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Rhetoric And Law: How Do Lawyers Persuade Judges? How Do Lawyers Deal With Bias In Judges And Judging?

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RHETORIC AND LAW:
HOW DO LAWYERS PERSUADE JUDGES?
HOW DO LAWYERS DEAL WITH BIAS IN JUDGES AND JUDGING?

By:

Danielle Barnwell

Under the Direction of Dr. Beth Burmester

An Honors Thesis Submitted in Partial Fulfillment of the Requirements for Graduation with
Undergraduate Research Honors in the Department of English

Georgia State University

2014

Honors Thesis Advisor

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Date

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ABSTRACT

Judges strive to achieve both balance and fairness in their rulings and courtrooms. When either of these is compromised, or when judicial discretion appears to be handed down or enforced in random or capricious ways, then bias is present. Bias is unavoidable, because judges are human, they have certain preferences, and lawyers do not always know how to get familiar with judges' style and previous rulings. Lawyers strive to win their cases by persuading judges that their argument is better than opposing counsel, and deserves merit. Understanding rhetoric, the history and art of persuasion that goes back to Ancient Greece and Rome, gives lawyers the strategies they need to communicate effectively with judges and win cases, but rhetoric is not taught in law schools. My thesis explores the history and magnitude of the problem of bias in bench trials, and offers discussion of how rhetoric can be used ethically by both judges and lawyers. I examine how the judicial system works and conclude with ideas for dealing with bias. In studying bias, I have drawn on textual sources including legal journals, books written by lawyers and judges, accounts of legal and judicial history, materials from political science, rhetoric and communication, current events and news reports, and observed judges on popular reality television programs and in municipal courtrooms.

INDEX WORDS: LAWYERS, JUDGES, RHETORIC, BIAS, TELEVISION

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INTRODUCTION: HISTORY AND MAGNITUDE OF THE PROBLEM

The first thing people need to know about rhetoric is that it is all around us: in our conversations, in T.V. shows, in books, and even in courtrooms; because it's an art. The majority of the time, people are not aware of exercising rhetoric; nevertheless, becoming conscious of how rhetoric functions can change the way an individual speaks and writes, especially lawyers. In particular, awareness of rhetoric allows a lawyer to analyze his audience, often a judge, and better communicate inside the courtroom. In the courtroom, lawyers practice the skill of rhetoric to persuade judges. According to Franklin Weiss, a lawyer in New York City, "rhetoric is an instrument, a tool, and is one of the very few tools available to an attorney in his daily life of advocacy."¹ Rhetoric dates back to the ancient Greeks and Athenian Sophists. Aristotle and other rhetoricians over the centuries, including Cicero and Quintilian, wrote about rhetoric as an art that can be taught. Forensic rhetoric impacts lawyers trial methods and plays a huge role in the way litigators approach legal writing and trials, even though it isn't usually studied in law schools.

Rhetoric is the study of effective speaking and writing, and also the art of persuasion. The concept originated in Athens in the fifth century BCE, by a group of innovators known as the Sophists, who came to Athens from Sicily, Syracuse, and Asia Minor. Though they didn't invent public speaking, the Sophists, including Gorgias and Protagoras, were the first "self-styled knowledge professionals, who charged for their services and claimed to be able to teach

¹ Weiss, Franklin R. "How the Lawyer Uses Rhetoric." *Today's Speech*. Vol. 7, Iss. 3, 1959. Page 6.

the secrets of success."² Essentially, the Sophists were the first group of advocates, and rhetoric was ideal as a communication technology within a democratic society. Generally, a citizen's success and influence in Athens depended on his rhetorical ability. The Sophists traveled from city to city teaching young men how to speak and debate. In political life, rhetoric and public speaking were fundamental, so these individuals were more than willing to pay the Sophists for their knowledge and teaching. The men were convinced they needed to be persuasive public speakers to defend themselves in lawsuits, to prosecute others, and to participate in politics. However, teaching rhetoric in exchange for high fees, eventually caught the Sophists criticism from philosophers and Athenian leaders, such as Socrates and Plato. From these ancient Greeks' viewpoint, a Sophist was a man who manipulated the truth for financial and personal gain for power and money. With regards to finding truth, Plato, in particular, aimed to discover the true definition of rhetoric in his dialogue, *Gorgias*.³ According to Richard Toye, Plato attacks the concept of rhetoric, using his own teacher, Socrates, and one of the most famous Sophists, Gorgias of Leontini, as characters:

SOCRATES: It turns out, then, that rhetoric is an agent of the kind of persuasion which is designed to produce conviction, but not to educate people, about matters of right and wrong.

GORGIAS: Yes.

SOCRATES: A rhetorician, then, isn't concerned to educate the people assembled in lawcourts and so on about right and wrong; all he wants to do is persuade them. I mean, I shouldn't think it's

² Toye, *Rhetoric: A Very Short Introduction*. Oxford UP, 2013. Page 7.

³ *Gorgias: A Socratic dialogue written by Plato around 380 BC*.

possible for him to get so many people to understand such important matters in such a short time.

GORGIAS: No, that's right.

Socrates argues rhetoric is really a skill or “knack” intended for convincing people but not knowledge gained from truth; rhetoric is telling people what they want to hear, instead of what is morally right and just. Shamelessly, Socrates displays the flaws located in the Sophist's oratory techniques. On one hand, the Sophists considered the art of persuasion as widely necessary for political and legal advantage in classical Athens. On the other hand, Socrates' argument suggests that rhetoric is not an art at all, while philosophy is an art that aims for truth, not persuasion and not merely probability. For Plato, Sophistic rhetoric is "a form of superficial 'flattery' comparable to cookery, which teaches what is pleasurable rather than what is actually good for you."⁴ As Socrates argues, rhetoric is corrupt. Plato believed rhetoric could not exist alone, and must depend on philosophy to direct its morality. Socrates concludes the dialogue by saying that might is not better than right, and warning that rhetoric is dangerous.

Aristotle, a student of Plato, offers his own defense of rhetoric. Although he seen a lot of potential in rhetoric and thought it should be studied more, Aristotle thought rhetoric could be used to manipulate an audience by distorting their emotions and ignoring facts. According to Cory Clements,

"Aristotle taught that what the audience believes to be true is more important than what is proven to be true, that the speaker should endeavor to use every method of persuasion he possesses to persuade the audience, and that the speaker should adjust and use the best

⁴ Toye, *Rhetoric: A Very Short Introduction*. Page 10.

type of emotional appeal in each situation to receive the best emotional response from the audience."

Aristotle defined rhetoric as all available means of persuasion, which was necessary for the virtuous and moral speaker to overcome the effects of an unscrupulous opponent. For Aristotle, rhetoric was a science and art, one that relied on logos, ethos, and pathos, the rhetorical appeals of logic and facts, authority and ethnics, and emotions and connection with the audience.

All communication is rhetorical. For example, it is the language and the delivery lawyers use that conveys a message to a judge. Moreover, Aristotle classified rhetoric into three branches: deliberative rhetoric, epideictic rhetoric, and forensic rhetoric. In general, lawyers participate in each kind of argument for different purposes. When a lawyer uses deliberative argument, he is urging someone to do something or take action. Most political debates and the creation of laws and legislature fall under this category. Next, when a lawyer uses epideictic argument, he is making a speech that praises or blames. For instance, a condolence speech at a funeral or a letter of recommendation, but also opening and closing statements in civil suits. When a lawyer uses forensic argument, he is defending or accusing someone in a criminal or civil case. The aim of forensic rhetoric is to find guilt or innocence, and to see justice served.

For individuals who are active in the courtroom or in law, it is vital to understand the skill lawyers use during bench trials. It has been determined that lawyers have to be able to relate to a judge in order to win their case. A judge plays a major role in deciding cases and sentencing, because he determines the verdict. Therefore, a lawyer must be able to persuade judges, which causes lawyers to find legal precedents and heavily research a judge's philosophy

and background from previous rulings. In recent years, bias in judging has become highlighted as a problem. In the journal, *A Rebuke of Modern Judicial Practices*, Lawrence R. Velvel, the Dean of the Massachusetts School of Law, expresses serious concern over how judge's conduct is currently destroying faith, trust, and confidence in the legal system, and details judicial misconduct:

In recent years, there has been a rising crescendo of complaint over the legitimacy - sometimes even the honesty - of particular judicial conduct. From political conservatives have come charges that judges are overriding the will of the people as expressed in statutes and referenda relating to abortions, gay rights, affirmative action, religion and other subjects. From political liberals come charges of bias against women, sexual misconduct, harshness toward the interests of minorities, and forced imposition of deeply conservative political views. From both sides, depending on whose ox was gored, come charges of overriding the people's views and protecting the professional politicians by striking down term limits. From all venues - even from high-priced corporate lawyers - come charges of frequent tyrannical and arbitrary conduct by trial court judges. Misuse of position and even bribery are known to have sometimes existed...Beyond these matters, my thirty-four years as a law professor or a litigator have persuaded me that there is yet another problem, one that is widespread. It is that judges too often are unwilling to listen to facts or reasons. Rather, they start with predilections heavily favoring one side - predilections which they, of course, deny - and then prove impervious to facts and resulting reasons contrary to their bias..When judges act on the basis of their prior predilections, ignore facts, and even make up supposed counter facts, they destroy a central tenet of the judicial system: decision of cases based on facts rather than prejudice. They also..destroy faith in the judicial system..Prior judicial predilection and associated imperviousness to facts, judicial invention of purported counter facts and concomitant problems are among the most important

problems of the judicial system today. It would be beneficial to the system, would prevent the law from being a hollow mockery of its promises, and would help maintain the faith of citizens, if judges were to stop ignoring facts in order to enforce their own predilections.⁵

The judicial system has placed the discretion of deciding cases in the hands of the judges; each judge decides cases using their own experiences and values. It is the way the system is set up that has supported differing views of judges. Generally, the judiciary system has both advantages, as well as disadvantages. To begin with, the legal system is designed and created with the promise to provide justice, and it also functions in interpreting laws and settling disputes. An advantage of the judicial system involves the United States' population, which is responsible for the establishing of a variety of courts within its judicial system. In fact, U.S. Supreme Courts date to 1789 and the Federal Court System has 12 regional circuit courts, which oversee U.S. District Courts. Beneath and beside the Federal Courts is the state court system, which has circuit and superior courts, courts of appeal, county and municipal courts. This creates a balance of power, making the judicial system run more effectively. The district courts and superior courts are where most trials occur. If those cases go into appeal, they go to a new judge for review. A case brought before a judge fully depends on that particular judge's opinion, experience, and discretion. A disadvantage of random assignment of judges to cases can create an imbalance of bias that can lead to unfair results in some cases. One thing about federal judges is that they are appointed for life; therefore, their views can create major conflicts as law changes over the time of their appointment, or as the judge personally changes views as they age. In some county and state courts, judges are elected, and campaigning can

⁵ Wacks, Raymond. *Law: A Very Short Introduction*. Oxford UP, 2008. Pg. 102

create bias or conflict of interests that may influence judgments. Also, judges are lawyers first, so their bias may be related to whether they used to be prosecutors or defense attorneys.

The intentions of this paper are to show how lawyers tend to perceive bias from judges and how judges apply their ideologies and perceptions in a given case. Chapter 1 gives a brief overview of the judicial process and how legal reasoning influences how a lawyer effectively persuades a judge to accept his or her position in a case. I will also discuss the correlation between cognitive biases and informal fallacies that are linked with persuasion and perception in the reasoning process. Chapter 2 describes how judges play a role in the court and distinguishes between federal and state judges in the decision-making process. Chapter 3 examines how lawyers use rhetorical techniques when presenting an argument, and how they take bias away from judges.

I. HOW DOES THE JUDICIAL PROCESS WORK?

The U.S. legal system is inherited from English common law and by design, it is an adversarial system. Roberto Aron and his colleagues highlight that "litigation is not a philosophical discussion."⁶ In fact, litigation is the most traditional and public dispute resolution process, even though there exists other Alternate Dispute Resolutions (ADR)⁷, such as mediation, negotiation, and arbitration. These procedures too are adversarial in nature, because a third party comes in to help decide the case. Arbitration is one of the most exercised ADR processes, since it is most similar to going to court. Notably, television judges, such as "Judge Judy" and "The People's Court" Judge Millian, actually act as arbitrators, which I will discuss in the next chapter. Mediators play the role of a rhetorician, being that they are able to guide the disputants in both parties to reach an agreement or to decide whether or not to go to court. The method mediators rely on involves asking questions rather than telling, because questions are less argumentative and pressuring. It's important to note that a mediator must maintain neutrality in any kind of situation, because mediators as rhetoricians advocate to separate the problem from the two disputing parties. Moreover, if there is no resolution, the case goes on to the courts. At this point, the court will engage and resolve the dispute.

Raymond Wacks notes:

⁶ Clements, Cory S. "Perception And Persuasion In Legal Argumentation: Using Informal Fallacies And Cognitive Biases To Win The War Of Words." *Brigham Young University Law Review* 2013. See page 318.

⁷ Carp, Robert A., Ronald Stidham, and Kenneth L. Manning., "The Civil Court Process," in *May Judicial Process in America*, 9th ed. (Washington, DC: CQ Press, 2014). ADR are commonly classified as "private, court-referred, and court annexed, but the latter two often are called court-connected." In other words, some private ADR processes are independent of the courts. A court-referred ADR process operates outside the court but still has some relationship to it. In some instances the relationship is formal. For example, the court may contract for ADR services, with the stipulation that they be provided according to rules and procedures specified by the court. In another jurisdiction the relationship may be less formal. The court might simply refer parties to an ADR provider without monitoring the progress of the case. The court administers the ADR process in a court-annexed program. In this scenario the authority flows from statute or court rules. Case progress is supervised by the court, and the individuals providing the ADR service are directly responsible to the court. Depending on the model and the issue, "ADR processes may be voluntary or mandatory; they may be binding or allow appeals from decisions rendered; and they may be consensual, adjudicatory, or some hybrid of the two." See page 279-81.

The lawyers who represent the party seek to persuade the court of the merits of their case.

In a common law trial one side cites a previous judgment, arguing that the present case is sufficiently similar to the earlier one that it ought to be followed. The other side seeks to distinguish this precedent by identifying its subtle differences. This is the essence of legal reasoning. Should the losing party appeal, the arguments will be rehearsed before more senior judges.⁸

What does Wacks mean by "legal reasoning?" In particular, legal reasoning is interpretation of the law, and rules how judges should decide cases. Only lawyers, judges, and paralegals have experience and training in legal reasoning, which is why lawyers are so critical in courtrooms.

When it comes to legal reasoning and argumentation, the lawyer's primary goal is advocating for a client to win. The lawyer has to convince a judge to accept his or her position, instead of opposing counsel. According to Cory Clements, "the best type of advocate accomplishes this goal using various rhetorical techniques, attempting to manage other people's perceptions of such things as the facts, the lawyer's own theory of the case, the credibility of eyewitness testimony, the weaknesses of opposing counsel's claims, and the praiseworthiness of the lawyer's own client."⁹ Generally, the trial is a judicial competition between lawyers, which given the case and facts, are clarified and illustrated in individual ways by each party. Each defense lawyer is trying to persuade the judge of their client's innocence, while each Plaintiff or Prosecutor is trying to argue guilt and blame. The jury trial originated in

⁸ Wacks, *Law: A Very Short Introduction*.

⁹ Clements, "Perception And Persuasion In Legal Argumentation: Using Informal Fallacies And Cognitive Biases To Win The War Of Words." See pages 320-337 for the connection between persuasion and perception.

Athens, Greece, in the fourth century BCE. The lawyer as advocate for clients originated in Ancient Rome: two cultures with rhetoric central to their lives.

In the courtroom, "the advocate's [only] weapons...are methods, tactics, and strategies, all of which have in common the ultimate goal of *persuasion*."¹⁰ The art of persuasion is interconnected with the psychological process of perception. In fact, in order to accept or reject a lawyer's argument, an individual must apply their own idea of perception. Therefore, the lawyer's motive is to use persuasion to change his or her listener's mind, or as Clements refers to 'frame of reference.'¹¹ If a lawyer successfully adjusts the listener's perception, then he or she can convince a judge to perceive facts and the law the way the lawyer sees it. This is because "the skilled lawyer recognizes that 'narratives, ideas, and ideologies are what fuel the world, not facts."¹² Being persuasive and having accurate information are two different ideas. Generally, by gaining a listener's trust through rhetorical techniques and appealing to a listener's emotions or senses, the lawyer is able to persuasively alter his or hers listener's perceptions in a way that aligns with his or her own beliefs – and benefits the client.

Additionally, cognitive biases and informal fallacies link with persuasion and perception at different stages in the reasoning process.¹³ Cognitive biases relate to errors in reasoning and thinking, which in turn alter an individual's perception. On the other hand, informal fallacies are

¹⁰ Clements, "Perception And Persuasion In Legal Argumentation: Using Informal Fallacies And Cognitive Biases To Win The War Of Words." See page 320.

¹¹ See Clements, "Perception And Persuasion In Legal Argumentation: Using Informal Fallacies And Cognitive Biases To Win The War Of Words." (The set of ideas and assumptions that control how the listener perceives and understands something. This is part of the listener's *perceptual field*, which is fundamental to motivation and behavior.)

¹² Clements, "Perception And Persuasion In Legal Argumentation: Using Informal Fallacies And Cognitive Biases To Win The War Of Words." See page 331.

¹³ Clements, "Perception And Persuasion In Legal Argumentation: Using Informal Fallacies And Cognitive Biases To Win The War Of Words."

arguments, oral or written, that "contain material flaws,¹⁴ which enhance their persuasiveness."¹⁵ When a lawyer uses legal arguments with informal fallacies, rhetoric is being employed. For example, "the lawyer can play upon the listener's inherent cognitive biases to persuade the listener to see things the same way the lawyer does."¹⁶ I feel cognitive biases deal with how individuals understand and investigate their surroundings, which is why they are linked with perception. However, informal fallacies are difficult to identify, because they often involve the intent of manipulation and even deception. An informal fallacy is very similar to the slippery-slope fallacy, which falsely assumes that one thing will lead to another.¹⁷ Being that informal fallacies begin with a false assumption, then fail to establish a connection, lawyers can play upon this type of logical fallacy as a strategy to influence other people's thinking and eventually change their beliefs. For example, "a lawyer's principal job is to ensure that her client receives justice by advocating her client's view of the truth."¹⁸ Lawyers are aware of their tactics and knowledgeable of the intended effect of their arguments. Inevitably, good legal arguments and proper judicial proceedings include both types of reasoning errors, even though they are dissimilar in kind and lawyers and judges need to be aware of their positive and negative effects. Informal fallacies allow individuals to think about certain information, and this information is used to manage exactly what they perceive or come to believe. Not only do listeners, such as members of a jury, go through the process of persuasion and perception

¹⁴ Material flaws are referred to as assumptions that fail to establish a conclusion.

¹⁵ Clements, "Perception And Persuasion In Legal Argumentation: Using Informal Fallacies And Cognitive Biases To Win The War Of Words." Pg. 319

¹⁶ Clements, "Perception And Persuasion In Legal Argumentation: Using Informal Fallacies And Cognitive Biases To Win The War Of Words." Pg. 319.

¹⁷ Logical Fallacies, "Slippery Slope Fallacy" <logicalfallacies.info>

¹⁸ Clements, "Perception And Persuasion In Legal Argumentation: Using Informal Fallacies And Cognitive Biases To Win The War Of Words." Pg. 319.

linked with cognitive biases and informal fallacies, but lawyers and judges do too. This is especially true when a judge's ideologies and preferences are in question.

II. JUDGES AND RHETORIC

Frequently, judges will simply recuse themselves from a case if there is conflicting interest, whenever an issue with bias arises. Whether publicly noticed or not, bias exists in the courtroom, but "judges usually don't comment on cases before them."¹⁹ For example, a New York judge's "mistake"²⁰ led to a 1998 case being reviewed, 15 years later, by another judge. Unlike most judges, Frank Barbaro, former New York Supreme Court Judge, "acknowledged his racial prejudice in the case, where he wrongfully convicted a man of murder nearly 15 years ago."²¹ When he issued his verdict, Barbaro admits he was a steadfast civil rights advocate, and "he was convinced at the time that the defendant who stood before him was a racist who wanted to kill a black person."²² In theory, judges are supposed to be impartial decision-makers when finding justice for litigants. The idea of judges as impartial also originates in Ancient Athens, where they oversaw trials. Their role is to interpret the law, assess presented evidence, and maintain order in the courtroom. Notably, Appellate Court Judge Richard Posner points out that a judge's decisions are not fully based on theory, but on "temperament, emotion, experience, personal background, and ideology."²³ Posner's observation certainly applies to Judge Barbaro. Barbaro did not weigh the evidence that was given to him in the 1998 case. In his opinion, Barbaro wrote to the court:

¹⁹ Visser, Steve. "District Attorney: Dekalb judge appeared biased in murder case article." <AJC.com: *Atlanta News, Sports, Atlanta Weather, Business News.*>

²⁰ Casarez, Jean. "Did Racial Bias Lead NYC Judge to Convict Man of Murder?" <CNN.com>

²¹ Casarez, "Did Racial Bias Lead NYC Judge to Convict Man of Murder?" <CNN.com> (Ruling postponed. In a bench trial in October 1999, Kagan said he was acting in self-defense when he shot Wavell Wint, 23, during a confrontation at a Brooklyn movie theater 11 months before. Barbaro, who is white, didn't believe Kagan. The judge found him guilty of second-degree murder and criminal possession of a weapon. Kagan was sentenced to 15 years to life in prison, where he remains today.)

²² Casarez, "Did Racial Bias Lead NYC Judge to Convict Man of Murder?" <CNN.com>

²³ Posner, Richard A. *How Judges Think*. Harvard UP, 2010. (Posner is a is an American jurist, legal theorist and economist. He currently serves as a distinguished appellate court judge in Chicago.)

The circumstantial evidence convinces the court that when [Kagan], in response to [Wint's] verbal taunts, pulled out his gun for the second and last time, he fully intended to kill [Wint].²⁴

Since judges are elected officials, they are supposed to consider all evidence on both sides without passing judgment until all is heard. Yet, Barbaro disregarded the self-defense argument presented by the attorney of the accused, and primarily focused on apparent racism, since it was a factor that influenced both his personal and professional life at the time. Therefore, Judge Barbaro was responsible for allowing his own personal bias to play out inside the courtroom, which is something judges should actively avoid, yet still influences judgments.

Systematically, judges are different from lawyers: "they are officers appointed or elected to implement the law."²⁵ In particular, I will examine federal and state judges, because both levels are similarly influenced by the same decision-making characteristics. For example, both type of judges are heavily led by court precedents, but "virtually all judges reflect to some degree their political party affiliation."²⁶ Moreover, both federal and state judges handle civil and criminal matters. A federal judge will only hear a case based on federal law violations or rights, since they have incorporated appellate jurisdiction.²⁷ These kinds of cases can include civil rights violations and discrimination. With regards to a limited jurisdiction, federal judges are able to pick and choose cases based on their interests and preferences. In a like manner, state judges will hear cases concerning state law violations and all other cases filed in the court

²⁴ Casarez, "Did racial bias lead NYC judge to convict man of murder?" <CNN.com>

²⁵ Wacks, *Law: A Very Short Introduction*. See chapters 4 & 5 for the roles judges and lawyers play in the court.

²⁶ Carp, "Decision Making by Trial Court Judges," in *May Judicial Process in America*. See chapter 12.

²⁷ Carp, *May Judicial Process in America*, (Appellate jurisdiction is the authority of a higher court to review the decision of a lower court.) See glossary on page 417.

due to original jurisdiction.²⁸ Cases under original jurisdiction include criminal and civil law cases, including family law, juvenile matters, probate, and traffic violations.

However, major differences between federal and state judges become more clear during the deciding of cases. For example, "one would expect public opinion to have less effect on federal judges, who are appointed for life, than it has on those state judges who must regularly stand for reelection."²⁹ The bigger picture about judges reveals their levels of accountability, independence, and competence. Based on the merits, an appointed judge will have more independence than an elected judge, who holds more accountability. Federal judges' independency reflects their lifetime appointment "during good behavior,"³⁰ in which they cannot be removed from office unless they are impeached. For instance, Federal Judge G. Thomas Porteous, Jr., of Louisiana, was impeached by the U.S. House of Representatives earlier this year on corruption charges.³¹ According to sources, he was the fifteenth federal judge to be impeached in the nation. State judges, in contrast, go through an elections process: partisan and nonpartisan election, Legislative election, gubernatorial appointment, and merit selection. Like federal judges, they may hold life tenure, but state judges also go through mandatory requirements, regular re-election campaigns, recall elections, and even impeachment in some jurisdiction.

²⁸ Carp, *May Judicial Process in America*, (Original jurisdiction is the court that by law must be the first to hear a particular type of case. For example, in suits with alleged damages in excess of t \$75,000 between citizens from different states, the federal district courts are the courts of original jurisdiction.) See the glossary on page 422.

²⁹ Carp, "Decision Making by Trial Court Judges," in *May Judicial Process in America*. I feel like state judges have more to lose, opposed to federal judges who remain on the bench regardless of the situation (unless something happens bad enough to the point where he or she is impeached).

³⁰ Carp, "Decision Making by Trial Court Judges," in *May Judicial Process in America*. (This means that the judge is on the bench for life or until he decides to step down.)

³¹ CNN Wire Staff, "Senate trial on impeached judge to begin." <CNN.com: Cable News Network> G. Thomas Porteous Jr. is accused of corruption and accepting kickbacks, as well as lying to the Senate and FBI about his past, regarding his nomination to the federal bench.

In general, judges make critical decisions affecting individuals who are accused of breaking criminal or civil laws. They are determining how to resolve disputes, punish offenders, and determine guilt or preponderance of evidence. Their overall goal is to safeguard the rights of the accused and protect the interests of the general public.³² Another difference that exists between federal and state judges regards how they decide cases. Particularly, federal judges usually have more time to reflect on a case, and have opportunities to discuss legal issues with their staffs, and other colleagues. Whereas state judges generally have to decide their case on the spot, without any reflection contributed from their staff or colleagues. Legal scholar Robert Carp was able to speak with a trial judge, who gave insight on his experience with making decisions:

We're where the action is. We often have to 'shoot from the hip' and hope you're doing the right thing. You can't ruminate forever every time you have to make a ruling. We'd be spending months on each case if we ever did that.³³

Consequently, if a judge is unable to apply pre-existing legal rules to a case, then he has no choice but to use discretion based on his own materials, such as emotions or experience, rather than traditional materials like legal interpretation and applying precedents. Studies have suggested that when judges, especially trial judges, "find no significant precedent to guide them, that is, when the *legal subculture*³⁴ cupboard is bare, they tend to turn to the *democratic subculture*³⁵, an amalgam of determinants that includes their own political inclinations."³⁶ As a

³² "Special Functions of the Trial Judge (Contents)." American Bar Association, Feb. 1999.

³³ Carp, *May Judicial Process in America*.

³⁴ Carp, "Decision Making by Trial Court Judges," in *May Judicial Process in America*. (Legal subculture consists of rules and practices that guide decision making inside the legal profession. For example, most judges are committed to following precedent.) See chapter 12.

³⁵ Carp, "Decision Making by Trial Court Judges," in *May Judicial Process in America*. (Democratic subculture deals with political party affiliation, localism, and public opinion.) See chapter 12.

result, this is how internal constraints³⁷ come in to effect. However, when discretion is used the rule of law is then questioned. Some people tend to wonder if the use of discretion minimizes legislation or the rule of law as a whole. But Posner assures people that regardless of the situation, a judge will honestly apply legal rules to a case if they exist.³⁸ Judges strive to achieve both balance and fairness in their rulings and courtrooms. When either of these is compromised, or when judicial discretion appears to be handed down or enforced in random or capricious ways, then bias is present and affects the trial outcome.

Moreover, different judges bring different values and life experiences to law and facts. Being that, one judge's ruling will not be the same as another judge in a similar case, because each trial will vary. When trying to figure out where discretion originates, Raymond Wacks suggests that we should find the meaning of law itself:

A theory of what constitutes law is, of necessity, presupposed in the act of judging, as well as any account of it. The orthodox, so-called 'positivist' model perceives law as a system of rules; where there is no applicable rule or there is a degree of ambiguity or uncertainty, the judge has a discretion to fill in the gaps in the law.³⁹

Yet, rules are not the only means of law, because *corpus juris*⁴⁰ also includes the United States Constitution, state constitution, statutes enacted by legislatures, executive orders, and common law. When a judge cannot easily find a rule or a decision cannot be applied to any of the available rules, he will then use the other bodies of law, which are more or less equivalent to rules. As opposed to cases where judges have to use discretion, there are hard cases where

³⁶ Carp, "Decision Making by Trial Court Judges," in *May Judicial Process in America*. Pg. 295

³⁷ Posner, *How Judges Think*. (This consists of analytical tools for managing uncertainty and producing what legalists regard as objective decisions.)

³⁸ Posner, *How Judges Think*.

³⁹ Wacks, *Law: A Very Short Introduction*. Pg. 89

⁴⁰ Carp, *May Judicial Process in America*. (*Corpus juris* means the body of law.) See chapter 1.

"a judge is not expected to resort to his personal preference in arriving at a decision, he has, contrary to the positivist view, no real discretion. There is always one legal answer, and it is the judge's responsibility to find it by weighing competing principles and determining the rights of the parties in the case before him."⁴¹ Besides, it is a judge's job to apply an appropriate law to the crime in question and implement a judgment that fits the committed crime. With a judge's experience and knowledge of the law, there is a profound trust that he or she will ethically exercise his or her judgment and preferences at his or her own discretion when deciding a case. This doesn't mean that a judge should become personally connected to a case. For example, let's say a judge's sister was killed by a drunk driver three years ago and he was the same judge to decide a case where the defendant was accused of injuring a young girl while driving under the influence. Unquestionably, the particular judge could act on bias during this case, because he has the moral grounds to do so. His bias could result in a harsher sentence, or worse than what another judge without a personal connection to the case would rule. Given that, a judge should always use his discretion with caution in most cases. This discretion can also be influenced by a judge's understanding and awareness of audience outside the courtroom, such as the media, the public, voters, and politicians. These audiences may pressure the judge toward biased rulings.

At the other end of the spectrum, are real life judges versus reality T.V. judges. Idealistically, real life judges see themselves as policymakers, constructionists, or pragmatists and realists,⁴² whereas reality T.V. judges simply act as arbitrators.⁴³ Usually before a party goes

⁴¹ Wacks, *Law: A Very Short Introduction*. See page 89.

⁴² Carp, "Decision Making by Trial Court Judges," in *May Judicial Process in America*. See chapter 12.

on to a court T.V. show, they are aware of the risks, and agree to be bound by the decision of the judge presiding over their cases, which involve civil claims. This becomes obvious during the opening statements of most shows. Judge Judith Sheindlin's opening for Judge Judy states:

*You are about to enter the courtroom of Judge Judith Sheindlin. The people are real. The cases are real. The rulings are final. This is her courtroom. This is Judge Judy.*⁴⁴

And Judge Marilyn Milian of the People's Court states:

*What you are about to witness is real. The participants are not actors. They are actual litigants with a case pending in civil court. Both parties have agreed to drop their claims and have their cases settled here, before Judge Marilyn Milian, in our forum: The People's Court.*⁴⁵

The opening statements highlight the program's legal nature in allowing the citizens to interact with the law. Steven A. Kohm wrote in "People's Law versus Judge Judy Justice: Two Models of Law in American Reality-Based Courtroom TV," that "the effect of this discursive centering of the do-it-yourself justice of 'the people' is to highlight not only the reality of the proceedings and the dispute resolution function of the program, but by referring to 'our forum,' the narrator advocates a more participatory process."⁴⁶ In this manner, he describes how the courts will never change regardless of old judges leaving and new judges coming in. I believe that "We the People"⁴⁷ plays a big role in court systems allowing citizens to have a voice, and to act more hands-on with the law. Commonly, the reality T.V. show is an arbitration proceeding, and once

⁴³ Before each show the parties agree to be bound the decision of the judge, as if he or she is an actual real-life judge.

⁴⁴ "Judge Judy." *Judge Judy*. <<http://www.judgejudy.com/>>

⁴⁵ "Judge Milian." *The People's Court*. <<http://peoplescourt.com>>

⁴⁶ Kohm, Steven A., "The People's Law versus Judge Judy Justice: Two Models of Law in American Reality-Based Courtroom TV." *Law & Society Review*, 2006. See page 701.

⁴⁷ "We the People": the first words of the United States Constitution in the Preamble. The phrase is meant to emphasize the fact that ultimate powers granted to the federal government were derived from the People, and not by the states.

an agreement has been reached, the ruling is sent to the trial courts for confirmation.

According to sources, these proceedings are very rarely overturned.

In my opinion, arbitrators, like Judge Judy and Judge Milian, are just as powerful as actual trial court judges. As figures in popular culture and with an audience of millions of viewers, these judges give people experience with trials, courtrooms and the behavior of judges that they otherwise would never see, since only a fraction of viewers will ever be involved in litigation themselves. For that reason, viewers see judges assist in making decisions, maintain order in their courtrooms, and display signs of discretion. Yet, reality T.V. judge attitudes and behaviors ultimately don't reflect the same attitudes and behaviors as real trial court judges. For example, Judge Judy, a strong-willed woman, is overtly very prejudiced in her courtroom proceedings. However, she considers herself "the ultimate truth machine,"⁴⁸ as if she has a built-in lie detector system and can sense a lie from a mile away. I wouldn't necessarily say she doesn't pay attention to the facts of the case, but she more so judges cases strongly based on her own opinions. She "presents us with a vision of the judge as a great, charismatic lawgiver who appeals to extralegal and perhaps supernatural sources as a foundation for judgment."⁴⁹ She is indeed knowledgeable of the law. In my opinion, she doesn't necessarily need to justify or reference any of her decisions with legal principles, because of the charismatic skill she has acquired. Moreover, Judge Judy is a tough woman within the courtroom. For instance, if a litigant speaks out of turn, she instantly embarrasses him in the most stern way. On one episode, she straightforwardly declared to a male litigant who was in a dispute with his ex-

⁴⁸ <<http://www.judgejudy.com>>

⁴⁹ Kohm, "The People's Law versus Judge Judy Justice: Two Models of Law in American Reality-Based Courtroom TV." See page 704.

girlfriend, "Personally, I don't find you as attractive as she did; so I suggest you shut up!"⁵⁰ By far, she is more hypocritical and demanding of litigants than would be acceptable in a circuit court. It is her way or no way inside the televised small claims courtroom. On the other hand, unlike Judge Judy's authoritative deciding style, Judge Milian adopted a "judging style often conform[ed] to the characteristics of the strict adherent."⁵¹ With a strict adherent judging style, she is a fair woman. Being an advocate for justice and fairness, she often explains to litigants the legal factors leading up to her decision in a case, since all litigants deserve a fair trial. Judge Milian is capable of leaving litigants "to believe that [her judgment] is simply the way the law is,"⁵² even if they are unusual. Despite her judging style, there are some cases where it seems as though she exercises a bias against male litigants. Additionally, Judge Milian doesn't cut people off, prejudge, or insult people like Judge Judy does. But, like Judge Judy, she does show emotions. She shows compassion, understanding, as well as complete knowledge of the law and judicial system. For instance, in one episode, she had to get harsh with second-year University of Miami law student Eric Paolino, who disagreed with her by stating, "That's your opinion":

"No, that's my *ruling*, pal. And let me tell you something, Mr. University of Miami Law School. I taught at U-M for many, many years, and you, right now, are embarrassing us. You do not show that kind of disrespect, okay? If you don't like what a judge is doing, then you take it to the next forum. But you do not sit and say, 'That's your opinion,' like a *baby*, when a judge rules against---don't even utter another word!... You've got a lot to learn about what

⁵⁰ "Judge Judy Quotes." *IMDb*. <IMDb.com>

⁵¹ Kohm, "The People's Law versus Judge Judy Justice: Two Models of Law in American Reality-Based Courtroom TV." See page 710.

⁵² Kohm, "The People's Law versus Judge Judy Justice: Two Models of Law in American Reality-Based Courtroom TV." See page 710.

it means to be a litigator and a lawyer. [Paolino says, "I don't want to be a lawyer."] Good, because you don't have it in you, but you have a lot to learn about what it means to be a member of the Florida Bar! And if you think that this kind of petulance and babiness on your part, to turn around and tell a judge you disagree with, 'Well, that's your opinion!', is going to get you anywhere, you are sorely mistaken! If there's nothing that you have learned in the last two years as a law student, there's something you should have learned as a human growing up, that you do not show that type of disrespect! You don't like it, take it to the hallway; but you do not look a Judge in the face, because I don't care what you think of me but you got to respect this process, and if there's anybody who I'd expect to respect this process, is a second year law student at the University of Miami.....Verdict for the plaintiff, \$450 and court costs."⁵³

Though she had to enforce her authority with Paolino, Judge Milian is a judge who teaches, has a motherly instinct, praises, and uses tough love when needed. Generally, I've observed that she displays a warm, friendly smile at times, a lot more than Judge Judy. All in all, she is a judge who actually cares for and respects litigants. Her behavior is far closer to real judges. A year and a half ago, I attended a small claims court hearing with no lawyers, and the judge there actually displayed a few of the same characteristics as Judge Judy and Judge Milian. For instance, he was very stern, and acted with bias in deciding the few cases I was able to hear. At the end, I felt bad for the litigants, just as I do after watching an episode of Judge Judy.

Overall, judges, whether in real life or on reality T.V., create the most vital role in the judicial process. Reality T.V. may be based more on entertainment, but still gives viewers insight into law and justice and trial procedures. In fact, "Judge Judy and [the People's Court] are

⁵³ Herson, Kelly. "UM News: Judge reprimands UM law student on national TV." *The Miami Hurricane*. <<http://www.themiamihurricane.com/2007/10/22/um-news-4/>>

currently [two] of the highest rated daytime reality-based courtroom program[s]."⁵⁴ By viewing T.V. court shows over the years, I can easily understand why the proceedings are entertaining and compelling. Wacks perfectly sums up the reality T.V. courts, including other law-based T.V. series, by illustrating, "the clash of the lawyers, the uncertain fate of the accused, the lurid evidence -- all excite a voyeuristic curiosity in the presentation. And occasionally the fictional representation of the judicial process is no less spectacular than authentic trials, which, particularly in the United States, are often televised live. Where a celebrity is on trial, cameras in court guarantee an enormous audience of viewers -- the more gruesome the alleged crime, the better. Few trials, however, achieve this level of vivacity or glamour; they tend to be dreary and tedious."⁵⁵ Most real life trials are not as exciting, but the only actors who are able to entertain and spice up any courtrooms are lawyers themselves, who may also reach celebrity status and become famous. On reality T.V. shows in courtrooms, litigants do not have lawyers, but the televised trials of actual cases prove the importance of having a good lawyer, and showcase the influence lawyers have with judges during court proceedings, as well as reveal the danger of bias within certain judges' courtrooms.

⁵⁴ Kohm, "The People's Law versus Judge Judy Justice: Two Models of Law in American Reality-Based Courtroom TV." Page 703.

⁵⁵ Wacks, *Law: A Very Short Introduction*. Pg. 86. See chapter 4.

III. LAWYERS AND RHETORIC

With little evidence, it is difficult to determine the way lawyers perceive bias from judges. However, in *The Lawyer-Judge Bias in the American Legal System*, written by Benjamin H. Barton, insight is given on the relationship between judges and lawyers, including the criticism that stems from their connection. In general, it is common knowledge that the vast majority of judges have previously held practiced law and are members of the Bar. Therefore, lawyers and judges have similar educational backgrounds and training, the same approaches to solving problems, and studied from the same law books to take the same bar exams. Given that, a major criticism that Barton asserts is that judges are all too able to understand and relate to a lawyer's perception, rather than legal reasoning, and it is this connection that ultimately creates a bias between the two, regardless of their political party affiliation or ideologies, for example. He adds that some reasons for judge bias are "conscious/crass" and others are "unconscious/stable."⁵⁶ On a conscious level, "no judge wants to be a pariah among her friends and colleagues, and most judges seek acceptance and admiration from those same people."⁵⁷ All judges are lawyers, and their friends and colleagues are lawyers too. Therefore, "judges want to maximize their own prestige, which generally means their standing among other lawyers."⁵⁸ On an unconscious level, "judges approach their work with a prescribed set of heuristics, behaviors, and notions about the world."⁵⁹ When a judge is given a question that affects legal reasoning, he or she will react naturally, trying to convince not only lawyers, but

⁵⁶ Barton, Benjamin H. *The Lawyer-Judge Bias In The American Legal System / Benjamin H. Barton*. n.p.: Cambridge; New York: Cambridge University Press, 2011. Pg. 14.

⁵⁷ Barton, Benjamin H. *The Lawyer-Judge Bias In The American Legal System*. See pg. 30

⁵⁸ Barton, Benjamin H. *The Lawyer-Judge Bias In The American Legal System*. See pg. 30

⁵⁹ Barton, Benjamin H. *The Lawyer-Judge Bias In The American Legal System*. See pg. 37

also themselves, that their decision is correct and unbiased. Barton feels the bias that exists between a judge and a lawyer, make judges more willing to grant lawyers allowances and exemptions in cases, as possibly a sign of respect or duty. However Barton justifies his implications, there are some judges who have never been lawyers, and cannot make the same connection Barton presents with fellow lawyers. It seems he believes judges and lawyers hold secret meetings to decide the laws together, which cannot be true. For example, watching the movie, "A Civil Action",⁶⁰ makes clear that all judges and lawyers do not share a great connection inside, or outside, the courtroom. In this case, the Judge and Defense Attorney both graduated from the same Law School and saw each other as equals, whereas the Judge saw the Plaintiff's attorney as inferior because he went to a different school. This federal judge was also biased against personal injury lawyers in general, and sided with opposing counsel (corporate lawyers) in virtually all contested aspects of the trial.

The ethics of a lawyer is a powerful means of persuasion.⁶¹ Persuasion, according to the Greek philosopher Aristotle, is constructed through three different kinds of appeals: logos,⁶² ethos,⁶³ and pathos⁶⁴ which together create conviction in an argument, and convince listeners to believe the speaker. In Aristotle's Rhetoric, he "identifies three elements of argument [that help guide lawyers in the persuasive process]: the speaker, the argument, and the listener."⁶⁵ He explains how the three appeals are most important to the listener, because the "whole

⁶⁰ A Civil Action is a book written in 1996 by Jonathan Harr about a water contamination case in Woburn, Massachusetts, in the 1980s. (Anderson v. Cryovac).

⁶¹ Weiss, "How the Lawyer Uses Rhetoric." Page 8.

⁶² Logical argument.

⁶³ Speaker credibility.

⁶⁴ Emotional argument.

⁶⁵ Sandler, Paul Mark, JoAnne A. Epps, and Ronald J. Waicukauski. "Classical Rhetoric And The Modern Trial Lawyer." *Litigation* 36.2 (2010)

affair of rhetoric is the impression to be made upon the audience."⁶⁶ It's important for a lawyer to effectively recognize his audience, because many fail to realize that all audiences aren't the same. Paul Sandler claims that "the capacity to match one's rhetoric to one's audience is well served by a sophisticated understanding of human nature, habits, desires, and emotions."⁶⁷ Not every audience will have the same attitudes or beliefs, nor interpret the same kind of evidence a rhetor presents in the same ways as another individual. Moreover, lawyers are able to use the five canons, known as invention,⁶⁸ arrangement,⁶⁹ style,⁷⁰ memory,⁷¹ and delivery,⁷² as a guide to creating speeches and written work. First, a lawyer's argument usually stems from the invention process. According to Aristotle, invention involves "discovering the best available means of persuasion."⁷³ In this phase, a lawyer has to consider his audience, then collect all supporting evidence to assemble his case. Evidence ranges from facts, laws, eyewitness testimonies, and expert witnesses. For example, in "A Civil Action," Jan Schlichtmann spent over two million dollars on geographical documents and medical reports, and brought in expert witnesses to testify. Yet, in the end, all the evidence he gathered wasn't sufficient enough to win the case, because he failed to prove that the corporations contaminated the water, and the Judge's perception was they had not. Again, audiences, especially judges, are persuaded by different types of evidence and how that evidence is presented; therefore, it is the lawyer's

⁶⁶ Sandler, "Classical Rhetoric And The Modern Trial Lawyer."

⁶⁷ Sandler, "Classical Rhetoric And The Modern Trial Lawyer." See the 2nd section.

⁶⁸ Toye, *Rhetoric: A Very Short Introduction*. Page 36. (Refers to the process of coming up with arguments appropriate to the situation.)

⁶⁹ Toye, *Rhetoric: A Very Short Introduction*. Page 38. (Concerns the ordering of material.)

⁷⁰ Toye, *Rhetoric: A Very Short Introduction*. Page 39. (The choice of words.)

⁷¹ Toye, *Rhetoric: A Very Short Introduction*. Page 40. (Refers to visualizing elements of a speech.)

⁷² Toye, *Rhetoric: A Very Short Introduction*. Page 40. (The questions of accent, posture, gesture, tone of voice, ect.)

⁷³ Aristotle, W. Rhys Roberts, Ingram Bywater, and Friedrich Solmsen. *Rhetoric*. New York: Modern Library, 1954. Print.

responsibility to learn his audience. He can do this by "read[ing] a judge's prior opinions and writings, contact[ing] people familiar with the judge, observ[ing] the judge in other proceedings, and, in some instances, conduct[ing] online research on the judge."⁷⁴ Completing this type of background research will help a lawyer avoid arguing in opposition to "a judge's preconceived notions or even prior opinions."⁷⁵

Next, the arrangement of a lawyer's speech and written work significantly impacts its ability to persuade. The structure of an argument shows a sense of preparedness, which a lawyer can build upon to establish his credibility, or ethos, also, arrangement, the sequencing of facts and arguments, leads to perceptions and can make a case stronger or weaker. A lawyer employs arrangement through "arranging of the facts and all the applicable law."⁷⁶ In the previous centuries, Classical rhetoricians divided their speeches into six parts: "an introduction, a narration of the facts, an outline of the structure of the speech, a proof of the argument, a refutation of opposing arguments, and a conclusion (or peroration)."⁷⁷ Likewise, in modern terms, lawyers begin their arguments with opening statements, direct and cross examinations, rebuttal evidence, and then closing arguments. A good argument first introduces the facts of a case, creating a road map for the judge so he won't get lost, for example. Ancient Roman philosopher and lawyer, Cicero, "recommends placing the strongest points first, following them with weaker arguments, and concluding with strong arguments."⁷⁸ By drawing an audience in at the beginning, a lawyer can establish ethos and begin to build on logos. The lawyer should make statements that convince and persuade the audience. Second, a strong argument is

⁷⁴ Sandler, "Classical Rhetoric And The Modern Trial Lawyer."

⁷⁵ Sandler, "Classical Rhetoric And The Modern Trial Lawyer."

⁷⁶ Weiss, "How the Lawyer Uses Rhetoric." Page 7

⁷⁷ Toye, *Rhetoric: A Very Short Introduction*. Page. 38

⁷⁸ Sandler, "Classical Rhetoric And The Modern Trial Lawyer."

accompanied with facts, which include reliable evidence: testimony and/or circumstantial evidence, such as blood or DNA evidence. Subsequently, to further an argument, it will also help to underline the weaknesses in the other side of the case. This technique shows an audience the lawyer came to win, because she can literally beat the opposing side on his weaknesses, before he tries to make her client look bad. Also, this is a skill that makes a lawyer look more persuasive. An argument can be finalized by creating an emotional appeal, making the argument as memorable as possible. A lawyer uses this method to impress judges. There is a possibility that a lawyer will come in contact with the same judge numerous times in the courtroom, so the goal is leaving a lasting impression, like the resonance and emotion found in Martin Luther King, Jr.'s, "I Have a Dream" speech.⁷⁹ For that reason, word choice is essential in making logical points throughout an argument. Word choice also relates to rhetorical style.

Thirdly, an argument's style relates to a lawyer's use of language, word choice, and syntax. Style tends to individualize the lawyer, and make him or her stand out. A lawyer wants personal style to show a "down-to-earth character and commitment to popular values."⁸⁰ For instance, if all lawyers came into the courtroom using the same traditional arguments and styles, there would be no way to differentiate the most persuasive lawyers from the less persuasive. They would all blend together through the eyes of a judge, and that could lead to more bias within the courtroom. However, having an effective style "can touch the nerves of political, social, and ethnic conflict."⁸¹ A lawyer doesn't want to be the reason a judge ignores part of the law, and uses his own bias to decide a case, because the lawyer wasn't useful in

⁷⁹ Martin Luther King's Address at March on Washington August 28, 1963.

⁸⁰ Toye, *Rhetoric: A Very Short Introduction*. Page 39.

⁸¹ Toye, *Rhetoric: A Very Short Introduction*. Page 40.

arguing the law. Moreover, the propriety of words and clarity of style, pave the way for an effective delivery. Style is interconnected with a lawyer's delivery. An argument's delivery consist of "the question of accent, posture, gesture, tone of voice, and so forth, that may have a profound effect on how a speech is received."⁸² The way an argument is delivered, or performed, correlates to how an argument is disputed. It's not about what a lawyer says, it's about how they say it, the manner. Eye contact is very important, as well as a good memory. Therefore, the last canon of rhetoric, memory, deals with "visualizing the different elements of [a lawyer's] speech" and naturally communicating it in the public forum. Again, a good memory displays how prepared a lawyer is, and allows the lawyer to be quicker in getting the point across. Roman rhetorician Quintilian, points out:

A good memory will give us credit for quickness of wit as well, by creating the impression that our words have not been prepared in the seclusion of the study, but are due to the inspiration of the moment[...][T]he judge admires those words more and fears them less which he does not suspect of having been specially prepared beforehand to outwit him.⁸³

A good memory allows lawyers to internalize and recall laws, statutes, and facts, for example, and later use them as building blocks of their argument. This concept isn't exactly about remembering an argument word-for-word, but being able to create a spur-of-the-moment response to an argument when necessary. According to Weiss, "regardless of the preparation an attorney has made, there will always be something new and unexpected at the trial, and he must be ever alert to adapt his rhetoric to the immediate circumstances."⁸⁴ In reference, a judge can call a lawyer to speak at any point during a trial, and it is his responsibility to be

⁸²Toye, *Rhetoric: A Very Short Introduction*. Page 40.

⁸³Toye, *Rhetoric: A Very Short Introduction*. Page 41.

⁸⁴Weiss, "How the Lawyer Uses Rhetoric." Page 7.

prepared "whenever a situation demands."⁸⁵ Cross-examination and redirects of witnesses benefit from the lawyer's good memory.

Although lawyers aren't car salesmen, they are selling their cases. According to Justice Antonin Scalia and Bryan Garner, judges can only be persuaded when three requisites are met:

1. They must have a clear idea of what you're asking the court to do.
2. They must be assured that it's within the court's power to do.
3. After hearing the reasons for doing what you are asking, and the reasons for doing other things or doing nothing at all, they must conclude that what you're asking is best --both in your case and in cases that will follow.⁸⁶

A lawyer has to have an idea of what prompts the court. For example, a lawyer can never go wrong with following statutes and precedents, because these principles guide the court. Yet, it's more difficult to figure out exactly what motivates a judge. The more obvious are fairness, following precedents, and coming to socially desirable outcomes, but Scalia and Garner specify more customization for particular judges. They add, "some judges believe that their duty is quite simply to give the text its most natural meaning --in the context of related provisions, of course, and applying the usual canons of textual interpretation --without assessing the desirability of the consequences that meaning produces."⁸⁷ These kinds of judges are what we know today as Originalist. Originalists interpret the Constitution and law with the same intent that the Framers did. Notably, Supreme Court Justice Scalia is one judge who holds an Originalist view. On the other hand are the judges who interpret the law using the original meaning, but who give the text an altered meaning to fit the desired outcome of the situation.

⁸⁵ Toye, *Rhetoric: A Very Short Introduction*. Page 41.

⁸⁶ Scalia, Antonin, and Bryan A. Garner. *Making Your Case: The Art Of Persuading Judges*. St. Paul, MN: Thomson/West, 2008.

⁸⁷ Scalia, *Making Your Case: The Art Of Persuading Judges*. Pg. xxi

They're known as having a living document interpretation, and believe in an ever-changing world. When a lawyer is arguing, it is essential to remain factual and make sure all statements are logical, because when it comes to judges "all sorts of extraneous factors -- emotions, biases, preferences --can intervene, most of which you can absolutely do nothing about."⁸⁸

Therefore, unless the lawyer has done extensive research on a particular judge, he has to argue keeping in mind that the judge can be either Originalist or a living document advocate. For instance, though Jan Schlichtmann gathered all the evidence he could during the *Anderson* case, in the end, the judge still favored the corporations. Studies show that the judicial process is, in fact, skewed in favor of corporations, over communities or individuals, because they tend to have the necessary resources and money to pay highly experienced lawyers and they carry political influence. Moreover, a lawyer's objective is to prove himself or herself as trustworthy, reliable, and knowledgeable. According to Scalia and Garner, "judges listen to [lawyers] because, at the time of briefing or argument, [lawyers] can be expected to know more about the legal and factual aspects of the case than anyone else."⁸⁹ Trust can be lost by giving false information, misinterpreting precedents or other laws, or having no evidence to back up claims. Winning a judge's trust is obtained when a lawyer gives reliable information, facts are presented with knowledge of the law, and "by owning up to those points that cut against you and addressing them forthrightly."⁹⁰

Simply put, "the argument that litigants as a whole have a symbiotic relationship with the [Justices] on the Supreme Court as a whole, and that this symbiotic relationship results in

⁸⁸Scalia, and Garner. *Making Your Case: The Art Of Persuading Judges*. Pg. xxiii

⁸⁹ Scalia, and Garner. *Making Your Case: The Art Of Persuading Judges*. Pg. 8

⁹⁰ Scalia, and Garner. *Making Your Case: The Art Of Persuading Judges*. Pg. xxiv

transforming the Supreme Court's agenda, is not dependent on whether one kind of justice or one kind of litigant versus another is providing or responding to cues."⁹¹ There is no clear-cut connection to lawyers and judges when it comes to bias in the courtroom. Regardless, bias exists, so when arguing, the trial lawyer will use techniques and skills learned from rhetoricians to make clearer, logical arguments, in hopes that the argument effectively persuades the judge toward balance and fairness.

⁹¹ Baird, Vanessa A. *Answering The Call Of The Court : How Justices And Litigants Set The Supreme Court Agenda*. Charlottesville : University of Virginia Press, 2007. Pg. 9

CONCLUSION: DEALING WITH BIAS

Based on my research and observations, I think that judges and lawyers are each susceptible to bias, causing their views of the law and values to clash with one another. Lawyers act as an advocate for clients in courtrooms. Lawyers put together strong cases based on evidence, and present clients cases by arguing points of law and questioning witnesses using specific rhetorical techniques. Through opening and closing statements, lawyers persuade judges to rule in their favor. Judges preside over the court, making sure all parties follow rules and procedures, so everyone is treated fairly. As has been noted, judges aim to deliver both balance and fairness in their rulings and courtrooms. But if either balance or fairness is ever compromised for any reason in any way, then bias will definitely affect the trial's outcome. Regardless, bias is unavoidable, because judges too are subject to everyday pressures and inclinations. The only difference is judges are held to a higher standard, because of the position they hold. Judges are expected to act impartially and without bias; however, all judges hold different views and experiences. Some judges intentionally decide cases based on bias to be authoritative, while other judges actually use bias because the law isn't sufficient enough, and they have to, for instance.

By understanding the relationship between lawyers and judges, I am now more informed of what to expect inside a courtroom. Anyone may be summoned for jury duty, or become an actual litigant in a civil case, or find themselves charged with breaking a law or committing a crime. Therefore, it's always helpful to have knowledge of a system that everyone will come into contact with at some point of their lives. From my research, I can also generalize that a good lawyer can overcome judging bias if he or she knows the law; stays focused on the

law, and then applies known facts to their cases using minimal emotions. Notably, there is a time for emotions inside the courtroom, but not when arguing a case. A good lawyer will use techniques and skills learned from rhetoricians to make clearer arguments that effectively persuade judges towards balance and fairness.

I feel a major problem in the judicial process with lawyers and judges concerns the issue of public trust. Judges break public trust when they display unethical behavior or show consistently, unfair bias throughout different cases. This is an issue because judges serve the public. Therefore, the public is supposed to be able to confide in the judicial system and its judges. Lawyers break public trust just in their nature as a lawyer. Lawyers are known to be professional liars. From the beginning of its history, people distrusted the Sophists for their rhetorical ideas of teaching oratory and rhetoric towards civil and political life. Adversaries, like Plato and Aristotle, viewed the Sophists as greedy and manipulative intended to deceive others, which is a similar view the public holds toward most lawyers today. As a word of advice, in order to ensure fairness in bench trials, things need to change one by one to attempt to reach an ideal judicial system.

I have one major suggestion in particular. I want to see less corruption inside the judicial system. For instance, some judges are bribed with money or better opportunities to have certain cases thrown out or make wrongful convictions. Bribery is another factor that causes bias; therefore, I'd want to remove bias. In order to eliminate bias, misconduct by judges has to be subject to discipline in any situation that arises. From my research, I have interpreted that there is a lack of accountability and consequences for some individual actors in the judicial system, including lawyers, but more importantly judges, when they intendedly break rules or

commit crimes. Without any accountability or consequences, judges have no motivation to change their behaviors and will continue to act with bias in cases.

It's not about what a judge does in his or her personal life, but what he or she does on the bench during litigation. A well-known example is Judge Judy. She runs her courtroom like she owns it, treating litigants and even lawyers in a bossy, overbearing way. But even where a judge, like Judge Milian, is even-tempered and dignified in her demeanor, all court hearings involve the judge ruling on a certain aspect of a case. Therefore, a judge needs to be held accountable for his or her actions, in order to eliminate bias and make the judicial system less corrupt. If these suggestions are achieved, then justice will prevail over bias.

For future research, I'd like to receive feedback from Atlanta-based lawyers and judges about how they personally feel about bias inside courtrooms and to what extent they have observed or experienced bias. Questions I'd love to explore further include how easy it is for lawyers to find out about judges and their previous rulings or preferences? Do judges and lawyers know what the term 'rhetoric' means and how it is practiced? What is the process used by judges to decide cases?

I found my reading of texts and study of T.V. judges to be highly informational in giving me a foundational base for exploring judicial bias. The next step is exploring the subject directly with actual participants and collecting their stories through interviews.

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