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# Overinterpreting Law

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## Overinterpreting Law

Robert F. Blomquist\*

### ABSTRACT

Overinterpretation has attracted considerable attention in other fields, such as literary studies, science, and rhetoric, but it is undertheorized in law. This Article attempts to initiate a theory of legal overinterpretation by examining the rhetorical nature of excess, the sociological dimensions of roles in team performances, and citation to legal and non-legal sources that have discussed overinterpretation. The Article concludes by positing illustrative categories of potential legal overinterpretation, and providing an examination of ways to minimize legal overinterpretation through a judicious, pragmatic balance between abstract considerations and concrete considerations in law.

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## I. INTRODUCTION

Think of the dense and uncabined legal doctrines and accompanying jurisprudence of implied federal preemption of conflicting state law in constitutional law and of negligence per se in tort law. Both depend upon legal overinterpretation. Overinterpretation is as unappealing and counter-productive in the law as it is in other fields of human endeavor like literature, film, art, science, politics, and medicine. Consider some examples by way of introduction to the fascinating subject of cultural overinterpretation.

In the second chapter of Booker Prize-winning author Ian McEwan's exquisite novel, *Atonement*, two key characters, Cecilia and Robbie—both Cambridge students on summer break in 1935—have a sexually-charged conversation in front of a stately manor house on a hot afternoon. As Cecilia rolls a cigarette for Robbie they engage in intellectual banter about eighteenth century English literature layered with chitchat about Robbie's future plans to become a doctor and to continue the "student life." The limited omniscient narrator follows up Cecilia's line, "That's my point. Another six years [of university]. Why do it?" with the following observation: "He wasn't offended. She was the one who was *overinterpreting*, and jittery in his presence, and she was annoyed with herself."<sup>1</sup> What does the author mean?

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1. IAN MCEWAN, *ATONEMENT* 25 (2001) (emphasis added).

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In an essay entitled *Down the Yellow Brick Road of Overinterpretation*,<sup>2</sup> a critic discusses the then upcoming fiftieth anniversary, in 2006, of the first television appearance in 1956 of the 1939 movie, *The Wizard of Oz*,<sup>3</sup> and the sesquicentennial of Frank Baum's birth (the author of the book that ultimately led to the movie). As the critic explains:

Oz went on to become one of the great place names in the fantasy culture of childhood, the predecessor and equal of Never-Never Land, Narnia and Hogwarts. The book proved to be as fertile to the popular imagination as the Kansas soil is to wheat. Out of that original . . . manuscript [came] no less than 13 sequels, enough films to keep a movie megaplex busy, and Broadway blockbusters such as "The Wiz" and "Wicked."<sup>4</sup>

Our *Wizard of Oz* critic goes on to point out that "there is a long history of digging deeper into Baum's books and searching for hidden meanings."<sup>5</sup> In this regard, we learn that one of the most famous hidden meanings of the book was that it was "a parable of the Populist movement of the 1890s" with Dorothy a symbol of the American people, the Scarecrow an icon of farmers, the Tin Man representing factory laborers, and the Cowardly Lion standing for the three-time presidential candidate for the Democrats, William Jennings Bryan.<sup>6</sup> In 1964, a high-school history teacher named Henry M. Littlefield published the aforementioned symbolic take on Frank Baum's *Wizard of Oz* story with the following meta-interpretation: "One of the leading concerns of Bryan and the Populists was to get off the gold standard (the Yellow Brick Road) and replace it with the silver standard (the color of Dorothy's slippers in the book [but not the ruby slippers in the movie])."<sup>7</sup> Amazingly, after Littlefield's interpretational tome, "reading the Oz books became a kind of parlor game": Oz enthusiasts tackled "the challenge of trying to figure out exactly what Baum meant to imply when he wrote about Toto the dog (teetotalism?) and the Winged Monkeys (Plain Indians?)." One analyst went so far as to argue that "'Oz' is more than a nonsense word borrowed from a filing drawer—it's a cunning reference to the abbreviation for 'ounce,' a common unit of measurement for both gold and silver."<sup>8</sup> Our critic contends that the "real brilliance"

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2. John J. Miller, *Down the Yellow Brick Road of Overinterpretation*, WALL ST. J., May 11, 2006, at D6.

3. THE WIZARD OF OZ (MGM 1939).

4. Miller, *supra* note 2.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

of Baum's *Wizard of Oz* story was its entertainment value and that readers were well-advised to take the tale "at face value" instead of "pushing the parable too hard" and "overlook[ing]" certain facts or inferences in favor of others.<sup>9</sup>

As a third introductory reference, consider the following line from a book by an intellectual historian discussing the meaning of the widespread depiction of the voluptuous female figure in Paleolithic art: "Whether some of these early 'sexual images' have been *overinterpreted*, it nonetheless remains true that sex *is* one of the main images in early art, and that depiction of female sex organs is far more widespread than the depiction of male organs."<sup>10</sup>

What all the previous three references to *overinterpretation* share, of course, is the root "over"—depending on its usage being either an adverb, a preposition, a noun, or an adjective. "Over" is an adverb "expressing movement or position or state above or beyond something stated or implied." Indeed, *overinterpretation* is akin to similar words in suggesting some form of excess: "overabundant," "overachieve," "overactive," "overambitious," "overanxious," "overawe," "overbearing," "overblown," "overbuild," "overbusy," "overcapacity," "overcareful," "overcharge," "overcompensate," "overconfident," "overcook," "overcritical," "overcrop," "overcrowd," "overcurious," "overdevelop," "overdo," "overdose," "overdraft," "overdrink," "overeager," "overeat," "overelaborate," "overemotional," "overemphasis," "overenthusiasm," "overexercise," "overexpose," "overextend," "overgeneralize," "overheat," "overmeasure," "overpopulated," "overreact," "overrun," "overspend," "oversteer," and "overtax"—to name a sampling of such words.<sup>11</sup> Excess, moreover, is a quality that arguably defines twenty-first century American culture.<sup>12</sup>

This Article builds on America's fascination with excess while focusing on the specific problem of overinterpreting law. In Part II, my Article explores the analogous nature of excess in the field of rhetoric. Part III, in turn, considers the sociological dimensions of excess as a problem of roles in a team performance. Part IV examines appellate judicial opinions and law review writings that have utilized the lexemes *overinterpretation*, *overinterpret*, or similar language. Finally, in Part V, before concluding, I first explore some illustrative categories of potential legal overinterpretation. Then, I attempt to unpack, better understand,

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9. *Id.*

10. PETER WATSON, *IDEAS: A HISTORY OF THOUGHT AND INVENTION, FROM FIRE TO FREUD* 36 (2005) (emphasis added).

11. OXFORD DICTIONARY AND THESAURUS 1062-67 (American ed., 1996).

12. *See, e.g.*, WALTER KIRN, *MISSION TO AMERICA* (2005). The book jacket claims that this novel is about "an overstimulated, overfed, spiritually overextended America."

and tame the problem of overinterpretation of law. Next, I offer a short meditation on Fredrich Nietzsche's exhortation to "live dangerously," as discerned by the radical legal theorist Adam Gearey, by seeking limitless interpretations about the law.<sup>13</sup> Using the Nietzschean-Gearey approach as a foil, I delve into recent scholarship of literary theorist Umberto Eco about interpretation and overinterpretation that suggests the need for limits of interpretation.<sup>14</sup>

## II. THE RHETORICAL NATURE OF EXCESS

### A. *A Very Brief Overview of Rhetoric*

"Rhetoric is a storehouse of communicative tactics: some are hoary and stale . . . ; some are too new to be codified (like 'emoticons' in e-mails); most are time-bound, dependent upon audience and occasion."<sup>15</sup> Scholars of rhetoric acknowledge its "scarlet past" and its slippery definitions over the centuries: "sophistry, queen of the liberal arts, oldest of the humanities . . . practical logic, loaded language, purple prose" and the like.<sup>16</sup> In recent years some rhetoricians have called rhetoric "purposive communication"—what one writer has characterized as "a stunning neutrality."<sup>17</sup>

Two basic elements comprise "the rhetorical enterprise": (1) a capacious view of appropriate *modes of proof*<sup>18</sup> and (2) the importance of the *audience*.<sup>19</sup> In turn, the creative process of rhetoric comprises five basic characteristics: (1) invention,<sup>20</sup> (2) arrangement,<sup>21</sup> (3) style,<sup>22</sup> (4) memory,<sup>23</sup> and (5) delivery.<sup>24</sup>

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13. ADAM GEAREY, *LAW AND AESTHETICS* 74-75 (2001). *See infra* Part V.D.

14. *See infra* Part V.D.

15. Thomas O. Sloane, *Preface* to *ENCYCLOPEDIA OF RHETORIC* ix (Thomas O. Sloane ed., 2001) [hereinafter *RHETORIC*]. For interesting articles on the rhetoric of President George W. Bush and arguments that Bush overinterpreted the "War on Terror" see Stephen J. Hartnett & Jennifer R. Mercieca, "A Discovered Dissembler Can Achieve Nothing Great"; *Or Four Theses on the Death of Presidential Rhetoric in an Age of Empire*, 37 *PRESIDENTIAL STUDS. Q.* 599 (2007); Robert L. Ivie & Oscar Giner, *Hunting the Devil: Democracy's Rhetorical Impulse to War*, 37 *PRESIDENTIAL STUDS. Q.* 588 (2007).

16. Sloane, *Preface* to *RHETORIC*, *supra* note 15, at ix.

17. *Id.*

18. Sloane, *Synoptic Outline to Contents of Rhetoric*, *supra* note 15, at 800. "In the rhetorical view, three kinds of evidence are considered relevant to establish a case: the perceived character of the speaker or writer (*ethos*), the argument or thought in the message itself (*logos*), and the emotions the audience is led to experience (*pathos*)." *Id.* These terms probably originated with Aristotle. *Id.*

19. *Id.* Audiences are of two basic types: mass audiences and virtual audiences. *Id.*

20. *Id.* ("Invention includes the entire process of initial inquiry into uncertain questions, the reflection upon alternative possibilities of position, proofs and perspectives.")

B. *The Hermeneutical Limits of Ambiguity*

Hermeneutics involves the making and understanding of meaning through interpretation.<sup>25</sup> Biblical hermeneutics—catalyzed by the Jewish mystic tradition of Kabbalah in the late twelfth century—began in earnest the human penchant for “translating, explaining, and asserting”<sup>26</sup> that had its cultural roots with the ancient Greeks. The term “hermeneutics” goes back to Greek mythology and “the wing-footed messenger god, Hermes,” who had the difficult and delicate job of communicating the “words of the gods” in a way that “human intelligence [could] comprehend.”<sup>27</sup> One scholar helped to clarify the nature of hermeneutics by observing that it involves “Hermes process” whereby “something foreign, strange, separated in time, space, or experience is made familiar, present, comprehensible; something requiring representation, explanation, or translation is somehow brought to understanding—is interpreted.”<sup>28</sup>

Importantly the traditional discipline of hermeneutics is cabined by the concept of *rhetorical competence*.<sup>29</sup> Rhetorical competence demands, on the one hand, the art of persuading others on the meaning of a text but, on the other hand, a “devot[ion] to cultivating judgment and practical wisdom in others.”<sup>30</sup> Yet, rhetorical competence also involves, at its core, a *moral pursuit*<sup>31</sup> of “the art of understanding,” dedicated to advancing a robust “scholarly enterprise” entailing the interpreter’s good faith interpretation that clearly discloses to the audience “any truth claim regarding the authorial intentions of a given text.”<sup>32</sup>

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21. *Id.*

22. *Id.* “Style is a central category of rhetoric, which at the same time possesses profound cultural significance. As verbal expression, it is essential to rhetoric, but is also significantly related to other areas of cultural production such as literature, and it has deep socioaesthetic implications.” Wolfgang G. Müller, *Style*, in RHETORIC, *supra* note 15, at 745. A dimension of style is “appropriateness (*aptum*).” *Id.* at 746. “This quality requires that the orator’s words must be appropriate to the subject of the speech, to the person of the speaker, the nature of the audience, and to time and place.” *Id.* “Propriety is a category which extends from rhetoric to literature and life and culture in general.” *Id.*

23. Sloane, *Synoptic Outline to Contents of Rhetoric*, *supra* note 15, at 800.

24. *Id.*

25. Michael J. Hyde, *Hermeneutics*, in RHETORIC, *supra* note 15, at 329.

26. *Id.* (internal quotation marks omitted).

27. *Id.*

28. *Id.* (quoting RICHARD PALMER, HERMENEUTICS 14 (1969)) (internal quotation marks omitted).

29. Michael J. Hyde, *Hermeneutics*, in RHETORIC, *supra* note 15, at 331.

30. *Id.*

31. *Id.* at 330. Rhetoric, in Aristotle’s sense, means reasoning under uncertainty (compared to mathematical and logical reasoning). Interpretation is one element of such reasoning and hermeneutics emphasizes the uncertainty of interpretation.

32. *Id.* at 331. Thus:

Ambiguity is related to hermeneutics in that the process of interpretation may admit multiple plausible explanations.<sup>33</sup> The fifth-century, B.C.E., Greek Sophists magnified the potentialities of ambiguity. “They concluded that, since it is impossible for humans to know with certainty . . . , the best practicable alternative is to equip skilled rhetors to argue competently on all sides of a probable issue.”<sup>34</sup> Thus, the Sophists believed in a powerfully indeterminate human world.<sup>35</sup>

A twentieth century literary theorist, William Empson, articulated a modest Sophist manifesto with his well-respected book *Seven Types of Ambiguity*.<sup>36</sup> Empson took an expansive view of ambiguity that could arise, in his view, with slight literary “nuance” leading to “alternative reactions to the same piece of language.”<sup>37</sup> While Empson did not rule out the potential of shared meaning through literary interpretation, he, nevertheless, celebrated “the rich potential of symbolic ambiguity for literary contexts.”<sup>38</sup> Yet, deconstructionists, exemplified by Jacques Derrida, attempted to take ambiguity in texts to the level of radical indeterminacy. Indeed, Derrida “argued that experiential and symbolic ambiguities entail . . . texts innately negat[ing] themselves” and paradoxical meanings at every juncture.<sup>39</sup>

But some later twentieth century literary theorists objected to the turn to overinterpretation. For example, M.H. Abrams argued that Empson’s typology of multi-ambiguity in texts encouraged excessive hermeneutics: “over-reading” involving “ingenious, overdrawn, and sometimes self-contradictory explications that violate the norms of the English language and ignore . . . context.”<sup>40</sup> In a similar manner, other theorists took a pejorative view of modernist proponents of literary ambiguity.<sup>41</sup>

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In short, the rhetorical competence that informs a text leads hermeneutics in the direction it must go to reach out to and engage others so that its declared understanding of a particular subject matter can be shared, agreed with, or disputed. This is how hermeutics achieves practical significance: by returning, with the help of rhetoric, from the workings of the mind to the everyday world of situated, practical concerns.

*Id.*

33. Kathryn M. Olson, *Ambiguity*, in RHETORIC, *supra* note 15, at 21.

34. *Id.*

35. *Id.*

36. WILLIAM EMPSON, *SEVEN TYPES OF AMBIGUITY* (3d. ed. 1953).

37. *Id.* at 1.

38. Kathryn M. Olson, *Ambiguity*, in RHETORIC, *supra* note 15, at 22.

39. *See id.* (citing JACQUES DERRIDA, *WRITING AND DIFFERENCE* (1978)).

40. *Id.* (quoting M.H. ABRAMS, *A GLOSSARY OF LITERARY TERMS* 9 (3d ed. 1971)).

41. *See, e.g.*, Tom Tashiro, *Ambiguity as Aesthetic Principle*, in 1 *DICTIONARY OF THE HISTORY OF IDEAS: STUDIES OF SELECTED PIVOTAL IDEAS* 48-60 (Phillip P. Weiner ed., 1968).



The hermeneutical limits of ambiguity—akin to the related concept of rhetorical competence<sup>42</sup>—were staked out by Roger Hufford in an article that distinguished ethical and unethical rhetorics of ambiguity, wherein he insisted that a “prominent goal” of genuine ethical public-spiritedness infuses rhetoric with a search for ethical ambiguity.<sup>43</sup> Alas, Hufford’s ethical rhetorical ambiguity is, itself, ambiguous!

C. *The Theatricality of Law*

The historical and social functions of the theater, on the one hand, and of law, on the other hand, have at times competed and at other times complemented each other. Theater and law both relied upon myth and both staged truth for an audience.<sup>44</sup> Both used fictions and actors to advance a coherent narrative in a public realm.<sup>45</sup> Legal rhetoric has, from ancient times to the present, sought to meld law and the theater into a study of social communication that focuses on the language of the law and law’s theatricality.<sup>46</sup> Legal rhetoric’s “object is explicitly the study of verbal action, of the force and effect of law. It is a study of legal performances, of the enactment of law through argumentative persuasion, and through the written justifications of statute, doctrine, and judgment.”<sup>47</sup>

Since law is wrapped up in drama performed by actors (lawyers, witnesses, law enforcement officials, parties, judges, legislators, executive officers), it is inherent in the nature of law that some actors will overplay their roles and overact their lines. Indeed, the humanistic turn in European legal academies within universities, which occurred during the fifteenth century, had as its purpose the dismantling of what was viewed as sophistic overinterpretation of law from corrupt legal rhetoric.<sup>48</sup> So, too, twentieth century legal theorists—like Belgian jurist, Chaim Perelman<sup>49</sup>—as well as a host of legal thinkers in recent and contemporary reform movements (legal realism, critical legal studies, critical race theory, feminist jurisprudence, and others) have been

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42. See *supra* notes 29-32 and accompanying text.

43. Kathryn M. Olson, *Ambiguity*, in RHETORIC, *supra* note 15, at 22, 24 (citing Roger Hufford, *The Dimensions of an Idea: Ambiguity Defined*, 14 TODAY’S SPEECH 4-8 (1966)).

44. Peter Goodrich, *Law*, in RHETORIC, *supra* note 15, at 417.

45. *Id.*

46. *Id.*

47. *Id.*; see also SADAKAT KADRI, THE TRIAL: FOUR THOUSAND YEARS OF COURTROOM DRAMA 277-332 (2006) (discussing the criminal jury trial as “a theater of justice”).

48. Peter Goodrich, *Law*, in RHETORIC, *supra* note 15, at 419.

49. See generally CHIAM PERELMAN & LUCIE OLBRECHTS-TYTECA, A NEW RHETORIC: A TREATISE ON ARGUMENTATION (1969).

concerned with past, purportedly unjust and overblown styles of legal interpretation.<sup>50</sup> At various times, utilizing various methodologies of criticism, these legal theorists have problematized overwrought stagings of legal practice, and criticized overdone language as well as overzealous gender parlance.<sup>51</sup> Those lawyers who have lost their bearings—fated to be characterized in various social epochs over the centuries in Europe and America as ranters, pettifoggers and declaimers—can be viewed as misapprehending the subtle relation between ethics and legality on one side of the scale of persuasive advocacy, and oratory and theater on the other side.<sup>52</sup> (An interesting historical manifestation of this concern for oratorical balance occurred in ancient Rome, most notably with Cicero, in orators' wariness of theater and theatricality and their emphasis to distinguish oratorical delivery from mere "acting on the stage.")<sup>53</sup>

#### D. *The Problem of Hyperbole*

Exaggeration and overstatement that exceed the reality and truth of a particular issue is known as hyperbole and is generally (but not always) viewed as an undesirable and unattractive rhetorical trope figure of speech.<sup>54</sup>

One prominent type of hyperbole in literature is the "loud liar"—"a soldierly braggart of Roman and Renaissance comedy, of whom a prominent representative is Shakespeare's Falstaff."<sup>55</sup> Another important category of hyperbole is a literary character who is an "overreacher" illustrated by Christopher Marlowe's Renaissance hero Tamburlaine who is portrayed by the poet as delivering the following hyperbolic oration: "I hold the Fates bound fast in iron chains,/And with my hand turn Fortune's wheel about."<sup>56</sup>

Excessive hyperbole (as opposed to artful hyperbole) can draw the critique of "rhetorical bombast," so powerfully expressed in Shakespeare's *Love Labour's Lost*: "Three-pil'd hyperboles, spruce affection,/Figures pendentical."<sup>57</sup> In modern times advertising claims and slogans utilize lots of hyperbolic language. Other examples of everyday hyperbole include "a numerical overstatement, a comparative, a

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50. Peter Goodrich, *Law, in RHETORIC, supra* note 15, at 419.

51. *Id.*

52. *Id.* at 422.

53. Kathleen E. Welch, *Delivery, in RHETORIC, supra* note 15, at 219.

54. Heinrich F. Plett, *Hyperbole, in RHETORIC, supra* note 15, at 364.

55. *Id.*

56. *Id.*

57. *Id.*

superlative, an upgrading adjective, or an exaggerating constituent of a nominal compound ('mega-city')."<sup>58</sup>

### III. THE SOCIOLOGICAL DIMENSIONS OF ROLES IN TEAM PERFORMANCES

#### A. *Roles, Social Interaction, and Dramaturgy*

The concept of role is fundamental in sociological theory.<sup>59</sup> Role involves the social expectations regarding social positions or statuses.<sup>60</sup>

Role theory involves two different approaches. The first approach is a social anthropological account of roles within a social system that consists of "clusters of normative rights and obligations."<sup>61</sup> Moreover, role players in a society have different partners and each partner has differing expectations.<sup>62</sup> When we add up the total sum of expectations concerning a social role we have a role-set.<sup>63</sup> In the frequent situations where expectations of role partners disagree, the result is "role conflict and role strain."<sup>64</sup>

The second approach to role theory is known as the social-psychological school.<sup>65</sup> This approach "focuses upon the active processes involved in making, taking and playing at roles"<sup>66</sup> and draws upon symbolic interactionism<sup>67</sup> and dramaturgy (looking at social life as consisting of drama and theatre).<sup>68</sup>

Erving Goffman was an influential sociologist who pioneered the dramaturgical perspective of sociology in the 1960s and 1970s.<sup>69</sup> In his book, *The Presentation of Self in Everyday Life*,<sup>70</sup> he set forth his sociological dramaturgical framework with a special emphasis on how

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58. *Id.* To round out the discussion of excess, exploring the twenty-first century dilemma that "[s]urrounded by excess, we [Americans] seem to have forgotten how to exercise self-control," see Meghan Clyne, *Saying Yes to Saying No*, WALL ST. J., Jan. 5, 2011, at A13 (reviewing the book, DANIEL AKST, *WE HAVE MET THE ENEMY* (2011)).

59. A DICTIONARY OF SOCIOLOGY 570 (2d ed., 1998) [hereinafter SOCIOLOGY].

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 570.

65. *Id.*

66. *Id.*

67. *Id.* Symbolic interactionism "focuses upon the ways in which meanings emerge through interaction. Its prime concern has been to analyze the meanings of everyday life, via close observational work and intimate familiarity, and from these to develop an understanding of the underlying forms of human interaction." *Id.* at 657.

68. *Id.* at 570. Dramaturgy studies, at the micro-level, the interactions between people involved in role sets with a focus on "impression management." *Id.* at 171.

69. *Id.* at 260-61.

70. ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959).

people play roles and manipulate “the impressions they present to each other in different settings.”<sup>71</sup> Goffman’s discussion of “discrepant roles”<sup>72</sup> sheds light on our exploration of overinterpretation. He claims: “One over-all objective of any team is to sustain the definition of the situation that its performance fosters. This will involve the over-communication of some facts and the under-communication of others.”<sup>73</sup> Thus, as part of a team trying to sustain an interpretational situation, Goffman’s social performers must learn and practice the art of “impression management.”<sup>74</sup> When “disruptions occur” in the performance, team members can “utilize techniques for saving the show” including ways to correct disruptions.<sup>75</sup> Over-communication of some facts to the audience (such as the purpose of the dramatic situation, the traditions that led up to the dramatic situation and the problems that the team must overcome to achieve the dramatic denouement) might be a strategic way to both prevent disruptions and to defuse them should they occur in the course of performance. Similarly, under-communication of other facts (such as the detailed histories of the characters, and precedents for the type of dramatic situation being staged before the audience) could have parallel strategic resonance.

#### *B. The Search for Dramaturgical Balance*

Teams in the law are theoretically diverse. Some examples include: a client and his or her lawyers in litigational or transactional settings; a corporation’s inside counsel and its outside counsel; a trial court judge and his or her law clerks; judges who coalesce in supporting a majority, concurring, or dissenting opinion in a case; legislators who support or oppose a particular measure (along with their staff); the chief executive of a nation, state, or political subdivision (along with his or her staff); and government administrative agency officials and their staff. As part of their performative roles in the law, these actors must advance and defend an interpretational situation of the law in the course of performances to achieve litigation victories, transactional successes, preferred legal outcomes, legislative wins, and regulatory objectives.

In the course of these various roles and legal performances, legal actors must strategically decide upon an interpretational approach for each material issue in the conflict situation. Given the generally conservative nature of legal discourse—with arguments tethered by

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71. SOCIOLOGY, *supra* note 59, at 260.

72. GOFFMAN, *supra* note 70, at 141-66.

73. *Id.* at 141.

74. *Id.* at 208.

75. *Id.* at 239.

necessity to texts, precedents, intents, traditions, and public policies<sup>76</sup>—common sense and pragmatic interpretational approaches are likely to have the highest probability of success in advancing and defending a team’s legal situation.<sup>77</sup> However, on occasion, more elaborate and complex legal interpretations may be needed in order to prevail, but complex interpretations risk rejection by legal audiences as over-interpretations.

On a basic level, attempts by legal actors to interpret straightforward, everyday, or simple legal contexts might raise the hackles of a legal audience who believes, like the philosopher Ludwig Wittgenstein, that these matters do not require interpretation.<sup>78</sup> So, too, an audacious, ambitious and perfectionist interpretational theory, such as Ronald Dworkin’s “constructive interpretation” that, as literary/artistic interpretation seeks to make the law—like an object—“the best it can be within its genre,”<sup>79</sup> risks opposition by more mundane legal actors akin to Richard A. Posner who insist that legal interpretation is limited by such values as “the need for finality, the need for a single correct answer, and the deference to the intentions of the authors/lawmakers.”<sup>80</sup> Finally, as explained by American literary critic Stanley Fish, the “interpretive community”—the immediate and foreseeable legal audiences who are likely to judge the interpretation<sup>81</sup>—may disagree with an outlier interpretational performance and consider it to be over-the-top.

#### IV. LAW AND OVERINTERPRETATION

##### A. *Journalistic and Non-Legal References to Overinterpretation*

During the last twenty-five years, journalists and non-legal analysts have, with increasing frequency, utilized the trope of overinterpretation. Some brief illustrations of this parlance are instructive.

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76. See WILSON HUHNS, *THE FIVE TYPES OF LEGAL ARGUMENT* 13 (2002).

77. “While the theorists who share the label ‘pragmatist’ differ significantly in the details of their views, they generally preferred that the grand concepts of philosophy—such as ‘truth’ and ‘justification’—be thought of instead in the more mundane terms of ‘what works.’” BRIAN H. BIX, *A DICTIONARY OF LEGAL THEORY* 163 (2004). “The pragmatists opposed ‘foundationalism’ in philosophy and absolutism generally. In analyzing terms and concepts, the pragmatists tended to focus on how they were used in life.” *Id.*

78. The majority of legal actors probably agree with Ludwig Wittgenstein in limiting “the term and practice” of “interpretation” “to difficult texts or to certain important contexts.” *Id.* at 103.

79. *Id.* at 104 (internal quotation marks omitted).

80. *Id.*

81. *Id.* at 104-05.

Using a WESTLAW “ALL NEWS” database on June 25, 2009, and the search “overinterp!”<sup>82</sup> I found 189 citations going back to January 1, 2008. Most of the citations were medical news publications.<sup>83</sup> Twelve subject matter categories encompass the overinterpretation parlance in this sample: (1) politics,<sup>84</sup> (2) medical news,<sup>85</sup> (3) science,<sup>86</sup>

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82. I uncovered 1,935 citations with the earliest citation consisting of a 1970 *New York Times* Abstract reporting that the New York Federal Reserve Senior Vice President warned First National City Bank “not to overinterpret [weekly] or monthly changes in the money supply.” *Abstract*, N.Y. TIMES, Sept. 19, 1970, at 35.

My study and commentary on overinterpretation as a cultural phenomenon in Part IV is inspired by Herbert Gans. HERBERT J. GANS, *THE WAR AGAINST THE POOR: THE UNDERCLASS AND ANTIPOVERTY POLICY* (1995) (discussing the concept of the underclass in the media, politics, and society). These non-legal examples of insights about overinterpretation may be useful in understanding the *limits of legal interpretation*—“about demonstrations that certain proposed imaginable approaches [of interpretation] can be ruled out as untenable.” KENT GREENAWALT, *LEGAL INTERPRETATION: PERSPECTIVES FROM OTHER DISCIPLINES AND PRIVATE TEXTS* 4 (2010).

83. Ninety-nine of the 189 citations were articles that addressed medical news. The ALLNEWS database includes transcripts of video news programs.

84. See, e.g., Howard Kurtz, *Dave Steps In It*, WASH. POST (June 11, 2009, 7:45 AM), [http://www.washingtonpost.com/wpdyn/content/article/2009/06/11/AR2009061101132\\_5.html](http://www.washingtonpost.com/wpdyn/content/article/2009/06/11/AR2009061101132_5.html) (“[T]he press has a tendency to overinterpret local elections. . . .”); Fareed Zakaria, *The Secret of His Success: What Obama Has Been Able to Accomplish in His First 100 Days is Enough to Make any President Envious*, NEWSWEEK, May 4, 2009, at 28 (“Just as important, Obama has not overinterpreted the moment.”); Carol Eisenberg, *Terrorism is Still a Key Issue in Race*, NEWSDAY, Feb. 4, 2008 (“But it would be a mistake to overinterpret [American’s reaction to another terrorist attack.]”).

85. See e.g., Nicholas Bakalar, *Broccoli Sprouts May be Germ Fighters*, N.Y. TIMES, Apr. 14, 2009, at D6 (“‘We’re enthusiastic about the results, but we have to be careful not to overinterpret it,’ Dr. Fahey said.”); Donald G. McNeil, Jr., *Officials Note Youth of Serious Flu Cases*, N.Y. TIMES, May 7, 2009, at A14 (“[A doctor] cautioned against ‘overinterpretation’ from such a small number of hospitalizations.”); *New Clinical Trial Research Data Have Been Reported by A. Wringle and Co-Authors Clinical Trial Research*, DRUG WK., May 8, 2009, at 509 (“‘Although reporting quality is unlikely to affect comparisons . . . care should be taken not to overinterpret small changes. . . .’”); *Study Data from E.M.L. Chung and Colleagues Update Understanding of Stroke Research*, BLOOD WKLY., Mar. 12, 2009, at 342 (“The researchers concluded: ‘Clinicians should be careful to avoid causal overinterpretation of transcranial Doppler ultrasound data.’”).

86. See, e.g., Kenneth Chang, *In Lake, Signs of Slow Shift from Savannah to Sahara*, N.Y. TIMES, May 9, 2008, at A11 (“Dr. Kropelin did not dispute the ocean core data but said it had been ‘overinterpreted.’”); Anand Gnanadesikan & Whit G. Anderson, *Ocean Water Clarity and the Ocean General Circulation in a Coupled Climate Model*, 39 J. PHYSICAL OCEANOGRAPHY 314 (2009) (“What is surprising, and should make us cautious about overinterpreting these results, is that the effect is so large when heat is added. . . .”); Paul Markowski, Erik Rasmussen, Jerry Straka, Robert Davies-Jones, Yvette Richardson & Robert J. Trapp, *Vortex Lines Within Low-Level Mesocyclones Obtained from Pseudo-Dual-Doppler Radar Observations*, 136 MONTHLY WEATHER REV. 3513 (2008) (“The differences in the exact number of vortex lines that form arches should not be overinterpreted. . . .”); Carolyn Y. Johnson, *For Hints on Humans, Scientists Study Dogs’ Thinking*, BOS. GLOBE, Apr. 13, 2009, at 1 (“‘Everyone has their views about how smart they are. No doubt we are overinterpreting—and in some cases underinterpreting,’ said Marc Hauser, a Harvard professor. . . .”); Mark Henderson, *Probability Lessons May*

(4) performing arts,<sup>87</sup> (5) religion,<sup>88</sup> (6) fine arts,<sup>89</sup> (7) foreign policy,<sup>90</sup> (8) history,<sup>91</sup> (9) race relations,<sup>92</sup> (10) business and finance,<sup>93</sup> (11) education policy,<sup>94</sup> and (12) literary studies.<sup>95</sup>

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*Teach Children How to Weigh Life's Odds and Be Winners—Professor Wants 'Risk Literacy' on the Curriculum*, THE TIMES (U.K.), Jan. 5, 2009, at 16-17 (“We seem to grossly overinterpret immediate stories that happen to individuals around you, and from an evolutionary point of view that might be enormously valuable. . .”).

87. See e.g., Fred Baumann, *Amadeus on Stage; What Mozart's Operas Tell Us About Mozart*, WKLY. STANDARD, Feb. 9, 2009, at 44 (“Her treatment of The Magic Flute, with its much-decried, interpreted, and overinterpreted libretto, is appropriately sensible.”); Bernard Lane, *Dark Side of Spain Revealed Along the Road to Redemption*, THE AUSTRALIAN, Apr. 8, 2009, at 14 (“Predictably, the film has polarised opinion in Spain. Precisely because Camino is rich in meaning, it's easy to overinterpret.”); Howard Singerman, *One and All One*, ARTFORUM, July 1, 2008, at 111 (“[The opera] should probably not be overinterpreted.”).

88. See, e.g., William Rees-Mogg, *The Pope's Message is Not the Problem: The Image of an Ultra-Conservative Pontiff is False*, THE TIMES (U.K.), Mar. 23, 2009, at 24 (“[T]he withdrawal of the excommunication of a cranky pseudo-bishop who happens to have denied the Holocaust, [has] been overinterpreted in the press.”).

89. See, e.g., Kenneth Baker, *Impressionist Women of Substance*, S.F. CHRON., June 15, 2008, at N20 (“Linda Nochlin, the doyenne of feminist art historians, has learned how to walk the line between fresh perspective and overinterpretation.”); Robert Pincus-Witten, *Pablo Picasso*, ARTFORUM, Jan. 1, 2009, at 206 (“The sitter, depicted in what is widely overinterpreted as a masturbatory reverie, enjoys a prominent place in Picasso's long succession of muses.”).

90. See, e.g., Andrew S. Erickson, *Assessing the New U.S. Maritime Strategy: A Window Into Chinese Thinking*, NAVAL WAR C. REV., Oct. 1, 2008, at 35 (“While these informed commentaries are not definitive and should not be overinterpreted, they may be suggestive of the Chinese government's viewpoint and future policy responses.”); Gary Sick, *The Republic and the Rahbar*, NAT'L INT., Jan. 1, 2009, at 10 (“[W]hatever we do (and that can include doing nothing at all) will be noted, registered and interpreted—probably overinterpreted—in Tehran.”); Gordon Lubold, *After Georgia, What Future for NATO?*, CHRISTIAN SCI. MONITOR, Aug. 18, 2008, at 10 (“Meanwhile, in the reaction that followed last week's events, some believe the world could be overinterpreting whatever strategic ambitions the Russians may or may not have beyond Georgia.”).

91. See, e.g., Claudia Anderson, *Friendly Persuasion*, WKLY. STANDARD, Dec. 8, 2008, at 27 (“He sometimes seems bent on catching Lincoln in contradictions and lapses, as when he overinterprets the absence of any record of Lincoln's mentioning former president and antislavery crusader John Quincy Adams. . .”).

92. See, e.g., Rex W. Huppke, *Perception Problem: When Outsiders Look in on Black America*, CHI. TRIB., July 6, 2008, at 1 (“Jackson worries when the media view the Obamas through a racial lens and naively overinterpret or mischaracterize certain comments or actions.”); *Thomas Friedman's Civil War*, WKLY. STANDARD, Nov. 17, 2008, at 3 (“The press has a long and condescending history of overexcitement about (and overinterpretation of) racial ‘firsts’ in our country—so much, indeed, that the meaning of these particular distinctions is lost.”).

93. See, e.g., Vikas Bajaj & Floyd Norris, *Shares Rally as Oil Continues to Fall*, N.Y. TIMES, Aug. 8, 2008, at C1 (“I would be cautious about overinterpreting any of the up days or down days this week.”); Jerry W. Jackson, *New Truth of Our Economy: Numbers Lie*, ORLANDO SENTINEL, May 7, 2008, at C1 (“And even if Orlando's rate was higher than that of any other metro area, it could easily be overinterpreted as a sign of real-estate weakness.”).

B. *Law Review Literature and Other Legal Texts*

Legal commentators—like non-legal writers<sup>96</sup>—started deploying the language of overinterpretation in the last quarter of the twentieth-century; the frequency of usage has increased steadily during the past four decades.

Using WESTLAW “TP-ALL” database on June 25, 2009, and the search “overinterp!” I found 140 citations of legal texts and periodicals going back to 1983. The following discussion highlights and summarizes some of the uses of the overinterpretation trope in the legal literature. The most prevalent context for legal commentators’ reference to overinterpretation involved cautions to avoid drawing factual conclusions from various kinds of empirical studies—overgeneralizing from data. For example, one article urged circumspection in reviewing federal appellate judges’ votes on court panels tied to political party affiliation.<sup>97</sup> Another usage involved heedful advice with regard to drawing conclusions from survey data about the impact of the custodial divorcing parent relocating to a geographical destination far away from the non-custodial parent.<sup>98</sup> A further reference addressed the limits of false positives in brain-imaging tests.<sup>99</sup> Several other legal articles apply a warning of overinterpretation vigilance in discerning the meaning of empirical data or studies applied to legal problems.<sup>100</sup> Other

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94. See, e.g., Corinna Crane & Sarah Theule Lubienski, *What Do We Know About School Effectiveness? Academic Gains in Public and Private Schools*, PHI DELTA KAPPAN, May 1, 2008, at 689 (“[A]lthough recent work raises fascinating questions about an inherent superiority of private schools, there are good reasons to be cautious about overinterpreting this research.”).

95. See, e.g., Louis Lo, *The Literary in Theory*, MOD. LANGUAGE REV., Jan 1, 2008, at 176 (“Part II deals with literary concepts: texts, the sign, language’s performativity, ‘overinterpretation,’ and ‘omniscience’”).

96. See *supra* notes 82-95 and accompanying text.

97. Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319, 1364 (2009) (“However, one should be cautious about overinterpreting these results—for example, assuming that Republican male judges are less strategic than Democratic male judges. . .”).

98. William G. Austin, *Relocation, Research, and Forensic Evaluation, Part I: Effects of Residential Mobility of Children of Divorce*, 46 FAM. CT. REV. 137, 138 (2008) (“[T]he reader is reminded of the danger of overinterpreting research findings and the limitations to the survey research method.”).

99. Jonathan H. Marks, *Interrogational Neuroimaging in Counterterrorism: A “No-Brainer” or a Human Rights Hazard?*, 33 AM. J. L. & MED. 483, 493 (2007) (“They also understand the hazards of overinterpretation and the risk of false positives.”) (footnote omitted).

100. See, e.g., William L. Anderson, Barry M. Parsons & Drummond Rennie, *Daubert’s Backwash: Litigation-Generated Science*, 34 U. MICH. J.L. REFORM 619, 680 (2001) (observing the potential use of expert research panels to “ensure that . . . reform research is not ‘overinterpreted’ to prove more than it actually supports”); Arthur Best,



overinterpretation parlance in recent legal literature involved matters of physical evidence;<sup>101</sup> questions of judicial doctrine and precedent;<sup>102</sup>

*Student Evaluations of Law Teaching Work Well: Strongly Agree, Agree, Neutral, Disagree, Strongly Disagree*, 38 SW. L. REV. 1, 5 (2008) (suggesting an overinterpretation of quantitative data by erroneously “assuming that there are meaningful distinctions in small statistical differences”); Judith A. Chevalier & Fiona M. Scott Morton, *State Casket Sales Restrictions: A Pointless Undertaking?*, 51 J.L. & ECON. 1, 22 (2008) (urging caution in not overinterpreting empirical data to funeral chains in several states); James D. Cox & Randall S. Thomas, *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 COLUM. L. REV. 1587, 1637 (2006) (reviewing data on “provable loss ratios,” pausing to remind others not to overinterpret the result, but claiming that the data has “enormous” “potential significance”); Nancy A. Denton, *The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property*, 34 IND. L. REV. 1199, 1208 (2001) (warning not to overinterpret housing data); Marjory E. DeWard, Note, *Psychological Evaluations: Their Use and Misuse in Illinois Child Abuse and Neglect Cases*, 54 DEPAUL L. REV. 971, 984 (2005) (warning against “overinterpreting clinical or assessment data”); Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285, 300 (2002) (noting that federal court data “were overinterpreted as well as underanalyzed”); Angela K. Gore, Kevin Sachs & Charles Trzcinka, *Financial Disclosure and Bond Insurance*, 47 J.L. & ECON. 275, 296 (2004) (cautioning against overinterpreting economic findings); Joseph A. Grundfest & A.C. Pritchard, *Statutes With Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 735 (2002) (cautioning against overinterpretation of regression analyses); Marshall B. Kapp, *Legal Standards for the Medical Diagnosis and Treatment of Dementia*, 23 J. LEGAL MED. 359, 370 (2002) (noting that “[c]linicians should avoid overreliance on and overinterpretation of laboratory findings, particularly computed tomography and magnetic imaging results”) (internal quotation marks omitted); Sally Katzen, *A Reality Check on an Empirical Study: Comments on “Inside the Administrative State,”* 105 MICH. L. REV. 1497, 1507 (2007) (criticizing an overinterpretation of data and an “unsympathetic, if not hostile” approach in another article); Jonathan Mantel, Janet Kester & Elliott Zenick, *Power Plants, Particulates, and the Uncertain Science of Public Health*, 18 NAT. RES. & ENV’T 31, 38 (2004) (arguing that the epidemiological data regarding potential health effects of particulate matter has been overinterpreted and, therefore, has “tended to misinform public and judicial opinion”); Mathias M. Siems, *Shareholder Protection Around the World (Leximetric II)*, 33 DEL. J. CORP. L. 111, 136 (2008) (noting that a divergence in empirical data should not be overinterpreted); Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1009 (2003) (claiming a need to not overinterpret results of studies regarding race and juries); David Weisburd & Alex R. Piquero, *How Well Do Criminologists Explain Crime? Statistical Modeling in Published Studies*, 37 CRIME & JUST. 453, 478 (2008) (warning against overinterpretation of modeling data because “[m]acro- and micro-level theories are often investigated at different levels of analysis” and some “studies [are] conducted at higher levels of aggregation”); Davin Youngclarke, Kathleen Dyer Ramos & Lorraine Granger-Merkle, *A Systematic Review of the Impact of Court Appointed Special Advocates*, 5 J. CTR. FOR FAM., CHILD. & CTS. 109, 123 (2004) (warning against overinterpreting studies regarding special advocates for children).

101. ROBERTO ARON, JULIUS FAST & RICHARD B. KLEIN, TRIAL COMMUNICATIONS SKILLS § 22:29 (2d ed. 2008) (suggested line of questioning to confirm the importance of avoiding “overinterpretation of bloodstain patterns” to avoid misleading conclusion); Craig M. Cooley, *Forensic Science and Capital Punishment Reform*, 17 GEO. MASON U. C.R. L.J. 299, 340 (2007) (noting that “because of pressure to ‘solve’ a particularly horrendous crime, even the most well-intentioned and educated criminalists have

political meanings;<sup>103</sup> social and literary theory;<sup>104</sup> and behavioral/psychological discourse.<sup>105</sup>

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succumbed to overinterpreting the results of a physical analysis”) (internal quotation marks omitted).

102. See, e.g., Vivian Grosswald Curran, *Re-Membering Law in the Internationalizing World*, 34 HOFSTRA L. REV. 93, 102 (2005) (claiming the inappropriateness of overinterpreting European court decisions); John S. Kane, *Refining Chevron—Restoring Judicial Review to Protect Religious Refugees*, 60 ADMIN. L. REV. 513, 541 (2008) (discussing how the Supreme Court’s *Chevron* doctrine’s boundary has been overinterpreted); Nickolai G. Levin, *Constitutional Statutory Synthesis*, 54 ALA. L. REV. 1281, 1306 (2003) (discussing possible overinterpretation by the New Deal Supreme Court of a constitutional moment); Nickolai G. Levin, *The Nomos and Narrative of Matsushita*, 73 FORDHAM L. REV. 1627, 1677 (2005) (arguing that lower courts have “potentially overinterpreted” the application of a U.S. Supreme Court anti-trust decision to parallel pricing cases “effectively requiring too much of plaintiffs at the summary judgment stage”); Jerry L. Mashaw, *Administration and “The Democracy”*: *Administrative Law From Jackson to Lincoln, 1829-1861*, 117 YALE L.J. 1568, 1670 (2008) (suggesting that some legal historical interpretations of Supreme Court administrative law opinions have sometimes overinterpreted the evidence); Tim Wu, *Treaties’ Domains*, 93 VA. L. REV. 571, 640 (2007) (arguing against overinterpretation of a Supreme Court opinion on national security).

103. See, e.g., Kimberle W. Crenshaw, *Framing Affirmative Action*, 105 MICH. L. REV. 123, 127 (2006) (arguing against a political overinterpretation of a Michigan anti-affirmative action initiative); John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 537 (2002) (discussing an “overinterpretation of the civil rights movement”); Carolyn Strange, *The Undercurrents of Penal Culture: Punishment of the Body in Mid-Twentieth Century Canada*, 19 LAW & HIST. REV. 343, 345 (2001) (discussing political overinterpretation of European ideas).

104. See, e.g., Subha Ghosh, *Patents and the Regulatory State: Rethinking the Patent Bargain Metaphor After Eldred*, 19 BERKELEY TECH. L.J. 1315, 1317 (2004) (discussing and critiquing a judicial characterization of patent and copyright as a social contract bargain and arguing that this constitutes overinterpretation); Alfred S. Konefsy, *The Accidental Legal Historian: Herman Melville and the History of American Law*, 52 BUFF. L. REV. 1179, 1179 (2004) (observing that “Melville’s pages are the object of wild overinterpretation”); Pierre Legrand, *Paradoxically, Derrida: For a Comparative Legal Studies*, 27 CARDOZO L. REV. 631, 640 (2005) (claiming to eschew an overinterpretation of a literary text, equating overinterpretation to “a disconnected reading”).

105. See, e.g., Robert J. Condlin, “What’s Love Got to do With It?”—“It’s Not Like They’re Your Friends for Christ’s Sake”: *The Complicated Relationship Between Lawyer and Client*, 82 NEB. L. REV. 211, 294 (2003) (discussing “[f]riendliness” as “a social practice designed to make day-to-day interaction pleasant and efficient by removing the friction produced by overinterpretation of the other’s motives”); Robert J. Morris, *Not Thinking Like a NonLawyer: Implications of “Recognition” for Legal Education*, 53 J. LEGAL EDUC. 267, 275 (2003) (discussing, among other “biases” that affect “retrospective or postmortem investigations of situations,” the problem of sampling bias involving “overinterpretation of too few relevant cases”); Troy A. Paredes, *Blinded by the Light: Information Overload and its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 456 (2003) (surveying studies that “show that by trying to evaluate more information, individuals . . . often overinterpret information, focus too much on less relevant information” and ignore key information).

C. *Caselaw*

Surprisingly, lagging behind the usage in non-legal sources<sup>106</sup> and scholarly legal texts,<sup>107</sup> very few courts (in either published or unpublished judicial opinions) have had recourse to overinterpretation language. My research has found only sixteen cases—twelve cases decided after 2000, with the earliest case decided in 1965.<sup>108</sup>

In *Morey v. School Board of Independent School District No. 492, Austin Public Schools*,<sup>109</sup> the Supreme Court of Minnesota quoted from the trial testimony that dealt with an expert opining “for not overinterpreting test results,”<sup>110</sup> in a case involving a teacher whose contract was terminated because of her ineffective teaching methods, insubordination, and disruptive conduct.<sup>111</sup>

Thirty years transpired before two separate judicial opinions in 1995 utilized overinterpretation parlance. A federal district court judge in Alabama issued two separate opinions involving the same case, *Sims v. Montgomery County Commission*.<sup>112</sup> *Sims* involved a class-action lawsuit brought by African-American and female employees against the Montgomery County Sheriff’s Department for employment discrimination on the basis of race and gender; both references to “overinterpreting” related to a warning to avoid making too much of “small score differences” because employees within a given band of test scores are equally qualified.<sup>113</sup> A 1998 judicial opinion that mentioned the overinterpretation trope was a Massachusetts trial court opinion construing a transportation contract with a bus company and a local school board.<sup>114</sup> The trial court refused to “rigidly apply[]” the language of a certain paragraph contained in the agreement and observed that the bus company was “overinterpreting” the language of the document.<sup>115</sup>

The turning of the millennium came and went before two more judicial opinions deployed language of overinterpretation. A federal district court judge in Illinois, in a 2002 opinion, mentioned the technical

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106. See *supra* notes 82-95 and accompanying text.

107. See *supra* notes 97-105 and accompanying text.

108. I utilized a Westlaw “all cases” database on June 25, 2009, with the search term “overinterpr!”

109. *Morey v. Sch. Bd. of Indep. Sch. Dist. No. 492, Austin Pub. Sch.*, 136 N.W.2d 105, 106 (Minn. 1965).

110. *Id.* at 107 n.1 (internal quotation marks omitted).

111. *Id.* at 106.

112. *Sims v. Montgomery Cnty Comm’n*, 887 F. Supp. 1479 (M.D. Ala. 1995); *Sims v. Montgomery Cnty Comm’n*, 890 F. Supp. 1520 (M.D. Ala. 1995).

113. *Sims*, 887 F. Supp. at 1486; *Sims*, 890 F. Supp. at 1526.

114. *N. Suburban Transp., Inc. v. City of Woburn Sch. Comm.*, No. 973711, 1998 WL 1284165 (Mass. Super. Ct. May 15, 1998).

115. *Id.* at \*3.

debate, implicated in the controversy, involving “overinterpreting the data” of RFU levels.<sup>116</sup> A Texas intermediate appellate court refused to allow the overinterpretation of pleadings to provide a litigant an inappropriate statutory remedy.<sup>117</sup>

A 2004 California intermediate appellate court opinion in a criminal case delved into the trial testimony of an expert who had explained that “people suffering from PTSD [Post-Traumatic Stress Disorder], depression and dissociation” tend to “overinterpret” threats of others and over-react to the perceived threats.<sup>118</sup> Another 2005 California intermediate appellate court opinion, *People v. Preston*, involved a similar psychological assessment of a criminal defendant who had, in the expert’s opinion, “overinterpreted events.”<sup>119</sup>

In *Laymon v. State*, the Supreme Court of Kansas opined that the state trial court judge below had been wrong “in overinterpreting” the Supreme Court of Kansas’ decision to deny the appellant’s petition for review,<sup>120</sup> because that discretionary denial was not a decision on the merits. Courts accelerated reference to overinterpretation parlance in opinions issued during 2005 through the first half of 2009: two opinions admonished litigants against attempting to overinterpret contractual language;<sup>121</sup> three opinions addressed purported overinterpretation of medical evidence;<sup>122</sup> and one opinion argued that the majority had overinterpreted a state evidence statute and “as a result, approves exclusion of relevant evidence” that the dissenter thought should have been admitted in a criminal prosecution.<sup>123</sup>

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116. *Fid. Nat’l Title Ins. Co. of N.Y. v. Intercounty Nat’l. Title Ins. Co.*, No. 00-C-5658, 2002 WL 377728, at \*12 (N.D. Ill. Mar. 8, 2002).

117. *Crownover v. Crownover*, No. 03-02-00193-CV, 2002 WL 31769037, at \*3 (Tex. App. Dec. 12, 2002).

118. *People v. Thiecke*, No. A098206, 2004 WL 1427023, at \*4 (Cal. App. June 25, 2004) (internal quotation marks omitted).

119. *People v. Preston*, No. A103369, 2005 WL 348962, at \*3 (Cal. App. Feb. 14, 2005) (internal quotation marks omitted).

120. *Laymon v. State*, 122 P.3d 326, 332 (Kan. 2005) (internal quotation marks omitted). *See also* *Penn v. State*, 173 P.3d 1172, 1175 (Kan. Ct. App. 2008) (quoting overinterpretation language from the 2005 *Laymon* opinion).

121. *Mason v. Orthodontic Ctr. of Colo., Inc.*, 516 F. Supp. 2d 1205, 1211 (D. Colo. 2007); *Happ v. Corning, Inc.*, No. Civ. A03-11258-GAO, 2005 WL 3704889, at \*3 (D. Mass. Nov. 28, 2005).

122. *Harrison v. Catholic Healthcare W. Grp. Long Term Disability Plan*, 612 F. Supp. 2d 1099, 1105 (C.D. Cal. 2009); *Babb v. Metro. Life Ins. Co.*, No. 5:06-cv-281 (Car), 2008 WL 4426059, at \*5 (M.D. Ga. Sept. 25, 2008); *Colon v. Sec’y of the Dep’t of Health & Human Serv.*, No. 04-044V, 2007 WL 268781, at \*15 (Fed. Cl. 2007).

123. *State v. Pennington*, 132 P.3d 902, 912 (Kan. 2006) (Beier, J., dissenting).

## V. MANAGING INTERPRETIVE ENERGY IN LAW

A. *Illustrative Categories of Potential Legal Overinterpretation*

When we think of potential categories of legal overinterpretation—claims by advocates, judges, and litigants that an opposing reading of legal materials or evidence in a legal proceeding goes too far and is not justified by various norms of interpretation—what categories of disputes and theoretical undertakings come to mind and why? What follows is a brief, illustrative, and tentative list of potential overinterpretation problems in law.

## 1. Identity Epistemic Wisdom

The confirmation process of Sonia Sotomayor raised an intriguing problem of legal interpretation: Can a Supreme Court Justice (or for that matter any judge who might be called upon to interpret law or evidence) exercise epistemic wisdom by virtue of her identity—as a woman, or a Hispanic? This question arose in the immediate aftermath of President Obama’s nomination of Sotomayor, a United States Circuit Judge who made a comment in a 2001 speech when she stated that she “would hope that a wise Latina woman, with the richness of her experiences, would more often than not reach a better conclusion than a white male who hasn’t lived that life.”<sup>124</sup> In an ironic twist on Obama’s implicit agreement with Sotomayor’s “wise Latina woman” comment, Obama was criticized for disparaging the nomination of Justice Clarence Thomas because, in Obama’s words during the 2008 Presidential campaign, “I don’t think that he was a strong enough jurist or legal thinker at the time for that elevation” from federal appellate court judge to Supreme Court Justice.<sup>125</sup> As pointed out by a *Wall Street Journal* editorial:

[P]erhaps we can expect [Sotomayor] to join in opinions with the wise and richly experienced Clarence Thomas . . . who lost his father, and was raised by his mother in a rural Georgia town, in a shack without running water, until he was sent to his grandfather. The same Justice Thomas who had to work every day after school, though he was not allowed to study at the Savannah Public Library because he

124. Naftali Bendavid, *Sotomayor Makes Senate Rounds: High Court Nominee Addresses Concerns on Judicial Activism, Controversial Comment*, WALL ST. J., June 3, 2009, at A3 (internal quotation marks omitted).

125. Kimberley A. Strassel, Editorial, *The Sotomayor Rules*, WALL ST. J., May 29, 2009, at A13 (internal quotation marks omitted).

was black. The same Justice Thomas who became the first in his family to go to college and receive a law degree from Yale.<sup>126</sup>

Professor Lino A. Graglia of the University of Texas School of Law raised the interesting issues of whether the “racial and ethnic composition of the courts”<sup>127</sup> is a legitimate matter in the American legal system and whether the tradition of impartial justice is compatible with identity epistemology on the bench when he opined: “[t]he statue symbolizing justice is always a woman who is blindfolded to make clear that such individual characteristics as race and ethnicity are irrelevant. Judge Sotomayor’s conception of justice seems to be different.”<sup>128</sup>

While experience is an acknowledged tool for thinking—by jurists and lawyers as well as non-legal laypersons—the uses of experience can be unreliable and misused. Experience is “a crucial source of input” to our thought through “sense experience—what you see, taste, smell, feel and hear.”<sup>129</sup> But what do we make of “those who claim to have religious experiences; . . . those who claim to have revelations; . . . those who claim to have extrasensory input, extrasensory perception?”<sup>130</sup> The epistemic problems with self-revelatory experience—including gender, ethnic, and racial identity experience—is that these assertions of truth are difficult, if not impossible, to test. While self-revelatory experiences can help jurists and lawyers to approach a particular legal problem (say, of discrimination based on gender, ethnicity, or race), and to assist a probing of the evidence and thinking about the meaning of relevant statutes, regulations, and precedents, there is a danger of making too much of one’s sensory experiences and empathy and taking the side of the litigant you, yourself identify with. In other words, identity experience presents a risk of overinterpretation—of assuming improper motive by the non-identity litigant, of reading into broad legal language of discrimination your empathetic feelings about identity groups that share your background.

Put in still different terms, personal experience can be flawed and “counterproductive if what has been cultivated and refined are bad habits.”<sup>131</sup>

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126. *Id.*

127. Lino A. Graglia, Letter to the Editor, WALL ST. J., June 4, 2009, at A14.

128. *Id.*

129. James Hall, Tools of Thinking: Understanding the World Through Experience and Reason 22 (2005) (lecture transcript).

130. *Id.*

131. ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES (2008) (quoting T.W. Wakeling, *The Oral Component of Appellate Work*, 5 DALHOUSIE L.J. 584, 586 (1979)). *Cf.* Warren Bennis & Noel Tichy, Editorial, *Judgment Trumps Experience*, WALL ST. J., Nov. 29, 2007, at A19 (“After a five-year study . . . covering virtually all sectors of American life, we came to the inescapable

## 2. Law and Literature

In recent decades, the interdisciplinary Law and Literature movement and its proponents have made ambitious claims about the edifying potential of literary texts to improve law and justice. Among these bold theorists are Martha Nussbaum,<sup>132</sup> Wayne Booth,<sup>133</sup> Robin West,<sup>134</sup> and James Boyd White.<sup>135</sup>

Richard A. Posner, however, is concerned “that law and literaturists are claiming too much for their interdisciplinary venture” and engaging in “overstatement,”<sup>136</sup> or, if you will, overinterpretation of the value of literature to legal improvement. Writing in a revised and enlarged edition of his pathbreaking book, *Law and Literature*,<sup>137</sup> Posner makes a number of points to deflate an overinterpretation of the potential for literature to edify legal studies. He notes that “it doesn’t follow that because some people use literature as a source of insight into human nature and social interactions, other people, for example judges who are not already lovers of literature, should be encouraged to do so.”<sup>138</sup> Moreover, according to Posner, “[t]here is neither evidence nor reason to believe that literature provides a straighter path to knowledge about man and society than writings in other fields, such as history and science, and interactions with real people as distinct from fictional characters.”<sup>139</sup> In a similar vein he observes: “Rarely can readers extract from works of imaginative literature practical lessons for living.”<sup>140</sup>

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conclusion that judgment regularly trumps experience. Our central finding is that judgment is the core, the nucleus of exemplary leadership. With good judgment, little else matters. Without it, nothing else matters.”).

132. See, e.g., MARTHA NUSSBAUM, *LOVE’S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* (1990) (claiming that Greek tragedies and Anglo-American realist novels should be viewed as a part of moral philosophy); MARTHA NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 12 (1995) (arguing that reading novels “develops moral capacities without which citizens will not succeed in making reality out of the normative conclusions of any moral or political theory, however excellent”).

133. See, e.g., WAYNE C. BOOTH, *THE COMPANY WE KEEP: AN ETHICS OF FICTION* 152 (1988) (arguing that Shakespeare’s plays can reinforce and guide social norms).

134. See, e.g., ROBIN WEST, *NARRATIVE, AUTHORITY AND LAW* 368-89 (1993) (arguing that Shakespeare’s plays can reinforce and guide social norms and legal improvement).

135. See, e.g., James Boyd White, *What Can a Lawyer Learn From Literature?*, 102 HARV. L. REV. 2014 (1989) (claiming that through literary education, lawyers and judges can be morally and professionally improved).

136. David Ray Papke, *Problems With an Uninvited Guest: Richard A. Posner and The Law and Literature Moment*, 69 B.U. L. REV. 1067, 1084 (1989) (reviewing RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988)).

137. RICHARD A. POSNER, *LAW AND LITERATURE* (rev. & enlarged ed. 2002).

138. *Id.* at 315.

139. *Id.*

140. *Id.* at 316.

### 3. Constitutional Law

A recent article by Professors Jack Goldsmith and Daryl Levinson about the commonalities between international law and constitutional law<sup>141</sup> raises, in interesting and unexpected ways, what can be reframed as the tendency of American constitutional law theorists to overinterpret constitutional law. The authors achieve this result by describing how critics of international law have tended “to conclude that, in both form and function, international law is a qualitatively different and lesser species of law [than constitutional law]. . . .”<sup>142</sup> The authors compare this American theoretical underappreciation—and overappreciation of American constitutional law—by pointing out:

Constitutional law, in contrast, has been subject to few such doubts. Conceived as the overarching framework for, and thus inseparable from, the statutes, regulations, and common law rules that comprise the familiar domestic legal system, constitutional law sits securely opposite international law on the domestic side of the divide. . . . In contrast to the dubious efficacy of international law, constitutional law is generally assumed to serve as an important . . . check on the interests of the powerful.<sup>143</sup>

In the course of their analysis, however, Goldsmith and Levinson question the claimed conceptual preeminence of constitutional law in relation to international law and conclude that the two kinds of law are “architectural[ly] similar[] and interchangeable[e]”<sup>144</sup> and should, therefore, be viewed as really “two sides of the same coin: addressing the ‘external’ and ‘internal’ manifestations of the sovereign state.”<sup>145</sup>

Constitutional law, indeed, has drawn other overinterpretations. By way of further illustration of this phenomenon, Professors Daniel A. Farber and Suzanna Sherry in their book, *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations*,<sup>146</sup> make an extended argument against grand theories of constitutional interpretation and, in the process, demonstrate that quests for overarching theories of reading and applying the U.S. Constitution entail questionable overinterpretation. Farber and Sherry summarize their critique against

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141. Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791 (2009).

142. *Id.* at 1793.

143. *Id.*

144. *Id.* at 1864-65.

145. *Id.* at 1868.

146. DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* (2002).



constitutional overinterpretation through grand theories of meaning as follows:

Apart from their overblown anxiety about democratic legitimacy, grand theorists also believe that the rule of law will suffer if judges lack sure theoretical guidance. But this fear is no better grounded than the concerns about majoritarianism. On the contrary, the alternative to grand theory—the common law method that builds principles up from individual cases rather than down from abstract theories—has served the rule of law reasonably well. Grand theory would be no improvement. In practice, grand theory would be unlikely to bring greater order to legal doctrine, and collective deliberation over constitutional issues would be disrupted by the cacophony of conflicting theories.<sup>147</sup>

#### 4. Two Vague Doctrines: Implied Pre-emption and Negligence Per Se

Two judicially-developed doctrines, that of (a) *implied pre-emption* of state laws by federal courts “based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law,” as articulated by Justice Clarence Thomas in a recent concurring opinion<sup>148</sup> and (b) the doctrine of *negligence per se*, whereby courts construe the intent of a legislative body—often based on vague or manufactured notions of “intent”—to provide particularized standards of conduct in tort of negligence cases,<sup>149</sup> are apt examples of doctrinal licenses for statutory overinterpretation by courts.

Overinterpretation pursuant to the federal implied pre-emption doctrine springs from a number of abstract and non-concrete interpretational norms that have accreted over the years since the Supreme Court’s initial promulgation of the doctrine in 1941.<sup>150</sup> These fudgy and noetic factors include the following: “broad atextual notions of

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147. *Id.* at 141.

148. *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring).

149. See Robert F. Blomquist, *The Trouble With Negligence Per Se*, 61 S.C. L. REV. 221 (2009).

150. See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (holding for the first time that federal law pre-empts state law when “under the circumstances of [a] particular case, [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”); cf. the Court’s other category of conflict pre-emption doctrine, the impossibility doctrine first articulated in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963) (determining pre-emption exists “where compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce”).

congressional purpose”;<sup>151</sup> “congressional inaction”;<sup>152</sup> “freeranging speculation about what the [objects] of the federal law must have been”;<sup>153</sup> “[t]he nature of the power exerted by Congress”;<sup>154</sup> “the character of the obligations imposed by the [federal] law”;<sup>155</sup> “public sentiment”;<sup>156</sup> “comments” made by federal administrative agencies in promulgating federal rules;<sup>157</sup> “statements that the Government” makes in appellate briefs to the Court;<sup>158</sup> and the “regulatory history” of a type of federal regulation.<sup>159</sup> The overarching problem with the Supreme Court’s “purposes and objectives pre-emption jurisprudence” is that “it encourages *an overly expansive reading* of statutory text.”<sup>160</sup> This “overly expansive reading,” as explained by Justice Thomas, leads to an unbalanced and distorted judicial assessment of the underlying compromises of the legislative bargain that led to the congressional enactment: “The Court’s desire to divine the broader purposes of the statute before it inevitably leads it to assume that Congress wanted to pursue those policies ‘at all costs’—even when the text reflects a different balance.”<sup>161</sup>

Overinterpretation under the negligence per se doctrine stems from similar unpractical and ideational doctrinal norms as the Supreme Court’s purposes and objectives pre-emption approach.<sup>162</sup> First, negligence per se involves nonprescriptive statute-like enactments (state and federal legislative enactments, state and federal administrative regulations, and local governmental ordinances and codes) that are not expressly applicable to civil tort actions for money damages.<sup>163</sup> Rather, nonprescriptive enactments assign quasi-criminal or administrative penalties for violations of the statute-like enactments. Since the text of

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151. *Wyeth*, 555 U.S. at 594 (Thomas, J., concurring).

152. *Id.*

153. *Id.* at 595.

154. *Id.* (alteration in original) (internal quotation marks omitted).

155. *Id.* at 595-96 (internal quotation marks omitted).

156. *Wyeth*, 555 U.S. at 596 (Thomas, J., concurring).

157. *Id.* at 598.

158. *Id.*

159. *Id.*

160. *Id.* at 601 (emphasis added) (internal quotation marks omitted).

161. *Wyeth*, 555 U.S. at 601 (Thomas, J., concurring). Justice Thomas went on to opine: “As this Court has repeatedly noted, it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.” *Id.* (citations omitted) (internal quotation marks omitted). In the course of his concurrence in *Wyeth*, Justice Thomas cited and relied upon two important law review articles: John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000).

162. See *supra* notes 150-61 and accompanying text.

163. See DAN B. DOBBS, *THE LAW OF TORTS* 311-14 (2000) (discussing classes of prescriptive statutes in tort).

these enactments is devoid of any express applicability to civil tort actions, it is problematic to read the nonprescriptive enactments as governing tort law. Second, since legislative histories and regulatory history materials are typically sparse or non-existent at the state level—the overwhelming corpus of enactments inspiring negligence per se arguments—courts must seek to divine legislative “intent” from often metaphysical analyses. The negligence per se touchstone (whether the nonprescriptive enactment was designed to protect a particular class of persons from a particular kind of harm) is extremely malleable by creative rhetorical arguments.<sup>164</sup> Third, the wide-ranging and expansive set of excuses for an alleged tortfeasor’s violation of a nonprescriptive standard opens the door to further chicanery and equivocation.<sup>165</sup> In a previous article,<sup>166</sup> relying upon the legal theory of a properly functioning legal system,<sup>167</sup> I identified numerous general form and function problems<sup>168</sup> and specific form and function problems<sup>169</sup> with the negligence per se doctrine. In a nutshell, these theoretical difficulties can be boiled down to unwise incentives of the negligence per se doctrine that encourage an overly expansive reading and misapplication of statutory text.

### B. *Other Potential Categories of Legal Overinterpretation*

Other areas of law are subject to persuasive claims of overinterpretation. Some examples of potentially overinterpreted legal theories include the following: law and economics,<sup>170</sup> behavioral law and economics,<sup>171</sup> and critical legal studies (and other critical approaches

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164. Blomquist, *supra* note 149, at 222.

165. *Id.* at 225.

166. *See id.*

167. *See generally* ROBERT S. SUMMERS, FORM AND FUNCTION IN A LEGAL SYSTEM: A GENERAL STUDY (2006).

168. *See supra* note 149, at 272-85 (discussing how general form and function problems of negligence per se doctrine involve problems of fundamental origin, unreasonable haphazardness, nonflexibility, institutional legitimacy, and a dysfunctional enforcement or implementative problem).

169. *See id.* at 280 (stating that specific form and function problems of negligence per se doctrine involve problems of high manipulation, importation of criminal law standards without criminal law protections for defendants, uncabined excuses, self-defeating process, excessive judicial discretion, and judicial encroachment on the legislature).

170. Behavioral law and economics scholarship changes the view of law and economics that assumes rational actors who are self-interested, harbor stable and well-ordered preferences, and act always in favor of wealth maximization. *See* BRIAN H. BIX, A DICTIONARY OF LEGAL THEORY 22 (2004).

171. Classical economists have argued that behavioral economists have overstated the alleged defects in the “rational man” model inherent in law and economics theory and “that markets can be rational even when individuals are not.” *Id.*

such as feminist legal theory, postmodernist legal theory, and critical race theory).<sup>172</sup>

Similarly, legal proof standards that emphasize “doubt”—such as the criminal burden of proof beyond a reasonable doubt<sup>173</sup> and various regulatory standards requiring reasonable scientific certainty<sup>174</sup>—can be overinterpreted to require absolute certainty and absolutely no doubt.

C. *Unpacking, Better Understanding, and Taming Overinterpretation of Law*

A theory of managing overinterpretation of law—both descriptive and normative in nature—can be aided by considering three bodies of analogical concepts: (1) pragmatic approaches to statutory interpretation that “look to multiple goals for statutory interpretation and insist on considering multiple sources”;<sup>175</sup> (2) pragmatic considerations in

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172. Critical legal studies encompass a “radical critique of law” with arguably overstated assertions “that law [is] radically indeterminate, and that legal reasoning [is] just a cover for the clash of different interest groups or different ideologies” such that law is just politics. *Id.* at 46. Legal indeterminacy, in turn, as a key tenet of critical approaches to the law, is a claim that “legal questions do not have correct answers, or at least not unique correct answers.” *Id.* at 97. As explained by Brian H. Bix:

Those who argue that the law is significantly indeterminate base that conclusion on a variety of grounds: on the general nature of rules, the nature of language (e.g. pervasive vagueness, or deconstruction); gaps or contradictions within the law; the availability of exceptions to legal rules; inconsistent rules and principles that overlap in particular cases; the indeterminacy of precedent; and the indeterminacy in applying general principles to particular cases.

*Id.* Yet, other critics have pointed out that some legal cases resist creative interpretational strategies and that law in action in real cases is often predictable. *Id.*

173. See generally FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 219-22 (2009) (discussing criminal burden of proof standard).

174. See, e.g., DAVID MICHAELS, DOUBT IS THEIR PRODUCT: HOW INDUSTRY’S ASSAULT ON SCIENCE THREATENS YOUR HEALTH (2008) (arguing that “mercenary” scientists and industry lawyers have increasingly shaped and skewed the technical literature, manufactured and magnified scientific uncertainty, and influenced government policy to the advantage of polluters and the manufacturers of dangerous products). But see the analytically distinct matter of overinterpretation of *facts* in legal cases: DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS 16-21 (2008) (describing the dangers of “interpretive fact-finding” by the Supreme Court in constitutional cases when the Court’s factual premises are uncertain and not subject to empirical verification); David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117, 137-41 (2010) (discussing the new Supreme Court standard for adjudicating motions to dismiss for failure to state a claim, premised on “plausibility,” determined, in part, by “judicial experience and common sense” and critics’ fears that motion to dismiss practice will allow “a license to rely on broad new categories of extrinsic information”).

175. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 249 (2d. ed. 2006) [hereinafter STATUTORY INTERPRETATION]. See *infra* notes 177-82 and accompanying text.

reconciling free trade with environmental protection;<sup>176</sup> and (3) philosophical ideas that seek to explain the interplay of the abstract and the concrete.<sup>177</sup>

### 1. Pragmatic Theory of Statutory Interpretation

Professors William N. Eskridge, Jr., Philip P. Frickey, and Elizabeth Garret offer a pragmatic approach to the task of statutory interpretation, which can also shed some light on the problem of overinterpretation in legal theory. Starting with the seminal thinking of one of the founders of American pragmatism, Charles Peirce,<sup>178</sup> Professors Eskridge, Frickey, and Garrett contend that pragmatic reasoning should seek not to resemble a chain (no stronger than its weakest link) but, instead, should be like a cable of interconnected fibers.<sup>179</sup> In developing what they call a “[f]unnel of [a]bstraction”<sup>180</sup> to the task of statutory interpretation, these authors explain the wisdom of playing concrete considerations off of abstract factors in the process of interpretation. They argue that this approach makes sense because “human decisionmaking tends to be polycentric, spiral, and inductive, not unidimensional, linear, deductive” and because it “consider[s] several values, and the strength of each in the context at hand, before reaching a decision.”<sup>181</sup> “The Frickey and Eskridge Funnel of Abstraction” for statutory interpretation is as follows:

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176. See *infra* notes 184-89 and accompanying text.

177. See *infra* notes 190-98 and accompanying text.

178. See, e.g., CHARLES SANDERS PEIRCE, PRAGMATISM AND METHOD OF RIGHT THINKING (Patricia Ann Turrisi ed., 1997) (containing Peirce’s manuscripts for lectures on pragmatism). “The term ‘pragmatism’ was introduced into the discourse of philosophers by Charles Sanders Peirce in 1878, to express . . . ideas about logic (good thinking) [and catalyzed by William James’ invitation to lecture at Harvard in 1903, suggesting the “pragmatism” title of his lectures] which he had developed since 1867.” John Finnis, *Natural Law: The Classical Tradition*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 1, 31 (Jules Coleman & Scott Shapiro eds., 2002).

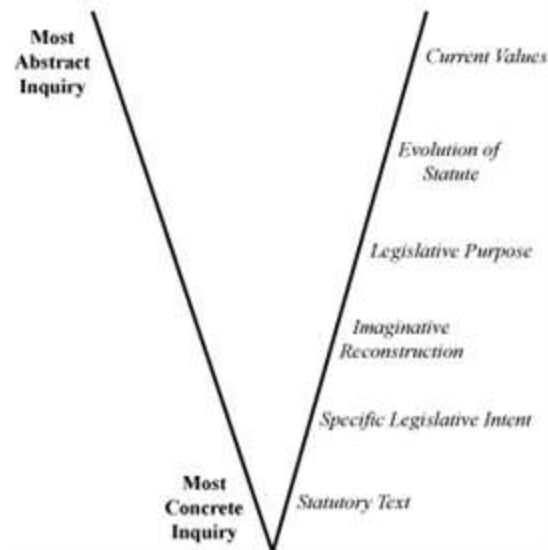
179. STATUTORY INTERPRETATION, *supra* note 175, at 249.

180. *Id.* at 250. See *infra* Figure 1.

181. *Id.* at 249.

THE FRICKEY AND ESKRIDGE FUNNEL OF ABSTRACTION<sup>182</sup>

Figure 1



This pragmatic approach to statutory interpretation is explained by Eskridge, Frickey and Garrett as encompassing interactive consideration of relatively concrete arguments juxtaposed with relatively abstract arguments:

Our “funnel” reflects both the multiplicity of considerations and the conventional hierarchy ranking them against one another. For example, because statutory text is the most accessible and formally the most authoritative basis for knowing what statutes require, it is the weightiest evidence. Note also how the most concrete considerations, like text, outweigh more abstract ones, like best answer. This model also suggests the interactive process by which a practical interpreter will think about the various sources of statutory meaning: she will slide up and down the funnel, considering the strengths of various considerations, rethinking each in light of the others, and weighing them against one another using conventional criteria.<sup>183</sup>

182. *Id.* at 250, Figure 1.

183. *Id.* at 250.

## 2. Globoecopragmatism

Inspired by the Frickey and Eskridge Funnel of Abstraction for statutory interpretation, I developed the Blomquist Funnel of Pragmatism on Global Trade and the Environment,<sup>184</sup> in an article entitled *Globoecopragmatism: How to Think (and How Not to Think) About Trade and the Environment*.<sup>185</sup> The principal thesis of my article was “that globalization is not as bad for the environment as critics contend and, in many ways, is good for the environment in the long term.”<sup>186</sup> However, “there are pragmatic steps that the international community can take to more intelligently ameliorate trade-induced environmental degradation and to better balance free trade with ecological protection.”<sup>187</sup> My funnel of globoecopragmatism consists of seventeen principles and modes of inquiry, with the most abstract considerations at or near the lip of the funnel (for example, appreciating the complexity and uncertainty of reconciling trade and environmental considerations in an era of globalization, constant improvement of legal processes involving trade and the environment, and use of a limited and nuanced precautionary principle for protecting the global environment from trade-induced degradation) and the most concrete factors at or near the tip of the funnel (for example, improving national environmental enforcement capacity and attacking corruption, better use of cross-country environmental statistics, and acceleration of bilateral and regional free trade agreements (FTAs)). I summarized my approach as follows:

[I]n thinking about issues of global trade and the environment, the most pragmatic and fruitful way to proceed is through a polycentric consideration of both abstract and concrete principles. By pondering something general and something specific on trade and the environment issues, we can learn to exercise better judgment—call it globoecopragmatism—that will reflect both general standards and factual specifics. In this way, perhaps we can make further progress in simultaneously opening global markets and protecting the earth’s environments.<sup>188</sup>

The globoecopragmatism model that I proposed is as follows:

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184. See *infra* notes 185-89 and accompanying text.

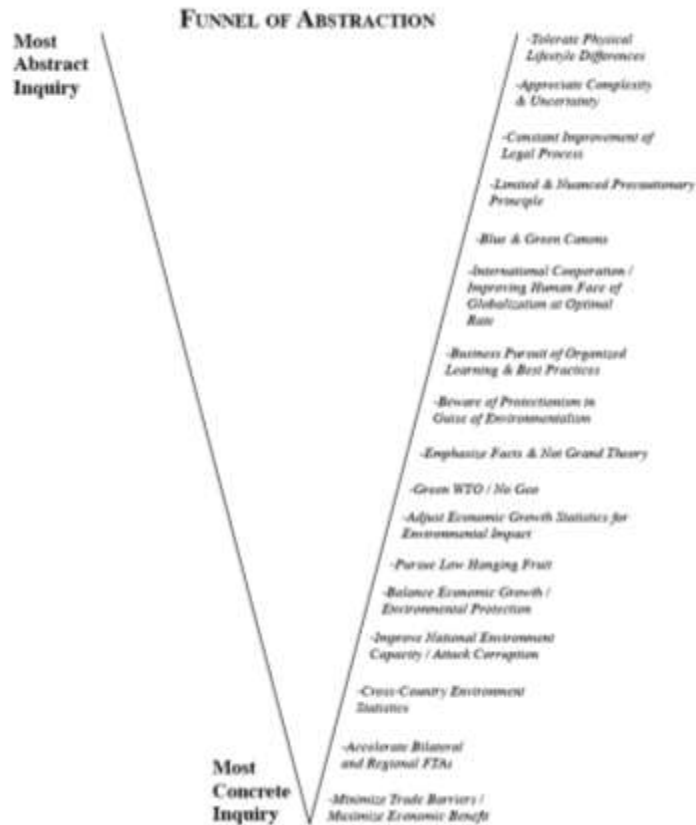
185. Robert F. Blomquist, *Globoecopragmatism: How to Think (and How Not to Think) About Trade and the Environment*, 55 U. KAN. L. REV. 129 (2006).

186. *Id.* at 129.

187. *Id.*

188. *Id.* at 188 (footnote omitted).

THE BLOMQUIST FUNNEL OF PRAGMATISM ON GLOBAL TRADE AND THE ENVIRONMENT<sup>189</sup>  
FIGURE 2



### 3. The Philosophy of the Abstract and the Concrete

Epistemological problems with the classification of conceptions—how we think about things, state fundamental problems, and define issues—have been the subject of discourse on the nature of concrete and abstract ideas for millennia. Aristotle pointed out that “[m]en will frequently fall into fallacies through not setting out the terms of the premis[e] well”;<sup>190</sup> Aquinas, speaking of the mystery of God, sought to explain human confusion on the subject by observing that “[w]e can speak of simple things only as though they were like the composite

189. *Id.* at 176.

190. ARISTOTLE, *PRIOR ANALYTICS* (A.J. Jekinson trans.), in 8 *GREAT BOOKS OF THE WESTERN WORLD* 39, 66 (Robert Maynard Hutchins ed., 1952).



things from which we derive our knowledge” so that “in speaking of God, we use concrete nouns to signify His subsistence, because with us only those things subsist which are composite; and we use abstract nouns to signify His simplicity”;<sup>191</sup> Locke devoted an entire chapter of his book, *Concerning Human Understanding*, to *Of Abstract and Concrete Terms*.<sup>192</sup> In more modern times both William James<sup>193</sup> and Sigmund Freud<sup>194</sup> have wrestled with the psychological dimensions of abstract versus concrete thinking. Discussing the evolution of human reasoning, James noticed:

The first words are probably always names of entire things and entire actions, of extensive coherent groups. A new experience in the primitive man can only be talked about in terms of the old experiences that have received names. It reminds him of certain ones from among them, but the *points* in which it agrees with them are neither named nor disassociated. Pure similarity must work before the abstraction can work which is based upon it. The first adjectives will therefore probably be total nouns embodying the striking character. The primeval man will say not “the bread is hard,” but “the bread is stone”; not “the face is round,” but “the face is moon”; not “the fruit is sweet,” but “the fruit is sugar-cane.” The first words are thus neither particular nor general, but *vaguely* concrete; just as we speak of an “oval” face, a “velvet” skin, or an “iron” will, without meaning to connote any other attributes of the adjective-noun than those in which it *does* resemble the noun it is used to qualify. After a while certain of these adjectively-used nouns come only to signify the particular quality for whose sake they are oftenest used; the *entire thing* which they originally meant receives another name, and they become true abstract and general terms.<sup>195</sup>

Philosophy has wrestled with the tension between the *concrete*—entities like physical objects, persons, and events, and terms or names that denote such things—and the *abstract*—like qualities, numbers, states

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191. THOMAS AQUINAS, THE SUMMA THEOLOGICA (1293), in 19 GREAT BOOKS OF THE WESTERN WORLD 1, 16 (Robert Maynard Hutchins ed. 1952). See also *id.* at 205-08 (discussing “Concrete Essential Names” for God and “Abstract Essential Names” for God).

192. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (1689), in 35 GREAT BOOKS OF THE WESTERN WORLD 85, 284-85 (Robert Maynard Hutchins ed., 1952).

193. See WILLIAM JAMES, PRINCIPLES OF PSYCHOLOGY (1890), in 53 GREAT BOOKS OF THE WESTERN WORLD 1, 305-08 (Robert Maynard Hutchins ed., 1952) (discussing “abstract” ideas).

194. SIGMUND FREUD, A GENERAL INTRODUCTION TO PSYCHO-ANALYSIS (June Riviere trans.), in 54 GREAT BOOKS OF THE WESTERN WORLD 449, 516 (Robert Maynard Hutchins ed., 1952) (discussing “dream work” translation of abstract thoughts into concrete images).

195. JAMES, *supra* note 193, at 689.

and relations. To make matters more difficult, many philosophers contend that there is a hybrid conceptual category called *collective names* or *concrete universals*, “i.e. names of classes or collections of concrete things, distinct from the [purely] abstract.”<sup>196</sup> Existential philosophy, a twentieth-century phenomenon theorized by Martin Heidegger, Jean-Paul Sartre, Karl Jaspers and others, was anticipated by nineteenth-century thinkers like Friedrich Nietzsche, Søren Kierkegaard, Edmund Husserl and W.F. Hegel.<sup>197</sup> Existentialism is “a family of philosophies devoted to an interpretation of human existence in the world that stresses its concreteness and its problematic character.”<sup>198</sup> Concreteness dominated mid-twentieth-century continental European philosophy and Existentialist strands of twentieth-century American philosophy. Arguably, however, this obsession with the concrete and disparagement of abstract formalism and metaphysical speculation has been unwise and unpragmatic.

*D. Living Prudently: Rejecting the Abyss of Infinite Interpretation and Embracing Limits*

Adam Gearey—a lecturer in law at the University of London—buys into the grand ambitions of Friedrich Nietzsche to “will” radical creation into being<sup>199</sup> and to then apply it to law.<sup>200</sup> The following references give us a flavor of Gearey’s interpretive project:

Supposing that it were possible to learn anything from Nietzsche, one might take the following lesson. The law rests upon an unsure foundation. Law embodies a form, a set of values that mandate a way of living. What allows the law to be posited in the first place could also perhaps lead to its overcoming. One would require sufficient desire to will the law anew. Aesthetics is, at heart, this energy to mandate the form of a world, to create oneself. Ultimately it is the courage to will an ethics, to take from the law its power to determine forms of community.<sup>201</sup>

Picking up on Nietzsche’s *Thus Spake Zarathustra*,<sup>202</sup> Gearey asserts that “[a]s things are set to recur, to return . . . the cost of their

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196. 3 ENCY. BRIT. 519 (15th ed. 1985).

197. 4 ENCY. BRIT. 63 (15th ed. 1985).

198. *Id.*

199. Gearey relies on four principal books by Nietzsche. FRIEDERICH NIETZSCHE, DAYBREAK (R.J. Hollingdale trans., 1982); HUMAN, ALL TOO HUMAN (R.J. Hollingdale trans., 1996); THE GAY SCIENCE (Thomas Common trans., 1974); and THUS SPAKE ZARATHUSTRA (Thomas Common trans., 1974).

200. GEAREY, *supra* note 13, at 51-76.

201. *Id.* at 51.

202. NIETZSCHE, THUS SPAKE ZARATHUSTRA, *supra* note 199.

return is their reinterpretation”<sup>203</sup> and a “celebrat[ion] [of] interpretative ethical energy.”<sup>204</sup> This leads Gearey to argue: “The aesthetic provocation to legal theory [by Nietzsche] is thus to continue a will to power, to will a different way of thinking and feeling the law. If there were a summary [of this approach] it would be: *will the law*.”<sup>205</sup> Gearey boldly asserts that “[t]he legal text does not appear as a repository of immemorial truths, but as a site in which ideological disputes can be fought out; the text itself carries radically inconsistent ideas that can be creatively worked at to elaborate accounts of human association.”<sup>206</sup> For lawyers and judges who accept the Nietzschean-Gearey canon of legal interpretation (whether it be of statutes, regulations, cases, or common law) there are really no limits other than the injunctive gestalt to “make it new.”<sup>207</sup>

We, of course, can trace the Nietzschean-Gearey style of legal interpretation to the heady days of literary theory, a few decades ago, when Percy Shelley’s dictum that “[p]oets [and literary theorists?] are the unacknowledged legislators of the world”<sup>208</sup> held sway. But ever since Umberto Eco’s 1990 Tanner Lecture, the manic, unbridled ambitions of literary theory have been rightfully brought back to earth. Legal theorists should remember this wisdom.

Umberto Eco’s Tanner Lecture was entitled *Interpretation and Overinterpretation*.<sup>209</sup> In his follow-up commentary on the lecture, Eco ridiculed the notion “that interpretation has no criteria.”<sup>210</sup> Indeed, Eco reminds we legal theorists that “[t]o interpret a text means to explain why

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203. GEAREY, *supra* note 13, at 75.

204. *Id.*

205. *Id.* at 76 (emphasis added). Gearey provides a more sweeping explanation of his legal interpretative manifesto by claiming:

The injunction placed upon the critical legal interpreter is to find the spaces where doctrine stumbles, where legal principles can become shaped to fit social realities, rather than simply repeating a legal logic. This call to arms stresses the inseparability of legal theory, legal practice and political vision. It heralds the coming of the lawyer as existential hero whose activity transforms both her and her world.

*Id.* at 122.

206. *Id.* at 123 (citation omitted) (internal quotation marks omitted).

207. *Id.* at 124 (“Legal aesthetics would accept that life in law is defined by principles and rules that determine and restrain interpretive activity and political possibility, but it would see this as the challenge to the joyous interpreter: make it new.”).

208. Percy Shelley, *A Defence of Poetry*, in *SHELLEY’S LITERARY AND PHILOSOPHICAL CRITICISM* 131 (Henry Frowde ed., 1909).

209. The lecture was expanded and included in an edited volume that included three essays by Umberto Eco and replies by the world-renowned literary theorists. See *UMBERTO ECO, INTERPRETATION AND OVERINTERPRETATION* (Stefan Collini ed., 1992). Umberto Eco is Professor of Semantics at the University of Bologna.

210. Umberto Eco, *Interpretation and History*, in *INTERPRETATION AND OVERINTERPRETATION*, *supra* note 209, at 23.

these words can do various things (and not others) through the way they are interpreted.”<sup>211</sup>

Eco thinks it important that interpreters eschew the “irrational”—the “senseless, absurd, nonsensical, incoherent, delirious, farfetched, inconsequential, disconnected, illogic[al], exorbitant, extravagant, skimble-skamble,” the “unsinning, unlogisch, unvernünftig, sinnlos.”<sup>212</sup> To do this, Eco defends the interpretative virtue of “moderateness”—“being within the *modus*” (derived from “ancient Greek and Latin civilizations”).<sup>213</sup> In a fascinating linkage between *interpretative* theory and *political* theory, Eco informs us: “The Latin obsession with spatial limits goes right back to the legend of the foundation of Rome: Romulus draws a boundary line and kills his brother for failing to respect it. If boundaries are not recognized, then there can be no *civitas*.”<sup>214</sup> This insight has enormous importance for understanding *legal* interpretation and overinterpretation.

Professor Eco gets at the praxis of overinterpretation when he reminds us that for the *Übermensch*,

Every time one thinks to have discovered a similarity, it will point to another similarity, in an endless progress. In a universe dominated by the logic of similarity (and cosmic sympathy) the interpreter has the right and the duty to suspect that what one believed to be the meaning of a sign is in fact the sign for a further meaning.<sup>215</sup>

Eco, then, starts to try to put limits on the *Übermensch* by a brilliant gambit wherein we can find a useful approach to defining overinterpretation by deploying “a sort of Popperian principle according to which if there are no rules that help to ascertain which interpretations are the ‘best’ ones, there is at least a rule for ascertaining which ones are ‘bad!’”<sup>216</sup> This approach is further refined by Eco into a sort of Posnerian Law and Economics principle, when put in the context of legal

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211. *Id.* at 24. Eco follows this statement by the following:

But if Jack the Ripper told us that he did what he did on the grounds of his interpretation of the Gospel according to Saint Luke, I suspect that many reader-oriented critics would be inclined to think that he read Saint Luke in a pretty preposterous way.

*Id.*

212. *Id.* at 26 (citation omitted) (internal quotation marks omitted).

213. *Id.* (citation omitted).

214. *Id.* at 27; *cf. id.* at 34 (“New Hermetic irrationalism oscillates between, on the one hand, mystics and alchemists, and on the other, poets and philosophers, from Goethe to Gérard de Nerval and Yeats, from Schelling to Franz von Baadar, from Heidegger to Jung. And in many post-modern concepts of criticism, it is not difficult to recognize the idea of continuous slippage of meaning.”).

215. Umberto Eco, *Overinterpreting Texts*, in INTERPRETATION AND OVERINTERPRETATION, *supra* note 209, at 47.

216. *Id.* at 52.

interpretation. Eco says that “every act of reading is a difficult transaction between the competence of the reader (the reader’s world knowledge) and the kind of competence that a given text postulates *in order to be read in an economic way*.”<sup>217</sup>

While Umberto Eco provides a detailed and nuanced follow-up to his Tanner Lecture insights in his book, *The Limits of Interpretation*,<sup>218</sup> I think that the meta-principle he develops in that book can be stated quite simply. Textual interpretation and use vitally depend on *context* and *concreteness*.<sup>219</sup> As Richard A. Posner said in one of his judicial opinions: “Context may disambiguate.”<sup>220</sup> Indeed, there is considerable overlap with the Eco-Posnerian contextual concern of interpretation and the late philosopher Richard Rorty’s pragmatic account of interpretation that seeks “to forget the idea of discovering What the Text is Really Like, and instead to think of the various descriptions which we find it useful, for various purposes, to give.”<sup>221</sup> I think that a pragmatic, contextual method of legal interpretation is what Professor Jónsson recently sketched out in a 2009 article published in *Legal Theory*.<sup>222</sup> Professor Jónsson’s thesis is that vagueness in law does not call “for a specific interpretation of the law—interpretation that changes the meaning of the law and makes it more precise,” but rather, “that vagueness in law calls only for an application of the law to the case at hand,” pragmatically and for the limited purpose of deciding a concrete case.<sup>223</sup>

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217. Umberto Eco, *Between Author and Text*, in INTERPRETATION AND OVERINTERPRETATION, *supra* note 209, at 68 (emphasis added). *Cf. id.* at 88 (“Between the mysterious history of a textual production and the uncontrollable drift of its future readings, the text qua text still represents a comfortable presence, the point to which we can stick.”).

218. UMBERTO ECO, *THE LIMITS OF INTERPRETATION* (1990).

219. *See id.* at 62.

220. *McDonald v. Schweiker*, 726 F.2d 311, 313 (7th Cir. 1983), *quoted in* THE QUOTABLE JUDGE POSNER: SELECTIONS FROM TWENTY-FIVE YEARS OF JUDICIAL OPINIONS 163 (Robert F. Blomquist, ed., 2010).

221. Stefan Collini, *Introduction: Interpretation Terminable and Interminable*, in INTERPRETATION AND OVERINTERPRETATION, *supra* note 209, at 11. *Cf.* Richard Rorty, *The Pragmatist’s Progress*, in INTERPRETATION AND OVERINTERPRETATION, *supra* note 209, at 102 (“For us pragmatists, the notion that there is something a given text is *really* about, something which rigorous application of a method will reveal, is as bad as the Aristotelian idea that there is something which a substance really, intrinsically, *is* as opposed to what it only apparently or accidentally or relationally is.”).

222. Ólafur P. Jónsson, *Vagueness, Interpretation, and the Law*, 15 LEGAL THEORY 193 (2009).

223. *Id.* at 193. Jónsson contrasts his underinterpretation approach to that of well-known legal theorist Ronald Dworkin. *Id.* at 193 n.1 (quoting RONALD DWORKIN, A MATTER OF PRINCIPLE 129 (1985)) (arguing that we should ask “which interpretation . . . provides the best political justification for the statute at the time it was passed”).

Legal theorists, therefore, who seek to avoid overinterpretation of law seem to favor judicial minimalism. Professor Michael Gerhardt explains as follows:

For some scholars, resolving cases or controversies cannot be separated from how the justices explain themselves. Cass Sunstein's theory of judicial minimalism suggests, for example, the Court should generally *undertheorize*, which means leaving some things undecided. He proposes some decisions should be narrow (confined to their particular facts) and shallow (reasoned thinly), while others should be narrow and deep (more elaborately reasoned). Minimalism has the principal virtue of reducing judicial interference as much as possible with democratic authorities' own, independent constitutional judgments.<sup>224</sup>

Deciding specific legal problems—with the combined insights of abstract learning and a focus on concrete particulars—is, then, a recipe that *works*; an approach that avoids the abyss of excessive interpretation and that embraces practical limits.<sup>225</sup>

## VI. CONCLUSION

Parlor games that dig deep for hidden meanings are fun: *Wizard of Oz* enthusiasts, art critics, and other culture vultures have enjoyed the

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224. MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 150 (2008) (emphasis added) (citation omitted) (internal quotation marks omitted). Cf. *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2274-75 (2009) (Scalia, J., dissenting) (citations omitted) (“A Talmudic maxim instructs with respect to the Scripture: ‘Turn it over, and turn it over, for all is therein.’ . . . Divinely inspired text may contain the answers to all earthly questions, but the Due Process Clause most assuredly does not. The Court today continues its quixotic quest to right all wrongs and repair all imperfections through the Constitution. Alas, the quest cannot succeed.”).

225. Cf. LACKLAND H. BLOOM, JR., *METHODS OF INTERPRETATION: HOW THE SUPREME COURT READS THE CONSTITUTION* (2009) (relaying a wide assortment of contextual and practical methodologies of constitutional interpretation that have been usefully employed by the Supreme Court and individual Justices in grappling with and deciding specific cases).

Professor Andrei Marmor offers some analogous thoughts on interpreting law. See ANDREI MARMOR, *LAW IN THE AGE OF PLURALISM* 4 (2007) (“[W]e must focus on what [the rule of law] means, and then ask why it is a good thing. . . . Not less importantly, however, we must also realize that legalism can be excessive. Even if the rule of law is a good thing, too much of it may be bad.”); *id.* at 27 (“Surely, there is some level of coherence which the law must have in order to function properly in guiding the conduct of its subjects. But it is equally clear that from a functional perspective, the law can tolerate a considerable amount of incoherence.”). Moreover, the insights of Matt Ridley on the behavior of government officials and the mistakes that government officials make are interesting. See Matt Ridley, *Studying the Biases of Bureaucrats*, WALL ST. J., Oct. 23–24, 2010, at C4 (the “illusions of competence” mistake involves how officials “systematically overestimate how much [they] understand about the causes and mechanisms of things [they] half understand”).

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innocent pursuit of overinterpretation for decades. But how should legal theorists view overinterpretation of law? As inevitable and harmless? As subject to abuse? As a mere byproduct of a search for meaning in the face of ambiguity?

In getting to the root of these overarching questions I first looked at the rhetorical nature of excess by considering the nature of rhetoric, the hermeneutical limits of ambiguity, the theatricality of law, and the problem of hyperbole. Then, in order to switch perspective, I focused on the sociological dimensions of roles in team performances that involve social interpretations by considering roles, social interaction, and dramaturgy as sociologists view matters and went on to describe the search for dramaturgical balance.

Turning to law and overinterpretation, I examined, by way of comparison, journalistic and non-legal references to overinterpretation, moving on to look at law review literature and other legal texts, along with caselaw that have deployed the parlance of overinterpretation.

Finally, I tried to wrap up my law and overinterpretation project by broadly and boldly considering how to manage interpretive energy in law. In this capstone portion of the Article, I first looked at illustrative categories of potential legal overinterpretation (identity epistemic wisdom, law and literature, constitutional law and two vague legal doctrines—implied pre-emption and negligence per se). Second, I briefly alluded to other potential categories of legal overinterpretation (law and economics, behavioral law and economics, and critical legal studies approaches to legal interpretation along with legal proof standards that may have a tendency to over-emphasize doubt). Third, I turned to unpacking, better understanding, and taming overinterpretation by looking at three illustrative approaches to modest interpretation: a pragmatic theory of statutory interpretation, a theory for better reconciling difficult tradeoffs between international free trade and global environmental protection dubbed globoecopragmatism, and some philosophical insights on the differences of abstract and concrete reasoning.

The culminating portion of the Article argued that good legal interpreters—like good literary interpreters—should live prudently by embracing limits to interpretation and trying to situate legal problems in a proper context.