

Rhetoric Counts: What We Should Teach When We Teach Posner

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*It is not, in short, a good judicial opinion. It is merely the greatest judicial opinion of the last hundred years. To judge it by "scientific" standards is to miss the point. It is a rhetorical masterpiece, and evidently rhetoric counts in law; otherwise the dissent in Lochner would be forgotten.*¹

I. INTRODUCTION

Evidently, rhetoric does count; otherwise we would not be teaching so many opinions by Judge Richard A. Posner.² This Essay will argue that Judge Posner uses certain rhetorical strategies to attract casebook editors and law professors to his opinions, and that the editors and professors happily succumb.³ As Judge Posner might say, "There is no crime in that." The frequency with which his opinions

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¹ RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 285–86 (1988).

² Judge, United States Court of Appeals for the Seventh Circuit, appointed by Ronald Reagan in 1981. The University of Chicago: The Law School, Faculty, <http://www.law.uchicago.edu/faculty/posner-r/> (last visited Mar. 10, 2009). He served as Chief Judge from 1993 to 2000. *Id.* From 1969 until his appointment, he was a Professor of Law at the University of Chicago, and he continues to teach as a Senior Lecturer there. *Id.* Judge Posner is also one of the founding scholars of the "law and economics" movement. *See generally*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (7th ed. 2007).

³ One reason for Judge Posner's particular appeal now is that university law faculties face allegedly competing demands to develop a more sophisticated theoretical discipline and to teach professional practice. *See, e.g.*, WILLIAM M. SULLIVAN ET AL., THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 4–7 (2007) [hereinafter THE CARNEGIE REPORT]. As a judge with major scholarly credentials, Judge Posner has been able to create a body of didactic literature in a genre that enables his audience to meet, or seem to meet, both demands efficiently—as he might say.

appear in the casebooks simply shows that they meet some demand in the market for legal educational texts.

In this Essay I reflect about the nature of that demand⁴ and about why a kind of symbiosis has developed between this particular judge and the legal academy,⁵ and what that symbiosis might tell us about legal education today.⁶ I suspect that most law faculty assume Judge Posner's opinions are anthologized because they provide examples, often controversial, of economic instrumentalism in judging, and they happen to be unusually clear and even entertainingly written. I also suspect that most faculty feel reasonably comfortable dealing with Judge Posner's opinions on the merits, whether or not they approve of his judicial philosophy or his particular resolution of a case. The volume of scholarship devoted to the merits of Judge Posner's opinions suggests such comfort.

My focus is different. I think Judge Posner's rhetoric, not his economic analysis, is the principal reason his opinions are so commonly anthologized for students. His rhetoric not only presents the substantive analysis in an intriguing way but also is itself a major part of the lesson students absorb. Just as Justice Holmes's rhetoric in *Lochner*⁷ ultimately changed minds and the law,⁸ so too, I think, Judge Posner's rhetoric may change minds and the law. His rhetoric powerfully conveys attitudes about law and society that go well beyond a calculus of economic efficiency. Yet, I will argue that these lessons are rarely identified, much less critiqued, in the typical law school classroom because most law professors focus on teaching doctrine and lack the training or supporting materials for engaging in rhetorical analysis. This Essay provides some of those materials and references for those who would like to try such an approach.

Judge Posner's rhetoric is a good chunk of his message, not just the means by which he conveys it. When the author is as skilled in rhetoric as Judge Posner, law professors' inattention to rhetoric allows students, and perhaps faculty as well, to receive more information than they may consciously perceive as being communicated. Such inattention may produce lawyers who are less skilled in critical reading and less conscious of persuasive rhetorical strategies than they should be.

⁴ See *infra* Part IV.

⁵ See Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM. & MARY L. REV. 1379, 1388–91 (1995).

⁶ See *infra* Part IV.

⁷ *Lochner v. New York*, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting).

⁸ RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 394 (1990).

Casebooks do not just ignore rhetoric's importance; they actively camouflage it. Judge Posner constructs many of his opinions as educational texts for law students and faculty, but casebook editors present them as if they were judicial opinions like any other—written primarily to justify a judgment in a case. Thus, at least from the student's point of view, they are cloaked in authority that a substantively identical essay would lack. I will argue that, as a result, Judge Posner is not only influencing several generations of lawyers in their understanding of legal doctrine but is also normalizing for them a specific judicial rhetorical approach to legal controversies.

I do not intend this Essay as yet another critique of Judge Posner's economic theories or of his judging, although some criticism of both may be inferred from my analysis of his rhetoric. Instead, my principal target is the modern legal academy's neglect of rhetoric as a subject worth studying. That Judge Posner's success in casebooks is cursorily and commonly attributed to his stature in law and economics or to his ability to "write well" is an especially vivid example of a long-standing bad habit of discounting authorship, context, and rhetoric in favor of doctrinal coverage in law schools.

This Essay is meant to inspire more interest in law and rhetoric as a focus of direct inquiry—rather than as a marginal topic or a skill confined to a first-year legal writing class—and bring a new perspective to the eternal debate about what law students should learn in law school.⁹

Part II of this Essay summarizes my argument. Part III explains Judge Posner's marked interest in rhetoric and connects that interest to his upbringing, his pragmatic theory of judging, and his preference for economic rationales. Part IV explains why Judge Posner's rhetorical strategies make his opinions so attractive to casebook editors and law professors. Part V describes three enriching rhetorical topics that professors could use to direct law students' attention to Judge Posner's strategies. Part V also devotes particular attention to

⁹ See, e.g., THE CARNEGIE REPORT, *supra* note 3, at 4. This report was sponsored by the Carnegie Foundation for the Advancement of Teaching and is commonly called the *Carnegie Report*. *Id.* at 3. Although the *Carnegie Report* recommends significant changes to other aspects of legal education in U.S. law schools, it characterizes the "case dialogue" as the "signature pedagogy" and approves its continuing use at least in the first-year curriculum. *Id.* at 47–86. That pedagogy is tied to the use of traditional casebooks—which is to say it is tied to teaching materials that are usually focused on legal doctrinal coverage and include modest, if any, attention to judicial biography, intellectual history, or rhetoric. I think the *Carnegie Report's* analysis of this aspect of the first-year curriculum is unfortunately superficial. *But see* ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" (2007) (documenting and critiquing the classroom dialogues in eight law school courses).

some contracts cases that I have taught, but I include examples from cases ranging from administrative law, to civil rights, to bankruptcy, that illustrate how a relatively basic rhetorical analysis can improve students' understanding of cases in any subject area. Part VI rounds out my initial argument with some general conclusions.

II. OVERVIEW

Judge Posner achieved his twenty-fifth anniversary on the bench in 2006. The following year, to honor him, the Harvard Law Review¹⁰ and the University of Chicago Law Review¹¹ dedicated issues to faculty comments on his opinions. Dean Elena Kagan introduces Harvard's issue with this:

As Judge Posner's opinions lend themselves to commentary, so too do they lend themselves to instruction. Rifle through the pages of whatever casebook you have at hand (nearly any subject, common law or statutory, will do) and you will find a grossly disproportionate number of Posner opinions. Perhaps consciously, perhaps not, Judge Posner writes for the casebooks: for two and a half decades, he has produced simply remarkable teaching materials. Love them, hate them, agree or disagree with them, Judge Posner's opinions make people think—about what the law is doing, about what the law should be doing, about why it all matters.¹²

As Dean Kagan's introduction reveals, Judge and Professor Richard A. Posner has become an "academics' darling," to borrow the term he used to describe Justice Benjamin Cardozo in his 1990 monograph on Justice Cardozo's reputation.¹³ In his monograph, Judge Posner explained that a judge can build an enduring reputation like Justice Cardozo's, at least in part, by writing opinions that appeal to casebook editors and law professors.¹⁴ The monograph is principally a

¹⁰ *Commentaries: Twenty-Five Years of Richard Posner, the Judge*, 120 HARV. L. REV. 1121 (2007).

¹¹ *Special Issue Commemorating Twenty-Five Years of Judge Richard A. Posner*, 74 U. CHI. L. REV. 1641 (2007).

¹² Elena Kagan, *Commentary, Richard Posner, the Judge*, 120 HARV. L. REV. 1121, 1122 (2007).

¹³ RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 91 (1990). In describing Justice Cardozo as "an academics' darling," Judge Posner refers to the extraordinary number of Justice Cardozo's opinions in torts and contracts casebooks. *Id.* at 90–91.

¹⁴ *Id.* at 89–91. See also Cunningham, *supra* note 5, at 1388–91; David A. Logan, *The Man in the Mirror*, 90 MICH. L. REV. 1739, 1739–40 (1992) (citing POSNER, *supra* note 13, at vii); David Rosenberg, *The Judicial Posner on Negligence Versus Strict Liability: Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.*, 120 HARV. L. REV. 1210, 1221–22 (2007).

study of Justice Cardozo's rhetoric and its effect on building his reputation.¹⁵

This Essay analyzes Judge Posner's academic audience as much as it does his rhetoric. I argue that Judge Posner's distinctive rhetorical strategies explain why casebook editors and law professors have afforded this living judge such a fulsome reception, and I criticize the legal academy nevertheless for focusing almost exclusively on the legal analysis of his opinions rather than on his rhetorical strategies or the subtexts they may convey. Is this a feedback loop in which one of the legal academy's graduates and stellar scholars now supplies it with teaching materials? That would be unremarkable in a graduate discipline like economics, but it is unusual in legal education. That may not be a bad thing, but it is certainly worth examining. It is true that Judge Posner writes well, but that is often the beginning and the end of the rhetorical analysis as we quickly move on to examine his economic theories, his pragmatic instrumentalism, or his revision of a precedent's significance. Given Judge Posner's reputation as a scholar of economic analysis of law and the economic rationales in his opinions, many law professors probably think it inevitable that his opinions should appear in their casebooks,¹⁶ and surely casebook edi-

[T]he future lies in the minds of students, and I surmise that they are the principal audience for Posner's opinion. The nature of legal education today (and yesterday) is such that students' exposure to the leading functionalist literature—or any scholarly work for that matter—is usually limited to snippets in casebook notes. For Posner to get more of his message across to students, then, he must do it through his opinions, having them published (albeit excerpted) in casebooks and his arguments (qua judicial rulings) mooted in class.

Id. at 1222.

¹⁵ POSNER, *supra* note 13, at vii. The book provides an excellent introduction to Judge Posner's own rhetorical techniques, discussed more *infra* Part III.

¹⁶ See Cunningham, *supra* note 5, at 1391. By 1995 Judge Posner had climbed to the top of the small list of judges whose opinions are frequently anthologized. As of 1994 Judge Posner's contracts opinions appeared in casebooks at an average rate of 2.46 per casebook. *Id.* at 1384–90. Only Justice Cardozo, with 4.07 per casebook, and Judge Roger J. Traynor with 2.62 (both deceased by 1994) surpassed him. *Id.* The economic analyses in Judge Posner's opinions, however, are frequently criticized. See, e.g., Jack L. Goldsmith & Alan O. Sykes, *Lex Loci Delictus and Global Economic Welfare: Spinozzi v. ITT Sheraton Corp.*, 120 HARV. L. REV. 1137, 1141–47 (2007) (critiquing Judge Posner for failing to account for multiple factors that might affect optimal choice-of-law rules); Lior Jacob Strahilevitz, "Don't Try This at Home": *Posner as Political Economist*, 74 U. CHI. L. REV. 1873, 1878 (2007) (critiquing Judge Posner's concurring opinion in *Chicago Bd. of Realtors v. City of Chicago*, 819 F.2d 732, 741 (7th Cir. 1987) (Posner, J., concurring)); Cass R. Sunstein, *Cost-Benefit Analysis Without Analyzing Costs or Benefits: Reasonable Accommodation, Balancing, and Stigmatic Harms*, 74 U. CHI. L. REV. 1895, 1895–96, 1901–09 (2007) (critiquing Judge Posner's "casual empiricism" and challenging the Posnerian claim that economic rationales

tors want to signal that their latest edition is *au courant*¹⁷ with what Anthony Kronman has described as “the intellectual movement that has had the greatest influence on American academic law in the past quarter century.”¹⁸

Because opinions can rarely accommodate significant theoretical analyses, it might be more accurate to say that opinions in casebooks can at most convey an *attitude* toward the use of economic rationales (or any other rationale for that matter) in judging, and that attitude is what casebook editors and professors hope to project and perhaps to critique. A more considered reflection on Judge Posner’s success in the casebooks provokes some interesting thoughts about why his opinions crop up so frequently. Is it possible that Judge Posner is useful and perhaps even reassuring to legal educators because he represents an iconic judicial type in the ideology of American lawyering—the smart, erudite, articulate, witty change-agent? He revitalizes our preferred teaching materials with refreshing craft and, often, new meaning. Some of his opinions are like art; he re-envision the law,¹⁹ stripping away the accretions of lesser artists, revealing the deep structures beneath and recasting conventional wisdom into shiny, new forms. His opinions supply a whiff of interdisciplinary theory

are less subject to rhetorical manipulation than others; asserting that at least in the manner used by the judiciary, “cost-benefit analysis also has potential vices. It can operate as a vessel for unreliable intuitions rather than a way of disciplining them, and it can fail to take account of an important aspect of discrimination, consisting of the daily humiliations of exclusion and stigmatization.”); Alan O. Sykes, *Strict Liability Versus Negligence in Indiana Harbor*, 74 U. CHI. L. REV. 1911, 1912, 1922–31 (2007) (critiquing Judge Posner’s analysis in light of “modern economic learning on the choice between strict liability and negligence”). Cf. Daryl J. Levinson, *Aimster and Optimal Targeting*, 120 HARV. L. REV. 1148, 1154, 1157, 1160 (2007) (praising Judge Posner for having taken a step in the “right direction” regarding indirect tort liability that was frustrated in part by the Supreme Court’s later rationale, and commenting with particular relevance to my topic, that “[t]he full potential, and indeed reality, of indirect liability as a legal and nonlegal regulatory strategy may have been masked by moralistic and legalistic aversions to deviations from the direct liability norm of sanctioning the intuitively primary wrongdoer”).

¹⁷ Fashions in casebooks no doubt lag behind theory, in part because theory may never appear in opinions because the judiciary is constrained by precedent.

¹⁸ ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 166 (1993). Readers who are interested in pursuing the issues I discuss here should find Kronman’s chapter on law schools worth reading, or rereading. Among other points, he captures the tension in legal education between the demands of theoretical and interdisciplinary scholarship and the “prudentialist” traditions associated with examining and teaching the common law. See *id.* at 165–270. Teaching Judge Posner’s opinions may relieve that tension a bit.

¹⁹ For a lay parallel and bestseller, see STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* (2005).

just when law faculties are most anxious that other university faculties view law schools as mere a-theoretical trade schools. Judge Posner is the consummate insider in a conservative profession and a discipline that cherishes the occasional irreverent iconoclast.²⁰ He is fresh yet familiar. For all that he has done to influence doctrine and theory, he nonetheless validates the century-old law school devotion to teaching appellate opinions.

It takes two to tango: it takes an author and an audience to create a publishing and academic phenomenon. I suspect Judge Posner understands his academic audience better than the audience understands itself. Judge Posner understands that legal education involves immersion in a very select *literature* of the law, not “the law.” There is a canon, and within the canon at any given time the most entertaining and accessible writers will be most influential. Judge Posner has deliberately and self-consciously created a body of didactic literature in his opinions—a canon update, if you will. There’s no law against that. If this phenomenon seems to threaten some separation of powers between academia and the judiciary,²¹ the casebook editors and professors must be responsible for buying the goods. Nobody is required to teach Judge Posner’s opinions.

But enough about the faculty! What about the students? Whatever impact Judge Posner may ultimately have on legal doctrine and theory, his substantial presence in the casebooks is bound to impress several generations of lawyers. Judge Posner’s enduring significance may be in what his opinions—with the law schools’ help—teach new lawyers about the law, about values, and about the use of rhetoric.²²

²⁰ I deliberately treat Judge Posner simultaneously as an icon and as an iconoclast. Persuasive iconoclasts, unlike merely overpowering ones, are endowed with some credibility.

²¹ See POSNER, *supra* note 13, at 133 (The criteria of academic excellence and judicial effectiveness are not co-extensive: “Then, too, the audience for judicial opinions is not primarily an academic one. . . . [T]he judge who wants to be effective is constrained for the most part to operate incrementally, respecting distinctions, precedents, traditions, and whatnot that make the professor justifiably impatient.”).

²² Rhetorical analysis considers much more than style. See generally ENCYCLOPEDIA OF RHETORIC (Thomas O. Sloane ed., 2001). Judge Posner’s style and other rhetorical characteristics deserve more scholarly attention than they have yet received. Judge Posner may be the leading authority on his own rhetorical strategies. See Richard A. Posner, *Judges’ Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421 (1995). The aforementioned article appears within an issue devoted almost entirely to judicial opinion writing. *Judicial Opinion Writing*, 62 U. CHI. L. REV. 1333, 1363 (1995).

Readers interested generally in judicial rhetoric may find two recent works worthwhile. Judicial opinions’ content, style, and legal significance in the Anglo-American tradition have varied significantly over time. For a fascinating argument

In Part V, I consider three rhetorical strategies Judge Posner commonly uses: citation of seminal authorities, distinctive organizational techniques, and colloquial style. Judge Posner's style—colloquial word choice, occasional sentence fragments, and so forth—probably attracts the most attention and makes most of his opinions instantly recognizable to experienced readers. The impact is heightened if an opinion is read in isolation or mixed in with opinions by other judges. The impact of Judge Posner's distinctive style is diluted, however, if one reads a number of his opinions together. Then one can see that this prolific writer efficiently reuses some techniques and that his opinions reveal remarkable stylistic consistency. Nevertheless, style alone does not account for his opinions' popularity as teaching vehicles.

To most students, Judge Posner's writing must sparkle with clarity and modernity, at least in comparison to most of the assigned reading. Here are two examples, the first from a very recent case and the second from a case that has been the subject of substantial doctrinal critique that is discussed in more detail below.

(1) "Constructive trust" is legalese for seeking to wrest ownership of a thing from its nominal owner, which is to say the holder of legal title. It is not a real trust; in law, "constructive" often and here means "fictional."²³

and

(2) If you extract a promise by means of a threat, the promise is unenforceable. That is not, as so often stated because such a promise is involuntary unless "involuntary" is a conclusion rather than the description of a mental state. If the threat is ferocious ("your money or your life") and believed, the victim may be desperately eager to fend it off with a promise. Such promises are made unenforceable in order to discourage threats by making them less profitable. The fundamental issue in a duress case is therefore not the victim's state of mind but whether the statement

that opinions were once, and could become again, distinct from the precedential significance of the judgment, see Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1226–27, 1273 (2007). For an interesting hypothesis that Judge Posner's ability to use informal organizational structures and colloquial language while maintaining an authoritative tone is due to the current security, stability, and power of the federal courts, see WILLIAM D. POPKIN, *EVOLUTION OF THE JUDICIAL OPINION: INSTITUTIONAL AND INDIVIDUAL STYLES* 108–26 (2007).

²³ *Travelers Cas. & Sur. Co. v. Nw. Mut. Life Ins. Co.*, 480 F.3d 499, 501 (7th Cir. 2007) (Posner, J.).

that induced the promise is the kind of offer to deal that we want to discourage, and hence that we call a “threat.”²⁴

Just these two examples contain good, practical lessons about writing well for the audience if professors would draw students’ attention to the short sentences and frank, funny, anti-legalese of the first and the colloquial wording and vivid examples of the second.²⁵

But in addition to pointing out these examples of craft—whether or not one likes them—professors could also call students’ attention to the possibility that, like many a great writer, Judge Posner’s writing reflects and conveys some implicit messages. In particular, as I discuss in the next section, Judge Posner’s distinctive rhetorical strategies may arise from a more or less conscious effort to distance his analysis, by using rhetoric, from some troublesome forbearers, especially his mother and Justice Cardozo.²⁶ While the content of his economic and judging theories, his logic, and his use of empirical and legal authority are all hotly contested in legal scholarship, and faculty presumably share some of these critiques with students, students will hear little of how Judge Posner’s views may have been shaped by his time, place, and circumstances and will not understand these influences unless their professors tell them.²⁷ I am quite sure that few professors devote precious classroom minutes to deconstructing the rhetorical techniques Judge Posner uses to advance his ideas and attitudes, and little can be discerned from the casebooks. Perhaps Judge Posner’s distortions and omissions of precedent might make it into the typical, doctrinally busy law school

²⁴ *Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924, 926–27 (7th Cir. 1983) (Posner, J.).

²⁵ Would it be possible to devote some of the legal writing curriculum to close analysis of Judge Posner’s rhetorical strategies? Could one teach legal method by assigning students the task of writing opinions in his style and then again in the style of a judge with a different philosophy—perhaps Judge Patricia Wald of the Court of Appeals for the District of Columbia Circuit? Compare Posner, *supra* note 22, at 1440–43, with Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1375–80 (1995) [hereinafter *Rhetoric of Results*] and Patricia M. Wald, *A Reply to Judge Posner*, 62 U. CHI. L. REV. 1451, 1452 (1995) [hereinafter *Reply to Judge Posner*] (Judge Wald objects, among other things, to Judge Posner’s manners in criticizing one of her opinions without having provided advanced warning: “Wow! What has happened to the vaunted Seventh Circuit civility? An out-of-town guest is invited to sup at the master’s table, only to find she is the main course.”).

²⁶ See HAROLD BLOOM, *THE ANXIETY OF INFLUENCE: A THEORY OF POETRY* 10 (1973) (explaining the literary theory that each new poet must supplant his predecessors).

²⁷ See MERTZ, *supra* note 9, at 75–79 (describing the contrast in the classroom dialogue between the professor’s insistence on precise dissection of doctrine and tolerance of airy policy discussions).

classroom, but even that may be unlikely because students would have to have read the precedents and they do not have time. Judge Posner is free—enabled by academics—to play the daring free-thinker, to restate the literature of the law in his own vivid and persuasive terms, while he is presented in casebooks as just one more work-a-day jurist.

I suspect Judge Posner has and will continue to have quite an impact on students' attitudes and expressive tones, and especially on their sense of what it means to be an elite legal professional. Most students are ill-equipped by prior education to detect subtexts. If professors do not draw students' attention to these subtexts, I do not see how students can do anything but accept the apparent approbation from the unusual frequency of his opinions. The way a judicial icon writes his way into academic iconicity is an important lesson, at least as long as law schools teach principally with appellate opinions.

In the balance of this Essay, I will suggest some of the implicit messages conveyed by our fondness for teaching this erudite, understandable, and coolly persuasive judicial writer. By attending to what seems natural, but has been carefully constructed, I hope to illuminate some dimly perceived aspects of our academic culture. A pedagogy that fails to contextualize an intellect like Judge Posner's and to attend to his rhetorical skills is undertheorized. To that end, in the next Part, I will describe a little of Judge Posner's personal background with the goal of explaining why he might be particularly interested in altering some inherited rhetorical conventions of the legal profession on his way to changing minds.

III. WHY RHETORIC INTERESTS JUDGE POSNER

Judge Posner has long acknowledged that appellate judges have considerable, but not unlimited, discretion in interpreting and applying the law.²⁸ He also thinks that a skilled writer may be able to persuade audiences to believe what they might not otherwise believe.²⁹ The combination means that a judge, who is a skilled writer, may persuade himself and other judges, lawyers, and the public, that a decision is wise despite not having very good reasons for it.³⁰ Judge Posner seems to believe that economic reasons, however, can curb a judge's ability to be confused by his own rhetoric:

There is a broad area in which judges can properly bring economics to bear on law, but they cannot make it the sole guide to their

²⁸ E.g., Richard A. Posner, *The Case Against Strict Constructionism: What Am I? A Potted Plant?*, THE NEW REPUBLIC 23 (Sept. 18, 1987).

²⁹ See *infra* note 46.

³⁰ See *infra* pp 117–21 and accompanying notes.

job; more important, the language of economics will not conceal from them what they are doing when they use economics to make or change the law.³¹

Others have observed, however, that the use of economic analysis is itself a rhetorical strategy so that Judge Posner's hope that economic analysis may restrain the excesses of judicial discretion and rhetorical prowess may be in vain:

The whole of normative law and economics is to that extent shaped by an ideal of clarity in moral argument, and by a confidence in the resolving power of certain methodical techniques, that are antithetical to the prudentialist tradition and to the claims of practical wisdom. The claim that there is no clean-edged method for resolving moral disputes and that many questions of this kind have no principled answer at all has its roots in the experience of incommensurability as a fact of moral life. It is the phenomenon of incommensurability that most forcefully suggests the need for practical wisdom in deliberation, and that compels us to ask what prudence is. But the phenomenon of incommensurability is invisible from an economic point of view. For the assertion that all moral controversies can be resolved by applying to them the single standard of efficiency (whatever the philosophical justification for doing so may be) implies that real incommensurabilities do not exist and, where they seem to, should be treated as illusions that clear thinking will dissolve.³²

³¹ POSNER, *supra* note 1, at 314.

³² KRONMAN, *supra* note 18, at 237–38. For an interesting and informative intellectual history and an argument that “law and economics” is but an instance of a persistent preference since the Enlightenment for scientific ways of knowing and reasoning in Anglo-American legal culture, see generally JAMES R. HACKNEY, JR., UNDER COVER OF SCIENCE: AMERICAN LEGAL-ECONOMIC THEORY AND THE QUEST FOR OBJECTIVITY (2007). Hackney discusses Judge Posner at some length, emphasizing his role as a “popularizer” of economic analysis in law and arguing that Judge Posner has evolved from an economic formalist to a pragmatist. *Id.* at 108–71, 209–10 n.132. For a critique of Judge Posner's preference for the methodology of economics by a leading pragmatist, see RICHARD RORTY, *The Banality of Pragmatism and the Poetry of Justice*, in PHILOSOPHY AND SOCIAL HOPE 93 (1999), and RICHARD RORTY, *Pragmatism and Law*, in PHILOSOPHY AND SOCIAL HOPE 104 (1999). See also Brian Leiter, *Science and Morality: Pragmatic Reflections on Rorty's "Pragmatism"*, 74 U. CHI. L. REV. 929 (2007); Martha Nussbaum, *On Moral Progress: A Response to Richard Rorty*, 74 U. CHI. L. REV. 939 (2007); Richard Rorty, *Dewey and Posner on Pragmatism and Moral Progress*, 74 U. CHI. L. REV. 915 (2007). For two different approaches to Judge Posner's views on economic analysis and pragmatism, see Martha Minow, *Religion and the Burden of Proof: Posner's Economics and Pragmatism in Metzle v. Leininger*, 120 HARV. L. REV. 1175 (2007), and Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 384–428 (1985). For Judge Posner's own views on pragmatism, economic analysis, and morals, see POSNER, *supra* note 8; RICHARD A. POSNER, THE PROBLEMATICS OF MORAL

Posner's intriguing monograph on Cardozo considers the effect of persuasive rhetoric on judicial opinions and on judges' reputations, and it reveals as much about its author as its subject.³³ I will use this book, together with a few published bits of biographical information about Posner's childhood,³⁴ to explain an intuition.

The intuition is this: I think Judge Posner's suspicion of "moralism" and moralistic rhetoric predates his devotion to arguments based on economic instrumentalism. The suspicion may actually drive him to the economic arguments. This is the reverse of what some critics say—his devotion to economic efficiency arguments makes him discount other values.³⁵ I suspect it was the persistent moralistic rhetoric of his mother, and people he associates with her views, that sent him to the market. That is not such a remarkable insight. After all, many people of Judge Posner's generation—growing up in the 1940s and 1950s, mature and educated before the late 1960s—thought the Soviet Union a horrible oppressor and became skeptical about the costs and the efficacy of domestic social uplift agendas. That the economic theories associated with the Chicago School from the 1950s through the 1980s should have offered Judge Posner an intellectual haven is hardly surprising. Judge Posner is remarkable not for the novelty of his ideology but for his intelligence, his rhetorical skills, and his contribution to transplanting economics into law. To understand that, students need some exposure to biographical, intellectual, and social history, which doctrinal casebooks do not impart.

Judge Posner came of age during the Cold War. From Judge Posner himself, we have a little information that he came to regard his parents' socialism or communism, especially his mother's, as soggy sentimentality.³⁶ Not just soggy, but stupid, dangerous, perhaps

AND LEGAL THEORY (1999) [hereinafter PROBLEMATICS]; and RICHARD A. POSNER, *So What Has Pragmatism to Offer Law*, in *OVERCOMING LAW* 388 (1995).

³³ See generally POSNER, *supra* note 13. Others have noticed this intersection of author and subject. See, e.g., Cunningham, *supra* note 5, at 1380; Logan, *supra* note 14, at 1739.

³⁴ Larissa MacFarquhar, *The Bench Burner: An Interview with Richard Posner*, *NEW YORKER*, Dec. 10, 2001, at 78.

³⁵ See generally RORTY, *supra* note 32; Nussbaum, *supra* note 32; Cunningham, *supra* note 5, at 1409 (arguing that Judge Posner turns Justice Cardozo's moralistic understanding of good faith in contract performance "upside down").

³⁶ MacFarquhar writes:

When Posner grew more conservative (he thought of himself as a liberal until he was thirty or so), his mother was horrified. "We had terrible fights," he says. "I became really furious at her. See, she was one of these bright fools, my mother—quite a bright person, but very limited. The other thing that annoyed me about her was that I worried about

even murderous, sentimentality.³⁷ Like many in his generation, he came to deplore those fellow travelers who failed to perceive the Soviet Union's brutal oppression of its own subjects, and who persisted without any empirical support even in the face of much empirical contradiction, in thinking that a communist ideology, or some variant, represented hope for the poor and downtrodden, rather than the greatest threat to western, individual liberties in the twentieth century after the Third Reich. The economic expansion of the United States after the Second World War and the eventual collapse of the Soviet Union seemed to validate the superiority of the U.S. political economy—if it could be preserved from blinkered do-gooders.³⁸

her politics interfering with my career. Every time I got a government job, I always felt obligated to tell the authorities that I had this mother who had probably been a Communist. It was an annoying piece of baggage. Then eventually she became senile and forgot about politics and actually became very benign. Both [my wife] Charlene and I breathed a sigh of relief." Looking back on his red-diaper childhood, Posner considers his parents hypocrites. "It was just talk," he says of their radicalism. "They wanted me to live the same conventional life that they lived."

....

"I don't know if this is true of everybody," Posner says, "but I loved my parents when I was growing up and they were really the sort of parents you should be grateful to—my mother gave me great cultural enrichment, and my father helped me buy our first house, so they were ideal parents."

....

Martha Nussbaum, a philosopher at the University of Chicago and a friend of Posner's, believes that his upbringing and his pious, Communist mother are the reason that he is now repelled by moralism of any kind, and takes refuge in literature. He loves scandalous, immoralist writers such as Stendhal and Gide, and indeed, the world of French novels is in many ways more congenial to Posner's caustic temperament, and to an economic, self-interested view of human nature, than that of the law.

MacFarquhar, *supra* note 34, at 83–84.

³⁷ MacFarquhar reports a family history that seems loaded with possible tensions about issues of morality, justice, law, politics, and finances.

His mother was a Communist and was friendly with the family that adopted the Rosenberg children. The day Stalin died was a day of mourning in the Posner household. His father had a checkered career: as a young man, he worked in a jewelry business with some cousins; then, having attended law school at night, he became a criminal-defense lawyer. After the Second World War, he became a money-lender, specializing in second mortgages in New York slums; he was so successful at this that he bought a Cadillac and, in 1948, moved his family to Scarsdale.

Id. at 83.

³⁸ For a collection of essays on major cultural figures of the twentieth century that reflects this post-WWII zeitgeist within certain circles in the western "liberal de-

The underlying issues here are not trivial, and they have bedeviled jurisprudence since the realists poked holes in legal actors' claims to objectivity and since H.L.A. Hart's positivism³⁹ took a body blow from the Third Reich.⁴⁰ One could argue that both Hitler's Third Reich and Stalin's Soviet Union owed a good deal of their powers to the abuse of reason and morality through rhetoric.⁴¹

It would be a small step to conclude that rhetoric *is* the problem, and that sentimentality—which can be hard to distinguish from moralism—clothed in rhetoric is an even bigger problem. As a juvenile, Judge Posner might have elided his mother's politics with her gift to him of a love of literature.⁴² Perhaps as a result, his early love of literature, with all the attendant lessons about the power of rhetoric and remarkable rhetorical gifts seemed to pose some danger that might need to be controlled.⁴³ Students of literature understand that rhetoric and authorial bias are inescapable. Add power to the mix, and you have a potentially serious danger. Judge Posner—the adult jurist—understands this. In an exercise of self-control he might have decided, consciously or not, to direct his very considerable rhetorical skills toward goals whose attainment could be quantified and assessed objectively, at least in theory. It could not have hurt that the United States was triumphant both militarily and economically, and that a good deal of intellectual fire power was directed toward explaining why and how the successes could be improved upon. Therefore, Judge Posner might have found a solution to rhetorical anxiety in economic methodology.

Judge Posner seems both intrigued and disturbed by what the study of literature taught him about the power of rhetoric to make people do and believe things that they might not otherwise do or be-

mocracies," see CLIVE JAMES, *CULTURAL AMNESIA: NECESSARY MEMORIES FROM HISTORY AND THE ARTS* (2007).

³⁹ See generally H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

⁴⁰ See POSNER, *supra* note 8, at 228–39.

⁴¹ See, e.g., RICHARD H. WEISBERG, *POETHICS: AND OTHER STRATEGIES OF LAW AND LITERATURE* 127–87 (1992) (including a discussion of the Nazis' use of legalistic rhetoric to abuse Jewish people and others).

⁴² POSNER, *supra* note 1, at v. ("For my mother, who initiated me into the pleasures of literature, and my father, who encouraged me to go to law school.").

⁴³ MacFarquhar, *supra* note 34, at 86 (reporting that Judge Posner studied English at Yale with Cleanth Brooks, a noted scholar associated with the New Criticism movement, and that Judge Posner was attracted to Nietzsche for the view that "a person is responsible for his own life" and that "we have no right to blame anyone else for the result because it was ours to make or muff"). I speculate on the relevance of New Criticism to Judge Posner's approach to legal education in the final part of this Essay.

lieve.⁴⁴ For example, in *Law and Literature: A Misunderstood Relation*, he devotes a chapter to the *Judicial Opinion as Literature*.⁴⁵ In that chapter, he pays particular attention to the Yeats poem, “The Second Coming,” and examines how Yeats seems to produce an attitude or belief in readers that is not borne out by the literal meaning of the words written.⁴⁶ Judge Posner goes on to examine the funeral speeches by Brutus and Antony in Act III of Shakespeare’s *Julius Cae-*

⁴⁴ All literature employs rhetoric, and rhetoric may be literary, but not necessarily. Both words have a broad range of meanings. In this context, by “literature” Judge Posner and I are referring to the broad category of literature that is “imaginative or creative writing, especially of recognized artistic value” and to the narrower category of professional or disciplinary literature comprised of judicial opinions. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1050 (3d ed. 1992). “Rhetoric” is the “art or study of using language effectively and persuasively.” *Id.* at 1547. This dictionary contains a pertinent usage note:

The word *rhetoric* was once primarily the name of an important branch of philosophy and an art deserving of serious study. In recent years the word has come to be used chiefly in a pejorative sense to refer to inflated language and pomposity. Deprecation of the term may result from a modern linguistic Puritanism, which holds that language used in legitimate persuasion should be plain and free of artifice—itself a tendentious rhetorical doctrine, though not often recognized as such. But many writers still prefer to bear in mind the traditional meanings of the word. Thus, according to the newer use of the term, the phrase *empty rhetoric*, as in *The politicians talk about solutions, but they usually offer only empty rhetoric*, might be construed as redundant. But in fact only 35 percent of the Usage Panel judged this example to be redundant. Presumably, it can be maintained that rhetoric can be other than empty.

Id. This usage note is reminiscent of the contest between Barack Obama and Hillary Clinton for the Democratic presidential nomination in which the question of whether Obama’s oratorical eloquence indicated his capacity for leadership or was merely “empty rhetoric.”

⁴⁵ POSNER, *supra* note 1, at 269–316.

⁴⁶ *Id.* at 275–76. Judge Posner writes,

How can a writer persuade, without an effort at logical or empirical proof? The answer is that in areas of uncertainty, areas not yet conquered by logic or science, we are open to persuasion by all sorts of methods, some remote from logic and science. It is not that people are irrational; it is that when unable to obtain direct confirmation of an assertion they do not just suspend judgment—they seek indirect confirmation or refutation.

Id. In light of this comment, it is interesting to read Richard Rorty’s argument that Judge Posner has rejected “the idea that we have made moral progress” and that this rejection is “a relapse from the true pragmatist faith into positivistic science-worship.” Rorty, *supra* note 32, at 918–19 (discussing POSNER, *PROBLEMATICS*, *supra* note 32, at 4–6). See also Nussbaum, *supra* note 32, at 939 (agreeing “with Rorty against Posner” that there is moral progress). But see Leiter, *supra* note 32, at 929 (disputing Rorty’s view of pragmatism). For a historical account of the role of scientific positivism in Anglo-American legal theory, see HACKNEY, JR., *supra* note 32, at 27–28, 35–51, 94–100.

sar.⁴⁷ He contrasts how Brutus's honest but elegantly detached oration fails to persuade the Roman mob, while Antony's does, despite the fact that "almost everything in this passage is false."⁴⁸ Judge Posner comments that "[n]ot for nothing has Antony's speech been called 'an exhibition of the destruction of reason by rhetoric.'"⁴⁹ Antony "uses emotion rather than reason to make his case."⁵⁰

These concerns inform Judge Posner's monograph on Justice Cardozo. Judge Posner argues that the principal cause of Justice Cardozo's judicial reputation was his combination of rhetorical prowess and pragmatism.⁵¹ Before Judge Posner gets to the details, he offers a summary of Justice Cardozo's life that is quite intriguing for what it might tell us about the particular rhetorical strategies Judge Posner uses to promote a non-moralistic, economic variation on Justice Cardozo's pragmatism.⁵²

After noting that "psychobiography is a controversial genre, and efforts at judicial psychobiography . . . have not been well received,"⁵³ Judge Posner first repeats speculation that Justice Cardozo set about creating an aura of personal "saintliness" to escape the taint of a corruption scandal that brought down his father's legal career.⁵⁴ Then he writes this fascinating paragraph:

Scholars of psychiatric bent might, however, want to explore the possible significance of the fact that Cardozo's mother died when he was a child and his father when Cardozo was an adolescent, and that Cardozo's twin was a girl. "Patients growing up in families where one or both of the parents died appear more compromised in their interpersonal relationships These patients are more likely to have impairments in achieving stable, mature adult attachments." Cardozo's relationship with Nell [his elder sister], and his (quite possibly related) failure to marry, is consistent with this observation. As for having a twin of the opposite sex, it has been suggested that this can result in the "feminizing" of the male twin and the "masculinizing" of the female. This suggestion might, if true, help explain Cardozo's failure to marry. Yet his twin was his only sibling to marry! I shall not pursue these questions further; the details of Cardozo's psychology, so far as they

⁴⁷ POSNER, *supra* note 1, at 278–81.

⁴⁸ *Id.*

⁴⁹ *Id.* at 281 (citing NICHOLAS BROOKE, SHAKESPEARE'S EARLY TRAGEDIES 157 (1968)).

⁵⁰ *Id.*

⁵¹ POSNER, *supra* note 13, at 126–28.

⁵² *Id.* at 1–19.

⁵³ *Id.* at 5 n.10.

⁵⁴ *Id.* at 5, 8.

are known, seem tenuously, if at all, related to his professional work, which is my interest.⁵⁵

Then why raise these questions in the first place? Judge Posner is too skilled a writer to have wandered off topic by accident. Instead, the last sentence is a prolepsis—a rhetorical device for rebutting an argument before it is even raised.⁵⁶ But what would that argument be? I see three possibilities.

One might question the evidence for Judge Posner's speculation about the feminizing effects of Justice Cardozo's youthful family circumstances. Judge Posner cites only two references.⁵⁷ The second might question Judge Posner's implicit message about normal gendered behavior: Judge Posner suggests that these feminizing influences resulted in Justice Cardozo's *failure* to marry. The next paragraph notes that Justice Cardozo was "exceedingly polite," and points to a particular sign of his politeness in that "he rarely adopted an adversarial stance toward lawyers or lower-court judges, either in person or in his opinions. . . . Of course he lived in an era when lawyers and

⁵⁵ *Id.* at 6 (citations omitted).

⁵⁶ The prolepsis shelters Judge Posner's implicit attitudes about normal maturation from challenge by declaring the paragraph irrelevant and thereby deflecting all but the most intrepid readers from considering it further. I note it here for two reasons. First, since Judge Posner often writes more than is strictly necessary for resolution of an appeal, he sometimes uses a form of prolepsis to indicate his awareness. For an example in a recent opinion of Judge Posner's use of prolepsis to shelter dicta, see *Harzewski v. Guidant Corp.*, 489 F.3d 799, 808 (7th Cir. 2007) (noting that "this is another issue to be considered in the first instance on remand, should its resolution become critical to the outcome"). The Seventh Circuit reversed the district court's dismissal of the plaintiff's claim prior to discovery for lack of standing and remanded the case. Much of Judge Posner's opinion was directed to the merits if certain facts could be proven. *Id.* at 800–08. Judge Ripple concurred in the decision but objected to this "commentary on the merits at this time." *Id.* at 808 (Ripple, J., concurring). A frank statement that an analysis is dicta can make space for a useful discussion without confusing lower courts and practitioners. For an interesting discussion about the appropriate and inappropriate use of dicta by the United States Supreme Court, see Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249 (2006).

Second, I dwell on this "aside" about Justice Cardozo's elective and gendered affinities because I do not think the prolepsis is literally true. Instead, I think the paragraph raises issues that may interest Judge Posner quite a bit. One might be whether a person without stable, mature, adult attachments would be more or less likely to build a considerable reputation. Another might be whether such a person might be inclined (perhaps out of necessity or insecurity) to be more than usually polite to acquaintances. Perhaps this paragraph implies that Justice Cardozo's remarkable kindness may have been the product of imperfect maturation. If so, then an unwitting reader, indulging in a sloppy negative inference, might infer that a judge and scholar like Judge Posner, who seems to engage in a fair amount of adversarial behavior on and off the bench, is exhibiting a fully mature personality.

⁵⁷ POSNER, *supra* note 13, at 6.

judges—perhaps people in general—were more civil than they are today.”⁵⁸ A third might accuse Judge Posner of concealing a stealthy put-down of his subject—and rival for judicial reputation—in a breezy, faintly gossipy, summary of his subject’s early years. On first impression, Judge Posner appears to be impugning Justice Cardozo’s masculinity while coyly avoiding any explicit endorsement of the gender stereotypes his writing employs. Upon reflection, however, I doubt that Judge Posner cares about Justice Cardozo’s masculinity. Instead, he is up to a subtler business: I think the above quoted paragraph is designed to imply that Justice Cardozo was not fully developed in some way. The significance of such an arrested development emerges later.

Far from being off topic, Judge Posner is laying the groundwork for a distinction—that Judge Posner does not suffer from an arrested development. Despite some similarities in rhetorical prowess, Judge Posner is not to be lumped with Justice Cardozo. His theory of judging, unlike Justice Cardozo’s, is fully developed.

By calling attention to Justice Cardozo’s rhetorical skills a little later in the book,⁵⁹ Judge Posner could have put himself in a tight spot had he not laid the groundwork for this distinction. Like Justice Cardozo, he is a skilled judicial rhetorician. Like Justice Cardozo, he claims to be a pragmatist, unwilling to pretend that judicial decisions are dictated by application of determinate principles. Like Justice Cardozo, he has acquired a reputation based in large measure on his ability to write opinions that garner readers, especially academic readers. If Judge Posner is not to concede that his opinions are interesting or powerful merely because of his rhetorical gifts, and if he is to avoid the implication that his own judicial reputation may rest upon *literary* talents and not on substantive merit, he must distinguish himself from Justice Cardozo. Here, I think, is the point of the psychobiography paragraph. Unlike some critics, Judge Posner does not fault Justice Cardozo’s rhetoric for being too flowery and metaphoric—that is, too *rhetorical*. He could not do so in good conscience because, as we shall see, he is an equally deliberate author. Nor does he fault Justice Cardozo for pragmatism or for manipulating precedent to wriggle free of formalist constraints—he too is a pragmatic instrumentalist more interested in achieving outcomes than in adhering to precedent for its own sake.

⁵⁸ *Id.* at 6–7.

⁵⁹ *Id.* at 47.

Instead, he criticizes Justice Cardozo's opinions for a substantive deficiency.⁶⁰ In discussing Justice Cardozo's famous opinion in *Hynes v. New York Central Railroad*,⁶¹ Judge Posner says that "[n]o reason is given for the conclusion. . . . In his soaring peroration Cardozo has given no reason why the plaintiff should win. Again it is Cardozo the rhetorician, rather than Cardozo the pragmatic policy analyst, the sociological jurist, whose hand is visible."⁶² Judge Posner comments that

neither in *Hynes* nor elsewhere in Cardozo's corpus are these fundamental principles set forth or the ends of law specified. Cardozo is committed to a pragmatic approach that he frequently is unable to make operational so that its application can be predicted. He may have had in mind as the shaping principle of law nothing more exciting than public opinion. . . .⁶³ If weak on policy analysis, *Hynes* is strong on rhetoric (no thanks to the plaintiff's sixty-six-page brief, with its seventeen separate argument headings). But as the term embraces all verbal methods of persuasion, including the emotive and the deceitful, the normative implications of "powerful rhetoric" are equivocal.⁶⁴

Judge Posner is working here to differentiate his own approach to opinion-writing, trying to preserve the credibility of self-conscious literary techniques to enhance the effectiveness of judicial opinions, while dealing with the criticism that the judge who uses such techniques may only be enacting his own intuitions under camouflage. He comments on another famous Justice Cardozo opinion:⁶⁵

Palsgraf's celebrity is due in part . . . to Cardozo's technique. And that technique is quintessentially rhetorical in a sense that cannot be taken as wholly complimentary in evaluating a judicial opinion, for one element of the technique is the selection of facts with a freedom bordering on that of a novelist or a short-story writer, and another is outright fictionalizing ("at the other end of the platform, many feet away"). Moreover, despite Cardozo's professed (and, so far as I am able to determine, sincere) pragmatism, his opinion does not come to grips with the issues of policy that are raised by the problem of the unforeseeable plaintiff, and

⁶⁰ *Id.* at 38–41.

⁶¹ *Hynes v. N.Y. Cent. R.R. Co.*, 131 N.E. 898 (N.Y. 1921).

⁶² POSNER, *supra* note 13, at 53.

⁶³ It is not clear why deference to public opinion is necessarily inappropriate in a case where the law is indeterminate. Perhaps Judge Posner thinks such deference is symptomatic of a failure to fully develop, as in modern adolescents' alleged concern with what people think of them.

⁶⁴ POSNER, *supra* note 13, at 53–54.

⁶⁵ *Palsgraf v. Long Island R.R. Co.*, 12 N.E. 99 (N.Y. 1928).

more broadly of the extremely unlikely accident. Indeed, one of the rhetorical skills deployed in the opinions is that of avoiding practical considerations while sounding practical To see how *ordinary* a case *Palsgraf* would have been in the hands of an ordinary judge, one has only to read the majority and dissenting opinions in the intermediate appellate court. Cardozo could make silk purses out of sow's ears—a gift vouchsafed to few judges.⁶⁶

Judge Posner understands that Justice Cardozo was able to hasten changes in the common law by cloaking his opinions in rhetorical appeals to unarticulated, undertheorized values. Justice Cardozo became the “academics’ darling,” perhaps because of his impact on the development of law, but certainly because his rhetorical skills made his opinions interesting to read and gave academics something to analyze and to teach, regardless of their evaluation of substantive merits.⁶⁷ This is a subtle but important point.

Judge Posner is not really disturbed by the outcome of Justice Cardozo's decisions. He admires Justice Cardozo's conscious pragmatism, and he has no use for the inherited formalism of some of Justice Cardozo's contemporaries—a formalism that Justice Cardozo helped relegate to the judicial back burner at least for a time. Judge Posner may be bothered that a great judicial writer could achieve such results—and such a reputation—by skillfully presenting the wrong or inadequate reasons for decent decisions and by skillfully appealing to the moralizing instincts in his readers to support outcomes he thought desirable. I think the point may be to stake out a position for writing opinions in such a manner as to ensure their popularity with academic lawyers while maintaining a claim to supra-rhetorical soundness.

Judge Posner has argued that because values and morals are variable and often highly contested within a given society—and certainly among different societies—they cannot provide an objective basis for concluding that one society is more “moral” than another.⁶⁸ Only science (in the sense of empirical investigation of phenomena) is able to produce considerable consensus—agreement that a hypothesis is borne out by repeated observations of measurable phenomena. To that extent, Judge Posner suggests that science has made more progress than morals.⁶⁹ Further, he argues that there is no objective basis by which one can assess moral arguments: “At its

⁶⁶ POSNER, *supra* note 13, at 46–47.

⁶⁷ *Id.* at 91.

⁶⁸ POSNER, PROBLEMATICS, *supra* note 32, at 6.

⁶⁹ *Id.* at 18; *see* Rorty, *supra* note 32, at 920–21.

best, moral philosophy, like literature, enriches; it neither proves nor edifies.”⁷⁰ Judge Posner claims that “[m]oral entrepreneurs persuade, but not with rational arguments.” They use “techniques of nonrational persuasion.”⁷¹ And, of course, he has spent much of his professional life arguing that economic analyses of the effects of legal decisions on costs and benefits, among other factors, are more objective. As Richard Rorty commented,

Posner’s refusal to admit that we have made moral progress is a rhetorical gesture that can have no bearing on practice. For moral progress is not an idea we can possibly get out of our heads. Only the lingering influence of science-worship tempts us to try. The positivists agreed with Plato that to have knowledge was to see things under the aspect of eternity, and they then argued that only natural science could do that. But if we can bring ourselves to give up that Platonic view of knowledge, we might become willing to admit that doubts about moral progress are as phony as doubts about the reality of electrons. Once Plato’s attempt to escape from time to eternity is abandoned, we are left with nothing but the hope that we will look good to our future selves, and to future generations. Dewey thought that hope was enough.⁷²

Judge Posner devotes the rest of the monograph to discussing the bases of Justice Cardozo’s “eminence.” Those are first, the rhetoric of his opinions, and second, his pragmatist agenda.⁷³ “An important part of Cardozo’s rhetorical skill was his ability to sugarcoat the pragmatist pill . . . so that not only his judicial colleagues but the entire legal establishment accepted him as a consummate insider rather than fearing him as a bomb-throwing radical.”⁷⁴ Judge Posner does not attribute Justice Cardozo’s reputation to analytic brilliance or to a substantial impact on the law.⁷⁵ Justice Cardozo’s accomplishment on the New York Court of Appeals “was not to persuade his colleagues to change their principles (a task beyond the persuasive power of any judge), but to persuade them to give rein to those principles. He showed them how to write professionally respectable opinions changing the law in the direction they and he desired.”⁷⁶

In describing the reputable characteristics of Justice Cardozo’s judicial opinions, Judge Posner could be describing some of his own:

⁷⁰ POSNER, *PROBLEMATICS*, *supra* note 32, at 32.

⁷¹ *Id.* at ix, 42.

⁷² Rorty, *supra* note 32, at 927.

⁷³ POSNER, *supra* note 13, at 126–27, 132.

⁷⁴ *Id.* at 127–28.

⁷⁵ *Id.* at 126.

⁷⁶ *Id.* at 131.

[W]hat we can expect, and what we find in abundance in Cardozo's opinions, are (1) a vivid, even dramatic, bodying forth of the judge's concerns, (2) a lucid presentation of arresting particulars—fodder for academic analysis, (3) a sense of the relatedness of these particulars to larger themes, (4) a point of view that transcends the litigants' parochial concerns (for Cardozo it was his pragmatist program), (5) a power of clear and forceful statement, and (6) a high degree of sensitivity to the expectations of one's audience. Anyone conversant with literature will recognize these as virtues commonly associated with works of imaginative literature and therefore rhetorical.⁷⁷

Pursuing the literary analogy we may say that a prime virtue of a judicial opinion is wit in the eighteenth-century sense of what oft was thought but ne'er so well expressed. None of the themes in Cardozo's judicial oeuvre is novel, and they are played in cases randomly served from the docket. The skill lies in making each of them a memorable exemplar of an issue, problem, or approach. It is an essentially literary skill, which Cardozo possessed to a high degree. He was also a highly competent legal analyst but no more so than many judges who are deservedly much less eminent than he. I suspect that the disquiet that many academic lawyers feel about Cardozo comes from a reluctance to acknowledge that so "unprofessional" a skill as literary writing ability could make a judge great. The academic—the lawyer generally—may admit that law may sometimes be poetry but is unlikely to admit that poetry may sometimes be law.⁷⁸ The tendency of academics is to view judges (implicitly) as failed academics, to be flayed for the amusement of students. Natural as it is, this tendency misconceives the proper division of labor between the judge and the professor. The judge is not to compete with the professor but to engage freshly, fruitfully, vivaciously, constructively, and expeditiously with the disputes that he is called on to resolve.⁷⁹

Nearly a century later, some of the same rhetorical moves continue to bemuse academics. Law professors wallow in an opinion that presents an arresting, if slanted, narration of facts, or whose mellifluous prose glides over a questionable reading of precedent or reveals a

⁷⁷ *Id.* at 133–34. I removed an initial sentence that Judge Posner might not apply to his own opinions, although perhaps this is a subtle apologia to his many critics. "[W]e should not expect a high order either of intellectual creativity or of analytical rigor in even the best judicial opinions." *Id.* at 133.

⁷⁸ This remark recalls some of James Boyd White's work. See, e.g., JAMES B. WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985) (suggesting that Judge Posner shares more of White's views about the efficacy of constitutive discourse than his funny, but snotty, jabs about White's use of italics would suggest). See POSNER, *supra* note 1, at 289–90.

⁷⁹ POSNER, *supra* note 13, at 133–34.

grand legal principle emerging from an apparently unremarkable lawsuit. This is possible in part because too many legal academics remain, for the most part, blithely indifferent to rhetorical analysis in favor of legal or substantive analysis so that each generation of professors is surprised anew at and grateful for opportunities to demonstrate that *they* saw through the art to the substantive errors beneath. Plainly, Judge Posner understands this about his audience. He also supplies wit in the eighteenth century sense. In many opinions, he writes with joy, curiosity, inventiveness, fascination with law, and love for the English language—as he seemingly effortlessly reconstitutes hoary old cases as exemplars of efficiency principles.⁸⁰ Like Justice Cardozo, he can make reading case law fun.

While it is conventional to think of Judge Posner primarily as a scholar of economic analysis in law, principally motivated by the intellectual insights brought to law from economics, I argue that his devotion to economic analysis may be an effort at self-discipline.⁸¹ His particular genius is that he indulges one love—rhetoric—and then subjects it to tough love—economics. He wields his rhetorical pen expertly, promoting his agenda, but it is an agenda that can, he claims, be measured and assessed by external, non-emotive, non-subjective criteria. Perhaps he is an “academic darling” because his opinions address (subtextually) an abiding modern anxiety about the intersection of power, subjectivity, and authority.

IV. READERS RESPOND: CASEBOOK EDITORS AND LAW PROFESSORS

So far, I have been talking about what may motivate Judge Posner. Now I turn to the qualities that attract casebook editors and law professors to his opinions. The two most important are rhetorical strategies he shares with Justice Cardozo. First, he often invokes old “chestnut” cases.⁸² A citation check of the chestnut case will quickly

⁸⁰ See, e.g., *Alaska Packers' Assoc. v. Domenico*, 117 F. 99 (9th Cir. 1902), discussed in *Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924 (7th Cir. 1983).

⁸¹ One writer perceives in Judge Posner an “antipathy toward the humanities” and notes his disapproval of literary critics he regards having “left-wing” agendas. Guyora Binder, Comment, *The Poetics of the Pragmatic: What Literary Criticisms of Law Offers Posner*, 53 STAN. L. REV. 1509, 1510, 1516–17 (2001). I do not think Judge Posner has any antipathy to the humanities, at least not literature or rhetoric. He seems to be fascinated by both. He objects to critics who try to evaluate law using the techniques of humanities disciplines.

⁸² See Cunningham, *supra* note 5, at 1388–90 (describing why casebook editors are likely to include old “chestnuts” updated with more recent opinions that invoke basic principles suitable for law students); Thomas J. Miles, *Posner on Economic Loss in Tort: EVRA Corp. v. Swiss Bank*, 74 U. CHI. L. REV. 1813, 1813, 1815–16 (1974) (noting Judge Posner’s discussion of twin “chestnuts”: *Vosburg v. Putney* from torts case-

reveal the new Judge Posner opinion; its reliance on the old case will signal to editors and professors an opinion that may be useful for modernizing without really changing inherited teaching materials. Invocation of old cases also allows Judge Posner, like Justice Cardozo, to expound on basic and general legal principles without getting bogged down in the ins-and-outs of more recent precedents.⁸³ (Perhaps someone will analyze the semiotics of citation practice in creating casebooks!)

Going back to basics increases the odds that the opinion will be anthologized in casebooks and thus remembered by subsequent generations of lawyers.⁸⁴ Judge Posner's tendency to skip over precedents has provoked criticism from some practitioners, judges, and scholars who see Judge Posner's disregard of precedent as unpredictable or activist.⁸⁵ This Essay does not engage that debate. It may be that, as a superb student and a long-term law professor, the old chestnuts come more readily to mind than they do for other judges who rely more upon the briefs or their clerks' research. The point is

books, and *Hadley v. Baxendale* from contracts casebooks); see also M. Todd Henderson, *Deconstructing Duff and Phelps*, 74 U. CHI. L. REV. 1739, 1739–59 (2007), and J. Mark Ramseyer, *Not-So-Ordinary Judges in Ordinary Courts: Teaching Jordan v. Duff & Phelps, Inc.*, 120 HARV. L. REV. 1199, 1199–1209 (2007) (both commenting on a rare Judge Posner dissent that invoked prototypical employment-at-will doctrine to challenge the applicability of established state precedent on the duty to disclose information to employee / shareholders in small corporations, which has now become a classic case in casebooks on corporate law); Sykes, *supra* note 16, at 1914–15 (noting Judge Posner's reliance on *Guille v. Swan*, 19 Johns. 381 (N.Y. Sup. Ct. 1822), and apparent, though not logically determinative, reliance on the RESTATEMENT (SECOND) OF TORTS § 520 (1965)).

⁸³ See, e.g., Michael Johnson, Comment, *Posner on the Uses and Disadvantages of Precedents for Law*, 22 REV. LITIG. 143 (2003); Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573 (2000).

⁸⁴ POSNER, *supra* note 13, at 61–62, 67–69. Judge Posner notes that too much “law” is one of the problems facing legal educators, observing that the “rapid increase in the number of judges and opinions is making it costly for lawyers, professors, and judges to determine judicial quality, and this may make them rely ever more heavily on the ‘signal’ of good quality emitted by the powerful reputation of a Cardozo.” *Id.* at 69. Note Judge Posner's use of the rhetorical device, metonymy, in the phrase “a Cardozo.” *Id.* The judge with a high reputation—a Cardozo, a Posner—is like a trademark, efficiently signaling a reliable source.

⁸⁵ See, e.g., Teresa Huang, *Gaiman v. McFarlane: The Right Step in Determining Joint Authorship for Copyrighted Material*, 20 BERKELEY TECH. L.J. 673, 693–703 (2005); Gerald P. Moran, *A Radical Theory of Jurisprudence: The “Decisionmaker” as the South of Law—The Ohio Supreme Court's Adoption of the Spendthrift Trust Doctrine as a Model*, 30 AKRON L. REV. 393, 403 n.32 (1997); Daniel T. Ostas, *Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard A. Posner*, 36 AM. BUS. L.J. 193, 212–13 (1998); Polly J. Price, *Precedent and Judicial Power After the Founding*, 42 B.C. L. REV. 81, 109 n.126 (2000).

simply that this characteristic makes Judge Posner's opinions attractive to casebook editors who may feel the need to nod at a century or two of case law in just a few pages. Moreover, if Judge Posner has ignored or misstated more recent precedent, so much the merrier! A professor can demonstrate acumen by pointing out the misstep to students and maybe publish an article to boot. Of course some students may hear a mixed message: the opinion is simultaneously anthologized and criticized. But this is legal education's old mixed message, which neither Judge Posner nor contemporary casebook editors invented.

Judge Posner's use of a 1902 case, *Alaska Packers' Association v. Domenico*⁸⁶ in his 1983 decision in *Selmer Co. v. Blakeslee-Midwest Co.*⁸⁷ provides a striking example of revisionism. The Ninth Circuit decided *Alaska Packers'* on the ground that a contract was unenforceable for failure of consideration.⁸⁸ Judge Posner recast it as a precedent on economic duress.⁸⁹ Selmer sought damages for breach of a construction contract despite having accepted an apparent settlement of the disputed amounts. Selmer argued that the settlement was unenforceable because Blakeslee had procured it through economic duress. In *Alaska Packers'*, the Ninth Circuit refused to enforce a modification to a labor contract for failure of consideration due to the pre-existing duty rule.⁹⁰ Judge Posner's re-casting of the old case has elicited scholarly interest. In unearthing the facts and the context of the earlier dispute, Deborah Threedy notes that

Judge Posner has had a great deal to do with the case being considered a [classic] duress case. In the last twenty-five years, *Alaska Packers'* has been cited thirteen times. Twelve of those citations appeared in cases decided by the Seventh Circuit, and eight of those Seventh Circuit decisions were authored by Judge Posner.⁹¹

In a similar vein, Douglas Baird argues that Judge Posner has successfully changed and rationalized the doctrine of economic duress by his recasting of *Alaska Packers'*.⁹²

⁸⁶ 117 F. 99 (9th Cir. 1902).

⁸⁷ 704 F.2d 924 (7th Cir. 1983).

⁸⁸ *Alaska Packers'*, 117 F. at 105.

⁸⁹ *Selmer*, 704 F.2d at 926-27.

⁹⁰ *Alaska Packers'*, 117 F. at 103.

⁹¹ Debora L. Threedy, *A Fish Story: Alaska Packers' Association v. Domenico*, in *CONTRACTS STORIES* 335, 342 (Douglas G. Baird ed., 2007) [hereinafter *CONTRACTS STORIES*].

⁹² Douglas G. Baird, *The Young Astronomers*, 74 U. CHI. L. REV. 1641, 1641-53 (2007) (arguing that Judge Posner has successfully explained that a defense to enforcement of a contract modification based on economic duress should be confined

For my purposes, the salient point is that *Alaska Packers'* appeared in the first edition of what is now the well-known contracts casebook edited by Dawson, Harvey, and Henderson.⁹³ The first edition was published in 1959, the same year that Judge Posner went to Harvard Law School. As a first year law student, he may have read it.⁹⁴ As a judge, he has altered our reading of it. Whatever one thinks about the merits of Judge Posner's revisionism, his reading of *Alaska Packers'* is now widely noted in the leading casebooks⁹⁵ and *Selmer* itself has become a principal case in at least one casebook.⁹⁶

The second rhetorical strategy Judge Posner shares with Justice Cardozo is a discursive or exploratory organization for presenting the legal analysis.⁹⁷ This is a pronounced and consistent feature of Judge Posner's opinions. Judge Posner rarely states a conclusion at or near the start of an opinion, and he typically proceeds through a number

to those very rare—perhaps now non-existent situations—where a legal remedy (however modest) for breach is unobtainable).

⁹³ CASES AND MATERIALS ON CONTRACTS AND CONTRACTS REMEDIES 762–68 (John Philip Dawson ed., 1959). *Alaska Packers'* has persisted as a principal case through the eighth edition. CONTRACTS: CASES AND COMMENT 569 (John Philip Dawson et al. eds., 8th ed. 2003). *Selmer* appears in a note. *Id.* at 572.

⁹⁴ Dawson taught at Harvard. In 1959, there were two contracts casebooks in use at Harvard—Dawson's and Lon Fuller's. Fuller's did not contain *Alaska Packers'*. E-mail from Lesley Schoenfeld, Access Services Coordinator, Harvard Law School Special Collections Department, to Kelly Aldrich, Reference Librarian, Reference Office, Gallagher Law Library, University of Washington School of Law (Apr. 2, 2008, 10:35:47 EST) (on file with author). I have not discovered which professor taught Judge Posner, but the Dawson casebook is a bestseller, now in its ninth edition. If Judge Posner did not read it as a first-year student, he no doubt became aware of it as a law professor.

⁹⁵ See, e.g., CONTRACTS: CASES AND DOCTRINE 636, 649 (Randy E. Barnett ed., 3d ed. 2008) (citing *Threedy*, *supra* note 91, at 639–43, and reprinting a different Judge Posner opinion, *United States v. Stump Home Specialties Mfg.*, 905 F.2d 1117 (7th Cir. 1990) which cites *Alaska Packers'* at 649); CONTRACT LAW AND THEORY 382 (Robert E. Scott et al. eds., 4th ed. 2007) (citing Judge Posner's discussion of *Alaska Packers'* in Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411 (1977)); PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 715 (Charles L. Knapp et al. eds., 6th ed. 2007).

⁹⁶ See, e.g., 1 CONTRACTS: LAW IN ACTION 568 (Stewart Macaulay et al. eds., 2d ed. 2003).

⁹⁷ I use “discursive” here in the sense of “[c]overing a wide field of subjects; rambling” and not in the alternative sense of “[p]roceeding to a conclusion through reason rather than intuition.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 44, at 532. Judge Posner has used the term “exploratory” in a similar vein to distinguish what he calls the “high” or “pure” style of opinion in which a judge declares the law and the judgment as if each were inevitable from the low or impure style in which the judge explains his options and his reasoning more informally. Judge Posner favors the latter approach. Posner, *supra* note 22, at 1426–32; see also Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J. L. & HUMAN. 201 (1990).

of issues and analyses before revealing to the reader the analysis he believes determinative.⁹⁸ As far as I have discovered, he states his conclusion early only when dissenting.⁹⁹ That makes sense, because the reader already knows that the dissenter disagrees with the majority. Deferring the conclusion and thereby exploring a variety of possible analyses is substantively suited to his pragmatic jurisprudence. Because he believes the legal rules in contested cases are often unclear and judges will have difficulty not applying their own values in such cases, he is annoyed by opinions that rely on rhetorical constructs, like syllogistic organization, that camouflage those defects. He associates the “high,” authoritative, declarative, and deductive style with a genuine, if misguided, certainty about the law or an effort to camouflage judicial discretion.¹⁰⁰

There is a tremendous amount of sheer hypocrisy in judicial opinion-writing. . . . Judges have a terrible anxiety about being thought to base their opinions on guesses, on their personal views. To allay that anxiety, they rely on the apparatus of precedent and history, much of it extremely phony. I do think judges can and should get away with a lot more candor, so that the public sees what a court is—not geniuses, or even particularly erudite people, but just lawyers trying to give some reasonable ground for their opinions.¹⁰¹

Discursive organization offers editors and professors an additional incentive to select or teach his opinions. William Domnarski has suggested that Judge Posner’s judicial “essays” fill in where classroom Socratic dialogue has dwindled.¹⁰² I suspect this is right. Judge Posner’s opinions efficiently demonstrate what students are supposed to learn to do. Read an anthologized Judge Posner opinion—or indeed almost any Judge Posner opinion—and you are likely to see the structure of an unusually smooth Socratic dialogue where hypotheti-

⁹⁸ See *infra* notes 105–08 and accompanying text.

⁹⁹ See, e.g., *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 444 (7th Cir. 1987) (Posner, J., dissenting). In distinction to his majority opinions’ typical organization, Judge Posner states his conclusion in the first paragraph: “I disagree with this holding. The terms of the stockholder agreement show that there was no duty of disclosure, and since there was no duty there was no violation of Rule 10b-5.” *Id.* See also *Gattem v. Gonzales*, 412 F.3d 758, 768 (7th Cir. 2005) (Posner, J., dissenting) (concluding, within the first full page, that “[w]ithout more detail concerning Gattem’s crime, I am unconvinced that the Board made a rational judgment in classifying it as an ‘aggravated felony’”).

¹⁰⁰ Posner, *supra* note 22, at 1432–33. But see Wald, *Rhetoric of Results*, *supra* note 25, and Wald, *Reply to Judge Posner*, *supra* note 25.

¹⁰¹ Linda Greenhouse, *Interview; In His Opinion*, N.Y. TIMES, Sept. 26, 1999, at 14 (quoting Judge Richard A. Posner).

¹⁰² WILLIAM DOMNARSKI, IN THE OPINION OF THE COURT 143 (1996).

cal solutions are raised, examined, and then discarded seriatim until one arrives finally at a satisfactory solution.¹⁰³ Judge Posner even poses factual hypotheticals, just as a classroom professor might.¹⁰⁴

This discursive approach has other advantages for page-constrained editors and time-constrained professors. In the course of raising and discarding alternative possible analyses of the issues in a case, Judge Posner also provides capsule summaries of doctrine and juxtaposes doctrinal “cousins,” effectively demonstrating just the skill that most traditional law professors want their students to demonstrate on exams—the ability to analyze a given set of facts through multiple doctrinal lenses. It has also struck me that Judge Posner’s opinions sometimes read like truly exceptional exam answers for “issue-spotter” hypotheticals.

Judge Posner’s discursive organization also adds some suspense, making his opinions more interesting to read than the run of the mill opinions. A Judge Posner opinion has a beginning, middle, and end that build and then resolve a certain legal tension—an opinion that begins with issue and conclusion cannot create much suspense. Sometimes, where the facts are key to the legal issue, Judge Posner

¹⁰³ See *Empire Gas Corp. v. Am. Bakeries Co.*, 840 F.2d 1333 (7th Cir. 1988) (examining a series of possible interpretations of the duty of “good faith” in a requirements contract); *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284 (7th Cir. 1985) (explaining the difference between a liquidated damages clause and a penalty clause with reflections on freedom of contract and efficient breach); *Morin Bldg. Prods. Co. v. Baystone Constr. Inc.*, 717 F.2d 413 (7th Cir. 1983) (explaining whether a jury instruction was correct by examining different state law rules governing whether exercise of a satisfaction clause is subject to a reasonableness standard); *Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924 (7th Cir. 1983) (explaining the reasons for making some, but not all, forms of coercion or pressure illegal for purposes of contract formation). See also *In re Oakley*, 344 F.3d 709 (7th Cir. 2003) (sequencing arguments for classifying a bankrupt’s property as tangible or intangible under an exemption statute); *Harmann v. Prudential Ins. Co. of Am.*, 9 F.3d 1207 (7th Cir. 1993) (presenting various arguments for and against equitable reformation of an insurance contract where the insured was murdered by the putative beneficiary); *Brazell v. First Nat’l Bank & Trust of Rockford*, 982 F.2d 206 (7th Cir. 1992) (considering various factual arguments supporting a claim for fraud on a loan guarantor); *Mucha v. King*, 792 F.2d 602 (7th Cir. 1986) (considering various factual claims to ownership of a painting in light of laws on bailment, abandonment and conversion).

¹⁰⁴ See *Harzewski v. Guidant Corp.*, 489 F.3d 799, 804 (7th Cir. 2007) (hypothesizing, “[s]uppose Guidant had stolen half the money in a plan participant’s retirement account and a suit by the participant resulted in a judgment for that amount”); *Lasowski v. Spellings*, 443 F.3d 930, 937 (7th Cir. 2006) (hypothesizing, “[s]uppose that it turns out that some part of the grant to Notre Dame was used to defray the cost of religious activities at the other schools. Several possibilities would then heave into view”).

lets them drive the plot,¹⁰⁵ but more typically his fact descriptions are remarkable more for clarity and brevity than rhetorical flair. In this, his facts differ markedly from Justice Cardozo's in the famous opening to *Hynes*.¹⁰⁶ Raw manipulation of facts to pull on the heartstrings might appeal to non-rational instincts. Instead, Judge Posner creates suspense by tempting readers down superficially plausible analytic pathways and then, just when he has them going, reveals an obstacle they had not anticipated. He may repeat the trick several times until at last he reveals the direct line to the most sensible outcome.¹⁰⁷ His authorial persona replicates the Socratic professor's in seeming to explore new ground. Reading an opinion like this is more fun—at least for academics and students, if not practicing attorneys—than reading the more standard, syllogistic resolution of yet another tawdry or tragic legal dispute—no matter what one ultimately thinks of the merits.

It is not that Judge Posner has more interesting cases than other judges do. He imbues his cases, for the student if not for the practitioner, with interest and excitement, maybe even passion. The student's attention is redirected to the evolving drama of Judge Posner's revelation of "the path of the law" and often away from the dispute and the parties. Just as a great critic can make a review more interesting than the book, so Judge Posner can make the law more interesting than the conflict that occasions it.

Both *Selmer*¹⁰⁸ and *Lake River*¹⁰⁹ provide clear examples of this discursive approach in contract cases.¹¹⁰ *In re Oakley*¹¹¹ provides an ex-

¹⁰⁵ See *Mucha v. King*, 792 F.2d 602 (7th Cir. 1986) (discussing the possible skull-duggery about a painting.); *Cecaj v. Gonzales*, 440 F.3d 897 (7th Cir. 2006) (discussing the abuse of an asylum-seeker).

¹⁰⁶ *Hynes v. N.Y. Cent. R.R. Co.*, 131 N.E. 898, 898–900 (N.Y. 1921) (Cardozo begins by stating, "On July 8, 1916, Harvey Hynes, a lad of sixteen, swam with two companions from the Manhattan to the Bronx side of the Harlem River or United States Ship canal, a navigable stream.").

¹⁰⁷ See *infra* notes 105–08 and accompanying text.

¹⁰⁸ *Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924 (7th Cir. 1983). After stating the issue as whether Wisconsin contract law would recognize the defense of economic duress and reciting the facts, Judge Posner begins the analysis with a fine example of the "impure" or "low" style. See *supra* note 97.

If you extract a promise by means of a threat, the promise is unenforceable. That is not, as is so often stated, because such a promise is involuntary unless "involuntary" is a conclusion rather than the description of a mental state. If the threat is ferocious ("your money or your life") and believed, the victim may be desperately eager to fend it off with a promise. Such promises are made unenforceable in order to discourage threats by making them less profitable. The fundamental issue in a duress case is therefore not the victim's state of mind but whether the statement that induced the promise is the kind of offer to

deal that we want to discourage, and hence that we call a “threat.” Selmer argues that Blakeslee-Midwest said to it in effect, “give up \$53,000 of your claim for extras [\$120,000 minus \$67,000] or you will get nothing.” This has the verbal form of a threat but is easily recast as a promise innocuous on its face—“I promise to pay you \$67,000 for a release of your claim.” There is a practical argument against treating such a statement as a threat: it will make an inference of duress inescapable in any negotiation where one party makes an offer from which it refuses to budge, for the other party will always be able to argue that he settled only because there was a (figurative) gun at his head.

Selmer, 704 F.2d at 926–27 (citations omitted). Possibly contrary Wisconsin cases are not discussed, although their existence is indicated by “cf.” citations. *Id.* at 927. Great attention is paid, however, to *Alaska Packers’*. *Id.* Then, in a transition that would surely puzzle the average first-year student, the opinion turns into a less-than-transparent lesson on the availability of a judicial remedy (perhaps inadequate) as the determinant of whether contract modifications or settlements that result from economic bullying during performance will be enforced. *Id.* The topic of good faith in performance never comes up. Good stuff to discuss with first-year law students, no?

¹⁰⁹ *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1289–90 (7th Cir. 1985) (explaining how to differentiate a penalty clause from a liquidated damages clause, while minimizing the significance of the contract language and ignoring all but direct performance costs). For a good discussion of the case and why it has become a casebook standard, see Cunningham, *supra* note 5, at 1448–55.

¹¹⁰ A random selection of less well-known Judge Posner opinions reveals mini-lectures on legal analysis. *See, e.g.*, *Farmers Auto Ins. Ass’n v. St. Paul Mercury Ins. Co.*, 482 F.3d 976 (7th Cir. 2007) (regarding insurance contract interpretation); *Westowne Shoes v. Brown Group*, 104 F.3d 994 (7th Cir. 1997) (regarding a franchise dispute); *Outboard Marine Corp. v. Babcock Indus., Inc.*, 106 F.3d 182 (7th Cir. 1997) (discussing a contract breach, and comparing mitigation of damages with comparative fault defenses in tort). I happened upon one recent Judge Posner opinion that was not well-written. *Am. Family Mut. Ins. Co. v. Roth*, 485 F.3d 930 (7th Cir. 2007) (involving a breach of a confidentiality clause and theft of trade secrets). This case struck me as atypical in that the prose was convoluted and the facts were hard to follow. *See id.* at 931–32. Judge Posner used unusually complex sentence structures. The seriatim discussion of legal issues is needlessly opaque. It is never quite clear whether the determinative issue is the enforceability of an employee assignment, non-compete and confidentiality agreement, or the trade secret status of the arguably assigned information.

¹¹¹ *In re Oakley* involves a bankruptcy exemption statute and provides a mini-lecture on the economic difference between tangible and intangible property. *In re Oakley*, 344 F.3d 709, 711–13 (7th Cir. 2003). Judge Posner uses a particularly detached style to explain why the debtor cannot exempt \$2700 cash from the reach of the bankruptcy trustee because it exceeds the \$100 maximum for “intangible” property. *Id.* at 714. The opinion offers a classic instrumentalist analysis that focuses on why the statute might distinguish between tangible and intangible property. *Id.* at 713.

The opinion provides a history lesson in the common law distinctions between tangible and intangible property. *Id.* at 713–14. But, I found the outcome and rhetoric distressing. The debtor—about whose earning capacity Judge Posner provided no information—was left by the decision with exempt “intangible” property of \$100 in cash and \$900 in “tangible” clothing and goods, for a total of \$1000. *Id.* at 714. The Indiana statute permitted an exemption of \$100 of intangible assets and \$4000

ample in a bankruptcy case; and *Unites States Department of Education v. National Collegiate Athletic Association*,¹¹² is an example in an evidence case.

The Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd. provides a partial counterpoint to Judge Posner's usual discursive organization.¹¹³ While Judge Posner does not state the bottom line at the very beginning of the opinion, he rather uncharacteristically states his conclusion as to each substantive issue as soon as he raises it.¹¹⁴ Judge Cudahy's dissent may have inspired Judge Posner to write more definitively in order to counter Judge Cudahy's critique that the Judge Posner's analysis of both the facts and the law were "implausible," "so lopsided as to be almost droll—if it were not serious business," and "equally one-sided."¹¹⁵ Judge Posner's dissent in *Jordan v. Duff & Phelps, Inc.*¹¹⁶ is also closer to the pure style and much less discursive—at least until the end when Judge Posner provides a laundry list of factors that ought to be considered in such cases.¹¹⁷ As noted above, this makes sense, given that he is arguing against the majority decision and is only concerned with correcting its errors.

of tangible assets. *Id.* at 710. The debtor had attempted to exempt \$2700 in cash. *Id.* at 711. The opinion does not explain why so much of his assets was in cash—whether he had just sold a car, for example, when foreclosure struck, or whether there was a nefarious reason. Judge Posner does not address the fact that the debtor ended up with only about one quarter of what Indiana would have exempted had the cash been deemed tangible. Judge Posner explains that the intent of the statute is to prevent debtors from shielding liquid assets because those are the kind that creditors can use most efficiently, and he used a classic cost/benefit rationale to show that any other interpretation would make credit more expensive for all. *Id.* at 712–13. He does not mention the possibility that the Indiana statute might have been designed to ensure that bankrupts were left with \$4100 of assets.

The style alternates between historical erudition and near-comedy. The opinion provides a clever illustration of the difference between intangible and tangible property: "A napkin has value; you can wipe your mouth with it. Wallpaper has value; you can decorate your walls with it. People do not wipe their mouths with money or paper their walls with it." *Id.* at 713. I thought that these references bordered on bathroom humor—hinting at what you can use to wipe what. I also thought that the reference to wallpaper was insultingly frivolous in this bankruptcy context.

¹¹² *United States Dep't. of Educ. v. Nat'l. Collegiate Athletic Ass'n.*, 481 F.3d 936, 938–42 (7th Cir. 2007) (raising and dismissing a sequence of reasons why the NCAA might claim a privilege).

¹¹³ *Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.*, 970 F.2d 273 (7th Cir. 1992).

¹¹⁴ *Id.* at 276.

¹¹⁵ *Id.* at 283 (Cudahy, J., dissenting).

¹¹⁶ 815 F.2d 429, 444–52 (7th Cir. 1987) (Posner, J., dissenting).

¹¹⁷ *Id.* at 451–52 (Posner, J., dissenting).

V. WHAT MIGHT A PROFESSOR DO DIFFERENTLY?

I believe that an explicit focus on rhetorical strategies can reveal important messages that conventional readings and substantive critiques may miss. This Part presents a few ideas about what professors might share with students. I will use two very different opinions to illustrate my points.

Let us suppose that a professor wanted to encourage students to think deliberately about why one of the apparent aims and certainly one of the common effects of traditional legal education is to disabuse new students of certain assumptions that may have served them reasonably well in lay life. For example, law schools are famous for shocking new law students into recognizing that their intuitions about what is right or wrong may not be apt or sufficiently nuanced to serve in legal practice. Or, to take another more complicated example, legal education may undermine some students' assumptions that law and morality are entwined, that legal behavior should also be moral (by some criterion), and that moral behavior should be legal. If a professor wanted students to reflect on how the process of legal education may effect these transformations without providing any theoretical materials relevant to the underlying jurisprudential issues, that professor might focus on Judge Posner because of his frank disregard for moralism.¹¹⁸

Another strategy would be to share with students some of what Judge Posner has written extra-judicially about the issue and put his life and times in some sort of intellectual and political context. This seems to me an approach more interesting, rigorous, and honest than simply assigning his opinions among a stream of opinions that seem to be about doctrine.

One could also focus on how Judge Posner's rhetorical strategies reflect his views on the intersection of law and conventional ideas of "good" behavior and what his status in the legal academy and profession suggests about acceptance of his attitudes. At least three discussions might emerge. The first considers how Judge Posner handles the doctrine of good faith in contract performance, a vexatious doctrinal nomenclature for a judge hostile to moralistic arguments. The second considers the role of empathy for a party, or the rhetorical semblance of empathy, in a judicial opinion. The third considers the construction of an authoritative voice in the legal profession.

¹¹⁸ Such an exercise would focus on the formation of "professional identity," a type of lesson the *Carnegie Report* advocates. THE CARNEGIE REPORT, *supra* note 3, at 126-61.

A. *Using Discursive Organization to Change Readers' Understanding*

A close reading of Judge Posner's discursive organization of *Market Street Associates Ltd. Partnership v. Frey*¹¹⁹ illustrates a subtext of what "good faith" does and does not mean for Judge Posner. *Market Street* is reproduced in at least one contracts casebook¹²⁰ and has attracted scholarly comment.¹²¹ In Judge Posner's hands, the case involves the duty of good faith in performance of contracts. I use this mundane case to illustrate Judge Posner's extraordinary ability to attract attention to an opinion that surely never would have emerged from the reports into casebooks and scholarship without his assiduity. Few other judges or academics would have perceived the opportunity to craft a novel lesson on the duty of good faith in contract performance in this appeal.

Market Street, a lessee of shopping mall property, sued the General Electric Pension Trust, lessor of the property.¹²² Market Street sought specific performance of the Trust's alleged contractual duty to convey title of the property at the Trust's cost upon failure of the parties to negotiate a loan to finance improvements.¹²³ There were three issues on appeal. The first concerned diversity of citizenship for federal jurisdiction.¹²⁴ The second concerned whether Market Street

¹¹⁹ 941 F.2d 588 (7th Cir. 1991).

¹²⁰ 1 CONTRACTS: LAW IN ACTION, *supra* note 96, at 598.

¹²¹ See, e.g., Todd D. Rakoff, *Good Faith in Contract Performance: Market Street Associates Ltd. Partnership v. Frey*, 120 HARV. L. REV. 1187 (2007); see also, Cunningham, *supra* note 5, at 1409 (making an extended analysis of Justice Cardozo's and Judge Posner's opinions and arguing, in part, that Judge Posner turns Justice Cardozo's understanding of good faith in contract performance "upside down").

¹²² *Market Street Assoc. Ltd.*, 941 F.2d at 589.

¹²³ *Id.*

¹²⁴ Although the first two issues are edited out of the Macaulay casebook, Judge Posner's analysis might be useful to civil procedure or professional responsibility professors—at least if they might want to produce an *in terrorem* effect. Toward inept counsel, Judge Posner does not emulate Justice Cardozo's alleged "saintliness." Market Street Associates, a limited partnership, had sued the General Electric Pension Trust in Wisconsin state court, and the Trust had removed the suit to federal court where the district court accepted jurisdiction. *Id.* at 589. Judge Posner delivers a lecture to the lower court, the Trust's counsel, and law students—who might be reading the unexpurgated version—on the need to establish complete diversity of citizenship among all the parties, including the limited partners. *Id.* at 589–90. While it is quite proper that the Seventh Circuit should insist on proof of jurisdiction, the fact that counsel did manage, however belatedly, to demonstrate complete diversity makes it interesting that Judge Posner sets out the rules in a case in where neither the rule nor the rule's application was contested. *Id.* One would have thought that the lecture would have been more apt in a case where jurisdiction was not obtained or was questionable. Be that as it may, this short lecture illustrates one of Judge Posner's authorial characteristics that must make him attractive to law professors. The lecture should also send a chill down the spine of the law student aspiring to litigate.

had waived its right to trial by bringing a motion for summary judgment.¹²⁵ The third concerned the meaning of “good faith” in contract performance, and this issue predominates.¹²⁶

Judge Posner uses the opinion’s opening paragraph to suggest, rather than define, this third issue. He also uses the opening paragraph to inspire the reader to keep reading. The paragraph opens, “Market Street Associates . . . appeal[s] from a judgment for the defendants . . . entered upon cross-motions for summary judgment in a diversity suit that pivots on the doctrine of ‘good faith’ performance of a contract.”¹²⁷ It closes with “[b]ut before we can get to the substance of the dispute we need to consider a jurisdictional and a procedural question.”¹²⁸ The first sentence creates some modest interest and perhaps a touch of suspense, at least for the weary academic reader, precisely because the issue is not technically defined. Note the vivid but vague verb “pivot.”¹²⁹ And true to form, Judge Posner withholds the court’s answer. The last sentence preserves the narrative momentum, propelling the reader through the first two technical issues with the assurance that after considering them, “we can get to the substance of the dispute.”¹³⁰ Eight paragraphs later, after defense counsel has been thoroughly admonished for sloppiness, “[w]e come at last to the contract dispute out of which the case arises.”¹³¹

So far, so good, one might think. Judge Posner has managed to create some interest about a dull squabble between a developer and an institutional investor over a small parcel in a shopping mall. Observe that the facts—discouragingly tedious, involving interpretation of Paragraph 34 of a lease—are not mentioned in the opening paragraph. Instead, Judge Posner manages to create a little suspense out of next to nothing by withholding information about the case, much less its resolution.

Note the use of “we” in the first and the eighth paragraphs.¹³² Although the first person plural is commonly used in majority appellate opinions, Judge Posner’s usage subtly shifts from a reference to his judicial colleagues on the panel to his common enterprise with the reader. After all, by the time an opinion appears in the reports,

¹²⁵ *Id.* at 590.

¹²⁶ *Id.* at 589.

¹²⁷ *Id.*

¹²⁸ *Market Street*, 941 F.2d at 589.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 591.

¹³² *Id.* at 589, 591.

the judges on the panel have already taken and completed the analytic journey. So, a sentence like this one, "But before we can get to the substance of the dispute we need to consider a jurisdictional and a procedural question,"¹³³ is pure artifice. The putative judicial "we" has already considered and decided these issues. Instead, this familiar "we" has subtly shifted its meaning to "you, dear reader, and I." Readers must also be subtly flattered, or at least relieved, by inclusion in this "we." By the time, in paragraph eight, "we come at last"¹³⁴ to the merits, "we" must breathe a sigh of relief that "we"—unlike hapless defense counsel—have not wasted the court's time by failing to understand and comply with "settled law."¹³⁵

"We," the readers, have been invited up onto the bench where we can join with Judge Posner in sorting out the only interesting issue. "We" are safely distant from counsel or party. Judge Posner did not invent emotional distance or the literary features that create or support it, of course. Emotional distance typifies an appeal, which is conducted mostly, if not exclusively, by written arguments about legal authority, and it is normalized in the practice of teaching law through appellate opinions.¹³⁶ But Judge Posner steps back even further than legal procedures require. He is adept, and probably self-conscious, in using rhetoric to distance the reader from a party and even its lawyer if the reader's emotional detachment will support his analysis. Promoting detachment is consonant with his distaste for moralizing in legal analysis. In this case, the rhetorical technique detaches the reader from the facts of the dispute and, in a nice twist, arguably attaches the reader emotionally and intellectually to the judge and to his view of the case. Most readers, perhaps especially law students, will indulge in *schadenfreude*—delighting in the misery of others—as Judge Posner skewers the lawyers for their mistakes.

There is still more to say about this superficially mundane first paragraph. Just after the first sentence appears a "cf." citation to a 1968 article by Robert Summers¹³⁷ on "good faith" in common law and the sales provisions of the Uniform Commercial Code

¹³³ *Id.* at 589.

¹³⁴ *Market Street*, 941 F.2d. at 591.

¹³⁵ *Id.* at 590.

¹³⁶ See MERTZ, *supra* note 9, at 67, 82–83, 120–28.

¹³⁷ Robert Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 232–43 (1968). Of course, Judge Posner might have cited Article 2's notice provisions as persuasive authorities to support his decision that Market Street could not sue for specific performance without first providing the Trust with a clear warning that it planned to exercise its rights to the property. See, e.g., U.C.C. §§ 2-606, 2-608. But he did not.

(U.C.C.).¹³⁸ There is no need for a citation there at all. Judge Posner then explains that Wisconsin common law governs this dispute and that Articles 2 and 2A of the U.C.C. do not.¹³⁹ Judges typically announce the source of governing law, but it is unusual to explain why some other body of law does not govern where there is no conceivable argument that it might. At first, I thought this was just an example of a writer following his own lead. Having cited an article whose title referred to common law and to the U.C.C., perhaps Judge Posner thought he needed to announce that the U.C.C. does not apply.

But I now think the citation and subsequent sentence are artful. The superfluous citation to an old article by Summers, a renowned scholar, signals erudition in the author and significance for the opinion. The age of the article—written shortly after the states' widespread adoption of Article 2—and the eminence of the author signal that the opinion will deal with fundamental issues, not with recent twists of state precedent. This citation serves the same purpose as citing old chestnut cases. The detailed explanation of which law governs—surely superfluous for the lawyer and unedifying to the lay reader—seems peculiarly directed to contracts professors for whom Article 2's scope might be an early lesson. Even the narrative structure, described above as a tool for generating reader interest, would suit a contracts casebook editor. The last sentence of the first paragraph and the first sentence of the eighth make it a breeze for the editor to cut the jurisdictional and procedural issues without drafting the slightest editorial transition.¹⁴⁰

If we now proceed with Judge Posner to the substantive good faith performance issue, on which the case “pivots,” his odd usage at the beginning of the opinion begins to make sense. The vagueness of “pivots” not only keeps the reader interested but also preserves Judge Posner's characterization of the issue from misstatement.¹⁴¹ We will learn at the end of the opinion that the precise issue on appeal is not whether the parties acted in good faith, but whether, in finding that the plaintiff had not acted in good faith and in granting the Trust's summary judgment motion, the trial court applied the appropriate standard.¹⁴² But first Judge Posner wants to use the opinion to disabuse readers, including perhaps the district court, of any naïve notion that “good faith” in contract law means what it does in the ver-

¹³⁸ *Market Street*, 941 F.2d at 589.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 589, 591.

¹⁴¹ *Id.* at 589.

¹⁴² *Id.* at 597–98.

nacular. He defers to the very end the actual holding that the case must be remanded to correct a possible procedural error¹⁴³—the record indicated that the lower court may not have viewed the evidence in the light most favorable to Market Street as the non-moving party.¹⁴⁴

In the meantime, however, Judge Posner discusses the merits and emphasizes the paradox that a decision for the Trust would save it from the consequences of failing to read and understand its own contract.¹⁴⁵ Describing a possible judgment as paradoxical creates dramatic tension because it signals that the judgment will indeed be for the Trust. If not, there would be no need to mention a paradox. But Judge Posner does not actually believe there is a paradox. Instead, this is a rhetorical device to frame Posner's explanation of good faith.

Recall that the case arose on Market Street's suit for specific performance and the Trust's motion for summary judgment on the ground, among others, that Market Street had not acted in good faith when it failed to call the Trust's attention to Paragraph 34 after the Trust failed to respond to its financing request.¹⁴⁶ The Trust's agent had ignored the plaintiff's request for financing apparently without recognizing that this refusal might be treated as a breakdown of financing negotiations and, thus, the condition precedent to the defendant's duty to convey the property back to the plaintiff at a favorable price. Market Street apparently did not give defendant prior notice that it regarded the Trust's non-response as a breach of the duty to negotiate and, as such, the condition precedent to the exercise of its right under Paragraph 34.¹⁴⁷ In other words, Market Street seems to have engaged in contract "gotcha."

But Judge Posner is not interested in proceeding directly to an analysis of whether Market Street was entitled to behave in this way under the terms of the contract or, perhaps, under standards of reasonable commercial behavior. He prefers to discuss the Trust's sloppy conduct, and he characterizes the Trust's problem as a failure to read and understand.¹⁴⁸ I doubt that most business people would characterize the Trust's problem as a failure to read or understand its contract. Instead, its agent's rudeness in failing to respond to Market

¹⁴³ *Id.* at 598.

¹⁴⁴ *Market Street*, 941 F.2d at 597.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 592.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 597.

Street and its negligence in failing to better supervise or train the agent or to have better risk management procedures in place are management mistakes. But Judge Posner characterizes the Trust's behavior as a failure to read and understand its own contract because the reference to reading and understanding neatly anticipates his later discussion of the misnamed and technically irrelevant "duty to read" doctrine.¹⁴⁹

Courts use the "duty to read" doctrine to determine the scope of a party's contractual obligation under written terms the party could have read, regardless of whether the party did in fact read them.¹⁵⁰ The Trust never argued that it had not read or understood Paragraph 34. It argued that it had not been notified that Market Street expected to exercise a right.¹⁵¹ The question on appeal was not whether the Trust was bound by the terms in the lease, which it may not have read or fully understood before signing—the scenario where the pre-formation "duty to read" applies. Judge Posner understood all of this perfectly, we can be sure. Instead, his description of the Trust's conduct as a failure to read the lease creates a verbal, associative link to the "duty to read" doctrine that camouflages the leap in legal logic from all but the most critical readers.

One might wonder why he bothers. I suspect he makes this rather strenuous rhetorical effort to persuade the reader that the pre-contractual "duty to read" doctrine is pertinent because its presence gives him an excuse for explaining the economic rationale for disparate treatment of pre- and post-contract behavior and for avoiding a moralistic evaluation of the parties' relative good faith.

The pre-contractual duty to read establishes a hard-nosed principle in which good faith is irrelevant.¹⁵² Absent fraud or misrepresentation, pre-contractual parties have no duty to correct one another's oversights or mistakes.¹⁵³ Starting here, Judge Posner, in similarly non-moralistic terms, contrasts parties' duties after a contract is formed. The duty to alert another contracted party to its own mistake is not because of moralistic sounding duty of good faith, but

¹⁴⁹ *Id.*

¹⁵⁰ See, e.g., Stewart Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051, 1052–55 (1966); see also *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148–49 (1997) (holding purchasers of a computer bound by an arbitration term in a contract enclosed with a computer despite their claim that they had not read the contract closely enough to have discovered the arbitration clause).

¹⁵¹ *Market Street*, 941 F.2d at 597.

¹⁵² *Id.*

¹⁵³ *Id.*

because it is efficient to do so. Judge Posner explains his controversial default rule for contract performance:

[T]he overriding purpose of contract law . . . is to give the parties what they would have stipulated for expressly if at the time of making the contract they had had complete knowledge of the future and the costs of negotiating and adding provisions to the contract had been zero.

. . . .

To be able to correct your contract partner's mistake at zero cost to yourself, and decide not to do so, is a species of opportunistic behavior that the parties would have expressly forbidden in the contract had they foreseen it.¹⁵⁴

We can now understand Judge Posner's curious usage. The appeal "pivoted" on the trial court's evaluation of Market Street's good faith, but Judge Posner prefers not to discuss the case on those terms. By focusing initially on the paradox that the Trust might win despite its carelessness, he diverts the reader's attention from Market Street's "gotcha" tactics, and he contrives a doctrine that allows him to shift the analysis from the moralistic vocabulary of good faith to the new, economic vocabulary of efficiency. The effect of this rather elaborate framing is to remind and persuade the reader that there is no generalized duty to be one's "brother's keeper,"¹⁵⁵ and the duty of good faith during performance is merely a default rule about efficiency. I suspect that Judge Posner would say that he, unlike Justice Cardozo, has given a reason for his judgment.

I hope I have illustrated how much students could learn from attending to why Judge Posner may use a particular rhetorical technique, like discursive organization. An ordinary judge might have resolved the case on narrow grounds without the need for a lesson about good faith. The judge could rely on the language of the infamous Paragraph 34, which provided that both parties "shall negotiate in good faith."¹⁵⁶ The plaintiff had neither negotiated nor made any serious effort to provoke the Trust into negotiating. The judge could

¹⁵⁴ *Id.* at 596–97. *Cf.* *Morin Bldg. Prod. Co. v. Baystone Constr., Inc.*, 717 F.2d 413 (7th Cir. 1983) (relying on a comparable type of default rule—that contract satisfaction clauses are interpreted to mean what a reasonable person would find satisfactory absent evidence that the parties really bargained for subjective satisfaction). *See generally* Scott Brewer, *Satisfaction and Posner's Morin Opinion: Aliquando Bonus Dormitat Posnerus?*, 120 HARV. L. REV. 1123 (deconstructing the logic of *Morin's* reasoning).

¹⁵⁵ *Genesis* 4:9. Here is a real "chestnut" reference—the biblical story of Cain and Abel. It is interesting that the phrase has come to stand for the opposite, I think, of the biblical story's import. Cain was not *supposed* to kill his brother. His question is rhetorical and designed to evade responsibility. *See id.* at 4:1–16.

¹⁵⁶ *Market Street*, 941 F.2d at 592.

also have held that the plaintiff's failure to provide notice was itself a breach of the duty of good faith and sufficient to preclude an equitable remedy.

B. Creating Empathy, or a Semblance of It

I turn now to lessons about how a skilled writer may create empathy in the reader, or its semblance in the authorial persona. *The Green Bag* reprinted Judge Posner's opinion in *Cecaj v. Gonzales*¹⁵⁷ in its annual compilation of exemplary legal writings.¹⁵⁸ Judge Posner's statement of facts seems a model for the creation of empathy. The case was an appeal from a denial of a petition for asylum. The first issue was whether the Bureau of Immigration Appeals (BIA) had erred in holding that there was not substantial evidence that an applicant for asylum in the United States had been persecuted in Albania.¹⁵⁹ Because the issue involved the weighing of evidence, the opinion presents a relatively rare instance where Judge Posner focuses more on the facts than on the legal analysis. He narrates the following in vivid but dispassionate terms:

In 1998, Cecaj—whom the immigration judge found wholly credible—was arrested following a political protest in which he had participated. He was detained for six days and during that period was beaten by masked police with rubber truncheons and also kicked, suffering injuries that required his hospitalization. A few days after his release from the hospital, a member of the Socialist Party accosted Cecaj on the street and fired a gun near his head, an act that Cecaj sensibly interpreted as a threat. He fled to Greece but returned in 2000 and resumed his political activity with the New Democratic Party. . . . The following year, after an unsuccessful run for mayor of his hometown, he stood for the Albanian parliament on the New Democratic Party ticket in his hometown, which was dominated by the Socialist Party. Although he was a well-known local figure and candidate for public office, he was arrested during the campaign and beaten by the police, ostensibly for not having identification papers on him. He also received threatening phone calls, which he believed came from the police. The last straw was the kidnapping of his 10-year-old brother by unknown persons who told the child that he was being kidnapped because of Cecaj's political activity and that the child

¹⁵⁷ 440 F.3d 897 (7th Cir. 2006).

¹⁵⁸ THE GREEN BAG ALMANAC OF USEFUL AND ENTERTAINING TIDBITS FOR LAWYERS & READER OF GOOD LEGAL WRITING FROM THE PAST YEAR, 239–42 (Ross E. Davies ed., 2006).

¹⁵⁹ *Cecaj*, 440 F.3d at 898–99.

“would end up dead” if Cecaĵ “didn’t do what they say.” The child was released unharmed after a few hours but Cecaĵ received a call in which “they said that [the kidnapping] was the last warning.” Cecaĵ prudently abandoned his candidacy and left Albania with his wife.¹⁶⁰

The next paragraph reports, in deadpan tone, the BIA’s explanation of why each one of these incidents, standing alone, failed to constitute evidence of persecution, and the following paragraph provides Judge Posner’s evaluation.

The immigration judge’s analysis of the evidence was radically deficient. He failed to consider the evidence as a whole, as he was required to by the elementary principles of administrative law. Instead he broke it into fragments. Suppose you saw someone holding a jar and you said, “That’s a nice jar,” and he smashed it to smithereens and said, “No, it’s not a jar.” That is what the immigration judge did.¹⁶¹

The opinion thus presents a short, clear, and persuasive statement of the facts—followed by an unequivocal conclusion and a vivid, if odd, simile.¹⁶² By sequencing the abuses inflicted on Cecaĵ, Judge Posner

¹⁶⁰ *Id.* at 898 (citations omitted) (alteration in original).

¹⁶¹ *Id.* at 899.

¹⁶² The conclusion and example are, of course, not part of the statement of facts, but it is easier to discuss these fairly characteristic rhetorical moves in context at this time. I find the simile odd because it seems to compare abuse by political actors in a failed, or nearly failed, state with a “nice jar” and then to compare the administrative judge’s decision to “smash[ing] it to smithereens.” See *id.* It is certainly an arresting image, especially because language like this is so rare in judicial writing. The comparisons are puzzling, to say the least, but the simile is probably effective in producing agreement by most readers, if only because it stops a reader from plowing mindlessly and unfeelingly into the intricacies of appellate review of administrative decisions. The simile turns the administrative judge into a perverse bully, much like Cecaĵ’s Albanian tormentors. For me, the jar also suggests a remote literary reference to a well-known Wallace Stevens poem, *Anecdote of the Jar* (1919), which Judge Posner has probably read even if he did not intend an allusion. In an interesting coincidence, Thomas Grey has written on both Stevens and Judge Posner. See THOMAS C. GREY, *THE WALLACE STEVENS CASE: LAW AND THE PRACTICE OF POETRY* 1–2 (1991).

One might accuse Judge Posner of the failing to give any “reasons” for his judgment, just as he accused Justice Cardozo of failing to give “reasons” for the judgment in *Hynes*. See POSNER, *supra* note 13, at 33. Most of the rest of the opinion is devoted to arguing with the administrative judge’s inferences or failures to draw inferences from imperfect evidence of the Albanian government’s complicity in Cecaĵ’s persecution. *Cecaĵ*, 440 F.3d at 899–900. Judge Posner’s chief point is a bare assertion that the “elementary principles of administrative law” require the judge to evaluate the evidence as a whole. *Id.* at 899. He does not discuss the cases he cites. See *id.* This criticism may be unfair to the extent that Judge Posner does not want to take the time to reiterate reasons he has articulated elsewhere for not deferring to the administrative law judge. See Adam B. Cox, *Deference, Delegation and Immigration Law*, 74 U. CHI. L. REV. 1671, 1671–87 (2007) (noting that Judge Posner, along with many other

paints a horrifying picture of political persecution that seems to speak for itself and renders absurd the administrative judge's apparent demand of proof that each incident was government-sponsored or government-sanctioned persecution.¹⁶³ In reciting Ceca's fate twice, once in Judge Posner's words and then in the administrative judge's deconstructed version, Judge Posner emphasizes the double trap in which Ceca was caught: abuse in Albania and bureaucratic indifference in the United States.¹⁶⁴ Only a hard-hearted reader could fail to boil up with indignation, but Judge Posner avoids any overtly emotional language. He is the dispassionate judge, tipping his hand only slightly near the end of the first paragraph where the phrase, "the last straw" and the word "prudently" subtly signal adoption of Ceca's point of view.¹⁶⁵

This effective organization and tone produces an emotional response in the reader while preserving the persona of a dispassionate judicial author. Is Judge Posner consciously appealing to the reader's empathy? I would think so. The reader's empathy and sense of outrage will carry most readers past the later descriptions of possible defects in the petitioner's evidence, which do raise some questions about whether the perpetrators of Ceca's persecution were acting on behalf of or with the acquiescence of the Albanian government. Empathy will probably deflect all but the most skeptical readers from questioning whether Judge Posner is correct to treat the BIA's findings as errors of law.

It would be easy for a reader to conclude that Judge Posner feels empathy for Ceca, and he well may. But I think that is beside the point, as Judge Posner would certainly agree. Instead, careful attention to the structure of this opinion suggests that the real target of Judge Posner's ire is the BIA judge. Perhaps that is why the facts are written so vividly. The point may not be to save Ceca so much as it is to make the judge look clueless—reversibly clueless.

It is consistent with what we know about Judge Posner's antimoralism to think that he is deploying his rhetorical skills here to chastise institutional incompetence, not to save the oppressed of other nations. My point is not that Judge Posner should or should not feel empathy or write in a way that inspires empathy. Instead, my point is that readers and students should be careful about succumb-

federal judges, has lost confidence in immigration law judges' capacity for accurately finding and evaluating facts or for interpreting and applying the law).

¹⁶³ See *Cecaj*, 440 F.3d at 898–900.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 898.

ing to a fallacy that Judge Posner has warned against: concluding that one knows an author's personal views from the moods his rhetoric may inspire.¹⁶⁶

Even so sophisticated a reader as Martha Nussbaum temporarily succumbed to the fallacy—perhaps from friendship and wishful thinking. In a welcome essay on Judge Posner's use of literary technique, she considered his narration of the facts in *Carr v. Allison Gas Turbine Division*,¹⁶⁷ a sex discrimination case. The case and the fact narration bear some similarity to *Cecaj*. As in *Cecaj*, Judge Posner writes in *Carr* to reverse the trial court's findings of facts and so we once again have occasion to see him devote more than ordinary care to the facts.¹⁶⁸ Carr was the first woman to work in the tinsmith shop of General Motor's (GM) gas turbine division.¹⁶⁹ For five years her male coworkers subjected her to aggressive, hostile, sexualized, and derogatory remarks, which Judge Posner quotes.¹⁷⁰ Carr fruitlessly and repeatedly complained to her supervisor and finally sued GM for sexual harassment.¹⁷¹

Nussbaum compliments Judge Posner's narration of the facts for "considerable literary selectivity and skill," in particular, his ability to stimulate empathy in the reader for the plaintiff by techniques that enabled the reader to perceive the situation from her point of view.¹⁷² Nussbaum notes that Judge Posner accomplishes this with calm and unsentimental prose, maintaining his position as the "judicious spec-

¹⁶⁶ No one can fault Judge Posner for a lack of candor about his own jurisprudential stances or his approach to writing opinions:

[D]o not infer a judge's jurisprudential stance from the judge's style without a consideration of both the content and form of the judge's opinions. Or the judge's character. All that a choice of style infallibly communicates is what the judge thinks an admirable character for a judge to have.

Posner, *supra* note 22, at 1436. It is too bad that casebook editors provide few references to this sort of material.

¹⁶⁷ 32 F.3d 1007 (7th Cir. 1994), *discussed in* MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE 104–11 (1995); Martha C. Nussbaum, *Poets as Judges: Judicial Rhetoric and the Literary Imagination*, 62 U. CHI. L. REV. 1477, 1502–09 (1995) [hereinafter *Poets as Judges*]. *But see* Martha Nussbaum, Carr, *Before and After: Power and Sex in Carr v. Allison Base Turbine Division, General Motors Corp.*, 74 U. CHI. L. REV. 1831, 1831–44 (2007) [hereinafter Carr, *Before and After*] (reevaluating Judge Posner's approach to that case and criticizing his subsequent opinion in another sexual harassment case, *Baskerville v. Culligan Int'l. Co.*, 50 F.3d 428 (7th Cir. 1995)).

¹⁶⁸ See Carr, 32 F.3d at 1009–10.

¹⁶⁹ *Id.* at 1009.

¹⁷⁰ *Id.* at 1009–10.

¹⁷¹ *Id.* at 1010.

¹⁷² Nussbaum, *Poets as Judges*, *supra* note 167, at 1505.

tator.”¹⁷³ Judge Posner would never indulge in the likes of Justice Blackmun’s “Poor Joshua!”¹⁷⁴

Several years later, however, Nussbaum expressed disappointment in Judge Posner,¹⁷⁵ speculating that, despite his artful opinion in *Carr*, his apparent understanding of sexual harassment had been merely a visceral reaction to one particular set of facts and that, being undertheorized, was not reliably sustained.¹⁷⁶ That may be.

I think, however, that Nussbaum partially misunderstood Judge Posner’s rhetoric in the first place. As he did for Cecaj, Judge Posner inspired reader empathy for Carr on his way to zapping his real target— incompetence. The key to the reason for Judge Posner’s vivid description of the harassment comes in the conclusion:

It is difficult for an employer to sort out charges and countercharges of sexual harassment among feuding employees, but we are dealing here with a situation in which for years one of the nation’s largest enterprises found itself helpless to respond effectively to an egregious campaign of sexual harassment directed at one woman. No reasonable person could imagine that General Motors was genuinely helpless, that it did all it reasonably could have done. The evidence is plain that it . . . was unprepared to deal with problems of sexual harassment even when those problems were rubbed in its face, and also incapable of improvising a solution. Its efforts at investigation were lackluster, its disciplinary effort nonexistent, its remedial efforts perfunctory. The U.S. Navy has been able to integrate women into the crews of warships; General Motors should have been able to integrate one woman into a tinsmith shop.¹⁷⁷

¹⁷³ *Id.* at 1507.

¹⁷⁴ *DeShaney v. Winnebago County Dep’t of Soc. Serv.*, 489 U.S. 189, 212, 213 (1989). Judge Posner debunks as “maudlin” Justice Blackmun’s opening line in his dissent in *DeShaney*. Posner, *supra* note 22, at 1434. He castigates Justice Blackmun for the “style” and especially the “voice” Justice Blackmun used in some “opinions in which he expressed his heartfelt views” as “embarrassing performances precisely because they seem the unmediated expression of self.” *Id.*

¹⁷⁵ Nussbaum, *Carr, Before and After*, *supra* note 167, at 1831–32. See also Mary Anne Case, *All the World’s the Men’s Room*, 74 U. CHI. L. REV. 1655 (criticizing Judge Posner’s failure to perceive the harm in the defendant’s failure to provide toilet facilities to the sole female in an outdoor crew).

¹⁷⁶ Nussbaum, *Carr, Before and After*, *supra* note 167, at 1840–41.

¹⁷⁷ Nussbaum, *Poets as Judges*, *supra* note 167, at 1508 (quoting *Carr v. Allison Gas Turbine Div., General Motors Corp.*, 32 F.3d 1007, 1012–13 (7th Cir. 1994)) (citations omitted). In fairness to Nussbaum, she understands the import of this particular passage as I do, quoting it and highlighting its satirical characterization of GM as an effort to create “well-founded indignation and contempt” for GM’s behavior. *Id.* at 1508–09.

There is, then, a common subtext that one might gather from *Cecaj* and *Carr*—Judge Posner’s impatience with institutional incompetence—and a cautionary lesson for students about inferring a judge’s views from emotionally powerful rhetoric. In these cases, Judge Posner’s apparent concern for the plaintiffs’ plights may not have been driven so much by empathy, much less by “moralizing” disapproval of the abusers’ behavior, but by a pragmatic concern that is completely in keeping with Judge Posner’s preference for efficiency and his dubiety that courts are competent to resolve messy social problems involving contested values. When institutions beneath the Seventh Circuit Court of Appeals, whether they are lower courts or corporations, make mistakes that bring these messy social problems into the glare of an appellate decision, he will be displeased.

C. *Constructing an Authoritative Voice*

The third lesson addresses possible effects of Judge Posner’s writing “style”¹⁷⁸ on students and their professional attitudes and

¹⁷⁸ There is no consensus definition of literary “style,” not even with respect to a distinction from content.

How are we to distinguish between what a poem says and the language in which it says it? On the one hand, there is no such thing as a “content” which does exist quite apart from the words; on the other hand the very existence of the word “style” shows that something can be said about the words which does not refer directly to the content. The relation between the two must be described metaphorically; and looking at the metaphors that have been used, we see that they are of two kinds. The first suggest that the relation is mechanical, that [style] is something added, more or less at the poet’s discretion; if on the other hand we see the relation as closer and more intimate, we are likely to use an organic metaphor.

STYLE, in PRINCETON ENCYCLOPEDIA OF POETRY AND POETICS 814 (Alex Preminger ed., 1974). Classical rhetoricians distinguished between “high” and “low” style and advocated for the use of particular styles for particular genres. *Id.* at 815. For instance, a “high” style was appropriate for epic poetry, such as the Aeneid—“Aeneas should not *trudge* out of Troy”—while a “low” style would be appropriate for satire. *Id.* We need not revisit the merits of this largely defunct rule to be interested by Judge Posner’s obvious resort on occasion to “low” style. Judge Posner’s Aeneas might very well *trudge*. We must leave for another time an examination of the institutional significance of such a change. See *supra* note 22 (discussing Tiersma and Popkin).

For some recent examples of Judge Posner’s style, see *Travelers Cas. & Sur. Co. v. Northwestern Mut. Life Ins. Co.*, 480 F.3d 499, 501 (7th Cir. 2007) (“‘Constructive trust’ is legalese for seeking to wrest ownership of a thing from its nominal owner, which is to say the holder of legal title. It is not a real trust; in law, ‘constructive’ often and here means ‘fictional.’”; “All this is a great muddle.”); *Moran Foods, Inc. v. Mid-Atlantic Mkt. Dev. Co.*, 476 F.3d 436, 439, 441 (7th Cir. 2007) (“There is a ‘for want of a nail the kingdom was lost’ flavor to Mid-Atlantic’s theory of damages.”; “So on to the merits.”). Judge Posner can be funny, at least if you are not the losing party: “It is curious to see an insurance company, in the role of insured, asking a court to

tones. Judge Posner's style, as you might expect of a judge writing nearly a century later, differs markedly from Justice Cardozo's. Justice Cardozo engaged in what Judge Posner calls "mannerism," meaning a fondness for relatively complex sentence structures and high-toned diction. Judge Posner uses shorter, declarative, active-voice sentences and colloquialisms common among well-educated English speakers in the United States during the second half of the twentieth century.¹⁷⁹ Judge Posner calls his style "impure" to distinguish it from the "pure" or "high" style of more conventional judicial writers:

Impure stylists like to pretend that what they are doing when they write a judicial opinion is explaining to a hypothetical audience of laypersons why the case is being decided in the way that it is. These judges eschew the "professionalizing" devices of the purist writer. . . . [devices such as] the unembarrassed repetition of obvious propositions, [and] the long quotations from previous cases to demonstrate fidelity to precedent These and other devices constitute what Robert Ferguson has felicitously summarized as the "rhetoric of inevitability."¹⁸⁰

Writing of an opinion by Justice Holmes, Judge Posner praises the ability to embed

the particular issue presented by a case in a much broader context, here consisting both of the common law tradition and of the institutional role of courts in the scheme of American government, [that] is characteristic of great judges. It not only lends resonance to an opinion but also connects what may be a narrow technical issue of interest only to lawyers—and often to precious few of them—with concerns shared by a broader education public. . . . An opinion so crafted speaks in the language of the general intellectual community to that community. . . . And this ascent from a pinched professional discourse to a sunnier upland of general culture can fairly be described as a stylistic characteristic of the great judges. The pure style is an anodyne for thought. The impure style forces—well, invites—the writer to dig below the verbal surface of the doctrines that he is interpreting and applying. . . . [I]f the judge is lucky, he may find, when he digs be-

make law adverse to insurance companies." *Farmers Auto. Ins. Assoc. v. St. Paul Mercury Ins. Co.*, 482 F.3d 976, 977 (7th Cir. 2007). On the other hand, where the parties are not evenly matched, Judge Posner's wittiness can seem inhumane. For example, in an appeal in a personal bankruptcy case involving whether the debtor could shelter \$2700 cash as "tangible" exempt property from the bankruptcy trustee, witticism struck a decidedly heartless note: "We may seem to have wandered from the point, which was not the metaphysics of money but the practical economies of debt collection." *In re Oakley*, 344 F.3d 709, 714 (7th Cir. 2003).

¹⁷⁹ See Posner, *supra* note 22, at 1428–29.

¹⁸⁰ *Id.* at 1429–30 (citing Ferguson, *supra* note 97, at 213–15) (citations omitted).

neath the verbal surface of legal doctrine, the deep springs of the law.¹⁸¹

In the course of this paean to the impure style, Judge Posner lit into an opinion by his co-panelist Patricia M. Wald as an example of the “pure” style run amok—anodyne for thought, apparently.¹⁸² After describing the opinion’s meticulous use of a multi-factor test for an aggravated offense in a drug case, Judge Posner comments ungraciously that the “style of the opinion retards the search for meaning.”¹⁸³ He admitted that the opinion would be highly effective rhetoric if the point were to uphold the lower court’s determination of an aggravated offense.¹⁸⁴ He also acknowledged that the statute that authorizes punishing drug dealers more heavily for using guns in connection with their drug dealing is not senseless or inoperable,¹⁸⁵ “[b]ut its sensible application is not advanced by chanting a litany of relevant factors.”¹⁸⁶

I think that Judge Posner’s discursive approach combined with his colloquialism and the occasional “low” usage is not only vivid and readily intelligible but has also become a “dominant” or authoritative style. William Popkin has suggested, in another context, that the style is “democratic,” by which Popkin must mean something like “sounding open-minded.”¹⁸⁷ That is an interesting insight, but Popkin’s choice of words is misleading. Judge Posner is not democratic; as a judge, he could not be even if he were so inclined. Popkin’s better point reflects an institutional insight: that federal judges can now afford to sound relaxed and engage with alternative analyses because the authority of Article III courts is more stable and widely accepted than it was earlier in the country’s history.¹⁸⁸ His political insight is

¹⁸¹ *Id.* at 1445, 1447.

¹⁸² *Id.* at 1442.

¹⁸³ *Id.* (discussing *United States v. Morris*, 977 F.2d 617 (D.C. Cir. 1992)).

¹⁸⁴ *Id.*

¹⁸⁵ Posner, *supra* note 22, at 1442.

¹⁸⁶ *Id.* at 1447; *cf.* Wald, *Rhetoric of Results*, *supra* note 25, at 1419. Wald, who had contributed a thoughtful, and much less tendentious, essay on the challenges of writing opinions, was not pleased by Judge Posner’s unannounced use of *Morris* as a vehicle for opining on the superiority of the impure style, characterizing it as a “kamikaze style of discourse” neither “particularly useful or attractive.” Wald, *Reply to Judge Posner*, *supra* note 25, at 1454 (noting that Judge Posner was really arguing about theories of judging as much as about style). Bryan Garner, legal writing pundit, prudently avoids taking sides in this pure/impure debate. BRYAN A. GARNER, *GARNER ON LANGUAGE AND WRITING: SELECTED ESSAYS AND SPEECHES OF BRYAN A. GARNER* 429–30, 591 (2009).

¹⁸⁷ POPKIN, *supra* note 22, at 169–71.

¹⁸⁸ *See id.* at 169–78.

that a modern judge like Judge Posner, who is skilled enough to engage in just the right measure of verbal caprice, actually increases his authority by doing so. In contemporary culture, a skilled author can gain authority from violating grammar rules and using slang and joking. The implied message is that he is so smart and so confident that he need not cloak himself in the traditional high style of institutional power. For all its informality, Judge Posner's is a rhetoric of power and a powerful form of rhetoric. Judges who plod dutifully through their syllogisms signal deference to limited judicial roles, and perhaps they also signal inability to do anything more creative with the materials handed to them. Not Judge Posner!

VI. CONCLUSION

The U.S. legal academy's susceptibility to one of its own superstars raises the question of whether its traditional teaching materials and "signature pedagogy" are up to the task of teaching students the messages embedded in its selected texts. This disciplinary discourse is self-referential. Judge Posner, without working in his judicial capacity, could take the record for any case on appeal and write a "Judge Posner opinion" as instructional material. Or, he—and many others—could simply write an essay describing what the judgment should be and why, or discourse on any number of other topics, if they had sufficient skill to keep the reader attentive. Given the traditions of legal education, however, Judge Posner's inclusion in casebooks depends precisely on his status as a judge; his status removes these opinions from the category of expressly didactic materials—they represent "law." Thus, editors and professors can teach these materials mixed in with other opinions from other judges, jurisdictions, and eras and preserve a fiction—a fig leaf, really—that they are simply presenting for students' study just another example of an observable, external-to-the-academy phenomenon: judge-made law. Again, as a result of our traditions, editors and professors feel no obligation to share with students much, if any, information about this particularly deliberate and didactic author.

Unbeknownst to law professors who may not have studied literary theory, the practice of case study in law schools shares a methodology with the "New Criticism." New Criticism is a literary theory that dominated university English departments in the mid-twentieth century, and was the theory to which Judge Posner was exposed as an undergraduate English major at Yale in the 1950s. One of the leading figures in New Criticism was Cleanth Brooks, then at Yale and

with whom Judge Posner studied.¹⁸⁹ In a nutshell, New Criticism was a reaction against the previous generation of literary criticism in which fictional and poetic texts were examined in light of the author's life and times.¹⁹⁰ Influenced by psychoanalytic theories of the early twentieth century, earlier critical practices attended not only to the text's surface meaning but also supplemented such readings with speculations, gleaned from biographical information, about the author's unconscious purposes and meanings.¹⁹¹ To make a gross oversimplification, prior to the New Critics, both a text and its author might receive substantially equal amounts of criticism. In contrast, the New Critics advocated primary attention to the text on its own terms and disapproved interpretations that depended upon an understanding of the author's life and times.¹⁹² In keeping with modernist and post-modernist literary and artistic theory, the New Critics were less interested in the author's intent, character, or historical context, than in his text and the reader's response to it alone.¹⁹³ Similarly, Legal Realism also developed at Yale in the 1920s. Its proponents, of course, took quite the opposite tack with respect to legal texts, arguing, in part, that legal actors and institutions could only be understood in the context of their backgrounds, historical, political, and economic situations.¹⁹⁴

Despite the influence of Legal Realism in scholarship and some recent efforts, like the *Stories* series,¹⁹⁵ to give students a richer context for cases, I think most classroom "Socratic" dialogue emphasizes the kind of de-historicized, de-personalized analysis typical of New Criticism,¹⁹⁶ with one huge difference: law school dialogues rarely address rhetorical strategies, per se. That is quite odd in a discipline and profession wedded to the interpretation of texts. In most classrooms, at least in the formative first year, the text of an opinion is subjected to a close reading for its statement of facts, its issue definitions, the legal

¹⁸⁹ MacFarquhar, *supra* note 34, at 84.

¹⁹⁰ See, e.g., NEW CRITICISM, in PRINCETON ENCYCLOPEDIA OF POETRY AND POETICS 567–68 (Alex Parminer ed., 1974).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ See *id.*; CLEANTH BROOKS, THE WELL WROUGHT URN 236–38 (1975).

¹⁹⁴ See, e.g., LAURA KALMAN, LEGAL REALISM AT YALE, 1927–1960, at 29–30 (1986).

¹⁹⁵ Foundation Press has published several volumes of background "stories" for different doctrinal subject areas. See, e.g., CONTRACTS STORIES, *supra* note 91.

¹⁹⁶ This is a coincidence, not cause and effect, because Langdell invented the case method before New Criticism took hold. My point is that Judge Posner's exposure to New Criticism would make him more than unusually sensitive to the way in which legal education suppresses the significance of the author judge in favor of a purported, but rather superficial, engagement with text.

principles invoked, and the rationale and background of important cases and, rarely, some information about the court and the judges who decided the case—but that kind of information is not the norm and is generally not the principal focus of classroom discussion. Seldom is any history, intellectual or political, included.¹⁹⁷ Instead, judicial opinions are presented as doctrinal artifacts whose meaning as “law” can and must be extracted by law students through close attention to the text with minimal reference to the life, times, or agendas of their authors. Cases are organized by legal issue, not by the court, the jurisdiction, or the era. While students may read several opinions by the same judge—especially Judge Posner—they will not read them together and, thus, the authorial attitudes and styles of any given judge will be less apparent. Of course, this disregard of the author’s role is not simply a borrowed conceit from literary theory. It is rooted in ideology: the goal that judges should be objective and neutral. Although practitioners and academics all know that, in practice, the judge matters a great deal—even if he or she is striving to be objective and neutral by whatever criterion—our teaching materials (except perhaps for constitutional law) subordinate discussion of that person’s views and their authorial techniques to exploration of doctrine.

I have suggested that law schools’ reception of Judge Posner’s opinions casts doubt on our traditional efforts to shelter doctrine from author and context. While some of what I have written may seem critical of Judge Posner, in truth I am awed by his accomplishment—much of it achieved through his mastery of rhetoric. To teach this judge’s work and to ignore his rhetorical strategies is, if nothing else, to miss an opportunity to improve law students’ rhetorical sensitivity and facility. Beyond this, I have suggested that attention to rhetorical analysis of judicial opinions is one way to reintroduce author and context and, in the process, enrich the intellectual content and practical utility of classroom instruction. Rhetorical analysis makes visible the type and caliber of a judge’s craft, it permits discussion of her implicit assumptions, it invites consideration of her integrity, and it permits discrimination between the form of an argument and its merits.

In conclusion, I suggest that law professors seriously consider whether dependence on casebooks, at least as most are currently con-

¹⁹⁷ The advent of supplements like the *Law Stories* series from Foundation Press is welcome, but those materials aim to provide context for the parties and their dispute, and to reverse the radical, factual, and emotional decontextualization of an appellate opinion. There is less focus on judges.

2009]

RHETORIC COUNTS

557

stituted, might be a bad habit. That reading appellate judicial opinions may be a questionable way to learn to be a lawyer in the United States is not a novel argument. That anthologizing a substantial number of Judge Richard Posner's opinions in introductory casebooks and then teaching them in an undifferentiated mix with other opinions might reveal an under-theorized discipline and pedagogy is a new argument. To teach with so little attention to author, context, and rhetoric seems an odd way to go.