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Great Judicial Opinions versus Great Literature: Should the Two Be Measured by the Same Criteria

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Article

Great Judicial Opinions versus Great Literature: Should the Two be Measured by the Same Criteria?

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I. INTRODUCTION

> I read something that moved me a lot not very long ago. I was reading something by Chesterton, and he was talking about one of the Brontës, I think her Jane Eyre. He says you go and look out at the city—I think he was looking at London—and he said you know, you see all those houses now, even at the end of the nineteenth century and they look all as if they're the same. And you think all those people are out there going to work and they're all the same. He says, but what Brontë tells you is they're not the same. Each one of those persons in each one of those houses and each one of those families is different, and they each have a story to tell. Each of those stories involves something about human passion. Each of those stories involves a man, a woman, children, families, work, lives—and you get that sense out of the book. And so sometimes I've found literature very helpful as a way out of the tower.[1]

When asked for a list of the ten most important books in his personal library during his Senate Confirmation hearings, Associate Justice Stephen Breyer's response illustrated a lucid tension for judges concerned with striking a realistic balance for litigants bringing claims before them: emotionalism versus rationalism.

Emotionalism, in this context, refers to a consideration of how one's actions will affect individuals in reality, rather than simply on paper. Instead of merely constructing a legal rule that appears to decide the circumstances accurately, a judge who employs this version of emotionalism will attempt to envision a legal rule's potential effect before deciding whether it offers the best solution. Doing so requires the judge to engage in a form of judicial empathy—to reach down and attempt to know the litigants' experiences from the inside out.[2] The term "empathy" in this

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1. *Nomination of Stephen G. Breyer to Be an Associate Justice of the Supreme Court of the United States Before the Senate Comm. on the Judiciary*, 103d Cong. 232-33 (1994), *reprinted in* MARTHA NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE 79 (1995).

2. *See* Richard A. Posner, *Emotion versus Emotionalism in Law*, *in* THE PASSIONS OF LAW 309, 323 (Susan A. Bandes ed., 1999) (acknowledging that empathy is an important emotion for judges to partake in and stating "[t]he importance of judicial empathy is to bring home to the judge the interests of the absent parties").

context is admittedly something of a misnomer, because empathy in its purest sense refers to the vicarious understanding of another person's thoughts or feelings.[3] Because a vicarious understanding of all litigants' legal woes is an impractical expectation to have of judges, "judicial empathy" is better understood as a judge's attempt to make empathy as likely as possible.

This may be (and probably is) an impossible task, but judges who accept this endeavor necessarily gain an understanding of the individual parties, both present and absent, and consequently demonstrate a concern for the parties' needs and motivations. Emotionalism need not be misunderstood as giving way to sterile reason.[4] The term "judicial temperament" refers to a well-balanced combination of the two modes of decision-making, and is recognized as an admirable trait in judges, as evidenced by Justice Breyer's quote above.[5]

Comparatively, rationalism refers to logical, linear arguments that can be made either for or against a particular perspective. The assembly of facts, reasoning, and conclusions, all with distinct and mathematical placement in an opinion, are arranged to leave the reader with no alternative but to agree with the judge's decision.[6] Predictably, this line of reasoning focuses primarily on technical merit.[7] Recognizing that emotionalism is necessary in compelling literature, Justice Breyer's quote suggests that both emotionalism and rationalism are necessary components to judging—to have only the latter is to have an incomplete toolbox, and may lead to an unjust result. The context of Justice Breyer's response also suggests that such emotionalism can be learned and remembered through literature, and that literature is consequently useful to a judge wishing to hand down a thoughtful opinion.[8]

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3. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 378 (10th ed. 1999).

4. NUSSBAUM, *supra* note 1, at 73 (stating that "both empathetic participation and external assessment are crucial in determining the degree of compassion it is rational to have").

5. Posner, *supra* note 2, at 324

> The name that the legal system gives to this 'detachment empathy' is 'judicial temperament'. . . . The judge who gets so emotionally involved in the immediacies of the case that he is blinded to the interests of the absent parties is said to lack judicial temperament . . . . We don't have an official name for the judge who displays the opposite form of emotionalism—a weird pride in maintaining a complete, inhuman indifference to the parties before him. But such judges are not admired.

Id.

6. *See* Benjamin Kaplan, Book Review, 95 HARV. L. REV. 528, 533 (1981) (reviewing FRANK M. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH (1980)) and (discussing the various ways in which the judiciary are held accountable in a federal system and putting emphasis on the role written opinions play and the "existence of well-recognized rules").

7. *See infra* Part II.B.

8. The theory that a judicial opinion need consist of anything more than a well-thought-out legal rationale is an essay unto itself, and is indeed fuel for many analyses within the scope of law and literature. *See, e.g.*, STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 478 (1989) (discussing the history of the competition between philosophy and rhetoric).

> [T]he quarrel between philosophy and rhetoric [] survives every sea change in the history of Western thought, continually presenting us with the skewed choice between the plain

Richard Posner[9] indirectly turns to this line of judicial temperament when stating that survival is "the operational test for greatness in literature."[10] Posner borrows this test from George Orwell, who felt that contemporary views involving taste and general preferences rendered a consensus on greatness impossible, and thus determined a Darwinian approach more appropriate: "[L]iterature can be judged great only by . . . its ability to survive in the competition of the literary 'marketplace.'"[11] It seems overly simple, however, to reduce a critique of great literature to so simple a test. For example, how does one define survival when applying Posner and Orwell's operational test? Does it mean simply to have a second, third, or fourth edition printed of a book? Does it imply an economic survival, where selling enough copies buys a permanent spot on the local bookstore's "Literary Classics" shelf? How much time must pass before the label "survived" is appropriate? If a literary work maintains prominence throughout a generation's lifetime, but is then denounced by later generations, has it failed the operational test? Furthermore, do novels that survive warrant any discussion for their literary merit, as opposed to simply a calculation of how old they are? Or is surviving the test of time evidence of a text's literary merit?

Posner offers the following guidance for measuring survivability: "[T]he debate [of literary merit] achieves closure only with regard to very old works . . . No one is apt to question the greatness of Homer, or Dante, or Shakespeare."[12] How much time is not enough to warrant greatness? "It is only . . . more than sixty years after major writings by Kafka, T.S. Elliot, Joyce, and Mann that we

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> unvarnished truth straightforwardly presented and the powerful but insidious appeal of 'fine language,' language that has transgressed the limits of representation and substituted its own forms for the forms of reality.

Id.

9. Judge, United States Court of Appeals for the Seventh Circuit; Chief Judge, United States Court of Appeals for the Seventh Circuit (1993-2000); and Senior Lecturer in Law at University of Chicago Law School.

10. RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 74 (1988). At the time that Posner published *Law and Literature* he was a newcomer to the developing movement, and his book received lukewarm reviews. *See, e.g.*, Judith Schenck Koffler, *Forged Alliance: Law and Literature*, 89 COLUM. L. REV. 1374, 1381-82, 1384 (1989) (book review) (stating that "[Posner's] book is, first of all, a delightful *vademecum*, a go-with-me or 'companion' for anyone studying law and literature," but "a good portion of Posner's book admittedly is a rescue effort to redeem 'valid' law and literature studies from the apparently wrong-headed, politicized, tendentious writings of the 'law and lit' subversives," and "Posner's attempt to introduce the reader to the murky strands of literary criticism . . . will not satisfy a demanding reader") *and* David Ray Papke, *Problems with an Uninvited Guest: Richard A. Posner and the Law and Literature Movement*, 69 B.U. L. REV. 1067, 1074, 1077, 1079 (1989) (book review) (stating that "Posner's attack [on law and literature scholars] borders on the *ad hominem*[,]" "Posner's work is, in effect, highly combative tertiary scholarship," "[Posner's] determination to differentiate law and literature . . . prevent[s] him from winning over the party into which he has boldly charged[,]" and "*Law and Literature* quite simply does not measure up to the author's usual high standard of prose").

11. POSNER, *supra* note 10, at 71 (quoting George Orwell, Lear, Tolstoy, and the Fool, *in* 4 COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL, 287, 290 (Sonia Orwell and Ian Angus eds., 1968)).

12. *Id.* at 72.

can say with some confidence, though more provisionally than in the case of Homer, Dante, Milton, and Shakespeare, that these men have written classics, too."[13] Thus, in Posner's view, if literature is one thousand years old and still being read (Homer), it has survived unequivocally, while a work as recent as sixty years (Kafka, Elliot, Joyce, and Mann, at the time Posner penned his test)[14] can probably be characterized as having survived, though not comfortably so.

To answer the question of what enables and encourages literature to survive, it is first necessary to define what literature is. Posner says that "[w]ritings count as literature when . . . they have something (no one is quite sure what) that enables them to become or to be made meaningful to an audience different from the one for which they are written."[15] In order for literature to manifest perpetual meaning, Posner supposes that it "must deal with things that do not change over time—must deal with the perennial concerns of human-kind and hence with the general and permanent features of the human condition."[16] This description mirrors Justice Breyer's analysis of the usefulness of literature in judging: literature, per Posner, survives when it universally appeals to people at a fundamental level. It survives because generation upon generation will face the same issues, and will thus read the same novel and (perhaps) gain similar understanding. Judges, in turn, will hear two parties present a case and will render a rule that, in the short term, has immediacy for these parties, but in the long term, could affect innumerable persons. It is a judge's duty to take the specific facts and foresee the consequences of universal application. There is universality in both: literature sustains itself by perpetually exploring human issues common to all generations, and judicial opinions are universal in the need for understanding a rule's potential effect on future litigants.

Given the common overarching theme of universal applicability to individual issues, one is tempted to apply the same test used for great literature to discerning great judicial opinions. However, determining which judicial opinions are unquestionably great in a country not even 250 years old is a somewhat futile undertaking if confined to Posner and Orwell's test of survivability. Is the test of time a meaningful way to identify great judicial opinions? Initially, it seems improper to suggest that the test directly applies to judicial opinions in the same way that Posner asserts it does to literature. Posner, in fact, does not suggest that survivability should act as the operational test for great judicial opinions, but is instead one of several factors in judging great judicial opinions.[17]

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13. *Id.* at 73.

14. *Law and Literature: A Misunderstood Relation* was published in 1988.

15. Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1424 (1995). Posner's definition is not genre specific, and thus may give literary critics pause. For purposes of this comment, the term "literature" refers only to fictional novels. For a more in depth discussion on the question of what is literature, *see generally* TERRY EAGLETON, LITERARY THEORY (1983).

16. POSNER, *supra* note 10, at 74.

17. *Id.* at 287. Posner concedes that there is an element of arbitrariness in evaluating judicial opinions based on taste, just as there is in critiquing great literature. "Resolving disagreement in difficult legal cases need

Why is survivability not the determinative factor for great judicial opinions, as it is for great literature, if both turn on how well individual issues are handled in light of universal applicability? Are judicial opinions not analogous to literature in that certain characteristics of each enable the texts to sustain an active readership, thus surviving, while other pieces of the same type of writing do not? The technical characteristics of each genre that foster survival may be different, but isn't the final question the same—whether each type of work has ultimately survived?

Justice Breyer's quote suggests an answer: thoughtful judicial opinions require both emotionalism and rationalism. Emotionalism and rationalism are two types of rhetoric, a term Aristotle defined as "the faculty of discovering all the possible means of persuasion in any subject."[18] If rhetoric is the study of persuasion, then how is persuasion defined? Most simply, it is successfully achieving a chosen end.[19] Employing two forms of rhetoric creates more definitions of the term "survived" than exist in the realm of literature, where only one mode of rhetoric is needed: emotionalism. Because both emotionalism and rationalism are necessary for a great judicial opinion, a different array of factors must exist in judicial opinions that need not be present in great literature.

In attempting to compare the criteria for great judicial opinions and great literature, and in determining whether there is any ground for suggesting that there should be more overlap than already exists, this comment will compare and contrast two seminal pieces of literature, *To Kill a Mockingbird*[20] and *The Adventures of Huckleberry Finn*,[21] with two historic judicial opinions, *Plessy v. Ferguson*[22] and *Brown v. Board of Education*.[23] These four texts, studied in unison, present a unique opportunity to examine how multiple authors have treated a single theme.[24] This comparison will illustrate that the differences

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no more be a pure matter of taste than the resolution of literary disputes over the merit of Kafka's fiction." *Id.* However, rather than disposing of all arbitrariness with the operational test of time, he lists it as one of many factors that aid or detract from an opinion's overall persuasiveness. *Id. See also* John V. Orth, *John Marshall and the Rule of Law*, 49 S.C. L. REV. 633 (1998) (book review) ("Longevity alone does not ensure eminence in judging . . . and a voluminous output is only a necessary, not a sufficient, condition of judicial greatness."). *But see* RUGGERO J. ADLISERT, OPINION WRITING 10 (1990) (stating that timeliness and current public opinion are factors for whether case law may survive, thus implying that survival is a key factor in identifying high quality opinions).

18. PETER GOODRICH, LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS 91 (1987) (internal quotation omitted).

19. *Id.* at 92 ("Rhetoric studies the linguistic means that allow a chosen end to be achieved.").

20. HARPER LEE, TO KILL A MOCKINGBIRD (Warner Books 1982) (1960).

21. MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN (Penguin Books 2003) (1885).

22. 163 U.S. 537 (1896).

23. 347 U.S. 483 (1954).

24. The selected texts all turn on the common theme of race, which serves to neutralize the concern that topic choice has bearing on a text's greatness, regardless of the genre in which it falls. Keeping Posner's suggested timeframe in mind, *To Kill a Mockingbird* is admittedly still on the outskirts of achieving "greatness." However, using examples that all center on a common theme and comparing the book's other features will serve to demonstrate that time is not the only calibrator for greatness.

between the two genres, particularly the different uses of rhetoric, require different standards for evaluating greatness.

This comment is not an attempt to develop an exhaustive list of what criteria should be used when evaluating great judicial opinions, nor is it an attempt to question whether Posner's test of survivability is a workable measure for great literature. The goal of this comment is to question why the same test is not useful when classifying a judicial opinion as "great." Consequently, it is sufficient for purposes of this comment to accept Posner's test of survivability for great literature.[25] Ultimately, this comment is meant to suggest that while much has been contributed to the interdisciplinary study of law and literature, judicial opinions and literature serve different purposes. These differing functions implement diverse types of rhetoric, and consequently, warrant different criteria when being evaluated for greatness.

II. SIMILARITIES BETWEEN THE TWO GENRES

A. *Characteristics of Great Literature*

Utilizing Posner's succinct test, it is easiest to begin comparing genres with examples from the category that Posner's test addresses: great literature.

To Kill a Mockingbird is set in a small town in Alabama during the 1930s, but was written during the 1950s and published in 1960, in the midst of the pervasive racial tension that marked the Civil Rights Movement.[26] Scout is the impudent main character, and it is she who recounts the story of how Jem, her brother, "[w]hen he was nearly thirteen . . . got his arm badly broken at the elbow."[27] Although her brother's arm being broken is the climax of the novel, the story actually turns on their father, Atticus, a reputable attorney in town, who defends a local black man charged with raping a white woman. On the eve of trial, Atticus has reason to believe that his client's life is in danger, and so he

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These four texts were also chosen because of their proximity in time to one another. *Plessy v. Furguson* was decided in 1896, only eleven years after *Huckleberry Finn* was published. *See* TWAIN, *supra* note 21. Similarly, *Brown v. Board of Education* was decided in 1954, only six years before *To Kill a Mockingbird* was published. *See* LEE, *supra* note 20. For more explanation, *see infra* note 29 and accompanying text.

25. Posner's test for great literature did not receive much attention in book reviews. In her book review, Judith Schenck Koffler mentions the test only in passing, *see* Koffler, *supra* note 10, at 1384. David Ray Papke, *supra* note 10, at 1080, does discuss it in contrast to what other literary critics assert. "[Many literary critics have] convincingly argued that great literature is labeled as such by elites in various epochs for assorted ideological reasons. [Citation omitted.] Posner, by contrast, proposes a survival theory of literature. Literary works face a Darwinian test, and only the strongest survive." As noted, though, this comment is not challenging Posner's Darwinian test as applied to literature. Instead, Posner's assertion that survivability is the test for great literature is accepted without examination for purposes of discussing whether the same test has meaning within the genre of judicial opinions.

26. Calvin Woodard, *Listening to the Mockingbird*, 45 ALA. L. REV. 563, 567 (1994) (asserting that Harper Lee wrote *To Kill a Mockingbird* during the 1950s).

27. LEE, *supra* note 20, at 3.

guards the local jail. Having not been given a satisfactory explanation for their father's outing, Scout, Jem, and their faithful companion, Dill, sneak out to investigate.

Shortly after spying Atticus, the children witness a group of men who enter the town square and instruct Atticus to leave the premises. Unable to contain herself, Scout bursts into the group in hopes of neutralizing the tension. As a confrontation develops between Jem and Atticus, Scout has the following exchange with the father of a boy she knows from school:

> "Go home, Jem," [Atticus] said. "Take Scout and Dill home."
>
> . . . .
>
> Jem shook his head. . . .
>
> "Son, I said go home."
>
> Jem shook his head.
>
> "I'll send him home," a burly man said, and grabbed Jem roughly by the collar. . . .
>
> . . . .
>
> In the midst of this strange assembly, Atticus stood trying to make Jem mind him. . . .
>
> I was getting a bit tired of that . . . I looked around the crowd. . . . I sought once more for a familiar face, and at the center of the semi-circle, I found one.
>
> "Hey, Mr. Cunningham."
>
> The man did not hear me, it seemed.
>
> "Hey Mr. Cunningham. How's your entailment gettin' along?"
>
> Mr. Walter Cunningham's legal affairs were well known to me; Atticus had once described them at length. The big man blinked and hooked his thumbs in his overall straps. He seemed uncomfortable; he cleared his throat and looked away. My friendly overture had fallen flat.
>
> . . . .
>
> "Don't you remember me, Mr. Cunningham? I'm Jean Louise Finch. You brought us some hickory nuts one time, remember?" I began to sense the futility one feels when unacknowledged by a chance acquaintance.
>
> "I go to school with Walter," I began again. "He's your boy, ain't he? Ain't he, sir?"
>
> Mr. Cunningham was moved to a faint nod. He did know me, after all.
>
> "He's in my grade," I said, "and he does right well. He's a good boy," I added, "a real nice boy. We brought him home for dinner one time. Maybe he told you about me, I beat him up one time but he was real nice about it. Tell him hey for me, won't you?"

> Atticus had said it was the polite thing to talk to people about what they were interested in, not about what you were interested in. Mr. Cunningham displayed no interest in his son, so I tackled his entailment once more in a last-ditch effort to make him feel at home.
>
> "Entailments are bad," I was advising him, when I slowly awoke to the fact that I was addressing the entire aggregation. The men were all looking at me, some had their mouths half-open. Atticus had stopped poking at Jem: they were standing together beside Dill. Their attention amounted to fascination. Atticus's mouth, even, was half-open, an attitude he had once described as uncouth. Our eyes met and he shut it.
>
> "Well, Atticus, I was just sayin' to Mr. Cunningham that entailments are bad an' all that, but you said not to worry, it takes a long time sometimes . . . that you all'd ride it out together . . ." I was slowly drying up, wondering what idiocy I had committed. Entailments seemed all right enough for livingroom talk.
>
> . . . .
>
> Atticus said nothing. I looked around and up at Mr. Cunningham, whose face was equally impassive. Then he did a peculiar thing. He squatted down and took me by both shoulders.
>
> "I'll tell him you said hey, little lady," he said.
>
> Then he straightened up and waved a big paw. "Let's clear out," he called. "Let's get going, boys."[28]

Unlike *To Kill a Mockingbird*, which followed the *Brown v. Board of Education* decision by six years, *The Adventures of Huckleberry Finn* preceded *Plessy v. Ferguson* by eleven years.[29] Published in 1885, *Huckleberry Finn* shadowed the closure of the Reconstruction era that followed the Civil War. Set in the years preceding the war, Huck Finn is the son of a drunkard, and the story follows Huck's escape from his abusive father down the Mississippi River. Although Huck is initially alone when he runs away, he soon encounters Jim, an escaped slave whom Huck knows. The two forge an alliance, albeit a contentious one for Huck, who struggles with the obligation he feels to turn Jim in. This theme runs consistently throughout the novel, springing up when Huck and Jim meet new people.

Huck comes very close to turning Jim in, and even writes a letter to the woman who owns Jim. It is at this climactic moment that Huck must choose between the social obligations of recognizing slavery and what his conscience has told him since the start of this adventure: that Jim is a real person with

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28. *Id.* at 153-54.

29. *To Kill a Mockingbird* was published in 1960; *Brown v. Board of Education* was handed down on May 17, 1954. *The Adventures of Huckleberry Finn* was published in 1885; *Plessy v. Ferguson* was handed down on May 18, 1896.

legitimate feelings who does not deserve to be treated as mere property. After writing the letter that would reveal Jim's status as a runaway, Huck says:

> I felt good and all washed clean of sin for the first time I had ever felt so in my life, and I knowed I could pray now. But I didn't do it straight off, but laid the paper down and set there thinking—thinking how good it was all this happened so, and how near I come to being lost and going to hell. And went on thinking. And got to thinking over our trip down the river; and I see Jim before me, all the time, in the day, and in the nighttime, sometimes moonlight, sometimes storms, and we a floating along, talking, and singing, and laughing. But somehow I couldn't seem to strike no places to harden me against him, but only the other kind. I'd see him standing my watch on top of his'n, stead of calling me, so I could go on sleeping; and see him how glad he was when I come back out of the fog; and when I come to him again in the swamp, up there where the feud was; and suchlike times; and would always call me honey, and pet me, and do everything he could think of for me, and how good he always was; and at last I struck the time I saved him by telling the men we had small-pox aboard, and he was so grateful, and said I was the best friend old Jim ever had in the world, and the *only* one he's got now; and then I happened to look around, and see that paper.
>
> It was a close place. I took it up, and held it in my hand. I was a trembling, because I'd got to decide, forever, betwixt two things, and I knowed it. I studied a minute, sort of holding my breath, and then says to myself:
>
> "All right, then, I'll *go* to hell"—and tore it up.[30]

The above excerpts from *Huckleberry Finn* and *To Kill a Mockingbird* implement Posner's strategy of using a universal theme that maintains the interest of a timeless audience by incorporating perpetual issues that are not easily solved. The passages from these two novels address the notion of confronting authority within the confines of social limitations. Atticus defies society by attempting to provide a black man with a fair legal trial. Scout defies her father by being present at the scene and refusing to leave. Scout also defies the group of men that is threatening Atticus by being so bold as to ask an adult about his personal legal affairs, and by insisting that he acknowledge her efforts at conversation. Huck Finn faces the same societal constraints as Atticus, grappling with the decision of whether to assist a runaway slave, whom Huck knows to be a loyal friend and a person of integrity, in evading authorities. All of the characters challenge societal norms in the context of a racial environment, yet the stories were published seventy-five years apart.[31]

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30. TWAIN, *supra* note 21, at 227-28 (emphasis in original).

31. *The Adventures of Huckleberry Finn* was published in 1885; *To Kill a Mockingbird* was published in

Huck Finn illustrated the problems that went unsolved by the Civil War, namely society's persistent prejudice against blacks and slaves. Although the novel is presumably set in a pre-Civil War context,[32] there would have been no need to address the issues, had they been cured by the end of the war and the Reconstruction era that followed. Seventy-five years later, *To Kill a Mockingbird* addressed many of the same themes explored in *Huckleberry Finn*, specifically Atticus's willingness, like Huck's, to defy society's perspective that a black person does not deserve the dignity of being recognized as a whole person, and thus does not receive effective or adequate protection of the laws.

Huck's decision to rebel against societal mores begins when he recalls the memories that he and Jim have created during their adventure on the raft. Huck's decision to abide by his own conscience, regardless of the consequences society will inevitably impose on him, is clear when he says, "All right then, I'll *go* to hell."[33] Atticus's character serves the same rebellious role as Huck's when he agrees to defend the case against Tom Robinson.[34] The selected passage reveals Atticus's dedication and beliefs through both a contextual mechanism and the specific text. Contextually, Atticus is sitting alone, at night, under a single light bulb, prepared to defend his client should this group of men attempt harm. Atticus believes that his client is entitled to a fair trial, and he is doing everything he can to ensure Tom Robinson receives one, even if it means defending Robinson against a mob of drunk, angry men. This same commitment to do right by his client, regardless of race, is demonstrated when Atticus, refusing to leave the jail, requests that Jem escort Scout and Dill safely home. Atticus is so committed to protecting Tom Robinson that he is not only willing to risk physical harm to himself, but he is also willing to entrust the children's safety to Jem, who is just twelve years old.

The choices that Huck and Atticus both face—of succumbing to society's perspective or trusting individual instinct—suggest that society was facing a similar dilemma during the time periods in which both were written, at the end of a less than successful Reconstruction era and the inception of the Civil Rights Movement. Clearly, the issues had not been fully redressed. In response, two unconnected authors chose to address prevalent societal concerns in their novels,

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1960.

32. There are actually no date references made in the novel. However, given that Jim's owner frees him in her will at the end of the novel, it follows that the setting of the novel took place in a time period during which slaves were still legally bought and sold.

33. TWAIN, *supra* note 21, at 228. Huck's references to going to hell and "finally being washed clean of all sin" are indicative of pressure he was also feeling from a divine source. For purposes of this comment, however, it is sufficient to limit discussion of the common themes to those emanating directly from society.

34. Of course Huck's lesson is self-serving: it is the adventure on the raft with Jim that enables him to understand the conflict he faces. Before developing his friendship with Jim, Huck would not have had reason to question the issue of prejudice and slavery. Atticus, on the other hand, enters the plot with a well-grounded understanding of human dignity, and serves as a lesson for Scout who, like Huck, has not had a personal reason to question society's views on race.

and in so doing touched on topics that continue to be important enough that the novels retain an active readership.

B. Great Judicial Opinions

Accepting Posner's two part assertion that (1) survivability is the operational test for great literature, and (2) the same test does not produce good, accurate, or meaningful results when using it as a gauge for great judicial opinions, the next question then becomes, what defines a great judicial opinion?

1. Technical Elements

Much has been written on the subject of good versus bad judicial opinion writing, but a non-exhaustive list of common technical themes includes: clear articulation,[35] brevity,[36] an organized structure with key components,[37] the artful use of legal rules (including the degree to which use of a particular rule is rational),[38] adherence to precedent,[39] and accurately applying the proper legal

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35. ALDISERT, *supra* note 17, at 12 ("The need to state clearly the precise issues before the court is no less important than setting forth the material facts as succinctly and carefully as possible."); WILLIAM DOMNARSKI, IN THE OPINION OF THE COURT 77 (1996) (using clarity, conviction, or eloquence as one of six criteria in choosing a canon of Supreme Court decisions); Posner, *supra* note 15, at 1424 (listing clarity as a standard instruction given in handbooks on style tips for judicial opinion writers).

36. DOMNARSKI, *supra* note 35, at 34. Domnarski identifies Justice Oliver Wendell Holmes as the first important judicial writer of the twentieth century, who wrote his opinions standing in front of a lectern within one or two days of receiving an assignment. Justice Holmes is quoted as saying, "nothing conduces to brevity like a caving in of the knees."

37. ALDISERT, *supra* note 17, at 71 (affirming that handbooks on judicial opinion writing advocate a five-part opinion structure); Nancy A. Wanderer, *Writing Better Opinions: Communicating With Candor, Clarity, and Style*, 54 ME. L. REV. 47, 55 (2002) ("A well-written opinion consists of five essential parts: the nature of the action, the statement of the facts, the questions to be decided, the determination of the issues, and the disposition and mandate.").

38. JAMES B. WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION 624, 687 (1973) (stating that "the art of legal judgment is necessarily an art in the use—and perhaps the avoidance—of rules" and that "both the judicial judgment and the opinion expressing it should be rational"); *see also* Wanderer, *supra* note 37, at 49 (stating that "[j]udicial scholars in the United States . . . emphasize the importance of writing a reasoned justification for the outcome in a case as a way of achieving the goals of our judicial system"); Kaplan, *supra* note 6, at 531 (citing the book being reviewed as providing that "the main measures of the quality of a judicial opinion lie in its assimilation of all the facts and the fairness and evenhandedness of its statement and handling of all the contentions that can be plausibly advanced on either side").

39. WHITE, *supra* note 38, at 711 (quoting B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112-14 (1921)). Cardozo emphasizes that precedent, while useful in ensuring uniformity, is only useful so long as it is "balanced against the social interest served by equity and fairness or other elements of social welfare." Thus, while sound judicial opinions may rest on decided precedent, equally sound judicial opinions may not, if done so in light of circumstances warranting departure. *See also* Walker Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U. L. REV. 915, 916 (1961) (identifying that "giv[ing] a Yes or No decision that will more or less consistently reflect the framework of the legal past . . . and that at the same time will sympathetically affirm my own and my society's current notions of justice" is the "dilemma . . . at the heart of the judge's function").

rule.[40] A consensus exists that these elements surface to some degree in all good judicial opinions.

Clarity has been recognized as "the essential ingredient in achieving the goals of [society's] judicial system,"[41] and yet the first thing the public associates with lawyers is "written language impossible to understand."[42] Formulaic opinions are one suggested answer, with the issue presented initially and followed by the facts, the pertinent legal rules, the application of those rules, and the conclusion.[43] While it goes without saying that an organized structure can certainly add to an opinion's clarity and assist an audience to understand a complex document, it is equally clear that structure alone cannot suffice to cure an opinion of its ambiguity.[44]

Brevity is of course a trait cherished by readers of judicial opinions, and equally valued by the authors themselves.[45] But because brevity may be impossible when dealing with complex issues of law, organized structure at these times is even more important in producing clarity.[46]

Adhering to precedent commands a different level of respect, depending on one's interpretation of the role(s) of the judiciary. An opinion that is well written should "set[] a powerful precedent because it continues to embody the persuasive truth that the judge's rhetoric displays."[47] However, Justice Benjamin Cardozo emphasized that precedent, while useful in ensuring uniformity, is only useful so long as it is "balanced against the social interest served by equity and fairness or other elements of social welfare."[48] It is at the moment "when [a judge] reforms

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40. Robert F. Blomquist, *Playing on Words: Judge Richard A. Posner's Appellate Opinions, 1981-82—Ruminations on Sexy Judicial Opinion Style During an Extraordinary Rookie Season*, 68 U. CIN. L. REV. 651, 679 (2000) (quoting EDWARD D. RE, APPELLATE OPINION WRITING 1 (1975)).

41. Wanderer, *supra* note 37, at 48.

42. *Id.* at 55 (quoting George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333, 333 (1987)).

43. *Id.* at 55-61 (suggesting that all well-written opinions will include the essential five parts listed, and in that order) *and* John Leubsdorf, *The Structure of Judicial Opinions*, 86 MINN. L. REV. 447, 448 (2001) (stating that "[o]pinions do tend to follow a standard order . . . [which] is, of course, appropriate to the opinion's functions").

44. DOMNARSKI, *supra* note 35, at 34.

> One of the reasons that judicial opinions are sometimes so opaque and irrational perhaps, in the sense of not being logical developments structurally, is because of the patchwork that goes into their creation, satisfying this judge, getting a majority by putting in a footnote, striking out a sentence that would have made a paragraph lucid, and it becomes opaque. This is also one of the reasons why judicial opinions, except dissents, are usually very poor literature.

Id. (quoting an interview with Justice Douglas).

45. *Id.* at 35 (quoting Justice Holmes in remarking on a set of his own opinions that "[t]heir only merit is brevity").

46. Wanderer, *supra* note 37, at 59 ("Because lengthy opinions are sometimes difficult to dissect, they should be divided into sections with section headings corresponding to each of the issues on appeal.").

47. John Fischer, *Reading Literature/Reading Law: Is there a Literary Jurisprudence?* 72 TEX. L. REV. 135, 148 (1993).

48. CARDOZO, *supra* note 39, at 112-14.

or brings to light what had a previous existence, but had been perverted or obscured"[49] that ignoring *stare decisis* is permitted.[50]

These technical elements are not mutually exclusive of one another; a brief opinion that is well organized is not necessarily clear, nor is a clear and brief opinion necessarily well organized. Any opinion that is clear, brief, well organized, or adheres to precedent without advancing a logical and well reasoned line of thought will never be considered "great."[51] The court's rationale for an opinion is ordinarily assumed devoid of emotion, even if the process by which a judge arrived at the decision was not. Presumably, this is because "a number of the strongest emotions, such as anger, disgust, indignation, and love, would be out of place because they would interfere with the problem-solving process. . . ."[52] Consequently, a good judicial opinion will strive to meet the aforementioned technical rules, while attempting to neutralize any language that implies an emotional bias. In turn, "the overwhelmingly preponderant subject matter for rhetorical analysis transpires to be a series of legally stated normative imperatives or presumptions . . . it is these figures that the . . . legal judgment will utilize to maintain its legitimacy in the face of the legal audience."[53] Judicial opinions are thus judged by both their technical and substantive merit.

Justice Benjamin Cardozo believed that distinguishing an opinion's technical merit from its substantive merit was an imprecise and counterproductive task because the two are nearly inseparable.[54] An opinion's substantive value is minimal though, when its text is inaccessible due to poor technical traits. It is at this point, where substance and technicalities are not significant enough to create lines between great and good judicial opinions, that an opinion's use of rhetoric, i.e., the way in which the opinion persuades, comes into play.

2. *The Role of Empathy*

Posner is skeptical of the relationship between law and literature,[55] but tries to make sense of it, in part, by locating the two genres on a spectrum of persua-

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49. Horace Binney, *Life of Chief Justice Tilghman*, 1 AM. L. MAG. 1, 14 (1843).

50. *Id.* Binney equivocates this as being the moment that stare decisis is no longer compelling by stating that this is when, "[i]f ever[,] [that a judge's] labours approach the merit of discovery ." *Id.*

51. *See infra* Part III.C for discussion on additional factors.

52. *See* Posner, *supra* note 2, at 311.

53. GOODRICH, *supra* note 18, at 119.

54. BENJAMIN N. CARDOZO, *Law and Literature, reprinted in* LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 4-6 (Harcourt, Brace and Co. 1931) "'We are merely wasting our time,' so many will inform us, 'if we bother about form when only substance is important.' I suppose this would be true if any one could tell us where substance ends and form begins." *Id.* Also subscribing to Henry James' view on the matter, "'Form *is* not substance to that degree that there is absolutely no substance without it. Form alone *takes*, and holds, and preserves substance, saves it from the welter of helpless verbiage that we swim in as in a sea of tasteless tepid pudding.'" *Id.*

55. Hence, the title: LAW AND LITERATURE, A *MISUNDERSTOOD* RELATION (emphasis added).

sion.[56] Posner places logic and emotion at opposite ends of the spectrum, thereby inferring that judicial opinions and literature will follow to their respective ends.[57] Posner acknowledges that these ends of the spectrum are extreme, and in between the ends of logic and emotion lay other means of persuasion, which he calls the "domain of practical reason."[58] Posner says that this domain "includes, among many other methods of persuasion available within the legal culture, appeals to common sense, to custom, to precedents and other authorities, to intuition and recognition[,] . . . to history, to consequences, and to the 'test of time.'"[59]

Although differences exist in their application, Posner concedes that judicial opinions and literature both utilize the techniques found on this spectrum to assure readers of the integrity of the text. The fact that both genres employ similar means of persuasion, however, also serves to illustrate the dissimilar grounds on which each genre finds success: judicial opinions successfully persuade the audience when the text is founded on reason (or other modes located closer to that end of the spectrum), while literature achieves persuasion when readers complete a novel, confident that the emotions at work are legitimate.[60]

Martha Nussbaum also explores the relationship between literature and judicial opinions: "storytelling and literary imagining are not opposed to rational argument, but can provide essential ingredients in a rational argument."[61] She makes the further claim that "the literary imagination . . . seems to [be] an essential ingredient of an ethical stance that asks us to concern ourselves with the good of other people whose lives are distant from our own. Such an ethical stance will have a large place for rules and formal decision procedures . . . ."[62] A literary imagination, Nussbaum explains, serves the purpose of imagining connections between two people (or ideas, or opinions) that were previously thought to be entirely unconnected:

> Literature focuses on the possible, inviting its readers to wonder about themselves . . . . In their very mode of address to their imagined reader, [literary works] convey the sense that there are links of possibility, at least on a very general level, between the characters and the reader. The reader's emotions and imagination are highly active as a result . . . .[63]

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56. POSNER, *supra* note 10, at 287.

57. *Id.*

58. *Id.*

59. *Id.*

60. *But see* Joseph William Singer, *Persuasion*, 87 MICH. L. REV. 2442, 2454 (1989) (claiming that the creation of an empathetic relationship is what truly enables persuasion to occur).

61. NUSSBAUM, *supra* note 1, at xiii.

62. *Id.* at xvi.

63. *Id.* at 5.

Nussbaum's assertion is resonant of one made by Henry James in *The Art of Fiction*:

> The power to guess the unseen from the seen, to trace the implication of things, to judge the whole piece by the pattern, the condition of feeling life in general so completely that you are well on your way to knowing any particular corner of it—this cluster of gifts may almost be said to constitute experience, and they occur in country and in town, and in the most differing stages of education.[64]

Although James' observation is addressed to writers of fiction, the premise is analogous to Nussbaum's argument that authors of judicial opinions must imagine the impact of their words and foresee the implications on future individuals.[65] This method of solving litigants' disputes employs means that are not near (or immediately adjacent to) the end of Posner's spectrum that focuses on pure logic. Nussbaum supports her premise with the same quote from Justice Breyer used at the beginning of this piece, but the two are not alone in thinking that reading literary works, and thus indulging emotionalism, puts judges at an advantage. In a letter to a twelve-year-old seeking advice on how to prepare for a legal career, Justice Felix Frankfurter gave the following reply:

> The best way to prepare for the law is to come to the study of the law as a well-read person . . . . No less important for a lawyer is the cultivation of the imaginative faculties by reading poetry, seeing great paintings, . . . and listening to great music. Stock your mind with the deposit of much good reading, and widen and deepen your feelings by experiencing vicariously as much as possible the wonderful mysteries of the universe. . . .[66]

Thus, another commonality exists between judicial opinions and literature: the need for an imagination that will enable a writer of either genre to envision and foresee how one's acts will affect future individuals and relate with other aspects of life.[67] This literary imagination, as Nussbaum terms it, is necessary for

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64. Henry James, *The Art of Fiction*, *in* PARTIAL PORTRAITS (1888), *reprinted in* WHITE, *supra* note 38, at 48.

65. NUSSBAUM, *supra* note 1, at 81-82, 92-94, 99.

66. Letter from Felix Frankfurter, Associate Justice, U.S. Supreme Court, to M. Paul Claussen, Jr. (May, 1954), *in* THE WORLD OF LAW: THE LAW AS LITERATURE 725 (Ephraim London ed., Simon and Schuster 1960).

67. *See also* Blomquist, *supra* note 40, at 671 (quoting Professor Nussbaum's assertion that "'the ability to think of people's lives in the novelist's way is . . . an important part of the equipment of a judge—not the whole, or even the central part, but a vital part nonetheless,'" *in* (Martha Nussbaum, *Poets as Judges: Judicial Rhetoric and the Literary Imagination*, 62 U. CHI. L. REV. 1477, 1496 (1995)); Fischer, *supra* note 47, at 136

literary authors and judges who wish to achieve universal appeal to a perpetual audience.

III. DIFFERENCES BETWEEN THE GENRES

The most significant similarity between great judicial opinions and great literature, as identified thus far, is that writers in both genres must concern themselves with an unknowable (and perhaps, non-existing) audience. This is the element of universality that Posner identifies as enabling literature to stand the test of time, and that Justice Breyer and Nussbaum both identify as enabling a judge to issue far-reaching opinions. The element of universality is significant, but there is still the question of whether great literature and great judicial opinions command a difference significant enough to warrant distinctive tests of greatness. In a word, yes. The difference that is most significant between the two genres is perhaps the most obvious characteristic of each—literature and judicial opinions are written for different reasons. Consequently, the rhetoric to which each subscribes, i.e., the way in which the text attempts to persuade its audience by achieving a chosen end, is different as well.

A. *Different Purposes*

Judicial opinions are written to induce action, a mandate to the litigating parties to perform in a certain way.[68] Specific goals from one judicial opinion to the next may differ, but all judicial opinions are written with the intent of persuading the audience. The audience for a judicial opinion does not typically include the public. Generally, it includes the litigating attorneys, fellow members of the judiciary, the parties, future litigants, and only occasionally, the public. Judges attempt to convince these readers that their decision is the product of such a logical and well-reasoned argument that there was simply no alternative outcome for the disposition of the case.[69] In so doing, the opinion, whether sitting in a library gathering dust, or being read with fervor by lawyers, litigants, and the public, creates a binding authority, regardless of who knows about it. In this way judicial opinions act in both a dormant and active sense.[70] They are dormant in that they remain unknown by most people over whom they have an effect, and become active only when a disagreement (i.e., a lawsuit) causes the pertinent law

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(stating that "[l]iterature . . . shapes the ethical sensibility of the aspiring lawyer and results in a responsible use of language in legal practice").

68. *See* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1372 (1995) (stating that "judges write opinions . . . to tell others . . . what to do").

69. Gerald Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1557, 1571, 1589 (1990). In calling persuasion the ultimate goal of judicial opinions, it is necessary to point out that three sub-purposes are simultaneously accomplished in achieving persuasion: "advocacy, closure, and the rule of law." *Id.* at 1589.

70. *See* Wald, *supra* note 68.

to become known by the parties involved. While the opinion has, at that point, certainly become active for the parties involved in the lawsuit, it remains dormant for all the uninvolved parties who have no knowledge of its existence. But even while waiting for a dispute that will bring a given opinion into light, the opinion is still binding, still commanding an adherence to the law it creates and thus simultaneously dormant and active.

A novel does no such thing, nor does it purport to. A novel that goes unread by an individual may indirectly affect that person, if he or she has an acquaintance who is so taken with the greatness of Shakespeare that conversations become filled with references to one of his plays. But a person who has not read *Hamlet* for himself does not experience the intimacy of individually reading the great work of literature. Consequently, the unread person will lack the understanding, imagination, or empathy he may have gained from reading *Hamlet*, but neither society, the law, nor justice have the means of holding such a person accountable for his or her unawareness. This is not to suggest that understanding, imagination, or empathy are the only purposes that writers of literature intend to serve; rather, the purposes of literature warrant a less defined description than the purpose(s) of judicial writing, as "literature is likely to celebrate and explore the problematic, the uncertain, the ambiguous, the subjective, the irrational, the insoluble .... It strives to preserve the problems that have not been solved—problems that may require preservation precisely because of our instinct to look away or to embrace feigned solutions."[71] In comparison, although judicial opinions undoubtedly deal with the uncertain, ambiguous, subjective, irrational, and insoluble, they do so specifically for the purpose of resolving disputes, not preserving them.

B. Different Rhetorics

Given the different goals of judicial opinions and literature, the distinctive means used to achieve the differing ends become clearer:

> The judicial opinion is a claim of meaning: it describes the case, telling its story in a particular way; it explains or justifies the result; and in the process it connects the case with earlier cases, the particular facts with more general concerns. It translates the experience of the parties . . . into the language of the law . . . and it translates the texts of the law . . . into the terms defined by the facts of the present case.[72]

The means used in conveying the "claim of meaning" to the opinion's reader is primarily based on the use of an impersonal voice,[73] which is meant to imply a

71. Wetlaufer, *supra* note 69, at 1564.

72. James Boyd White, *What's an Opinion For?* 62 U. CHI. L. REV. 1363, 1367-68 (1995).

73. Wetlaufer, *supra* note 69, at 1565.

lack of personal investment in the decision, and hence, a lack of emotion. Predictably, literature often uses a different approach:

> [Literature] will . . . acknowledge and examine the multiplicity of perspectives and the personal contingency of reality. Though it may tell some story in a way that renders the truth, it will rarely claim to reveal the one true meaning of things . . . . [I]t will confront the limits of knowledge and reason, often casting the rational and logical man not as the hero but as the fool.[74]

Distinguishing between the two formats illustrates the place that rhetoric has in both. Aristotle originally described rhetoric as "a faculty or art whose practice will help us to observe 'in any given case the available means of persuasion.'"[75] Thus, "[rhetoric] was quite simply . . . the study of all forms of public speech."[76] Over time, however, a different meaning has developed, and rhetoric is now popularly understood as a necessary evil, a means of persuasion in which a party uses extreme measures to communicate his message and hopes by doing so to convince his audience that what he is saying is true.[77] Described as "specious, bombastic or deceitful use of language[,] rhetoric . . . is the abuse of language."[78] Though not a universally accepted definition,[79] this characterization inherently separates the meaning of the words being spoken from the form in which they are delivered.

Though both legitimate content and the means of communication are inescapably necessary for a sound judicial opinion,[80] the content of great literature need not conform to a similar set of formulaic standards, so long as it centers on issues that will have universal appeal to encourage its survival.[81] Thus, the content matter of great literature is still an issue, but because literature does not operate within the same boundaries as judicial opinions, novelists may concern themselves as much with stylistic matters as with the content of their works. In contrast, the content of a judicial opinion, specifically its legal reasoning, is the crux of the opinion's attempt at persuasion.[82] Faulty reasoning,

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74. *Id.* at 1564.

75. FISH, *supra* note 8, at 478 (quoting Aristotle's definition of rhetoric).

76. *Id.*

77. *See, e.g.*, GOODRICH, *supra* note 18, at 8.

78. *Id.* at 85.

79. The constraints of this paper preclude delving into the history of rhetoric's development and its disparate definitions. For discussions on the matter, *see* FISH, *supra* note 8, at 478.

80. *See supra* pp. 19-23.

81. *See supra* pp. 6-7.

82. Wanderer, *supra* note 37, at 49 ("Judicial scholars in the United States . . . emphasize the importance of writing a reasoned justification for the outcome in a case as a way of achieving the goals of our judicial system.").

regardless of an opinion's technical merit, only begs for reversal on appeal.[83] Therefore, drafters of judicial opinions must be concerned with what they say and how they say it because failure to do so leads to breakdown in the overall persuasion of a piece, and if an opinion has failed to persuade its audience, then it seems unlikely that such an opinion will be characterized as "great" by any standard.

C. The Elements at Work: Excerpts From the Cases

Authors of judicial opinions seem to walk a finer line than authors of literature. Judicial opinions must address more topics than merely an endearing issue that generations of people will find compelling. An opinion must balance the technical merit that is necessary for a great judicial opinion against a broader spectrum of interests than those presented by the parties in their briefs—the interests of the absent parties.

Brown v. Board of Education provides an interesting case study because although it is categorically accepted as great,[84] it arguably lacks technical merit. It is true that *Brown* is (1) clear, with its easy declaration of the issue,[85] (2) brief, at a mere 13 pages long,[86] and (3) undoubtedly a masterful demonstration of Chief Justice Earl Warren's "artful use of legal rules," as he refused to apply legislative history where it was not helpful,[87] instituted the use of social science data as reliable evidence on which to base decisions,[88] and wrote with the clear intent of targeting an audience larger than the parties and lawyers involved in the case.[89] And although the Court received backlash throughout the country in the opinion's immediate aftermath,[90] the fiftieth anniversary celebrations that marked

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83. *But see* discussion regarding Cardozo's statement that separating form and substance is a counterproductive task, *supra* p. 21.

84. *See generally* DVD: Judicial Wall Dedication (University of the Pacific, McGeorge School of Law 2003) (on file with the McGeorge School of Law Dean's Office). At this filmed event, Justice Richard Goldstone of the Constitutional Court of South Africa spoke regarding the effect that *Brown v. Board of Education* has had on the international legal community. He remarked that *Brown* has been cited by courts in his own country, Canada, and India as a landmark decision worthy of precedential value outside of the United States.

85. 347 U.S. 483, 493 (1954). The issue of the case is stated as follows: "We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does."

86. *Id.* at 483-496.

87. RICHARD KLUGER, SIMPLE JUSTICE 697 (1975) (quoting Barret Prettyman, Justice Robert Jackson's law clerk at the time as saying "'[t]he genius of the Warren opinion . . . was that it . . . didn't pretend that the Fourteenth Amendment was more helpful than history suggested'").

88. *Id.* at 703-06.

89. *See* Gibson, supra note 39, at 922 (stating that the majority of an opinion's audience largely consists of professionals, but that "occasionally the judge writes with an awareness that his words may be displayed to the general public").

90. *See* Michael J. Fellows, *Civil Rights—Shades of Race: An Historically Informed Reading of Title*

the decision's longevity demonstrate that it has come to be accepted as an unequivocally accurate decision.[91]

The remainder of Chief Justice Warren's opinion, however, does not incorporate the other technical elements of organization and adherence to precedent. The opinion is obviously organized, though not in the traditional fashion where the issue is followed by the procedural history, then the facts, the legal rules and doctrine, and finally, the court's decision. Instead, it begins by foreshadowing the issue by stating "a common legal question justifies [the] consideration [of these various cases] together in this consolidated opinion."[92] This statement is followed with a short factual description, an equally short procedural history, and then a synopsis of the "separate but equal" doctrine.[93] The Court does not address the issue of the case until after (1) the plaintiffs' arguments have been described and (2) an explanation of why history is not helpful in interpreting the Fourteenth Amendment. The Court then discusses evidence regarding the plaintiffs' claims, distinguishes prior cases addressing the issue of separate but equal in schools, and finally presents the reasons for the inevitable holding.[94] The Court addresses administrative concerns in facilitating the order, and the opinion quickly ends.

Despite his divergence from sound technical practices, Chief Justice Warren managed to combine the sound logic and reason that any judicial opinion is supposed to base its finding on with an appeal to empathy, thus convincing the opinion's audience (which did include the public) that desegregation was the only available decision for the Court. Chief Justice Warren composed the opinion in such a way as to force the reader into understanding—and empathizing with—the unfortunate psychological and social effects that would have inevitably plagued segregated children if *Plessy v. Ferguson* remained good law.[95] Because

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VII, 26 W. NEW ENG. L. REV. 387 n. 83 (2004) (inferring that a "violent repression of black southerners" occurred post *Brown*) and Gary D. Rowe, *Constitutionalism in the Streets*, 78 S. CAL. L. REV. 401, 453 (2005) (stating that two years after *Brown* was issued, Justice William Douglas appeared before the Ninth Circuit Court of Appeals to address massive resistance to school desegregation).

91. *See* Michael Heise, *Brown v. Board of Education, Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 280 (2005) (characterizing *Brown* as having "*succeeded* in launching a desegregation movement") (emphasis added) *and* Earl M. Maltz, *Brown and Tee-Hit-Ton*, 29 AM. INDIAN L. REV. 75 (2004) ("The year 2004 witnessed a vast outpouring of scholarship analyzing the fiftieth anniversary of the Supreme Court's decision in *Brown v. Board of Education* . . . . The magnitude of this literature reflects the impact of *Brown* not only on the development of constitutional jurisprudence, but also on the overall pattern of race relations in America."). Though these scholars credit the *Brown* court for its landmark decision, contemporary authors also question whether the promise of *Brown* has been fulfilled. *See e.g.*, Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973, 974 (2005) (book review) (calling it "somewhat ironic . . . that on the fiftieth anniversary of Brown many scholars and some civil rights activists regard the decision as a failure" due to its failed implementation).

92. *Brown*, 347 U.S. at 486.

93. *Id.*

94. *Id.* at 494 (reasoning that "[separation] . . . solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone" and "[s]eparate educational facilities are inherently unequal").

95. *Id.* ("To separate them from others of similar age and qualifications solely because of their race

Chief Justice Warren presented *Plessy* as an impossible rule of law to uphold, the Court was forced to diverge from the tradition of *stare decisis*. However, the Court's divergence from precedent does not necessarily mark the opinion as failing the technical elements. According to Justice Cardozo's theory, precedent is only useful for uniformity purposes so long as it is "balanced against the social interest served by equity and fairness or other elements of social welfare."[96] Thus, while sound judicial opinions may rest on precedent, equally sound judicial opinions may not adhere to *stare decisis* if circumstances warrant departure. Chief Justice Warren managed to present these circumstances as such, thus allowing the Court to depart from the holding in *Plessy*.

If the *Brown* decision is not great for its use of solid technical features, then is it because of the mountainous issue it resolved? Is it because of the decision's timeliness, sandwiched between the tail end of World War Two, an era dominated by the notion that oppression of human rights was fundamentally wrong, and the beginning of the Civil Rights movement that marked the United States during the mid-twentieth century?[97] Or is it because of the combination of both the issue resolved and the timeliness in which it was decided? If *Brown v. Board of Education* is great for any one of these single reasons, it is also great for its implementation of empathy. Chief Justice Warren unabashedly acknowledged that the decision was being issued not merely for the parties before the Court, but instead to all students who were certain to experience the negative effects that segregation would have if no change were ordered.

> We must look . . . to the effect of segregation itself on public education . . . . We must consider public education in the light of its full development and its present place in American life throughout the nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.[98]

Chief Justice Warren's approach epitomizes what Justice Breyer and Nussbaum advocate: listen to an individual's story, learn as much as one can about the issue without being able to walk in that individual's shoes for a day,[99] and then attempt to issue an opinion that resolves the instant dispute on both an

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generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

96. CARDOZO, *supra* note 39, at 112-14.

97. *See generally* DVD: Judicial Wall Dedication, *supra* note 84. At this filmed event, Justice Richard Goldstone of the Constitutional Court of South Africa spoke regarding the affect that *Brown v. Board of Education* has had on the international legal community.

98. *Brown*, 347 U.S. at 492-93.

99. *See id.* at 495 n. 11. Chief Justice Warren relied on psychological studies to support the conclusion that "'[s]egregation of white and colored children in public school has a detrimental effect upon the colored children . . . . Segregation with the sanction of the law, therefore, has the tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.'" *Id.* Although Chief Justice Warren's reliance on the psychological studies has been criticized, it still illustrates the point on hand: that Chief Justice Warren was concerned with understanding these plaintiffs' perspectives, and that he was determined to understand it to the best of his ability.

immediate and grand scale. *Brown* illustrates the complex array of factors that are present in judicial opinions by balancing the technical elements of an opinion, including its substantive legal reasoning, against a need for emotionalism in order to demonstrate the gravity of the issue decided. Chief Justice Warren carefully chose which technical merits to implement, and combined these choices with the rhetorical device of empathy, a combination that persuaded his audience that the doctrine of separate but equal "has no place" in the field of public education.[100]

The fact that law students continue to read *Plessy v. Ferguson* in conjunction with *Brown*[101] undercuts the idea of using survivability as the operational test for great judicial opinions. *Plessy* is no longer viable law,[102] but is still perpetually taught in modern law school curricula, and as such is placed directly before *Brown* in all of the leading constitutional law casebooks.[103] This juxtaposition is interesting because *Plessy* is often cited as a terrible opinion,[104] while *Brown* is cited as one of the greatest substantive opinions ever written by the Court.[105]

The difference between the two opinions does not lie in distinctive technical qualities. Indeed, *Plessy's* technical merit is perhaps as meritorious as *Brown's*. Like *Brown*, it is clear, with its easy declaration of the issue,[106] and brief, at a mere fifteen pages long.[107] The opinion also attempts an "artful use of legal rules" by avoiding an in-depth analysis of the Thirteenth Amendment in calling it simply "too clear for argument."[108] Similarly dismissive, the *Plessy* Court said the Fourteenth Amendment, though intended to "enforce the absolute equality of the races before the law," was simply not intended to "abolish distinctions based upon color, or to enforce social, as

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100. *Id.* at 495.

101. *See e.g.*, NORMAN REDLICH ET AL., CONSTITUTIONAL LAW 656 (4th ed. 2002); RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES 624 (6th ed. 2000); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 637 (14th ed. 2001).

102. *Brown*, 347 U.S. at 495.

103. REDLICH, *supra* note 101 (placing *Plessy* at pages 656-58 with *Brown* directly following at 658-662); ROTUNDA, *supra* note 101 (placing *Plessy* at 624-626 with *Brown* directly following at 626-629); SULLIVAN & GUNTHER, *supra* note 101 (placing *Plessy* at 637-639 with *Brown* directly following at 639-643). One leading casebook, JESSE H. CHOPEL ET AL., CONSTITUTIONAL RIGHTS AND LIBERTIES: CASES—COMMENTS—QUESTIONS 1086, 1162, 1167 (9th ed. 2001) places Korematsu v. United States, 323 U.S. 214 (1944) in between *Plessy* and *Brown*, but the point remains that *Plessy* continues to be taught, despite being overturned.

104. *Compare* Eric K. Yamamoto et al., *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1281 n.70 (2003) (criticizing *Plessy* for "legitimiz[ing] the worst form of race discrimination) *with* Kent Greenawalt, *Interpretation and Judgment*, 9 YALE J.L. & HUMAN. 415, 430 (1997) (calling *Brown* a great constitutional decision).

105. *See e.g.*, DVD: Judicial Wall Dedication, *supra* note 84. *See also* KLUGER, *supra* note 87, at 697 (1975). "'The genius of the Warren opinion . . . was that it was so simple and unobtrusive . . . . His opinion took the sting off the decision, it wasn't accusatory, and it didn't pretend that the Fourteenth Amendment was more helpful than history suggested . . . .'" *Id.* (quoting Barret Prettyman, Justice Robert Jackson's law clerk).

106. 163 U.S. 537, 542 (1896) (stating that the issue is whether the constitutionality of race-based segregation in railroad cars "conflicts both with the thirteenth amendment of the constitution, abolishing slavery, and the fourteenth amendment, which prohibits certain restrictive legislation on the part of the states").

107. *See* 163 U.S. at 537-52.

108. *Id.* at 542.

distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either."[109] Indeed, the difference between *Plessy* and *Brown* lies in the *Plessy* Court's unwillingness to engage in empathy for the plaintiffs. The opinion does not indicate that the Court ever considered the harm such a rule would have on the plaintiffs or their successors. Instead, it focuses on the ability of the states to draft legislation permitting segregation in public places, relying on the establishment of segregated schools in "states where the political rights of the colored race have been longest and most earnestly enforced."[110]

Today, *Plessy* is taught not for its lesson of how to write (or not write) a judicial opinion, but to provide students with a contextual understanding of *Brown's* significance. Reading *Brown* by itself still would be a useful exercise in reading an artful opinion; it still would be a useful exercise in learning the law of equal protection; perhaps it would even be a useful exercise in appreciating the political climate of the United States in the early 1950s. What it would not be, however, is useful in understanding the progression of segregation and the change of view that the Court experienced in a short time frame—a mere sixty years.[111]

For purposes of this comment, however, the bottom line is that the term "survivability" lacks meaning when a "great" judicial opinion that uses empathy as a rhetorical device is taught alongside a "terrible" opinion that demonstrates some technical merit, but misses the boat in understanding what the long-term implications of its holding would be. Survivability cannot stand as the operational test for great judicial opinions when both great and horrible opinions maintain a simultaneous presence in modern times.

IV. CONCLUSION

Great literature and great judicial opinions share the need to address a perpetual audience, which requires authors in both genres to envision how their words will affect an unknowable group of readers. Consequently, authors in both genres must render their particular narratives in ways most likely to create empathy for an unknowable audience. Per Posner's test, authors of literature will realize the consequence of their unwillingness to do so when their works fail to survive. Authors of judicial opinions, however, need not concern themselves with such a fate when truly bad decisions, whether bad in substance, form, or both, continue to be taught and utilized alongside the truly great opinions that do demonstrate an effort at empathy. It is for this reason that Posner's test of time for great literature is not helpful when evaluating whether a judicial opinion is "great."

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109. *Id.* at 544.

110. *Id.*

111. *Plessy* was decided in 1896, *Brown* in 1954.

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