

Richard Posner and the Rhetoric of (Economic) Common Sense

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In 1961 Guido Calabresi and Ronald Coase published two articles that would reshape the landscape of American jurisprudence. Both Calabresi's "Some Thoughts on Risk Distribution and the Law of Torts"¹ and Coase's "The Problem of Social Cost"² introduced an intimate relationship between law and economics, suggesting the latter as the most useful and efficient means by which to analyze the former.³ Their landmark works, however, failed to catch the attention of the legal academy. With the 1973 publication of *Economic Analysis of Law*, Richard Posner succeeded where they had not as he brought law and economics to the forefront of legal theory and legal education.⁴ Emerging out of the highly influential "Chicago School," Posner's casebook, now in its ninth edition, is a mainstay in law schools across the country, educating future lawyers and judges in the ways of economic adjudication for over 40 years. Drawing insights from sources old and new, including classic economists such as Adam Smith as well as fellow Chicago School economist Gary Becker's Nobel Prize winning application of economics to non-market behavior,⁵ Posner's sweeping work covers everything from eminent domain to traffic congestion to surrogate motherhood to pay television. Rather than limit the economic analysis of law to traditionally economic issues (market regulation, for example), Posner argues that the entirety of law can be viewed, analyzed, and assessed through an economic lens.

Since the law and economics movement began, Posner has been the leading figure in the prominent field, authoring dozens of books, hundreds of articles, and thousands of cases. In keeping with the common law tradition of his intellectual and judicial hero, Justice Oliver Wendell Holmes, Jr., Posner's blend of neo-classical economics and "everyday" pragmatism eschews traditional theories of judgment in favor of a practical approach that values "efficiency" and "wealth maximization." Along with the great success Posner and the law and economics movement enjoys, he has also garnered significant criticism. Liberals question the value of wealth and efficiency as the guiding principles of law,⁶ radicals challenge the strength of neo-classical economics on which the law and economics approach is built,⁷ communitarians worry about the detriment that incentivizing individualism and consumption pose to society,⁸ and legal realists remain skeptical of the reality of his claims.⁹

Despite the criticisms, Posner's influence has been far-reaching.¹⁰ For Posner and his fellow law and economics advocates, the tools of economics prove invaluable for a judge. With proven methods such as the *Pareto Criteria* and *Kaldor-Hicks Efficiency*, judges would have an easier time issuing better judgments if they follow the guidelines set out by economics. In addition to the legal and economic resources available, Posner also utilizes an array of rhetorical appeals that give character to his judicial approach. Edward Panetta and Marouf Hasian note Posner's "anti-rhetorical" posturing and argue that he attempts to position law and economics as more in line with scientific discourse, thus beyond what he considers specious argumentation.¹¹ James Aune builds on their work in his analysis of Posner's *Overcoming Law*, arguing that Posner suffers from a strategically narrow understanding of rhetoric that undermines competing legal theories while simultaneously bolstering the validity of his economic approach to law.¹²

Complementing these works, this essay focuses on yet another way in which Posner attempts to position his jurisprudence as superior to competing theories. As he frames his theoretical appeals as pragmatic and economic, Posner situates his project as the most reasonable, the most useful, and the most efficient approach to law. In order to do so, Posner articulates a connection between economics and common sense, suggesting the former is simply a codified version of the latter. Good judgment requires common sense, which *is* economic judgment by his definition. Furthermore, Posner is able to counter arguments that admonish common sense for being anti-scientific or hegemonic by drawing on the quasi-scientific *ethos* that comes with economics. In addition to his arguments that common sense plays a prominent role in adjudicating cases, common sense is also used to defend economic judgment from criticism. His economically imbued notion of jurisprudence allows him to "call down" academics for their abstract and impractical ideas about legal judgment. Common sense is used to rebuke abstract legal theory, particularly those that differ from and disagree with the economic model of judgment. While he "calls down" academics, he also uses common sense to "call up" the general public. *Legal* common sense comes after years of proper training and experience. When the public gets upset with a decision, especially one issued under the auspices of Posner's law and economics approach, they lack the common sense necessary to understand the decision as it functions in the legal world. Whereas academics are called down with appeals to common sense because of their hubris, the public is called up with common sense because of their obtuseness.¹³ By aligning the idea of

common sense with the process of economic rationalization, the judgments rendered via the law and economics approach are *de facto* common sense judgments.

With all of this talk of common sense, a question remains: what *is* common sense? Perhaps the best characterization parallels Justice Potter Stewart's famous description of pornography: "I know it when I see it."¹⁴ Some scholars are reluctant to define common sense even if they utilize the concept in their work, instead assuming it is something "out there" that can legitimate or undermine arguments.¹⁵ There are many historic definitions and uses of common sense and these definitions tend to snowball on to one another rather than replace previous characterizations. This is not to suggest that judgments rendered from common sense would take the same form in different time periods. What constitutes common sense today is markedly different than 1950s common sense, or 1850s common sense, or 1750s common sense. One of the reasons why common sense is so rhetorically appealing is its ephemerality; all the definitions of common sense are accurate in some way or another. Although it is neither my goal nor my intention to offer an all-encompassing definition, the historic definitions underscore some shared assumptions about what common sense "is," why it is useful, and how it is rhetorically effective.

Historically, there have been a number of different invocations of common sense for various reasons. Whereas many scholars point to the Aberdeen Philosophical Society as the origin of a systematic and engaged common sense philosophy, others note that the tradition reaches as far back as Aristotle. They stress Aristotle's response to Platonic idealism and note the former's attention to the physical senses (e.g., sight, touch, taste) as the means by which humans gain a shared knowledge of their surroundings.¹⁶ Emanating from Aristotle's work in the natural sciences, this characterization represents a *physical* definition of common sense. The Scottish Enlightenment would adopt, in part, a similar definition responding to philosophical skepticism and the subjectiveness of human experience. In addition, Aristotle's *Rhetoric* suggests another notion of common sense in the rhetorical *topoi*.¹⁷ Drawing from Aristotle's *Topics*, Perelman and Olbrechts-Tyteca note:

Common sense admits the existence of unquestioned and unquestionable truths; it admits that certain rules are "beyond discussion," and that certain suggestions "do not deserve discussion." An established fact, a self-evident truth, an absolute rule, carry in themselves the affirmation of their unquestionable character, excluding the possibility of pro and con argumentation. Unanimous agreement on particular propositions can make it very difficult to question them.¹⁸

The *topoi*—or commonplaces—constitute an array of general argumentative appeals that are effective with all audiences. Unlike the “special” *topoi*, which focus on the commonplace arguments available in forensic, epideictic, and deliberative situations, common sense is one of the “general” *topoi* that can be deployed in virtually any rhetorical situation. Herein, we have the definition of common sense as a rhetorical trope.

Cicero’s conception of common sense builds off of Aristotle’s second characterization and runs closer to its contemporary use. A vital element for the successful orator, *sensus communis* is composed of two distinct yet connected formulations. The first is the ability to know the general disposition of the crowd—how they think and what they think about. What sort of language caters to all (or at least most) of them? What sort of cultural influences have they had? This element of *sensus communis* concerns the persuasive power of shared discourses and experiences when a *specific* audience has them in common and a rhetor deploys them effectively.¹⁹ The second form is much more general and cosmopolitan. Echoing Aristotle’s *topoi*, this formulation situates *sensus communis* as a natural process of judgment that *any* audience would find appealing.²⁰ For the successful orator, possessing both forms is necessary for effective persuasion.

These classical notions of common sense were reintroduced and built upon in two key periods in the Enlightenment, one at the beginning and one at the end. The first is Vico’s incorporation of *sensus communis* in his humanist response to the growing influence of scientific reason and discourse.²¹ For Vico, *sensus communis* is not only a type of shrewd knowledge characteristic of Aristotle’s *topoi* and Cicero’s two formulations, but also an *objective* to pursue through rhetoric. Vico believed scientific reason intrudes on civic life, undermining the common beliefs and values that unite society. A humanist, Vico argued that human history and poetic narratives ground and maintain a healthy society, which is one of the reasons he celebrated rhetoric throughout his work. For Vico, rhetoric serves as the means and ends in regard to *sensus communis*; it is the art that cultivates and maintains his conception of common sense while also working toward it.

More prominent, however, are the philosophical and political uses of common sense that emerged in the late 18th century, including the Scottish common sense tradition, Kant’s *Critique of Judgment*, and Thomas Paine’s revolutionary *Common Sense*. Scottish common sense philosophy emerged, in part, as a response to Hume’s skepticism and his (in)famous argument to debunk causality.²² Unwilling to accept such an upheaval of practical and philosophical thought, the

members of the Aberdeen Philosophical Society, including Thomas Reid, George Campbell, and James Beattie responded with arguments grounded in a “universally accessible”²³ common sense. Reid claimed that common sense is an imperative and inevitable element of inquiry, not a base or suspect form of knowledge. Instead of focusing on the abstractions of philosophy, common sense tends to the everyday resources of judgment.²⁴ “I despise Philosophy, and renounce its guidance” proclaimed Reid, “let my soul dwell with Common Sense.”²⁵ Arguably more influential was George Campbell and his treatment of common sense and rhetoric. Campbell argued in *Philosophy of Rhetoric* that common sense is a necessary element for any knowledge acquisition, expression, or judgment, and is also key feature of rhetoric.²⁶

Whereas Reid and Campbell turned to epistemological common sense, Flavio Comim argues that Adam Smith incorporated a psychological notion of common sense that ran throughout his economic theories “which works as a first principle of analysis.”²⁷ Citing Smith’s appeals to “sympathy,” the “plain man,” and his characterization of the “impartial spectator,” Comim claims that Smith’s economic theory maintains a basic assumption of a psychological common sense in order to function well.²⁸ If one wants to understand and predict how the Scottish people will behave—an important question for a Scottish economist—then one needs to know the habits and norms that frame their judgments. As we will see, Posner’s economic model of judgment possesses a similar sensibility that collapses common sense into an economic worldview.

Immanuel Kant similarly united judgment and rhetorical appeal in common sense, particularly in judgments of taste. Unlike his first two *Critiques*, Kant’s *Critique of Judgment* exhibits a humanistic tendency within which common sense serves as an argumentative groundwork for aesthetic judgment.²⁹ In many ways, Kant’s use of common sense is the application of Cicero’s notion but limited to the aesthetic world, as common sense here construed functions as a form of social knowledge and a vital element of rhetorical engagement.

The most recognizable American contribution to the rhetoric of common sense was Thomas Paine’s famous pamphlet, *Common Sense*. Unlike the aforementioned philosophical treatises, Paine was not interested in defining common sense or explicating its epistemological functions. Rather, Paine tapped into its rhetorical power as a trope and used it to stir revolution. Much has been made of the rhetorical merits of Paine’s work and rightfully so. Stephen Lucas cites *Common Sense* as the argument that tipped the scales in favor of colonial revolution.³⁰ In part due to the rhetorical style³¹ and charisma³² of Paine’s argument, *Common Sense* received

unprecedented recognition. With “enormously fortuitous timing”³³ and “published in just the right place,”³⁴ Paine balanced a “literary style that combined the rough poetry of the public house with the righteous zeal and vivid imagery of a preacher, and that set out a grand political vision in familiar words and elegantly simple sentences.”³⁵ Important for our discussion is the way in which Paine’s articulation of common sense was immensely persuasive and was able to speak to seemingly disparate groups within the colonies. He did not define common sense explicitly, for to do so minimizes its rhetorical power. Instead, Paine made a set of arguments that allow individual readers to bring in their personal experiences, to graft *their* notions of common sense onto Paine’s arguments, thus joining author and audience. In doing so, Paine illustrated its enthymematic potential.

These philosophical and rhetorical invocations of common sense from Ancient Greece and Rome through the 18th Enlightenment stress what Michael Billig calls the concept’s two forms: “There is an anthropological, or restricted, sense which confines particular versions of common-sense to particular communities or audiences. Then there is an unrestricted use, which implies that there is a common-sense to which all audiences subscribe.”³⁶ Billig notes how the 18th century invocations of common sense, such as George Campbell’s *Philosophy of Rhetoric*, draw on the unrestricted form: common sense as universal and accessible to everyone. The unrestricted form, however, neglects the many ways in which culture contributes to common sense. The rhetorical tradition often opts for the restricted use: “Each community possess its own common-sense, expressed in common-place, but nevertheless potent, symbols. It is these common-places which the orator is advised to invoke, even when seeking to criticize the audience.”³⁷ Yet, the restricted appeal to common sense rarely *acknowledges* it as such. A rhetor is unlikely to implore an audience to act based on *their* common sense; rather, she or he will use a restricted notion of common sense, but deploy it using an unrestricted discourse. Billig notes how two mutually exclusive arguments attempt to stake their claim on common sense, such as the prosecution and defense in a trial.³⁸ Each contends that their side reflects common sense whereas the opposition clouds the issue.

Both logoi and anti-logoi are presumed to co-exist within common-sense, and we can assume this state to be quite normal and not associated with the presumed *angst* of cognitive dissonance . . . The ordinary person, whose mind is filled with the contrary tendencies of common-sense, will resemble the desk-bound orator: each possesses contrary common-places, which are lurking within the mind, awaiting the call to be to be used in one-sided advocacy.³⁹

Rather than being problematic, the paradoxical invocation of common sense is useful for the rhetor.

John Brewer stresses this often unrecognized element, noting that individuals share a similar process by which they construct common sense, but the results differ significantly. Individuals *perceive* a shared stock of common knowledge even if it does not exist. “In short,” Brewer argues, “the social world becomes ‘real’ and ‘factual’ not because of shared or common stocks of beliefs, maxims, ideas and types but because of the assumption of shared and common beliefs, maxims, ideas and types. The assumption of their universality and actual universality are two completely different things.”⁴⁰ Brewer’s analysis suggests that common sense constitutes an important “ideograph.” Defining the ideograph as “a high-order abstraction representing collective commitment to a particular but equivocal and ill-defined normative goal,”⁴¹ Michael Calvin McGee argues that phrases like “liberty” and “the rule of law” (and, I propose, “common sense”) are culture-bound and have the ability to affect social consciousness.⁴² Furthermore, the only way to understand such abstract concepts is to address how they are used,⁴³ which reflect upon historically situated collectivities.⁴⁴ McGee references “popular history” (i.e., film, current events, literature, music, etc.) as points at which ideographs may be implemented and, as a result, traced.⁴⁵ In addition to its 2500-year-old philosophical and rhetorical history, common sense currently holds a prized place in rhetoric and social knowledge. One quick search of “common sense” brings countless news results citing the need for, presence of, or noticeable lack of common sense, yet offer little indication as to what constitutes the common sense framing their arguments. Gun laws, immigration, environmental legislation, firework regulation, and a myriad of legal and political issues inspire common sense responses, but every time it is vaguely invoked, authors assume that their respective audiences share the same common sense. As a result, groups with competing interests simultaneously claim to be on the side of common sense, which highlights its paradoxical yet potent rhetorical power.

Although common sense appeals may find resistance within technical, expert discourses, they often find little resistance when they enter the public sphere. Public audiences are less likely to have the time and resources needed to scrutinize arguments. Instead, they utilize their own experiences to tell whether or not a common sense argument is really all that common and makes any sense. Posner’s law and economics approach is able to tap into the rhetorical wealth of

common sense by distancing itself from academic philosophy and reframing economic judgment as a form of common sense. At least since Paine's pamphlet, common sense has played a prominent role in American political and philosophical history, including what has been described as the only truly American philosophy: pragmatism. The role of common sense in pragmatism is especially important given our attention to Richard Posner, who continuously aligns himself with the pragmatist tradition. Charles Sanders Peirce, often cited as the father of pragmatism, advocated a "critical common-sensism," which imbued Thomas Reid's approach with Kant's critical project.⁴⁶ William James was similarly interested in the relationship between common sense and science, although adopted a less critical edge. Dividing knowledge into three spheres—common sense, science, and philosophy—James writes, "Common sense is *better* for one sphere of life, science for another, philosophic criticism for a third; but whether either be *truer* absolutely, Heaven only knows."⁴⁷ He encourages suspicion of common sense, but nonetheless recognizes its prominent place. Not to be left out, John Dewey also addressed science and common sense, arguing that neither can survive on their own. Rather they are frames of reference, two ways of looking at the world that can benefit one another.⁴⁸

Posner breaks from his philosophical pragmatism lineage by connecting good and useful common sense as inherently economic and rooted in cost-benefit analysis. Common sense *without* an economic mindfulness for consequences suffers from the same challenges sociologists and cultural studies theorists have also posed—it is ideological and unreflective. "[C]ommon-sense does not provide a unitary discourse," warns Posner, "for it overflows with numerous bits and pieces, creating and recreating endless 'ideological dilemmas.'"⁴⁹ "[P]olitics shades into ideology," he argues elsewhere, "which in turn shades into common sense, moral insight, notions of sound policy, and other common ineradicable elements of judicial decision making."⁵⁰ Posner suggests that economics quells these fears by being a neutral analytic tool.

Posner blends common sense into economics by stressing what he considers to be their points of intersection: cost-benefit analysis and practical usefulness. For example, discussing the law of evidence, Posner argues that Rule 201 of the Federal Rules of Evidence, which deals with incontestable facts, is "obviously sound as a matter of economics as well as common sense" as determined by the cost-benefit ratio.⁵¹ Later in the same article he links common sense with economic usefulness.⁵² Similar themes appear in his analyses of consumer commerce,⁵³ negligence,⁵⁴ religious freedom,⁵⁵ and antitrust law.⁵⁶ Economics becomes the standard by which the

quality of common sense is determined by imbuing it with a scientific method and resisting political or ideological influence. As a result, Posner presents economic judgment as a paradigm example of *good* common sense.

Distancing the economic adjudication from academic pragmatism and offering his own “everyday” pragmatism in its place serves as the first of his rhetorical constructions and grants him the ability to call academics down from their Ivory Tower. Under this view, the academic “legalist” theories focus too much on complicated abstractions and advocate for legal ideas that simply cannot be put into practice. Moreover, they are written for a narrow academic audience, making their application all the more difficult for sitting judges. Common sense serves as a bulwark against what Posner laments as endless and often specious theorizing. In many ways, Posner’s characterization of academia echoes Aristophanes’ early criticism of philosophy. In *Clouds*, Aristophanes caricatures the paralyzing assiduousness of Platonic philosophy, labeling Socrates a “priest of pedantic prattle.”⁵⁷ In his desire to learn philosophy, the character Strepsiades vehemently protests against an interest in practical affairs: “No, no, no! I’m not interested in politics and carrying on in the assembly.”⁵⁸ Depicted here, philosophy is not simply hair spitting, but also a harmful disassociation from the world of everyday experience.

Posner, too, characterizes academic philosophers as overscrupulous, countering their persnickety disposition with common sense: “To practical people, however, including judges and lawyers and even many law professors, philosophy is an exasperating subject. Philosophers seem preoccupied with questions that no one with a modicum of common sense and a living to earn would waste a minute on.”⁵⁹ Notice how Posner characterizes philosophers (and, implicitly, other theorists) as consumed by irrelevant problems that have nothing to do with how “real” people live their lives. Although common sense remains vague and undefined, he situates it as a useful source of practical knowledge that can call these highfalutin’ thinkers down from the clouds.

Much like Aristophanes’ acerbic portrayal of Ancient Greek philosophers, Posner’s prioritization of common sense serves an important rhetorical function by associating his perspective with the lay public. Posner is less interested in picking a fight with academics about the nature of law and more interested in convincing an audience of his judicial peers and the learned public that good adjudication is economic. Building broad appeal, Posner claims that common sense emanates from the general public and serves as a useful bulwark against bad policies: “The people are the repository of common sense, which, dull though it is, is a barrier to the mad

schemes, whether of social engineering or foreign adventures, hatched by specialists and intellectuals.”⁶⁰ This characterization of common sense serves at least three rhetorical purposes. First, Posner is able to gain broad public support by praising the nebulous “people” as sage guides, in effect calling them into being. Their collective intuition serves as an adequate tool used to discern good from bad, right from wrong, and useful from useless. Do they know specialized, technical, and nuanced arguments for a particular policy or law? No, but their naiveté is actually a strength:

People don’t want to be lectured to by their intellectual superiors about needing to become informed about esoteric political issues, to participate actively in political and ideological deliberation, to subordinate their interests to some abstract public interest, and to allocate previous time to the political arena. But they do want to be heard concerning their interests by those who have power to do anything to protect or advance those interests.⁶¹

By praising the enduring wisdom of the people, Posner’s rhetorical strategy is not to *describe* the public, but instead *call a particular public into being as audience*.⁶² It is a way of constituting a particular audience that is predisposed toward his economic interpretation of law. Labeling his view “everyday,” Posner simultaneously calls into question other legal theories (he considers most of them vacuous) while also positioning the law and economics as the voice of common sense, as “of the people.” In many ways, Posner tells the people who they are: rational deliberators capable of sound decisions.

Second, Posner strategically ignores the many ways in which public opinion is grossly under/misinformed and the many instances of their “intellectual superiors” initiating a positive social cascade. A 2005 study illustrated the staggeringly low aptitude Americans have for basic scientific information.⁶³ History and politics fare little better. Americans are more than twice as likely to know two family members from the television show *The Simpsons* than two of the five freedoms guaranteed by the First Amendment.⁶⁴ Consider also the growing number of citizens who believe President Obama is a Muslim (29%)⁶⁵ and rumors of his country of birth have not been entirely quelled. The people, to which Posner ascribes a sage-like common sense, are not always a barrier against “mad schemes”—sometimes they are siphons channeling it into public discourse.

Finally, and most importantly, Posner is able to cast doubt on scholars and recast the legal system, particularly judges, as bastions of common sense wisdom set to protect the lay public from intellectual elitism. Rather than “slumming” it with common sense discourse as John Lyne suspects scientists must do,⁶⁶ Posner embraces the discourse as a way to garner rhetorical appeal with his

two target audiences—the legal community (judges and lawyers) and the lay public. Theorists and critics from other disciplines (philosophy, rhetoric, sociology, political science, history, literary studies, etc.) are outsiders looking in, many of whom serve as a distraction from the practice of law. Common sense lets Posner call down the academics to a level of reasonableness his audiences already understand. Posner plays a similar trick, but in the other direction. I argue Posner also aligns common sense with expertise in order to call up the lay public.

By associating law and the lay public by way of common sense, Posner is able to build up the *publicness* of his philosophy. His appeal may be most effective because of the many ways in which people talk the language of law in their everyday discourse. U.S. discourse is brimming with legalisms. Noting Alexis de Tocqueville’s early recognition of such American discursive habits,⁶⁷ Mary Ann Glendon argues that legal vocabulary has become increasingly influential for the citizenry: “This ‘legalization’ of popular culture is both cause and consequence of our increasing tendency to look to law as an expression and carrier of the few values that are widely shared in our society: liberty, equality, and the ideal of justice under law.”⁶⁸ She continues, “Legal discourse has not only become the single most important tributary to political discourse, but it has crept into the languages that Americans employ around the kitchen table, in the neighborhood, and in their diverse communities of memory and mutual aid.”⁶⁹ Law, for good or ill, has infused itself with contemporary discourse and goes well beyond its disciplinary bounds. As a result, the ways in which the public philosophizes about itself are similarly imbued with law. By positioning his economic judgment as synonymous with (or, at the very least, sympathetic to) the common sense of the public, Posner draws on the public’s already present discursive tendencies.

To rely on the public’s amorphous common sense, however, is a dangerous gamble. Unwilling to put all his chips on calling down academics in favor of the people, Posner relies equally on a *cultivated* common sense and the need to call up the uninformed public. Posner recognizes the dual roles of common sense, noting its public and judicial manifestations:

Common sense is what “everybody knows” without having to think hard about the subject. So it is elliptical, like intuition. And it is culturally specific. But within a culture it is a valid though flawed source of knowledge. It operates in judicial decision making as a set of policy judgments that everyone agrees on and so are not thought political at all. A lawyer’s position in a case in the open area that violates common sense is a strong candidate for rejection. The doctrine that a literal reading of a statute is to be rejected when it would lead to an absurd result illustrates the use of common sense as judicial technique.⁷⁰

Here marks the tipping point where Posner recognizes many of the attributes of common sense addressed by Billig, while simultaneously etching a special form of common sense for economic adjudication. Throughout much of Posner's work, he speaks as an experienced judge and attempts to characterize law as what judges do. As we saw earlier, he uses this position to call down philosophers and other academics. But common sense as public opinion is a poor guide and ignores many of the technical elements that contribute to judicial decision-making. Consequently, he must cultivate a refined conception of common sense that caters to the sitting judge, one that reinforces the common law tradition as a special (and necessary) kind of common sense.

Justice Oliver Wendell, Jr. began his foundational book *The Common Law* by flipping the idea of law on its head. "The life of the law has not been logic; it has been experience . . . The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."⁷¹ The experience to which Holmes refers concerns judges who must deal with ill-defined laws, a socially evolving society, and unexpected nuances present in the most difficult cases. The common law, as Holmes characterizes it, is a *narrative*—an unfinished story that grows within a culture. In many ways, judges serve as the chief storytellers of the national narrative. They must sculpt decisions that define and redefine the culture, but their decisions are only moments in what Ronald Dworkin describes as an epic "chain novel."⁷² Some of these moments are lost or forgotten (rightfully so), whereas others serve as pivotal points that are constantly brought into the nation's grander narrative. *Marbury v. Madison*, *Dred Scot v. Sanford*, *Plessy v. Ferguson*, *Gitlow v. New York*, *Brown v. Board of Education*, *Gideon v. Wainwright*, *Griswold v. Connecticut*, *Roe v. Wade*, *Bush v. Gore*, *Citizens United v. FCC*—these cases mark important moments in our judicial and national narrative. All, however, are subject to alteration. Through their experience in the judiciary, judges become better storytellers, which suggests a growing rhetorical acumen. Yet, their role utilizes a particular, exclusive discourse and set of experiences that is unique to them. It is this privileged position that Posner taps into when he attempts to call up the public.

Characterizing the law as a distinct discourse, Posner objects to lay common sense within adjudication. In *Overcoming Law*, he claims, "It soon becomes clear that one of the most important duties of judges is to resist the pull of common sense and laymen's justice. Even a lay person should be able to understand that judges have not been given a blank check on which to write their personal and political preferences and call them the Constitution."⁷³ Here, a particular

type of common sense is criticized in favor of the cultivated sense of duty and obligation associated with the role of judge. Recall Billig's discussion of the paradox of common sense. Whereas his discussion highlights two distinct and competing sides, Posner embodies both and deploys their arguments at key moments. This Janus approach allows him to craft particular messages to particular audiences.

Common sense, under this interpretation, must be cultivated and blended with other forms of knowledge in order to be useful to the judge. Although critical of some elements of legal education, Posner nonetheless considers it an essential part of the judge's refined common sense. Building off of Holmes' arguments regarding law and experience, Posner notes, "one had to know something about society to be able to understand, criticize, and improve law." That "something," Posner continues, is an amalgam of "a good general education and common sense," but could also be developed through "the legal texts themselves . . . or, failing these sources of insight, would acquire naturally in a few years of practicing law."⁷⁴ As it applies to law, common sense is no longer unrestricted and egalitarian. Rather, legal common sense is developed over time within the legal culture. As Posner characterizes legal common sense this way, he pulls up the lay public to his level so they can understand how and why his common sense decisions differ from theirs.

Part of a legal specialization stresses the long and complicated history of law in the United States (and beyond). In large part due to *stare decisis*, cases are not always decided by contemporary social and political landscapes alone. Judges often reach back in history, sometimes across centuries, in order to justify their positions. Posner argues, "The legal core is not a body of principles validated by scientific method or by robust common sense; it is a set of policy decisions, some made long ago under different social conditions."⁷⁵ Not only are legal training and experience necessary, but also a sense of history and timeliness are required. The standards for Posner's common sense increasingly are becoming uncommon.

In *How Judges Think*, Posner discusses how "intuition" is vital to the decision-making process, "along with its cousins common sense and good judgment."⁷⁶ The judge's ability to balance competing interests and act with practical wisdom is reinforced later in the same text:

The judge is wont to ask himself in such a case what outcome would be the more reasonable, the more sensible, bearing in mind the range of admissible considerations in deciding a case, which include but are not exhausted by statutory language, precedents, and other conventional materials of judicial decision making, but also include common sense, policy preferences, and often much else besides.⁷⁷

Sound judgment is marked by its ability to negotiate a multitude of perspectives and discourses, ultimately arriving at a good decision. As Posner notes, this includes the materials of law, politics, and common sense. Given the distinct role judges play, law and politics help shape and refine an otherwise clumsy and cursory common sense. Unlike his aforementioned charges against academia, he positions himself above the rabble, holding court both in law and in public opinion. Posner reinforces this point in one of his own decisions. In *Schmidt v. Sullivan*, a fairly hum-drum case concerning social security medical benefits, Posner claims, “Common sense can mislead,” especially when “lay institutions” attempt to contest the arguments from experts.⁷⁸

Reinforcing the idea that the economic adjudication must mediate an array of legal, political, and social forces, Posner states:

The weighting is the result of a complicated interaction—mysterious, personal to every judge—of modes of reasoning (analysis, intuition, emotion, common sense, judgment), political and ideological inclinations, personality traits, other personal characteristics, personal and professional experiences, and the constraints implicit in the rules of the judicial “game.”⁷⁹

This defense of practical wisdom and the specialized common sense of the judiciary are found throughout numerous works. In *The Problems of Jurisprudence*, Posner asserts that a judge’s practical reason is a “grab bag that includes anecdote, introspection, imagination, common sense, empathy, imputation of motives, speaker’s authority, metaphor, analogy, precedent, custom, memory, ‘experience,’ intuition, and induction (the expectation of regularities, a disposition related both to intuition and to analogy).”⁸⁰ Again we see the invocation of common sense but in concert with an array of other “modes of reasoning,” which economic judgment alone can balance and act upon.

One of the dangers of this more refined, cultivated common sense is its potential to undermine the valid experiences of other, less powerful groups. Drawing inspiration from Gramsci’s critique of hegemony, sociologists and cultural studies scholars lament what they consider to be part of an oppressive ideology behind the invocations of common sense. “For Gramsci,” writes Daniel Linger, “hegemony springs not only from the explicit ideological, moral, and philosophical underpinnings of power but also from less fully conscious, transparent realms of thought—the experientially insistent world of common sense.”⁸¹ Common sense serves as an understated yet extremely powerful mode of ideological maintenance, creating a false sense of normalcy amidst socio-political power imbalances. Linger continues, “This taken-for-granted

portion of culture, the fragmented “spontaneous philosophy” of the multitude’, muddies perceptions of injustice, inducing political passivity. In short, common sense makes revolution hard to think.”⁸² John Brewer adds, “[Gramsci] argued that ideologies percolate down to common sense and that ‘official meanings’ became a part of common sense.”⁸³ This hegemonic conception of common sense suggests it is an unreflective form of social knowledge that easily is susceptible to exploitation.

One of the important aspects of common sense’s hegemonic power comes from its appearance of constancy, which Stuart Hall argues makes it “a site of struggle (between competing definitions) and a stake—a prize to be won—in the conduct of particular struggles.”⁸⁴ For rhetoricians, this notion of common sense as a struggle over definition is particularly important. Noting the potential dangers of losing this battle, Errol Lawrence characterized “common sense racism” as a set of taken-for-granted assumptions legitimated by personal experiences, social relations, and a belief system that presumes permanence.⁸⁵ Although common sense itself is not bad or manipulative, it can be used to reinforce and maintain skewed perspectives and poor judgment.

Pierre Bourdieu shares a similar skepticism of common sense. Describing Bourdieu’s characterization of common sense, Richard Terdiman writes:

For inevitably it reproduces precisely the common assumptions and understandings . . . whose misperceptions and inadequacies any in-depth research seeks to uncover. In putting this common sense to the test by challenging its fundamental assertions and presuppositions, writing like Bourdieu’s also tests and challenges plain, “common-sense” writing styles because they tacitly assume precisely what Bourdieu wants to call into question: that reader and writer share a comfortable and unproblematical understanding of the meaning of words, of categories, and of social practices themselves, that we *already* know the truth about the very things which on the contrary Bourdieu claims need to be brought to light.⁸⁶

Again, we see the recurring theme of common sense as an untested set of principles that often reinforce an overpowering status quo, which includes the now dominant law and economics approach within the legal world. Even the commonality of legal language comes into question because of the different experiences each individual brings to bear on a given idea.

Noted earlier, Posner wants to split his bet between calling down academics and calling up the lay public. Yet, he takes one more crucial step when he invokes common sense. Posner attempts to differentiate between the *quality* of different common senses and associate good and useful common sense with a scientific, economic model. One step in this process is to criticize the

many ways in which common sense has failed, often due to its lack of a scientific method. In *The Problems of Jurisprudence*, Posner maintains, “[c]ommon sense and intuition support the discredited geocentric theory.”⁸⁷ Common sense defenses that have turned out to be completely off the mark are numerous throughout the history of science, and his argument sets the stage for a more critical common sense akin to that which C.S. Peirce championed. Peirce was an advocate of science as a methodical approach, lauding its ability to upend misplaced beliefs and entrenched dogmatisms. Dewey, too, praised the scientific method and argued for its role in public culture. Not until pragmatism’s second generation revival was science scrutinized by some pragmatists, most notably and voraciously by Richard Rorty.⁸⁸ While not philosophical, Posner’s everyday pragmatism nonetheless attempts to call back to the earlier appreciation and invocation of science. His approach, however, attempts to scientize common sense via economics, thus reframing the idea of common sense to cater to his economic theory of law.

For Posner, everyday pragmatism and economics are virtually synonymous, and both cultivate good common sense. Important to note are the many instances in which Posner associates a good common sense with consequences, which then leads him to use economics as a framework for legal decision-making. “The significance of economics for the study of judicial behavior lies mainly in the consilience of economics with pragmatism. The economist, like the pragmatist, is interested in ferreting out practical consequences rather than engaging in a logical or semantic analysis of legal doctrines.”⁸⁹ What will be the particular consequences of an act? Of a piece of legislation? Of a judicial decision? The good pragmatist, the good economist, and the good common sense judge ask these questions. Defining the rules of the game, Posner wants to be the house. As we all know, the house always wins.

As this essay attempts to illustrate, Richard Posner’s economic model of adjudication draws upon the rhetorical power of common sense as an ideograph in order to cultivate a privileged theoretical position that is able to simultaneously rebuke competing legal theories and repel criticisms from the lay public. Although Posner presents law and economics as a neutral and natural arbiter of the law, this model of judgment is nonetheless refracted through an economic discourse. As a result, the common sense invoked by Posner is only privy to those who embrace his economic conception of law.

Notes

- ¹ Guido Calabresi, "Some Thoughts on Risk Distribution on the Law of Torts," *Yale Law Journal* 70 (1961), 499-553.
- ² Ronald Coase, "The Problem of Social Cost," *Journal of Law and Economics* 3 (1961), 1-44.
- ³ Although Calabresi and Coase are often cited as the earliest advocates for law and economics, prototypical arguments can be traced as far back as John R. Commons' 1924 publication *Legal Foundations of Capitalism* (New York: MacMillan, 1924) and Robert Hale's *Freedom Through Law: Public Control of Private Governing Power* (New York: Columbia University Press, 1952).
- ⁴ Richard A. Posner, *Economic Analysis of Law* (Boston: Little Brown, 1973).
- ⁵ See, for example, Gary S. Becker, *The Economics of Discrimination* (Chicago: University of Chicago Press, 1957); Gary S. Becker, *Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education* (Chicago: University of Chicago Press, 1964); Gary S. Becker, "A Theory of the Allocation of Time," *Economic Journal* 75 (1965), 493-517; Gary S. Becker, "Crime and Punishment: An Economic Approach," *The Journal of Political Economy* 76 (1965), 169-217; and Gary S. Becker, *The Economic Approach to Human Behavior* (Chicago: University of Chicago Press, 1976).
- ⁶ Ronald Dworkin, "Is Wealth a Value?," *Journal of Legal Studies* 9.2 (Mar. 1980), 191-226. See also *Law's Empire* (Cambridge: Harvard University Press, 1986).
- ⁷ Mark Kelman, "Legal Economists and Normative Social Theory," from *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press, 1987), 114-50.
- ⁸ Steven Kelman, "Ethical Theory and the Case for Concern about Charges," from *What Price Incentives? Economists and the Environment* (Boston: Auburn House, 1981), 27-91.
- ⁹ Arthur Alan Leff, "Economic Analysis of Law: Some Realism about Some Nominalism," *Virginia Law Review* 60 (1974), 451-82.
- ¹⁰ According to the *Journal of Legal Studies*, he is the most cited legal theorist ever. See Fred R. Shapiro, "The Most-Cited Legal Scholars," *Journal of Legal Studies* 29.1 (2000), 409-26.
- ¹¹ Edward M. Panetta & Marouf Hasian, Jr., "Anti-Rhetoric as Rhetoric: The Law and Economics Movement," *Communication Quarterly* 42.1 (1994), 57-74.
- ¹² James Arnt Aune, "On the Rhetorical Criticism of Judge Posner," *Hastings Law Review* 23.3 (Spring 1996), 658-69.
- ¹³ I must give due credit to John Lyne for the idea that common sense can be used to "call up" and "call down," which emerged from our many conversations. Lyne's approach, however, stresses the *tone* of the speaker, asking how the voice is used differently when calling up or down. My approach differs in that I am interested in rhetorical *position*, instead asking how the rhetor crafts a particular niche that allows them to call up or call down groups.
- ¹⁴ *Jacobellis v. Ohio*, 378 U.S. 184 (1964).
- ¹⁵ See, for example, Cynthia MacDonald, "Theories of Mind and 'The Commonsense View'," *Mind & Language* 17.5 (Nov. 2002), 467-88; Hallvard Lillehammer, "Analytical Dispositionism and Practical Reason," *Ethical Theory and Moral Practice* 2.2 (Jun. 1999), 117-33; Dorothy M. Mansfield, "Abigail S. Duniway: Suffragette with Not-so-common Sense," *Western Speech* (Winter 1971), 24-29; Stephen J. Pullum, "Common Sense Religion for America: The Rhetoric of the Jewish Televangelist Jan Bresky," *The Journal of Communication and Religion* 15.1 (1992), 43-54; Donna Scimia, "A Common Sense Approach to Reducing Liability in Today's Workplace," *Employee Relations Law Journal* 33.2 (Autumn 2007), 23-29; Mike Wallace and Alison Wray, "The Fall and Rise of Linguists in Education Policy-making: From 'Common Sense' to Common Ground," *Language Policy* 1 (2002), 75-98. These articles from disparate disciplines share a common theme: all of them utilize common sense but offer little if any definition or description of it. Their arguments cite common sense as if it is a discernible and established set of ideas.
- ¹⁶ See Frederick Copleston, *A History of Philosophy, Volume I: Greece and Rome, Part II* (Garden City: Image Books, 1946), 115, and David Knowles, *The Evolution of Medieval Thought* (New York: Vintage, 1962), 15. Rhetoricians have taken these claims and drawn comparisons to the Scottish common sense tradition. See Wayne N. Thompson, "Aristotle as a Predecessor to Reid's 'Common Sense'," *Speech Monographs* 42 (Aug. 1975), 209-20, and Lois Agnew, "The 'Perplexity' of George Campbell's Rhetoric: The Epistemic Function of Common Sense," *Rhetorica: A Journal of the History of Rhetoric* 18.1 (Winter 2000), 79-101.
- ¹⁷ Aristotle, *On Rhetoric: A Theory of Civic Discourse*, trans. George A. Kennedy (Oxford: Oxford University Press, 1991).
- ¹⁸ Chaïm Perelman and L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, trans. John Wilkinson and Purcell Weaver (Notre Dame: University of Notre Dame Press, 1971), 57.

¹⁹ Cicero, *On the Orator*, Book I, trans. E. W. Sutton and H. Rackham (Cambridge: Harvard University Press, 1942), 3.12.

²⁰ Cicero, *On the Orator*, Book III, trans. H. Rackham (Cambridge: Harvard University Press, 1942), 50.195.

²¹ See Giambattista Vico, *The First New Science*, ed. Leon Pompa (Cambridge: Cambridge University Press, 2002).

²² David Hume, *An Enquiry Concerning Human Understanding and Other Writings*, ed. Stephen Buckle (Cambridge: Cambridge University Press, 2007), 26.

²³ For example, see Thomas Reid, *Essays on the Intellectual Powers of Man*, ed. Derek Brooks (University Park: Pennsylvania State University Press, 2002), 26-27: "A philosopher is, no doubt, entitled to examine even those distinctions that are to be found in the structure of all languages; and, if he is able to shew that there is no foundation for them in the nature of the things distinguished; if he can point out some prejudice common to mankind which has led them to distinguish things which are not really different; in that case, such a distinction may be imputed to a vulgar error, which ought to be corrected in philosophy. But when, in the first setting out, he takes it for granted without proof, that distinctions found in the structure of all languages, have no foundation in nature; this surely is too fastidious a way of treating the common sense of mankind. James Beattie echoes Reid's defense of common sense, claiming, "[T]hat power of the mind which perceives truth, or commands belief, not by progressive argumentation, but by an instantaneous, instinctive, and irresistible impulse; derived neither from education nor from habit, but from nature; acting independently on our will, whenever its object is presented, according to an established law, and therefore properly called Sense; and acting in a similar manner upon all, or at least upon a great majority of mankind, and therefore properly called *Common Sense*." See James Beattie, *An Essay on the Nature and Immutability of Truth, in Opposition to Sophistry and Scepticism* (Edinburgh: A. Kincaid and J. Bell, 1770), 40.

²⁴ *Ibid.* Stressing Reid's orientation to the practical and everyday, Lois Agnew claims that he "emphasizes the notion that common sense restores to philosophy the discussion of questions that are important in the lives of ordinary individuals." See Agnew, "The 'Perplexity' of George Campbell's Rhetoric," 81.

²⁵ Thomas Reid, *An Inquiry into the Human Mind, on the Principles of Common Sense* in *The Works of Thomas Reid, D.D., Vol. I*, 8th ed. (Edinburgh: James Thin, 1985), 101, as cited in Agnew, 81. The influence of Reid's ideas is particularly important for the history of rhetoric. Terence Morrow argues, for example, that Reid's common sense philosophy in tandem with Ciceronian rhetoric was a formative element of James Madison's deliberative model of government. See Terence S. Morrow, "Common Sense Deliberative Practice: John Witherspoon, James Madison, and the U.S. Constitution," *Rhetoric Society Quarterly* 29.1 (Winter 1999), 25-47.

²⁶ George Campbell, *Philosophy of Rhetoric, Vol. I* (London: W. Strahan, 1776), 114. Contemporary scholarship has gone back and forth regarding Campbell's historic place in rhetoric. Some argue that George Campbell's common sense was not, in fact, a rebuttal of David Hume's skepticism and that, to the contrary, the influence of Hume's philosophy can be seen throughout Campbell's work (Lloyd F. Bitzer, "Hume's Philosophy in George Campbell's 'Philosophy of Rhetoric,'" *Philosophy and Rhetoric* 2 (1969), 139-66.) Several scholars were quick to defend Campbell's common sense philosophy as intrinsically anti-Humean. Dennis Bormann, for example, claims that Bitzer blows the similarities between Campbell and Hume out of proportion. Instead, Bormann aligns Campbell with Reid (Dennis R. Bormann, "Some 'Common Sense' about Campbell, Hume, and Reid: The Extrinsic Evidence," *Quarterly Journal of Speech* 71.4 (Nov. 1985), 395-421). Similarly, Lois Agnew argues that Campbell's interest in rhetorical theory works in concert with common sense philosophy and is central to his practical epistemology. According to Agnew, Campbell acknowledged the importance of context, the problem of uncertainty, and the imperative to act - all of which are central to rhetoric. The divide between interpretations notwithstanding, Campbell's rhetorical and philosophical legacy remains influential as both camps acknowledge his longstanding contribution.

²⁷ Flavio Comim, "The Scottish Tradition in Economics and the Role of Common Sense in Adam Smith's Thought," *Review of Political Economy* 14.1 (2002), 108.

²⁸ *Ibid.*, 109-12.

²⁹ Addressing the rhetorical dimensions of Kant's philosophy, John Poulakos argues, "In the idea of common sense Kant locates not only the principle of judgments of taste but also the necessary condition for universal communication. According to him, all judgments of taste and all attempts to communicate such judgments presuppose a common sense, an abstract and intangible fund of sensibilities in which all people participate by virtue of their communal status." See John Poulakos, "From the Depths of Rhetoric: The Emergence of Aesthetics as a Discipline," *Philosophy and Rhetoric* 40.4 (2007), 347.

³⁰ Stephen E. Lucas, *Portents of Rebellion: Rhetoric and Revolution in Philadelphia, 1765-1776* (Washington, D.C.: Library of Congress, 1973). See also, Bernard Bailyn, "Common Sense," in *Fundamental Testaments of the American Revolution* (Washington, D.C.: Library of Congress, 1973).

- ³¹ See Lee Sigelman, Colin Martindale, and Dean McKenzie, "The Common Style of *Common Sense*," *Computers and the Humanities* 30 (1997), 373-79.
- ³² See J. Michael Hogan and Glen Williams, "Republican Charisma and the American Revolution: The Textual Persona of Thomas Paine's *Common Sense*," *Quarterly Journal of Speech* 86.1 (2000), 1-18.
- ³³ David C. Hoffman, "Paine and Prejudice: Rhetorical Leadership through Perceptual Framing in *Common Sense*," *Rhetoric & Public Affairs* 9.3 (2006), 377.
- ³⁴ *Ibid.*, 378.
- ³⁵ *Ibid.*, 380. See also Michele Kennerly, "Getting Carried Away: How Rhetorical Transport Gets Judgment Going," *Rhetoric Society Quarterly* 40.3 (Summer 2010), 269-91, wherein she argues that Paine's *Common Sense* uses "civic *phantasia*" to hasten the judgment on revolution.
- ³⁶ Michael Billig, *Arguing and Thinking: A Rhetorical Approach to Social Psychology*, 2nd ed. (Cambridge: Cambridge University Press, 1996), 231.
- ³⁷ *Ibid.*
- ³⁸ *Ibid.*, 233.
- ³⁹ *Ibid.*, 234.
- ⁴⁰ John D. Brewer, "Competing Understandings of Common Sense: A Brief Comment on 'Common Sense Racism,'" *The British Journal of Sociology* 35.1 (Mar. 1984), 70.
- ⁴¹ Michael Calvin McGee, "The 'Ideograph': A Link Between Rhetoric and Ideology," *Quarterly Journal of Speech* 66.1 (Feb. 1980), 15.
- ⁴² *Ibid.*, 7.
- ⁴³ *Ibid.*, 9-10.
- ⁴⁴ Celeste Michelle Condit and John Louis Lucaites, *Crafting Equality: America's Anglo-African Word* (Chicago: University of Chicago Press, 1993), xii.
- ⁴⁵ McGee, "Ideograph," 11.
- ⁴⁶ Charles S. Peirce, *Philosophical Writings of Peirce*, ed. Justus Buchler (New York: Dover, 1955), 290-301. For extended discussion of Peirce's critical common-sensism, see Christopher Hookway, "Critical Common-Sensism and Rational Self-Control," *Notis* 24 (1990), 397-412 and Susan Haack, "Reflections of a Critical Common-Sensist," *Transactions of the Charles S. Peirce Society* 32.3 (Summer 1996), 359-73.
- ⁴⁷ William James, "Pragmatism: A New Name for Some Old Ways of Thinking," in *William James: Writings 1902-1910* (New York: Library of America, 1988), 569.
- ⁴⁸ John Dewey, "Common Sense and Science: Their Respective Frames of Reference," *Journal of Philosophy* 45.8 (Apr. 1948), 197-208.
- ⁴⁹ Billig, 15.
- ⁵⁰ Richard A. Posner, *How Judges Think* (Cambridge: Harvard University Press, 2010), 73.
- ⁵¹ Richard A. Posner, "An Economic Approach to the Law of Evidence," *Stanford Law Review* 51.6 (Jul, 1999), 1516.
- ⁵² *Ibid.*, 1520.
- ⁵³ Richard A. Posner, "The Federal Trade Commission," *The University of Chicago Law Review*, 37.1 (Autumn 1969), 47-89.
- ⁵⁴ Richard A. Posner, "A Theory of Negligence," *The Journal of Legal Studies* 1.1 (Jan. 1972), 29-96.
- ⁵⁵ Richard A. Posner, "An Economic Approach to Issues of Religious Freedom," *The University of Chicago Law Review* 56.1 (Winter 1989), 1-60.
- ⁵⁶ Richard A. Posner, "A Program for the Antitrust Division," *The University of Chicago Law Review* 38.3 (Spring 1971), 500-36.
- ⁵⁷ Aristophanes, *Clouds*, trans. Peter Meineck (Indianapolis: Hackett, 2000), 359.
- ⁵⁸ *Ibid.*, 432.
- ⁵⁹ Richard A. Posner, *The Problems of Jurisprudence* (Cambridge: Harvard University Press, 1993), 3.
- ⁶⁰ Richard A. Posner, *Pragmatism, Law, and Democracy* (Cambridge: Harvard University Press, 2005), 168.
- ⁶¹ *Ibid.*
- ⁶² See Michael Calvin McGee, "In Search of 'the People': A Rhetorical Alternative," in *Contemporary Rhetorical Theory: A Reader*, ed. John Luis Lucaites, Celeste Michelle Condit, and Sally Caudill (New York: Guilford Press, 1999), 341-56.
- ⁶³ See Cordelia Dean, "Scientific Savvy? In U.S., Not so Much," *New York Times* (Aug. 30, 2005), <http://www.nytimes.com/2005/08/30/science/30profile.html>.

- ⁶⁴ Rick Shenkman, "Ignorant America: Just How Stupid are We," *Alternet* (July 1, 2008), http://www.alternet.org/story/90161/ignorant_america%3A_just_how_stupid_are_we.
- ⁶⁵ Sarah Pulliam Bailey, "A Startling Number of Americans Still Believe President Obama is Muslim," *Washington Post* (September 14, 2015), <https://www.washingtonpost.com/news/acts-of-faith/wp/2015/09/14/a-startling-number-of-americans-still-believe-president-obama-is-a-muslim/>.
- ⁶⁶ John R. Lyne, "Science Controversy, Common Sense, and the Third Culture," *Argumentation and Advocacy* 42 (Summer 2005), 39.
- ⁶⁷ Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991), 1-2. Tracing the history of the "rights-bearing" individual to the contemporary state of "no compromise," Glendon laments the adoption of rights without a reciprocal notion of obligation. See also Jean Bethke Elshtain, *Democracy on Trial* (New York: Basic Books, 1995).
- ⁶⁸ *Ibid.*, 3.
- ⁶⁹ *Ibid.*
- ⁷⁰ Posner, *How Judges Think*, 116-17.
- ⁷¹ Oliver Wendell Holmes, Jr., *The Common Law* (New York: Dover, 1992), 1.
- ⁷² Ronald Dworkin, *Law's Empire* (Oxford: Oxford University Press, 1986), 228.
- ⁷³ Richard A. Posner, *Overcoming Law* (Cambridge: Harvard University Press, 1996), 71.
- ⁷⁴ Posner, *The Problems of Jurisprudence*, 425.
- ⁷⁵ *Ibid.*, 81.
- ⁷⁶ Posner, *How Judges Think*, 98.
- ⁷⁷ *Ibid.*, 207.
- ⁷⁸ *Schmidt v. Sullivan*, 914 F.2d 117, 118 (7th Cir. 1990).
- ⁷⁹ Posner, *How Judges Think*, 376.
- ⁸⁰ Posner, *The Problems of Jurisprudence*, 73.
- ⁸¹ Daniel T. Linger, "The Hegemony of Discontent," *American Ethnologist* 20.1 (Feb. 1993), 3.
- ⁸² *Ibid.*
- ⁸³ Brewer, 68.
- ⁸⁴ Stuart Hall, "The Rediscovery of 'Ideology': Return of the Repressed in Media Studies," in *Culture, Society and the Media*, ed. Michael Gurevitch, et al. (London and New York: Methuen, 1982), 70.
- ⁸⁵ Brewer, 67.
- ⁸⁶ Richard Terdiman, "Translator's Introduction," in "The Force of Law: Toward a Sociology of the Juridical Field," *Hastings Law Journal* 38 (Jul. 1987), 810-11.
- ⁸⁷ *Ibid.*, 79.
- ⁸⁸ See, for example, Richard Rorty, *Objectivity, Realism, and Truth: Philosophical Papers* (vol. 1) (Cambridge: Cambridge University Press, 1991) and *Philosophy and the Mirror of Nature: Thirtieth Anniversary Edition* (Princeton: Princeton University Press, 2009).
- ⁸⁹ Posner, *How Judges Think*, 238.

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