are responsible for making legal decisions, these decisions will be a product not merely of the law, but also of the decision maker's background and subjective experience[122]—which in turn raises the prospect of illegitimacy.

But this human element in our legal institutions is not always a bad thing. It enables us to empathize with the lives of others, and thus understand the consequences of our judgments. Indeed, another lesson to be learned from the existentialist tradition is that human subjectivity is most dangerous when it is forgotten or denied.[123] To this end, many legal scholars have worked to refocus legal studies on the human character of the law. Martha Nussbaum, for instance, has written prolifically on the subject, drawing primarily from the ancient Greek philosophers to argue that legal educators spend more time cultivating the humanity of their students, "cultivat[ing] our perceptions of the human through a confrontation with cultures and

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[120] *Id.* at 115–16.

[121] *See id.*

[122] *See* Matthew C. Eshleman, *Beauvoir and Sartre on Freedom, Intersubjectivity, and Normative Justification*, *in* BEAUVOIR AND SARTRE: THE RIDDLE OF INFLUENCE 65, 69 (2009) ("Rarely noted by other commentators, Sartre abandons his initially exaggerated views of absolute freedom: freedom is not limited only by itself; it is also limited by Others. While existence precedes essence, the social world precedes individual existences; thus, when Sartre considers the fact that sociality precedes and modifies existence, he argues for social limitations to freedom.").

[123] *See* SARTRE, BEING AND NOTHINGNESS, *supra* note 1, at 47–49 (using the term "bad faith" to describe attempts to hide from one's own subjectivity and freedom of choice); *see also* MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 5 (2004) (arguing that while "[t]here is a popular commonplace to the effect that the law is based on reason and not passion," the "law without appeals to emotion is virtually unthinkable").

groups that we have traditionally regarded as unequal."[124] She has relied on philosophical and literary traditions to "emphasize[] the autonomy, the irreducible singularity of each human being and the qualitative aspects of each person's experience,"[125] maintaining that a degree of empathy and social sympathy is necessary for any legal decision maker.[126]

James Boyd White and the law and literature movement more generally have also worked to return the legal world's attention to its rhetorical roots, emphasizing the human elements of the law.[127] The "rhetorical" nature of the law, for White, is not captured by "merely the art of persuasion—of making the weaker case the stronger, as the Sophists were said to do—but that art by which culture and community are constituted and transformed."[128] Like Nussbaum, White focuses on the literary and philosophical character of the law to suggest transforming contemporary legal education: "It is the moment of silence, when the lawyer must speak, and in speaking make something new out of his or her language, and the world, to which our deepest attention should be directed, in law school and after."[129] Building on the law and literature tradition and focusing on the ways in which power structures our legal institutions, Robin West has also argued for return to humanism, suggesting that our "[m]oral criticism of the law might be properly grounded not in abstract reason, nor in general truths, nor in the dictates of preexisting law, nor in naked power, but rather in sympathetic judgments of the heart."[130] Drawing from the existentialist tradition, this Article offers

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[124] MARTHA C. NUSSBAUM, CULTIVATING HUMANITY: A CLASSICAL DEFENSE OF REFORM IN LIBERAL EDUCATION 294 (1998).

[125] David Gorman, *Poetic Justice: The Literary Imagination and Public Life (Review)*, 21 PHIL. & LITERATURE 196, 197 (1997).

[126] *See, e.g.*, Martha Nussbaum, *Reply to Amnon Reichman*, 56 J. LEGAL EDUC. 320, 328–29 (2006) (noting the importance of empathy, "in combination with a directive ethical intelligence that animates the whole of text, and allows us to see the world in a way that permits human understanding, and the understanding of the people as human").

[127] *See* JAMES BOYD WHITE, THE LEGAL IMAGINATION, at xiii (1985) (arguing that "law is not merely a system of rules (or rules and principles), or reducible to policy choices or class interests, but that it is rather what I call a language, by which I do not mean just a set of terms and locutions, but habits of mind and expectations—what might also be called a culture").

[128] WHITE, HERACLES' BOW, *supra* note 16, at xi.

[129] *Id.* at xiv.

[130] Robin West, *Disciplines, Subjectivity, and Law*, *in* THE FATE OF LAW 119, 155 (Austin Sarat & Thomas R. Kearns eds., 1994).

one more way of understanding and responding to the human element in our legal institutions: committed legal writing.

B. Commitment and Writing

Simone de Beauvoir and Jean Paul Sartre, two of the most well-known figures in the existentialist tradition, were no strangers to crisis. In postwar France, "[t]he intellectual world was in tumult,"[131] and existentialism was a cultural movement born out of that crisis. Writing in response to the horrors of World War II, the mid-century existentialists developed a philosophy focused on understanding how individuals shape and are inevitably shaped by their historical moment: "The austerity and pessimism of existentialism seemed realistic and courageous; there was hope in its humanism, its teaching of freedom of choice and its appeal to man's responsibility for fashioning himself by his own action."[132]

In keeping with this interest in human freedom, Sartre and Beauvoir offered *littérature engagée*—engaged, or committed, literature—a form of writing that emphasized the contingency of human existence and asked readers to commit themselves to taking responsibility for their actions and roles in events of the day.[133] According to Beauvoir, "[t]he writer is not only someone who sees the world clearly, he is also a social and political witness, whose task is 'to testify,' to transmit his experience of it to the reader by re-creating it in words."[134] For both Beauvoir and Sartre, writing is "an activity carried out by human beings, for human beings, with the aim of unveiling the world for them."[135] In this unveiling, Beauvoir argues that the reader "[has] to identify with someone: with the author; [she has] to enter into his world, and his world must become [hers]."[136] In identifying with the author, the reader is able to view the world from the perspective of another.[137] For Beauvoir, this is the "magic of

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[131] ANNE WHITMARSH, SIMONE DE BEAUVOIR AND THE LIMITS OF COMMITMENT 30 (1981).
[132] *Id.*
[133] *See, e.g.*, Gisele Sapiro, *Responsibility and Freedom: The Foundations of Sartre's Concept of Intellectual Engagement*, 6 J. ROMANCE STUD. 31, 38–45 (2006) (discussing Sartre's work concerning the responsibility of a writer).
[134] WHITMARSH, *supra* note 131, at 91.
[135] Toril Moi, *What Can Literature Do? Simone de Beauvoir as Literary Theorist*, 124 PUBL'N MOD. LANGUAGES ASS'N AM. 189, 191 (2009).
[136] *Id.* at 193.
[137] *Id.*

literature,"[138] and, fundamentally, "[t]here is no literature if there is no voice, that is to say language that bears the mark of somebody."[139]

Sartre, who originated the idea of committed literature in his 1948 long-form essay *What Is Literature?*, expanded on this idea. According to Sartre, writers do not write for themselves alone; every act of writing is an act of communicating with others about the human condition.[140] The prose writer writes to represent the world to a reader, and in this representation, imagination and judgment are inextricably intertwined. Sartre argues:

> Doubtless, the committed writer can be mediocre; he can even be conscious of being so; but as one cannot write without the intention of succeeding perfectly, the modesty with which he envisages his work should not divert him from constructing it as if it were to have the greatest celebrity. He should never say to himself, "Bah! I'll be lucky if I have three thousand readers," but rather, "What would happen if everybody read what I wrote?"[141]

To write for others, rather than merely for oneself, is to be acutely aware of the social implications of one's work. To this end, Sartre draws an influential (and controversial) distinction between the poet and the prose writer. The poet, according to Sartre, sees words as objects; she is mystified by the power and inadequacy of language and seeks to manipulate this inadequacy for her own ends.[142] The prose writer, on the other hand, writes to communicate. Her rhetoric is not an end in itself; rather, the written work's meanings are realized through the dialogue between writer and reader. Accordingly, "the book is not, like the tool, a means for any end whatever; the end to which it offers itself is the reader's freedom."[143]

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[138] *Id.*

[139] *Id.*

[140] *See* JEAN-PAUL SARTRE, WHAT IS LITERATURE? 10 (Bernard Frechtman trans.) (1950).

[141] *Id.* at 13–14.

[142] This distinction is of course woefully inadequate; however, Sartre's position is perhaps a little more understandable when situated in the context of French poetry at the turn of the twentieth century, with Stéphane Mallarmé writing such lines as "in these indefinite regions / of the wave / wherein all reality is dissolved." STÉPHANE MALLARMÉ, COLLECTED POEMS AND OTHER VERSE 179 (E.H. & A.M. Blackmore trans., 2006).

[143] JEAN-PAUL SARTRE, BASIC WRITINGS 266 (Stephen Priest ed., Routledge 2001).

Indeed, unlike the poet, "the [prose] writer, a free man addressing other free men, has only one subject: freedom."[144] Sartre is not advocating here for pure artistic didacticism, but rather for a radical notion of artistic responsibility.[145] The committed writer understands both that the social world is fundamentally a human creation and that she has entered a world that is already created. Her imagination is free, but situated: while the writer is able to imagine what is not the case, her imaginings are always conditioned upon what *is* the case in any given historical period.[146] Language is how we confer meaning upon the world, and the rhetorical imagination is for Sartre and Beauvoir an *active* imagination, constantly engaged in constituting the world as it is by imagining the world as it could be.[147] Sartre derives a profound responsibility from this creative freedom: In the act of writing, we effect change upon the world, for which we are then responsible.

At the risk of oversimplifying the discussion, the committed writer is concerned not with moralizing, *per se*, but rather with the prospect of

> achiev[ing] the most lucid and the most complete consciousness of being embarked, that is, when he causes the engagement of immediate spontaneity to advance, for himself and others, to be reflective. *The writer is, par excellence, a mediator and his engagement is mediation.*[148]

For the committed writer, then, the narrative imagination is never "free" in the negative sense of being completely spontaneous, completely unbound; rather, the committed writer recognizes that her own imaginative freedom comes into being only through an active engagement with the external world—one that existed before the writer's birth and will go on after the writer's death. The freedom of the writer is thus a social and historical freedom, and it becomes the committed writer's responsibility to induce others to recognize this freedom within themselves. It is this moral commitment to the freedom of others that distinguishes the committed writer from other artists, for Sartre: the committed writer engages her readers in a dialogue concerning the ways in which we abdicate responsibility for our social realities and treat others as means, rather than ends. She

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[144] SARTRE, BEING AND NOTHINGNESS, *supra* note 1, at 64.
[145] *See* SARTRE, WHAT IS LITERATURE, *supra* note 140, at 22–23.
[146] *Id.*
[147] *See* Moi, *supra* note 135, at 191–93.
[148] *See* SARTRE, WHAT IS LITERATURE, *supra* note 140, at 56 (emphasis added).

imagines the world differently, not for the sake of imagination itself, but to create a world in which the freedom of others may be universally recognized. Indeed, for both Beauvoir and Sartre, "engagement is first and foremost a critique of the situation or its acceptance . . . through the medium of a literary work."[149] And for these reasons, among others, this model of commitment seems so well suited to the law and legal writing in particular.[150]

The theory of committed literature has received both praise and criticism from novelists and literary theorists. For some, the literary work must be understood as an end in itself, apart from any social purpose.[151] For others, the act of writing a novel must inherently be an act of commitment.[152] Salman Rushdie, for instance, argues that some level of commitment on the part of novelists is necessary, noting that

> [i]f books and films could be made and consumed in the belly of the whale, it might be possible to consider them merely as entertainment, or even, on occasion as art. But in our whaleless world, in this world without quiet corners, there can be no easy escapes from history, from hullabaloo, from terrible, unquiet fuss.[153]

Whatever the role played by committed literature in the trajectory of literary theory, the paradigm, with its emphasis on voice, identification, and freedom, offers a helpful tool for approaching the task of legal writing, most notably as an antidote to illegitimacy and

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[149] *See* WHITMARSH, *supra* note 131, at 86.

[150] The "commitment" that the existentialists describe is both like and unlike the commitment that Robert Cover discusses in his formative article *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). In both cases, commitment is described as an engagement with lived experience, but the existentialists see commitment as the opposite of isolation, while Cover describes commitment more specifically as a community's (or judge's) dedication to an interpretative act that may conflict with, and ultimately give way, to a competing interpretation. *Id.* at 44. As discussed below, both views support this Article's arguments about committed legal writing. *See infra* Part III.

[151] *See* GEORGE BATAILLES, LITERATURE AND EVIL (Alastair Hamilton trans., 2001); *see also* Edward Greenwood, *Literature: Freedom or Evil? The Debate Between Sartre and Bataille*, 4 SARTRE STUD. INT'L 17, 17–20 (discussing the debates between Sartre and Bataille on the issue of literary commitment).

[152] *See* Salman Rushdie, *Outside the Whale*, GRANTA, Mar. 1, 1984, https://granta.com/outside-the-whale/.

[153] *See id.*; *see also* Catherine Bernard, *Introduction: Reassessing Literary Commitment (Anew)*, 50 ETUDES BRITANNIQUES CONTEMPORAINES 1, 6 (2016) (quoting Rushdie and discussing various approaches to literary commitment).

immobilizing skepticism. As with the existential committed writer, the goal of the legal writer—both advocate and judge, as discussed more fully below[154]—is to "overcome[] existential separation,"[155] asking the reader to listen to and engage with the exigencies of the dispute at hand. The trick, of course, is how to do so, and once again we turn to another literary source for inspiration.

C. Lawyer and Fool

Despite the acrimonious language he sometimes uses to describe the legal profession,[156] the works of William Shakespeare can illustrate for contemporary advocates one path forward, away from cynicism and toward the type of commitment described above.[157] While many writers of fiction might similarly illustrate the point, Shakespeare's talent for "creat[ing] and resolv[ing] conflict"[158] allows his work to serve as a constant source of inspiration for the legal profession.[159] And while scholars have examined Shakespearean

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[154] *See infra* Part III.

[155] *See* Moi, *supra* note 135, at 193.

[156] Consider, for instance, the infamous line from *Henry VI, Part 2*: "The first thing we do, let's kill all the lawyers." WILLIAM SHAKESPEARE, HENRY VI, PART 2, at act 4, sc. 2 (William Montgomery ed., Penguin Books 2000). For a discussion of the line in context, see Thomas W. Overton, *Lawyers, Light Bulbs, and Dead Snakes: The Lawyer Joke as Societal Text*, 42 UCLA L. REV. 1069, 1093–94 (1995).

[157] Many thinkers (legal and otherwise) have relied on Shakespeare to illuminate contemporary concerns. *See, e.g.*, KENJI YOSHINO, A THOUSAND TIMES MORE FAIR: WHAT SHAKESPEARE'S PLAYS TEACH US ABOUT JUSTICE (2012) (exploring various legal themes through the lens of Shakespeare's plays); SHAKESPEARE AND THE LAW: A CONVERSATION AMONG DISCIPLINES AND PROFESSIONS (Bradin Cormack, Martha C. Nussbaum & Richard Strier eds., 2016) (collecting essays from various thinkers, including Stanley Cavell and Justice Stephen G. Breyer, discussing the relationship between Shakespeare and the legal profession); PAUL RAFFIELD, THE ART OF LAW IN SHAKESPEARE (2017) (exploring how Shakespeare's plays relied on and borrowed themes from Jacobean common law).

[158] Louis Adrian Montrose, *"The Place of a Brother" in* As You Like It*: Social Process and Comic Form*, 32 SHAKESPEARE Q. 28, 28 (1981).

[159] Shakespeare is by far the most cited playwright in the American legal tradition, with each of his thirty-seven plays making at least one appearance in an American judicial opinion. Robert Peterson, *The Bard and the Bench: An Opinion and Brief Writer's Guide to Shakespeare*, 39 SANTA CLARA L. REV. 789, 793 (1999). As much as his plays often undermine the import of their profession, judges and advocates have nevertheless used his words to lend an aura of literary legitimacy to their briefs and opinions. *See id.*

comedy's relationship with the law,[160] few to date have recognized how the Shakespearean fool, the self-designated "corrupter of words,"[161] has a unique role to play in the law and legal writing in particular.

Shakespeare was, as many have recognized, a keen observer and chronicler of human freedom.[162] As Stephen Greenblatt notes,

> What is striking is that [Shakespeare's] work, alert to every human fantasy and longing, is allergic to the absolutist strain so prevalent in his world, from the metaphysical to the mundane. His kings repeatedly discover the constraints within which they must function if they hope to survive. . . . So too his proud churchmen are mocked for their pretensions, while religious visionaries, who claim to be in direct communication with the divine, are exposed as frauds.[163]

Shakespeare shares many similarities with the later existentialists; like Beauvoir and Sartre, Shakespeare rejects essentialism.[164] Further, while the theme of "fate" plays a significant

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[160] *See* John Denvir, *William Shakespeare and the Jurisprudence of Comedy*, 39 STAN. L. REV. 825, 827 ("If law is an attempt to bring a regenerative order to an otherwise chaotic world, then [Shakespearean] comedy is its fictive analogue."); *see also* Carolyn Sale, *The King Is a Thing: The King's Prerogative and the Treasure of the Realm in Plowden's Report of the Case of Mines and Shakespeare's Hamlet*, *in* SHAKESPEARE AND THE LAW 151–53 (Paul Raffield & Gary Watt eds., 2008) (discussing what the grave-digging clown in Act 5 has to say about the law).

[161] WILLIAM SHAKESPEARE, TWELFTH NIGHT, at act 3, sc. 1, at 35–36; *see also* THE RIVERSIDE SHAKESPEARE 401 (G. Blakemore Evans ed., 1996) ("Like all Shakespeare's fools, Touchstone is a corruptor of words.").

[162] *See, e.g.*, STEPHEN GREENBLATT, SHAKESPEARE'S FREEDOM 4 (2012) (analyzing the "four underlying concerns to which Shakespeare's imagination was drawn consistently and across the multiple genres in which he worked. These concerns are beauty—Shakespeare's growing doubts about the culture of featureless perfection and his interest in indelible marks; negation—his exploration of murderous hatred; authority—his simultaneous questioning and acceptance of the exercise of power, including his own; and autonomy—the status of artistic freedom in his work").

[163] *Id.* at 3.

[164] *See supra* note 118 and accompanying text.

role throughout his work,[165] it is often the characters themselves who make choices that end up shaping and determining their destinies.[166]

In laying bare the fundamental freedom and frailty of human beings,[167] Shakespeare often uses the character of the Fool to unleash a disruptive sort of irony. By "reveal[ing] inconsistencies in human behavior,"[168] the Fool conveys to the characters and the audience the contingency of existence, that things could be otherwise. *King Lear* provides a notable example: the play concerns a king who, blinded by arrogance and convinced that his power as a beloved father and ruler is immutable, disinherits his daughter Cordelia when she refuses to make broad declarations about how much she loves him.[169] Instead, he gives his kingdom to his other two daughters, Goneril and Regan, outright, and then goes slowly mad as the daughters' newfound power comes to corrupt both of them.[170]

Throughout the play, the character of the Fool acts as a disruptive force, openly critiquing the irony of Lear's actions as he takes them. In one exchange, the Fool derides Lear for giving his wealth away to his least worthy daughters, and Lear threatens to whip him, which in turn leads the Fool to remark:

> I marvel what kin thou and thy daughters are:
> They'll have whipped me for speaking true, thou'lt
> Have whipped me for lying; and sometimes I am
> Whipped for holding my peace. I had rather be any
> Kind o' thing than a fool: and yet I would not be
> Thee, nuncle; thou hast pared thy wit o' both sides,

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[165] *See, e.g.*, BERNARD J. PARIS, BARGAINS WITH FATE: PSYCHOLOGICAL CRISES AND CONFLICTS IN SHAKESPEARE AND HIS PLAYS 16 (2009) (arguing that Shakespeare's major tragedies "portray characters with inner conflicts that are very much like our own who are in a state of psychological crisis as a result of the breakdown of their bargains with fate").

[166] *See* Denvir, *supra* note 160, at 826–27.

[167] For more discussion of the frailty of human beings, see MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY (2d ed. 2001).

[168] Roger Ellis, *The Fool in Shakespeare: A Study in Alienation*, 10 CRITICAL Q. 245, 251 (1968).

[169] WILLIAM SHAKESPEARE, KING LEAR, at act 1, sc. 1, at 7–29 (Barbara A. Mowat & Paul Werstine eds., Simon and Schuster 2015). For a short but comprehensive synopsis of the plot, see Karen E. Boxx, *Shakespeare in the Classroom: How an Annual Student Production of King Lear Adds Dimension to Teaching Trusts and Estates*, 58 ST. LOUIS U. L.J. 751, 752–53 (2014).

[170] *See generally* SHAKESPEARE, KING LEAR, *supra* note 169.

And left nothing i' the middle . . . .[171]

He continues: "I am better than thou art now; I am a fool, thou art nothing."[172] Although Lear fails to take the Fool seriously, the Fool's disruptive critique works to undermine the image Lear has of himself as a powerful king. In this way, the audience, if not Lear, comes to understand that a king without a crown is just a man, with the same flaws and failings as anyone else. Indeed, as Mark Edmundson has noted, "before the play is over, Lear, tutored by the Fool, will show us how humane a vision can arise from losing all outward trappings, and seeing the essential fragility and preciousness of everything that lives."[173]

Many other Shakespearean fools serve a similar function for the audience. Feste and Touchstone, for instance, the fools of *Twelfth Night* and *As You Like It*, respectively, work throughout the plays "to explode [the] pretensions"[174] of the main protagonists.[175] While the fools in many of Shakespeare's plays are effective in undermining the self-deception of other characters, they themselves are relatively

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[171] *Id.* at act 1, sc. 4, at 53.

[172] *Id.* at act 1, sc. 4, at 55.

[173] Mark Edmundson, *Playing the Fool*, N.Y. TIMES (Apr. 2, 2000), http://movies2.nytimes.com/books/00/04/02/bookend/bookend.html. In his analysis of *King Lear*, Edmundson recognizes the effect *Lear*'s Fool has on Lear: when Lear has finally reached his breaking point, he "admonish[es] himself and others who have been blind to remediable human misery, 'Expose thyself to feel what wretches feel, / That thou mayst shake the superflux to them, / And show the heavens more just.'" *Id.* (quoting SHAKESPEARE, KING LEAR, *supra* note 169, at act 3, sc. 4, at 39–41).

[174] *Id.*

[175] Consider the following exchange between Feste and Olivia, *Twelfth Night*'s main protagonist:

> Feste: Good madonna, why mourn'st thou?
> Olivia: Good fool, for my brother's death.
> Feste: I think his soul is in hell madonna.
> Olivia: I know his soul is in heaven, fool.
> Feste: The more fool, madonna, to mourn for your brother's soul, being in heaven. Take away the fool, gentlemen.

Id. (arguing that Feste and other Shakespearean fools are "out to explode pretensions"). Similarly, when confronted with pretension in *As You Like It*, "Rosalind and Touchstone interrogate and undermine self-deceiving amorous rhetoric with bawdy wordplay and relentless insistence on the power and inconstancy of physical desire." Montrose, *supra* note 158, at 49.

powerless. "Shakespeare's fools are subtle teachers,"[176] not prone to active intervention in the affairs of others; as Roger Ellis writes of *Lear*'s fool, "it is here, especially in *King Lear*, that the fool comes into his own as the agonized expositor of a disordered conscience, the figure who sees truly what the world is like and feels powerless to change it."[177] It seems no coincidence that the name "Touchstone" refers to a stone that is not precious in itself but useful only insofar as it reveals the value of another substance.[178]

While fools like those described above use irony, cynicism, and word play as disruptive forces to tear down the audience's (and other characters') preconceptions about the world, there are also rare moments when disruption in the form of a fool is presented as a restorative force, capable of not only laying bare the contingency of existence but also realigning a character's commitment to an alternative, more humane worldview. For an example, we can return to *Measure for Measure* and look to a different comic character: Barnardine. Described as "[a] man that apprehends death no more dreadfully as a drunken sleep; careless, reckless, and fearless of what's past, present, or to come; insensible of mortality, and desperately mortal,"[179] Barnardine is a prisoner whom the Duke wishes to execute in order to make Angelo believe that Claudio is dead—part of the Duke's plan to regain control of his city.[180]

Barnardine enters to play his role; he will die, so Angelo may have his head in place of Claudio's. And yet Barnardine refuses, reminding both the Duke and the reader that the authority of the law is itself something of a fiction, or, at the very least, can falter in the face of a convincing alternative worldview. When the Duke tells Barnardine that he will die, he objects: "I will not consent to die this day, that's certain."[181] When the Duke insists, he replies: "Not a word. If you have anything to say to me, come to my ward, for thence will not I today."[182] Barnardine's refusal reminds us that things could be otherwise—he does not have to die, merely to satisfy the Duke's scheme and the play's narrative trajectory.

Barnardine's refusal to comply with his own execution also serves to draw the reader out of any complacency with the way in which the

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[176] Edmundson, *supra* note 173.
[177] Ellis, *supra* note 168, at 251–52.
[178] MERRIAM-WEBSTER'S DICTIONARY.
[179] SHAKESPEARE, MEASURE FOR MEASURE, *supra* note 76, at act 4, sc. 2, at 145–58.
[180] *See id.* at act 4.
[181] *Id.* at act 4, sc. 3, at 56–57.
[182] *Id.* at act 4, sc. 3, at 63–64.

plot is proceeding, forcing her to reckon with Barnardine's singular humanity. In this way, Shakespeare uses Barnardine to ask the question fundamental to the committed legal writer: "Is the way a person appears before the law adequate to the reality of their lives?"[183] Barnardine demands to be an end in himself—not a means for ensuring the protagonists' happy endings.[184] The Duke, and the play's audience, must engage with him. It is in situations like this that Shakespeare's gift as an artist is most apparent: Barnardine has eight lines in the play, but he is given a great deal of life and freedom. He is a prisoner, part of a historically disenfranchised group whose voices are generally either silenced or ignored, but Shakespeare gives him a voice equal to that of a duke. Indeed, when the two men converse, they converse not as prisoner and duke but as equals; thus, Barnardine is the only character in the play capable of making the Duke stop speaking mid-sentence.[185] And the Duke does pardon Barnardine.[186]

It is this act of disrupting the Duke's plan and asking him to commit to an alternative worldview that holds promise for reassessing the role legal writers can play in responding to the

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[183] Huw Griffiths, *Hotel Rooms and Bodily Fluids in Two Recent Productions of* Measure for Measure*, or, Why Barnardine Is Still Important*, 32 SHAKESPEARE BULLETIN 559, 561 (2014).

[184] *See id*. at 559 (noting that "the character of Barnardine, despite a relatively marginal position in the narrative, is a critical focus" for the play's themes of justice). Griffiths analyzes the approaches of different scholars to the character of Barnardine. *See id*. Focusing on the works of Debora Shuger and Phillip Lorenz, Griffiths notes:

> Lorenz concludes that, in *Measure*, the desire of the law for a body upon which to work is a desire that is satisfied with resemblance rather than identity, just as happy to work with a stand-in as with the real thing. Where Shuger sees the play tentatively moving towards the celebration of a redemptive justice that is benignly concerned with the fate of specific individuals, Lorenz sees it exploring the possibility that judicial systems are utterly indifferent to the parade of bodies that are brought to justice in their courts.

Id. at 563.

[185] SHAKESPEARE, MEASURE FOR MEASURE, *supra* note 76, at act 4, sc. 3, at 62; *see also* Griffiths, *supra* note 183, at 562 ("[Barnardine's] refusal to be executed appears as an obstinate refusal to enter into the representational strategies either of the Duke or of the play itself.").

[186] SHAKESPEARE, MEASURE FOR MEASURE, *supra* note 76, at act 4, sc. 3, at 62.

contemporary legal legitimacy crises described above. Like so many of Shakespeare's fools, a committed legal writer would endeavor to disrupt her reader's complacency and expose, instead, other possible endings, other choices. And, like Barnardine, a committed legal writer might also ask her reader to commit to a more humane understanding of the world and the law.

III. The Committed Legal Writer in Context

While disruption and even disobedience are far from new strategies with which to confront illegitimacy in the law,[187] disruption à la Barnardine has a unique appeal and resonance for legal writing.[188] Written communication, in one form or another, lies at the heart of the law.[189] Once considered to be nothing more than archaic jargon and legalese, on the one hand, or simply something good lawyers know how to do, on the other,[190] legal writing is now recognized as a doctrine that has its own "discursive conventions" and "rhetorical commitments" that are "specific to the discourse of the law."[191] Chris

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[187] *See, e.g.*, Cover, *supra* note 150, at 44–49 (observing how "committed groups" create legal meaning through civil disobedience and resisting the "rule of silence"); *see also* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 819 (1994) (describing examples of lower courts that defy Supreme Court precedent).

[188] Because this Article relies on disruptive writing as a technique to realign power dynamics, it focuses on advocates and judges, who admittedly comprise only one part of the legal writing world. If "committed" writing means engaging deliberately with the human element of a legal problem, however, it is possible to imagine that a legislator and even a transactional lawyer would be well served by this approach. And "commitment," of course, could easily go beyond the written word, though we chose to focus on the special role of writer.

[189] *See* Grant H. Morris, *Teaching with Emotion: Enriching the Educational Experience of First-Year Law Students*, 47 SAN DIEGO L. REV. 465, 478 (2010) (describing how essential it is to teach first-year law students the "importance of words to law and to lawyers" because "[w]ords are our tools, our only tools, in talking to clients, in drafting legal documents, in making arguments to a judge or jury").

[190] J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 40–41 (1994).

[191] J. Christopher Rideout, *Knowing What We Already Know: On the Doctrine of Legal Writing*, 1 SAVANNAH L. REV. 103, 104–11 (2014) (describing some of the most prominent rhetorical commitments as including that the writing is "rational and logical in appearance"; "instrumentally persuasive"; "clear, orderly, and linear"; "seemingly

Rideout and Jill Ramsfield, for example, describe how the discipline of legal writing has progressed from a formalist perspective, to a process perspective, to a social perspective that goes "beyond a focus on the individual writer to acknowledge the social contexts within which writing takes place and, thus, to acknowledge the ways in which writing generates meanings that are shaped and constrained by those contexts."[192] Within this social context, the legal writer's identity and power is best characterized as "discoursal" or, in other words, shaped by and a product of what she writes.[193] Moreover, by mastering this discourse, legal writers build an *ethos* that both makes them more persuasive to outside audiences and fosters a belief in their own legitimacy.[194]

"Committed" legal writing need not take any particular form but examples of how such an approach might manifest, whether on a grand or modest scale, help show the power of such an approach. Consider the example Robert Cover offers of the radical constitutionalists who opposed slavery not by rejecting governing law (the Constitution) but by using legal writing, in the form of "pamphlets, arguments, columns, and books," together with the Declaration of Independence and other parts of the Constitution, to disrupt existing patterns and enable a "jurisgenerative process" or, in other words, "an immense growth of law."[195] The balance of this Part describes legal writing by judges and advocates whose work might be characterized as "committed" because it helps realign the audience and recognize the human element at stake in a particular legal matter, even when that element ultimately may not control.

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univocal in the interpretation of texts"; and "dependent on textual authority").

[192] Rideout & Ramsfield, *supra* note 190, at 56–57.

[193] *See* J. Christopher Rideout, *Voice, Self, and Persona in Legal Writing*, 15 LEGAL WRITING 67, 93–94 (2009); Rideout & Ramsfield, *supra* note 190, at 736–38; *see also* J. Christopher Rideout, *Ethos, Character, and Discoursal Self in Persuasive Legal Writing*, 21 LEGAL WRITING 19, 40–44, 55–62 (2016) [hereinafter Rideout, *Ethos*] (describing the different aspects of constructing a lawyerly writing identity and associated discourse conventions).

[194] Rideout, *Ethos*, *supra* note 193, at 62 ("We improve ourselves by improving the words we write." (quoting WALKER GIBSON, TOUGH, SWEET, AND STUFFY: AN ESSAY ON MODERN AMERICAN PROSE STYLES 110 (1966))).

[195] Cover, *supra* note 150, at 39, 40.

A. The Committed Jurist

We start with judicial opinions, because they are the most well-known example of legal writing and shape the trajectory of the law in far more decisive ways than legal briefs. Moreover, although judicial opinions raise the question of multiple authors, they avoid the dilemmas raised by client demands that put an extra burden on committed advocates. Arguably, any judicial opinion that considers and weighs policy concerns might be characterized as "committed," because of its focus on something more than the individual litigants' dispute.[196] And yet, the tough cases are those where answers are readily available in the form of an applicable statute, body of law, or procedural mechanism that somehow lies in contrast to the human concerns. It is this type of case that has the potential to cause its audiences, law and layperson alike, to despair that the law is a means of achieving justice and is not at odds with that goal. Where judicial opinions are concerned, disruptive rhetoric has long had a role to play in how such cases affect their readers. The power of Justice Harry Blackmun's famous dissent in *DeShaney v. Winnebago County*,[197] for instance—a case where the Supreme Court found that a state government could not be held liable for failing to intercede before the death of a child, Joshua, at the hands of his abusive father—rests on this sort of humanizing, disruptive rhetoric. The dissent in that case invokes just two words—"Poor Joshua!" that not only remind the reader of the victim's humanity but also disrupt the reader's understanding of what a legal opinion is and should be.[198]

While we may not return any time soon to a judicial approach that provides "inspiration for all the world,"[199] there are moments in

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[196] *See* Owen Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789, 794 (1990) ("From my perspective, a justice charged with the duty of construing the due process clause . . . should be seen as engaged in a process of trying to understand what it means for a society to be committed to procedural fairness, and to elaborate that understanding in a certain practical context" because instrumentalizing the law "trivializes and distorts the judicial task" and "eradicates that portion of the judicial decision that is the foundation of its authority—the deliberation about ends and values.").

[197] 489 U.S. 189 (1989).

[198] *Id.* at 213 (Blackmun, J., dissenting); *see also* David Ray Papke & Kathleen H. McManus, *Narrative and the Appellate Opinion*, 23 LEGAL STUD. F. 449, 462 (1999) (discussing the role of judicial voice in the *DeShaney* opinion).

[199] Fiss, *supra* note 196, at 789 (citing, as examples of such "inspiration," Goldberg v. Kelly, 397 U.S. 254 (1970), Brown v. Board of Education, 347 U.S. 483 (1954), Reynolds v. Sims, 377 U.S. 533 (1964), Gideon v.

judicial decisions that show what it means to reason while remaining "fully sensitive to, and cognizant of, the underlying social reality" of a decision.[200] A recent example appears in the 2013 *per curiam* opinion *Boyer v. Louisiana*, in which Justice Sotomayor dissented because she refused to allow the procedural mechanism of "writ of certiorari improvidently granted"[201] to dissuade her from solving a critical problem that was sufficiently factually developed and a plague to the lower courts. Her dissent helps delineate some of the contours of a committed legal writing approach.

The Supreme Court granted certiorari in *Boyer* to resolve an issue of striking social significance: whether the failure of a state—in this case Louisiana—to provide funding for indigent counsel should be counted against the state when determining whether an individual's Sixth Amendment right to a speedy trial has been violated.[202] In *Gideon v. Wainwright*, the Court construed the Sixth and Fourteenth Amendments to require state-funded defense counsel for indigent defendants convicted of a felony.[203] *Gideon* was heralded by many as a triumph for individual rights, ensuring that "a poor person unable to afford a reasonable attorney's fee is treated substantially the same in our criminal and juvenile justice systems as a person of financial means."[204] Nevertheless, *Gideon* and its successors[205] "have been a significant unfunded mandate with which states have struggled for more than fifty years."[206] Without the resources or social structures

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Wainwright, 372 U.S. 335 (1963), New York Times v. Sullivan, 376 U.S. 254 (1964), and Engle v. Vitale, 370 U.S. 421 (1962)).

[200] *Id.* at 802.

[201] Boyer v. Louisiana, 569 U.S. 238, 238–39 (2013) (per curiam); *see also* John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 177–79 (1982) (discussing procedure for dismissing a writ of certiorari as improvidently granted).

[202] *Boyer*, 569 U.S. at 238 ("We granted certiorari in this case to decide '[w]hether a state's failure to fund counsel for an indigent defendant for five years, particularly where failure was the direct result of the prosecution's choice to seek the death penalty, should be weighed against the state for speedy trial purposes.'").

[203] Gideon v. Wainwright, 372 U.S. 335 (1963); *see also* Argersinger v. Hamlin, 407 U.S. 25 (1972) (extending *Gideon* to petty offenses); *In re* Gault, 387 U.S. 1 (1967) (extending *Gideon* to juveniles in delinquency proceedings).

[204] Norman Lefstein, *Will We Ever Succeed in Fulfilling* Gideon*'s Promise?*, 51 IND. L. REV. 39, 40 (2018).

[205] *Id.* at 39.

[206] *Id.*

necessary to adequately fund indigent counsel, defendants have lingered in jail, or, alternatively, been denied counsel outright.[207]

The Louisiana state courts are no different: defendant Jonathan Boyer waited more than seven years in a Calcasieu Parish jail for his trial—on murder and armed robbery charges—to begin.[208] Even though the parish had the funds necessary to enable Mr. Boyer's defense, the Louisiana Supreme Court had in an earlier case found, consistent with *Gideon*, "that the parish could not be ordered to pay because that was the state's duty."[209] And as opposed to the parish, the state was (and is) experiencing a funding crisis relating to indigent defense, caused by "undependable revenue sources, shrinking budgets and political paralysis."[210] Accordingly, while the rights to counsel and a speedy trial remain, "there is a vast gulf between the broad premise of [*Gideon*'s] ruling and the grim practice of legal representation for the nation's poorest litigants."[211]

In *Boyer*, the Court was presented with one opportunity to address the extent to which our social structures have failed to live up to our constitutional ideals. Indicted and jailed without bond in 2002 for the alleged robbery and murder of a driver who offered him a ride, Mr. Boyer's case did not proceed to trial until 2009, when a jury

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[207] In one particularly egregious case, Pennsylvania Court of Common Pleas Judge Mark Ciavarella allowed 1,866 juveniles to appear before him without counsel or without properly waiving their right to counsel. TASK FORCE AND ADVISORY COMMITTEE ON SERVICES TO INDIGENT CRIMINAL DEFENDANTS, A CONSTITUTIONAL DEFAULT: SERVICES TO INDIGENT CRIMINAL DEFENDANTS IN PENNSYLVANIA 3 (2011), http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2011-265-Indigent%20defense.pdf. As one Pennsylvania House report noted, "Juveniles who had committed minor offenses were consigned for harshly excessive terms to juvenile detention centers in return for kickbacks and other favors that a co-owner of the centers rendered to Ciavarella and former Judge Michael Conahan." *Id.* While this situation is far from typical, it does illustrate the ways in which state courts have been cavalier with the Sixth and Fourteenth Amendment rights of litigants.

[208] Boyer v. Louisiana, 569 U.S. 238, 241 (2013) (per curiam).

[209] *Unspeedy Trial in Louisiana*, N.Y. TIMES (Jan. 13, 2013), https://www.nytimes.com/2013/01/14/opinion/unspeedy-trial-in-louisiana.html.

[210] Christopher Zoukis, *Funding Crisis Handicaps Louisiana's Public Defender Offices*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffpost.com/entry/funding-crisis-handicaps-_b_9542728.

[211] Andrew Cohen, *How Americans Lost the Right to Counsel, 50 Years After 'Gideon'*, ATLANTIC (Mar. 13, 2013), https://www.theatlantic.com/national/archive/2013/03/how-americans-lost-the-right-to-counsel-50-years-after-gideon/273433/.

convicted him of second degree murder and armed robbery.[212] Boyer appealed the conviction, arguing that the state of Louisiana had violated his Sixth Amendment right to a speedy trial in light of the years he spent in jail. The Louisiana Court of Appeal denied the claim, but "found that most of the delay in Boyer's case was caused by the State's failure to pay for his defense due to a funding crisis experienced by the State of Louisiana."[213] The question the Supreme Court granted certiorari to address was whether, under the Court's Sixth Amendment precedent, trial delays resulting from a state's indigent counsel funding crisis should weigh against the state in determining whether the petitioner's right to a speedy trial has been violated.[214]

Instead of answering this question, however, the Court decided to dismiss the writ of certiorari as improvidently granted, after determining that the lower court's factual findings were inaccurate, and that the delay in Boyer's trial resulted primarily from his own counsel's repeated delays.[215] The Court's *per curiam* opinion was met with significant disapproval by Justice Sotomayor, who authored a lengthy dissent. Sotomayor took issue with several of the majority's positions—she argued both that the case was easily resolvable in favor of Boyer under the Court's existing precedent,[216] and that the majority had failed to be properly deferential to the factual findings of the lower court.[217] Most importantly for the purposes of this Article, however, she suggested that in cases such as *Boyer*, when constitutional rights are at stake and the Court's precedent provides an answer, the Court has a duty to remind states of their constitutional obligations: "It is important for States to understand that they have an obligation to protect a defendant's constitutional right to a speedy trial."[218]

Although rare, it is not unusual for the Supreme Court to rely on procedural mechanisms—like denying a writ of certiorari as improvidently granted—in cases where the Court's initial

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[212] *Boyer*, 569 U.S. at 240.
[213] *Id.* at 241 (internal quotation marks omitted).
[214] *See* Barker v. Wingo, 407 U.S. 514, 530–33 (1972) (establishing four factors that a court must weigh in determining whether a defendant's right to a speedy trial has been violated: (1) length of delay, (2) reason for delay, (3) time and manner in which the right was asserted, and (4) the degree of prejudice to the defendant caused by the delay).
[215] *Boyer*, 569 U.S. at 240–41.
[216] *Id.* at 242 (Sotomayor, J., dissenting).
[217] *Id.* (Sotomayor, J., dissenting).
[218] *Id.* (Sotomayor, J., dissenting).

understanding of the record and question presented are put into question after further review of the facts and briefing.[219] And yet, as Justice Sotomayor makes clear, factual complexities would not have prevented the Court from issuing some ruling on the merits of this appeal, even if that ruling were a narrow one.[220] The Court instead refused to engage with the merits of an easily resolvable suit—one which could have, if not far ranging consequences, at the very least a clear and tangible effect on both the rights of a single litigant as well as those of other indigent defendants facing excessive pre-trial confinement due to a state's negligent or intentional failure to fund their defense. While subtler than the examples of legal illegitimacy seen in Plato and Shakespeare,[221] these contemporary procedural mechanisms for avoiding the merits of a suit can erode the confidence of advocates and litigants in a court's ability and desire to engage with the dispute at hand. Indeed, to the extent procedural mechanisms mask how courts determine whether to take up the merits of a dispute, they are perhaps uniquely capable of compounding the skepticism surrounding our modern legal profession—as well compounding one popular conception of the advocate as uninterested in the pursuit of justice.

Justice Sotomayor's approach to this potential illegitimacy is striking for its engagement with—and attempt to focus the reader's attention on—the complex legal issues raised by the *Boyer* case. Regardless of her lack of success in convincing a majority of her colleagues to answer the constitutional question the Court had originally planned to answer, Justice Sotomayor's emphasis on the larger context in which Boyer's dispute was playing out illustrates a committed approach to legal writing. Though *per curiam* opinions are rarely released with any fanfare, let alone lengthy concurrences and dissents,[222] Justice Sotomayor's committed dissent gives voice to the

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[219] *See* Garrett Epps, *Justice Kennedy's* Masterpiece *Ruling*, ATLANTIC (June 4, 2018), https://www.theatlantic.com/ideas/archive/2018/06/the-court-slices-a-narrow-ruling-out-of-masterpiece-cakeshop/561986/ (arguing that the Court should have dismissed the 2018 case *Masterpiece Cakeshop v. Colorado Civil Rights Commission* as improvidently granted, given the factual complexities of the record and its failure to lend itself to the question presented, i.e., determining the relationship between First Amendment religious rights and Fourteenth Amendment civil rights legislation).

[220] *Boyer*, 569 U.S. at 247 (Sotomayor, J., dissenting).

[221] *See supra* Section I.A.

[222] The role that *per curiam* decisions do and should play, particularly when the Court does not speak with a unified voice, is quite interesting and a topic for further exploration. *See* Michael C. Gizzi & Stephen L. Wasby, *Per Curiams Revisited: Assessing the Unsigned Opinion*, 96 JUDICATURE 110

voiceless, expanding her audience's social consciousness while at the same time refusing to forsake her reliance on reasoned legal argumentation.

B. The Committed Advocate

In some respects, it is more difficult to identify examples of writing by committed advocates, as opposed to judges, because an advocate must focus on arguments that best serve her client's goals, which may not align with arguments that engage a larger social context. And yet, there are examples of briefs, or components of briefs, that demand, like Barnardine, an uncommon, unanticipated, and arguably more humane result. The authors of these examples use various techniques, including novelty, contrast, and even silence, to disrupt and realign their readers. As committed legal writers, they ask their audiences to recognize and engage with the social, political, and human element in the law, even if doing so is only a minor part of the argument. While the techniques may differ, the examples share the characteristic of "narrative fidelity" in that each supports its readers' belief that what is written reflects experience and social reality.[223] In Rideout's words, legal writing has narrative fidelity when it "goes beyond logic alone, to values" and "involves an act of self-definition, not only by the immediate audience, but for the community within which that audience . . . [is] situated." [224]

(Nov./Dec. 2012); Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 TUL. L. REV. 1197 (2012); Laura Krugman Ray, *The Road to Bush v. Gore: The History of the Supreme Court's Use of the Per Curiam Opinion*, 79 NEB. L. REV. 517 (2000); *see also* Sanford Levinson, *Compromise and Constitutionalism*, 38 PEPP. L. REV. 821, 837–42 (2011) (considering legitimacy of judges signing opinions with which they disagree in order to build a majority or present a "united front").

[223] J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING 53, 69–72 (2008) [hereinafter Rideout, *Storytelling*]; *see also* Anne E. Ralph, *Not the Same Old Story: Using Narrative Theory to Understand and Overcome the Plausibility Pleading Standard*, 26 YALE J.L. & HUMAN. 1, 30–31 (2014) ("Narrative fidelity refers not to the audience's belief in the actual truth of a story, but the audience's sense that the story 'represent[s] accurate assertions about social reality.' Narrative fidelity thus depends, in part, on an audience's 'practical judgment' based on its "intuition of experience.'" (quoting WALTER FISHER, HUMAN COMMUNICATION AS NARRATION: TOWARD A PHILOSOPHY OF REASON, VALUE, AND ACTION 105 (1987) and Rideout, *Storytelling*, *supra*, at 74)).

[224] Rideout, *Storytelling*, *supra* note 223, at 77.

Linda Edwards, who has written extensively on the persuasiveness of briefs, points to some famous historical briefs that used techniques so different from their predecessors as to command the attention of the readers and shift the audience's perspective, thereby showing commitment not only to the specific problem before the Court but also to the larger social context.[225] For example, Edwards describes how the brief filed on behalf of the State of Oregon in *Muller v. Oregon*, known to many as the "Brandeis Brief," contained more than 100 pages of sociological and statistical data collected by two labor reformers, Florence Kelly and Josephine Goldmark, to help demonstrate the "pernicious" social costs to workers and their families that the challenged legislation was designed to address.[226] The advocates also filed "a more conventional brief, relying on legal precedent and traditional legal argument," but it was the Brandeis Brief that "forged the way for a new kind of argument" and ultimately persuaded the justices to uphold the Oregon statute.[227] The *Muller* advocates took a committed approach by supplementing precedent and policy with social science data to convince the decision makers to engage with the human, political, and social concerns at stake.

On a far less epic scale, Bryan Garner describes briefs that employ creative and unusual architecture—structure that ignores or flouts traditional conventions of legal discourse—to illustrate, and help the audience appreciate, otherwise abstract concepts.[228] For example, Garner describes how Mike Hatchell, of Tyler, Texas, begins a motion for rehearing with a prologue in the form of a play set in the corporate board room of a fictional company.[229] In this play, the main character, the company's in-house counsel, tries to explain to and advise his CEO and board about the case, *Caller Times Publishing Co. v. Triad Communications, Inc.*,[230] that Hatchell was asking the court to rehear and modify.[231] The unusual structure of the brief forces the reader to engage with how the case defined, or failed to define, "profit margin," and the frustration of antitrust lawyers around the state trying to

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[225] LINDA H. EDWARDS, READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD (2012).
[226] *Id.* at 188, 351.
[227] *Id.* at 351. *But see* David E. Bernstein, *Brandeis Brief Myths*, 15 GREEN BAG 9 (2011) (arguing that some of the persuasive force and influence of the "Brandeis Brief" has been overstated).
[228] BRYAN A. GARNER, THE WINNING BRIEF 8–20 (2d ed. 2004).
[229] *Id.* at 9.
[230] 826 S.W.2d 576 (Tex. 1992).
[231] GARNER, *supra* note 228, at 9.

make sense of the earlier ruling.[232] Patricia Williams illustrates the power of language as the power of law when she describes her early work in the City Attorney's office.[233] Reviewing Williams's book, Linda Greene observes how Williams "implored her jurors to seize their interpretive power," and "not cede the power to define the word 'sausage' to manufacturers who would use that power to legitimize the production of sausages filled with rodents and sawdust."[234] A closing oral argument rather than a written brief, Williams's plea nevertheless shows the subversive power of legal language and commitment to a different vision of meaning.

But it is not just novelty that helps realign audiences. In a world where every advocate is trying to weave a creative and compelling story about her client, the committed legal writer might provide a deliberately spare, unvarnished description of a client's problem to disrupt the reader's thought patterns.[235] In considering the relationship between law and art, Wendy Duong describes an "anti-rhetoric" theory, observing how "the art of law is the skilled and respectable exercise of constraint."[236] Edwards makes this idea more concrete by describing the defense brief filed in the consolidated death penalty cases known as *Furman v. Georgia*,[237] which exemplifies "how good advocacy can help a lawyer practice virtue, particularly in what may be the most difficult brief-writing dilemma of all: dealing with bad facts."[238] More to the point of this Article, Edwards describes how the facts about one of the defendants read like a "poster child for the State's argument in favor of the death penalty" and thus were likely to cause an emotional reaction even in readers

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[232] *Id.* at 10–17. The Texas court accepted the appeal that it had previously rejected. *Id.* at 9.

[233] Linda S. Greene, *"Breaking Form" the Alchemy of Race and Rights (Review)*, 44 STAN. L. REV. 909, 910–11 (1992).

[234] *Id.* (quoting the closing argument as follows: "[W]ill you wave that so-called sausage, sawdust and tiny claws spilling from both ends, in the face of that machine and shout: this is not Justice! For now is the time to revolt against the tyranny of definition-machines and insist on your right to name what your senses well know, to describe what you perceive to be the limits of sausage-justice, and the beyond of which is this *thing*, this clear injustice.").

[235] *See* Wendy Nicole Duong, *Law Is Law and Art Is Art and Shall the Two Ever Meet? Law and Literature: The Comparative Creative Processes*, 15 S. CAL. INTERDISC. L.J. 1, 8 (2005).

[236] *Id.*

[237] 408 U.S. 238 (1972).

[238] Linda H. Edwards, *Advocacy as an Exercise in Virtue: Lawyering, Bad Facts, and Furman's High-Stakes Dilemma*, 66 MERCER L. REV. 425, 426 (2015).

who might otherwise be open to arguments about the death penalty.[239] Rejecting the "virtually unquestioned standard advice"[240] about minimizing bad facts, the attorney instead defied expectations when he wrote a facts statement that told of the "ghastly crimes" of his client that "were attended by aggravating features that must necessarily arouse the deepest human instincts of loathing and repugnance."[241] This unconventional choice helped build credibility for the advocate, inoculated the reader to facts that were certain to appear, smuggled in a few helpful facts, and ultimately allowed the advocate to execute "an aikido move," a disruptive feint.[242] One can imagine moments when silence and blank spaces might capture the unspeakable nature and complexity of a client's dilemma.[243] It is the structure of such briefs that serves as the fool in this case, demanding attention, breaking molds, and "corrupting" otherwise static language to help the reader appreciate an alternative world view.

Finally, amicus briefs help bring home the grand potential for committed advocacy. The "Voices brief," which was filed by the National Abortion Rights Action League (NARAL) in the 1986 Supreme Court case *Thornburgh v. American College of Obstetricians & Gynecologists*, is another of Edwards's "great briefs" and an example of committed advocacy.[244] The brief tells the stories

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[239] *Id.* at 428.

[240] *Id*, at 429.

[241] *Id.* at 431.

[242] *Id.* at 439. Along similar lines, when we presented this paper at the annual Law, Culture, & Humanities conference, one member of the audience who had clerked for the Supreme Court described briefs filed by the Solicitor General's office as particularly compelling because they appeared so sparse and objective.

[243] *See* Bret Rappaport, *"Talk Less": Eloquent Silence in the Rhetoric of Lawyering*, 67 J. LEGAL EDUC. 286 (2017) (discussing why silence is rhetorical and how it works cognitively to persuade); Stefan H. Krieger, *A Time to Keep Silent and a Time to Speak: The Functions of Silence in the Lawyering Process*, 80 OR. L. REV. 199, 204 (2001) (arguing that "effective lawyering requires an awareness of the significant role that silence plays in communication"); *see also* Laurence H. Tribe, *Soundings and Silence*, 115 MICH. L. REV. ONLINE 26, 32 (2016) ("There are as many reasons to be silent as there are to speak, and as many ways to hear meaning in the sounds of silence."); Debra Lyn Bassett, *Silencing Our Elders*, 15 NEV. L.J. 519 (2015) (discussing "silence bias" and the power of silence in negotiating, interviewing, and counseling); Peter Tiersma, *The Language of Silence*, 48 RUTGERS L. REV. 1 (1995) (describing legal significance of silence).

[244] 476 U.S. 747 (1986); *see also* EDWARDS, *supra* note 225, at 283–84 (excerpting the "Voices Brief" as a poignant example of storytelling technique to encourage "empathetic understanding").

of women outside of the litigation, women whose lives would inevitably be affected by the Court's decision. In doing so, the brief refused to "treat women as 'other,'" [245] instead crafting "a legal argument that helped to place before the Court the realities of women's situations when confronting such a profound and personal choice."[246] As Robin West notes, the "Voices brief"

> *shows*—illustrates—the terrible consequences of rolling back *Roe v. Wade*. Obviously, one does not have to have *been there* to understand what those consequences might be. However, one must indeed somehow be shown those consequences. The consequence that matters in that, in a world of illegal abortion, some of us, but not all of us, live in a regime of terror, torture and unnecessary death. This is not a hard point to grasp. But, to be grasped, it must be shown. Principles and reason do not make the case.[247]

This approach is fundamentally disruptive, defying legal conventions by relying on sources outside the record and voices outside those of the parties to the litigation.[248] But it does not disrupt merely for disruption's sake. The brief instead disrupts in order to commit its readers to focusing on what was at stake in the *Thornburgh* litigation: the lives of the women who would be affected by the Court's decision. As noted above, the committed legal writer, like the drafters of the *Thornburgh* brief, does not ignore that social and political problems shape the lives of people involved in the legal system, but rather engages with this reality and, by situating her legal writing in lived experiences, encourages her audiences to engage with that reality.[249]

Of course, asking advocates to think beyond their clients may seem to ask too much, especially if the specific interests are not aligned. To Beauvoir and Sartre—especially Sartre—a work of committed literature is inherently political, not to the extent that its subject matter is politics, but because it is constantly addressing "the

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[245] Linda H. Edwards, *Hearing Voices: Non-Party Stories in Abortion and Gay Rights Advocacy*, 2015 MICH. ST. L. REV. 1327, 1328 [hereinafter Edwards, *Hearing Voices*].
[246] EDWARDS, *supra* note 225, at 353.
[247] *Id*. at 284 (quoting Robin L. West, *The Constitution of Reasons*, 92 MICH. L. REV. 1409, 1436 (1994)).
[248] *See* Edwards, *Hearing Voices*, *supra* note 245, at 1327–30.
[249] *See* Rideout, *Storytelling*, *supra* note 223, at 77.

great social and political questions of our time."[250] While "the business of the novelist"[251] might be "to concern himself with contemporary social and political problems,"[252] it is certainly fair to ask whether such abstract problems are properly the concern of lawyers.[253] One response is, as the existentialists realized, that the larger problems beyond immediate client need cannot be avoided because they "are part of the reality which is forced on each one of us."[254] The legal writer can neither ignore them nor will them away. White, Rideout, and many other scholars of legal writing and rhetoric recognize this reality when they highlight the social and communitarian nature of the law and legal discourse.

Second, contemplating a way of thinking about lawyering that encourages advocates to commit to their clients *and* to the context in which the client is situated helps address one aspect of the cynicism and disillusionment with which this Article started. A committed approach to legal writing recognizes that an advocate's identity is more than simply an instrument or mouthpiece for a client. We traditionally think of lawyers as writing solely for others. But encouraging lawyers to recognize the human element in the law allows lawyers to write, too, for themselves, for the law, and for society more generally. It is hard to think of an approach that would address more directly the disillusionment that makes advocates feel so unconnected to the profession they set out to join.

This response raises the question of whether a committed approach to legal writing and legal practice more generally over-privileges the human element of the law. By attempting to recognize the freedom of the legal decision maker, does it risk returning legal practice to an exercise in sophistry and appeals to emotion that so concerned Socrates, Shakespeare and others? Not necessarily. The committed legal writer's focus on the "human" element of the law is not a substantive focus merely on appealing to the emotions of a decision maker. It is an emphasis on asking the audience to engage with the exigencies of any given dispute, to avoid ignoring the

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[250] Charles G. Whiting, *The Case for "Engaged" Literature*, 1 YALE FRENCH STUDIES 84, 84 (1948).
[251] *Id.* at 85.
[252] *Id.*
[253] *See, e.g.*, Annette Ruth Appell, *Introduction: Access to Justice: The Promise and Pitfalls of Social Problem Solving Through the Courts and Legal Advocacy*, 31 WASH. U. J.L. & POL'Y 1, 4–6 (2009) (discussing the veracity, accountability, and other problems arising from courts seeking to solve social problems).
[254] Whiting, *supra* note 250, at 85.

complexities of a case in favor of easy legal rules. An advocate who thinks of these opportunities as Barnardine moments will be less likely to lose hope or cave to cynicism, regardless of whether the arguments succeed.

Conclusion

Plato's views on the morality of legal advocacy were relatively bleak: in the *Gorgias*, for example, Socrates characterizes rhetoric as "a producer of persuasion. Its whole business comes to that, and that's the long and short of it."[255] Perhaps this is correct—and perhaps the primary goal of most contemporary advocates is still to use rhetoric to persuade. But the committed legal writing approach offered here suggests that we aim to do more. By seeking to disrupt static modes of legal reasoning by focusing on the real-world elements of the legal problem, the committed legal writer may help enhance the legitimacy of the profession for lawyers and nonlawyers alike.

Committed legal writing need not take any particular form—like we saw above in the case of *Measure for Measure*, it need not be didactic to engage its audience. Indeed, commitment is a way of relating oneself to the world; it is the acknowledgment that the legal writer is responsible for the words she chooses and does not choose. She confronts clients and legal issues not solely as means to produce a particular legal end, but rather with the goal of understanding the nature of the conflict and imagining a world in which the conflict might be resolved. Achieving this goal requires the committed writer to commit her imagination to the needs of her audiences. And like Barnardine, the facts of the case must be allowed to speak, and the committed legal writer must allow herself—condition herself—to listen.

Almost twenty years after giving us his vision of committed literature, Sartre returned to the theory in his autobiography *The Words*. He writes, "For a long time I took my pen as a sword; I know we're powerless."[256] These strategies of fostering disruption and commitment will not always be successful. Still, we must find inspiration where we can, and the paradigms of disruption and commitment might serve this function. Perhaps in this small way the law might not only reaffirm its roots as a rhetorical discipline, but might also advance beyond mere rhetoric, cementing its reputation as the sort of discipline of which even Plato would be proud.

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[255] *See* PLATO, GORGIAS, *supra* note 6, at 10[453a3–5].

[256] JEAN-PAUL SARTRE, THE WORDS: THE AUTOBIOGRAPHY OF JEAN PAUL SARTRE 253 (Bernard Frechtman trans., 1981).