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# The Categorical Balance of Safeguarding Honor: A Cluster Analysis of Rhetorical Value Hierarchies in the Ninth Circuit's *United States v. Alvarez*

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The Categorical Balance of Safeguarding Honor:  
A Cluster Analysis of Rhetorical Value Hierarchies  
in the Ninth Circuit's *United States v. Alvarez*

An Honors Thesis

Presented to

The Faculty of the Department of Rhetoric

Bates College

In partial fulfillment of the requirements for the  
Degree of Bachelor of Arts

By

Kevin Brown McCandlish

Lewiston, Maine

March 23, 2012

As we express our gratitude,  
We must never forget that the highest appreciation  
Is not to utter words, but to live by them.  
-John F. Kennedy

To Professor Hovden, Professor Kelley-Romano, and Professor Nero,

I am convinced of the fact, however bold or biased it may be, that no collegiate faculty has cohesively formed a more perfect union in the instruction and preparation of tomorrow's great communicators. Thank you for all of your support and mentorship.

To the Brooks Quimby Debate Council for always pushing me to unexpected heights.

To My Mother,

For her patience, love, and understanding, especially through my younger years; for I knew even then that I wanted to practice rhetoric and debate, but knew not what it was.

To My Father,

For never making me go through a day without seeing the precise kind of man that I want to be.

Thank you to Ryan Katon, Brett McAllister, Vincent Ciampi, Ryan Weston, Ben Kitendaugh, David Wood, Gregory Watts, Brian Goldberg, Louis Watanabe, Nicholas Barrett, Christopher Mackey, and all of their families. Never could I have conceived of finding a group of individuals who would have a larger impact on me, through both irreplaceable friendship and constant lessons in humility.

The mark of a truly civilized man [or woman] is confidence in the strength and security  
derived from the inquiring mind.

-U.S. Supreme Court Justice Felix Frankfurter

*Dennis v. United States (1950)*

To Professor Sawyer Sylvester, Professor Stephen Engel, Professor John Baughman, Professor  
Leila Kavar, Mr. Robert Kelly, and Mr. Thomas Fricke,

Thank you for the ardent devotion with which you instruct and inspire your pupils every day in  
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## Chapter 1:

### An Introduction

The process of interpreting social norms into a reflective system of laws denotes an essential practice of any democratic republic. The representatives of a citizenry are tasked with establishing codes of behavior that promote order and morality conducive to wellbeing. The general conception of democracy, in both its most ideal and inoperative form, assumes that popular sentiment will behave as a catalytic motivation for the inception of legislative proposals. As the late Václav Havel once famously stated, “Without commonly shared and widely entrenched moral values and obligations, neither the law, nor democratic government, nor even the market economy will function properly.”<sup>1</sup> A legitimate democratic process, however, does not guarantee a beneficent result; even the application of virtuous laws can render impacts that are malicious and troublesome. The role entrusted to courts of law therefore points to a fascinating juncture within our socio-political geography. A main facet of the judicial system’s role is indeed to enforce the laws produced by a legislature, thereby fortifying the codes of social norms through the tenets of deterrence, rehabilitation, and retribution. When the content of a law itself faces the skeptical examination of a court, however, this can position the justice system as an unpopular arbiter.

The critical review of legal decisions can serve as a valuable exercise in understanding the collective sentiments of a society, particularly towards certain principles. Either in instances of deciding along with public dogma, or in verdicts flowing against rising tides of popular

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<sup>1</sup> Havel, Václav. *Summer Meditations*. Trans. Paul Wilson. Pennsylvania State University:

sentiment,<sup>2</sup> the manner in which a Court addresses the sensitive or passionate issues at hand speaks volumes about general behavior towards compositional values. These values can be traditionally enshrined within a country's legal history (such as the freedom to practice religion), or stem from more modern developments of lawful consideration (such as electronic intellectual property law). The acknowledgement of the union between societal values and the law is essential, as from "precedents, morals, and customs; whence is formed a general spirit of nations."<sup>3</sup> What a country maintains as its most central beliefs is therefore a component necessarily embedded in the language used to express a judicial decision.

The notion of "values" may be found in almost any discipline, be it the humanities and liberal arts, or mathematics and the natural sciences. To hold value means to have a measure of worth or a quantitative attribution of meaning. It includes acumen of ascribed importance to concepts of communal resonance. To know someone is to know *what they value*, or what they esteem as containing elevated importance. It is these truths that form the foundation for Chaim Perelman's work with values and value hierarchies. Perelman, along with Lucie Olbrechts-Tyteca, articulated an essential view of *values* and how they work to form the most basic components of consubstantiality and collective understanding; "The existence of *values*, as objects of agreement that make possible a communion with regard to particular ways of acting, is connected with the idea of multiplicity of groups."<sup>4</sup> It is in this manner that a culture finds

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<sup>2</sup> Two examples being the more recent Supreme Court decisions of *Kelo v. City of New London* and *Citizens United v. Federal Election Commission*.

<http://online.wsj.com/article/SB10001424052970204358004577032071046475782.html>,

<http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021701151.html>

<sup>3</sup> Montesquieu, Charles De Secondat. *The Spirit of Laws; including D'Alembert's Analysis of the Work*. Trans. Thomas Nugent. Vol. 1. New York: P.F. Collier & Son, 1900. Book XIX, Ch. 4. Pg. 293.

<sup>4</sup> Perelman, Chaïm, and Lucie Olbrechts-Tyteca. *The New Rhetoric: A Treatise on Argumentation*. Notre Dame, [Ind.: University of Notre Dame, 1969. Print. 74.

“objects of agreement” from shared conceptions of “particular ways of acting,” creating the very substance of laws and codes of morality. From this observation, one may apply the idea of Perelman’s values towards a more complex understanding of legal proceedings. Focusing on the unmistakable link between the study of rhetoric and law, Perelman sought to define “justice,” as well as the general judicial process, in a “rhetorical” framework rather than one indebted to formal logic.<sup>5</sup> The way in which rhetorical theory functioned within courts of law, they found, was in the language and framework of values: “in the fields of law, politics, and philosophy, values intervene as a basis for argument at all stages of the developments. One appeals to values in order to induce the hearer to make certain choices rather than others and, most of all, to justify those choices so that they may be accepted and approved by others.”<sup>6</sup>

Within the process of a trial, lawyers rely on *values* to forward their argumentation, as aligning the case facts with the values most persuasive to a judge comprise the objective for both sides of a dispute. Similarly, and according to Perelman even more notable, are the ways in which values are used to create a basis for acceptance in justifications of an argument. The language of judicial decisions, it may then be surmised, contains values of many kinds that attempt to express what constitutes a “winning argument.” As noted by Haig Bosmajian in his book *Metaphor and Reason in Judicial Opinions*, some law scholars have noted “The subject of judicial rhetoric is both rich and comparatively unexplored... Despite the importance of rhetoric in the shaping of Supreme Court opinions, the subject has received little scholarly attention.”<sup>7</sup>

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<sup>5</sup> Gross, Alan G., and Ray D. Dearin. *Chaim Perelman*. Albany: State University of New York, 2003, 24.

<sup>6</sup> Perelman and Olbrechts-Tyteca, 75.

<sup>7</sup> Bosmajian, Haig A. *Metaphor and Reason in Judicial Opinions*. Carbondale: Southern Illinois UP, 1992. Pg. 7. Quoting Professor Robert A. Prentice from the article “Supreme Court Rhetoric” *Arizona Law Review* 25 (1983)



It is therefore valuable to turn to the subject of rhetorical “values” within judicial opinions as a way of discerning argumentative strategies. More specifically, focusing on the way in which a judge’s discourse reveals “value hierarchies” within the language allows the rhetorical critic to study the justifications for which societal “values” should be upheld over others. As will be discussed, many constraints also instruct the formulation of judicial opinions. These can certainly vary from case to case, as each presents its own set of justifications and case facts. The general rules and principles of decision-making (as well as those more implied within the role of judge) will be used to highlight what room is left for maneuvering, and what strategies are used to produce a resounding verdict of certain values over others. In utilizing the theory of values and value hierarchies established by Perelman and Olbrechts-Tyteca in *The New Rhetoric: A Treatise on Argumentation*, as well as those taken from Perelman’s independent work with value hierarchies, a case study will be performed to display how these rhetorical concepts can be employed to elucidate strategic insights into a controversial modern judicial ruling.

On August 17, 2010, The United States Court of Appeals for the Ninth Circuit issued a decision in the case of *United States v. Alvarez*. The legal exigencies that gave rise to this particular appeal began as all instances of criminality do: with the passing of a law. The law in question was known as the Stolen Valor Act of 2005, an update to 18 U.S.C. § 704. The act criminalized “fraudulent claims surrounding the receipt of the Medal of Honor [and other Congressionally authorized military medals, decorations, and awards].”<sup>8</sup> Congress believed such instances of falsehoods could “damage the reputation and meaning of such decorations and medals” suggesting “legislative action is necessary to permit law enforcement officers to protect

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<sup>8</sup> Public Law 109-437, 109th Cong., 120 STAT. 3266 (Dec. 20, 2006) (enacted). Print.

the reputation and meaning...”<sup>9</sup> Mr. Xavier Alvarez, who happened to serve as an elected official on the Three Valley Water District Board of Directors in California, violated this law on July 23, 2007. At a meeting, he gave a brief statement in which he claimed that he had won the Medal of Honor while serving as a marine.<sup>10</sup> This statement was simply fabricated, as Mr. Alvarez had never served in the military, let alone be the recipient of any armed services decoration. Following an FBI investigation into the incident, Alvarez was “indicted in the Central District of California on two counts of violating 18 U.S.C. § 704(b), (c)(1).”<sup>11</sup> It was noted in the decision that “Alvarez appears to be the first person charged and convicted under the present version of the act.”<sup>12</sup>

Following a motion to dismiss the charge as unconstitutional, The United States Court for the Central District of California found Alvarez guilty (after a guilty plea was eventually issued), and sentenced him to pay monetary damages, endure three years of probation, and perform over four hundred hours of community service.<sup>13</sup> Alvarez, however, reserved his right to appeal on the basis that the law violated First Amendment freedoms, and did so. The appeal was subsequently heard before the Ninth Circuit court. In a judicial opinion that sent sound waves through the legal and military spheres, the court ruled: “false factual speech as a general category is not, and cannot be, proscribed under threat of criminal prosecution... without clashing with First Amendment protections.”<sup>14</sup> This decision presented a simple yet momentous conclusion of the court; the importance of ensuring consistent protections of First Amendment rights

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<sup>9</sup> Public Law 109-437, 109th Cong., 120 STAT. 3266 (Dec. 20, 2006) (enacted). Print.

<sup>10</sup> *United States v Alvarez*, No. 08-50345. 11851 (9<sup>th</sup> Cir. Court of Appeals. 2010).

<sup>11</sup> *United States v Alvarez*, No. 08-50345. 11852 (9<sup>th</sup> Cir. Court of Appeals. 2010).

<sup>12</sup> *United States v Alvarez*, No. 08-50345. 11852 (9<sup>th</sup> Cir. Court of Appeals. 2010).

<sup>13</sup> *United States v Alvarez*, No. 08-50345. 11852-11853 (9<sup>th</sup> Cir. Court of Appeals. 2010).

<sup>14</sup> *United States v Alvarez*, No. 08-50345. 11875 (9<sup>th</sup> Cir. Court of Appeals. 2010).

superseded the government's interest in preventing the dissemination of military decoration mendacities.

The notions of ultimate sacrifice, respect, and integrity that our nation ascribes to service in America's armed forces symbolize unparalleled levels of cultural repute. The value of honor would therefore seem to be (and, as suggested by the Stolen Valor Act, most certain is) a supported basis for steadfast protection. Similarly, the Freedom of Speech and Expression, as enshrined by the First Amendment, has long been considered the chief foundational tenet of our democracy. The balancing of these two values, as well as the impact of their evaluations, form the legal quandary placed before the Ninth Circuit court in *United States v. Alvarez*. Strong reactions to this opinion have been offered from a multitude of notable figures in the field of law, such as United States District Judge Robert E. Blackburn who mused: "There is much irony that the core values of our system of governance, which our military men and women served to defend with their very lives, are here invoked to protect false claims of entitlement."<sup>15</sup>

Large swells of feedback led to a petition for Supreme Court Writ of Certiorari in the hope that the Ninth Circuit's precedent would be overturned. Filed on August 18, 2011, Solicitor General of the United States Donald B. Verrilli, Jr. led a unified front of government attorneys seeking the Supreme Court's review.<sup>16</sup> Additionally, fifteen amicus briefs were submitted by various friends of the court, including The American Legion, the ACLU, the Veterans of Foreign

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<sup>15</sup> Hudson Jr., David L. "Rumors of War Medals: The First Amendment May Protect Lying About Military Awards." *ABA Journal: National Pulse*. American Bar Association, 1 July 2011. Web.

<[http://www.abajournal.com/magazine/article/rumors\\_of\\_war\\_medals\\_1st\\_amendment\\_may\\_protect\\_lying\\_about\\_military\\_awards/](http://www.abajournal.com/magazine/article/rumors_of_war_medals_1st_amendment_may_protect_lying_about_military_awards/)>.

<sup>16</sup> "Supreme Court of the United States: Docket for No. 11-210- Proceedings and Orders." *Supreme Court of the United States: No. 11-210*. Supreme Court of the United States, 2 Mar. 2012. Web. <<http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-210.htm>>.

Wars of the United States, the National Association of Criminal Defense Lawyers, and a collaborative brief submitted by law school professors Eugene Volokh and James Weinstein<sup>17</sup> (of UCLA Law School and the Arizona State Sandra Day O'Connor College of Law, respectively). This cast of petitioners and friends of the court served as a stark indication of the magnitude of values embodied in the Stolen Valor Act, as well as the protections of the First Amendment. The appeal was granted its petition for a writ of certiorari by the Supreme Court, and arguments were heard on February 22, 2012. The decision of the Supreme Court has yet to be issued.

The strong attitudes produced in response to the Ninth Circuit's opinion allude to a unique clash of revered values within American society. The question of how the Ninth Circuit chose to weigh certain values over others, especially ones so quintessential to the preservation of our cultural identity, serve as the main inquiry of this analysis. More importantly, what can the specific language of *United States v. Alvarez*'s majority circuit court opinion reveal in terms of approaches for judicial justification and opinion formulation, particularly when such avidly protected values are necessarily pitted against one another? In order to shed light on these ambitious pursuits, a method is required through which the elements of Perelman's value hierarchies can be identified and examined. With a mind paid towards the overall analytic goal of discovering how the values within the decision are conveyed, weighed, and interacted with one another, the rhetorical method of Cluster Analysis provides a sterling technique to achieve these ends. The ways in which the Ninth Circuit Court of Appeals defines and associates these values represents a crucial rhetorical strategy within the decision making process. The specific key terms of "honor," "freedom of speech," and "false statements of fact" represent three critical

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<sup>17</sup> Professor Weinstein is also an Associate Fellow at the Centre for Public Law at the University of Cambridge, and following the earning of his Juris Doctor, served as a law clerk to James R. Browning, who was at that time the Chief Judge of the United States Court of Appeals for the Ninth Circuit.

issues or values under consideration in the decision. The choices made in crafting the language which employs these terms requires a simultaneous promotion of the court's interests and judgment. A majority opinion must justify its end through the means of addressing the critical issues at hand; fully understanding the implications of this truth can help trace the contours of embedded values within the court's roles, obligations, and ultimate decision.

In collaboration with the rhetorical theories of "values" and "value hierarchies," the analysis of the Ninth Circuit Court's decision in *United States v. Alvarez* will show how the aforementioned clusters of "key terms" are acted upon within their associations in the text. The motivations of the court may be viewed through their rhetorical formulation of language, as well as its facilitation of upholding the value of Freedom of Speech over the values of protecting the "reputation and meaning" of military service medals. Whether or not this appellate opinion was decided favorably is not the necessary conclusion of this analysis. Instead, it is most important to discern 1) How rhetorical theory may be applied to legal discourse, 2) The ways in which "values" and their hierarchies are relevant to an understanding of the weighing which takes place in judicial decisions, 3) How associations of "clusters" within the text give way to deeper meaning of the language and its strategic formulation, and 4) How judicial opinions account for the clash of fervently guarded values within a society. These central research questions seek to further the study of how rhetoric acts as an ever-present component of legal discourse. The intricate observations available through performing a rhetorical analysis achieve a lens through which intricate observation is possible. The arrangement and associations of key terms are crucial to the successful authorship of judicial opinions, amicus briefs, dispositions, argumentations, and nearly any other type of legal discourse one can imagine. Where there is

persuasion, there is rhetoric. The interests in find the available means of persuasion amounts to a common goal that only furthers the inseparable link between Rhetoric and Law.

## Chapter 2:

### The Stolen Valor Act and its Legal History

The Stolen Valor Act obtained Congressional approval on December 20<sup>th</sup>, 2006. Submitted as the Stolen Valor Act of 2005 (or Public Law 109-437), this legislative amendment expanded upon the previous versions of Title 18, Section 704 of the United States Code to “enhance protections relating to the reputation and meaning of the Medal of Honor and other military decorations...”<sup>18</sup> This act reported the findings of Congress that “fraudulent claims” of individuals receiving either the Medal of Honor, the Navy Cross, the Purple Heart, the Air Force Cross, or any other congressionally awarded military service medal posed a grave threat to the standing of those medals. It addressed the necessity for “Federal Law enforcement officers” to have greater scope and maneuverability in prosecuting those who committed such an offense, as well as broadened the actions which qualified as impairment to the medals’ reputation awards. The previous qualifying standard of “manufactures or sells” was removed to make way for “purchases, attempts to purchase, solicits for purchase, mails, ships, imports, exports, produces blank certificates of receipt for, manufactures, sells, attempts to sell, advertises for sale, trades, barter, or exchanges for anything of value.”<sup>19</sup> While similar laws protecting such awards could be found as early as the 1920’s<sup>20</sup>, the newest definition was an unmistakable expansion.

The Stolen Valor Act of 2005 additionally created an entirely new subsection (b), whereby a more comprehensive clarifying provision was included:

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<sup>18</sup> Public Law 109-437, 109th Cong., 120 STAT. 3266 (Dec. 20, 2006) (enacted). Print.

<sup>19</sup> Public Law 109-437, 109th Cong., 120 STAT. 3266 (Dec. 20, 2006) (enacted). Print.

<sup>20</sup> [http://www.law.cornell.edu/uscode/uscode18/usc\\_sec\\_18\\_00000704----000-notes.html](http://www.law.cornell.edu/uscode/uscode18/usc_sec_18_00000704----000-notes.html). At this point in time, the laws were found in the form of statutes housed in each individual branch of the military, i.e. the Army: Feb. 24, 1923, ch. 110, 42 Stat. 1286; and the Air Force: Apr. 21, 1928, ch. 392, 45 Stat. 437. In 1948, a more universal law was passed that included the Navy and the now antiquated War Department.

Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.<sup>21</sup>

The last major form of alteration to the United States Code was the creation of a subsection (d), which outlined increased punishment for falsifications of the highest honors of military distinction. This modification raised the length of possible imprisonment to a year for violations of the act that involved the Navy Cross, the Air Force Cross, the Silver Star, the Purple Heart, or “any replacement or duplicate medal for such medal as authorized by law.”<sup>22</sup> The final inclusion of this subsection was entitled “ENHANCED PENALTY FOR OFFENSES INVOLVING CONGRESSIONAL MEDAL OF HONOR.”<sup>23</sup> Though the “enhanced” penalty for the highest of all valor awards was identical to those listed in the earlier parts of subsection (c), Congress made clear the severity of committing this offense with regards to the Congressional Medal of Honor.

The first prosecution under this updated act followed a series of events that were found to be far from subtle. On July 23, 2007, newly elected Xavier Alvarez of the Three Valley Water District Board of Directors in Claremont, California rose to introduce himself to the other members and citizens present.<sup>24</sup> His statement was simply: “I’m a retired Marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got

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<sup>21</sup> Public Law 109-437, 109th Cong., 120 STAT. 3266 (Dec. 20, 2006) (enacted). Print.

<sup>22</sup> Public Law 109-437, 109th Cong., 120 STAT. 3266 (Dec. 20, 2006) (enacted). Print.

<sup>23</sup> Public Law 109-437, 109th Cong., 120 STAT. 3266 (Dec. 20, 2006) (enacted). Print.

<sup>24</sup> <http://articles.latimes.com/2011/mar/28/opinion/la-ed-medal-20110324>. March 28<sup>th</sup>, 2011.



wounded many times by the same guy. I'm still around.”<sup>25</sup> In fact, Mr. Alvarez had never won the Medal of Honor, nor had he ever been enlisted in the Marines at all. His claim of receiving the Medal of Honor was certainly questionable in and of itself, as only one living person has been awarded the Congressional Medal of Honor since the Vietnam War.<sup>26</sup> It was discovered shortly after this particular incident that Mr. Alvarez's general standards of honesty were not of the highest degree. Several other instances of a bizarre lack of honesty on his part began to surface into the public's view. The Federal Bureau of Investigation had even been notified the year before about his tendency to fabricate an armed services history.<sup>27</sup>

The FBI secured a recording of the alleged water board meeting in question, and Alvarez was indicted in the Central District Court of California on two counts under the United States Code Title 18, section 704.<sup>28</sup> This gave Mr. Alvarez the dishonorable distinction of being the first individual charged under the newly revised Stolen Valor Act of 2005. In the trial heard before the Central District Court of California, the justices repeatedly highlighted his past transgressions with mendacities, stating “There's no credibility in anything [he] say[s].”<sup>29</sup> Mr. Alvarez made his best efforts to have the charges dismissed by challenging the constitutionality of the Stolen Valor Act of being unconstitutional under the First Amendment, both *prima facie* and as directly applied to his set of circumstances. These efforts were blockaded, forcing Alvarez to plead guilty to the first count, while “reserving his right to appeal the First Amendment

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<sup>25</sup> *United States v Alvarez*, No. 08-50345. 11845 (9<sup>th</sup> Cir. Court of Appeals. 2010).

<sup>26</sup> <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/10/AR2010091002712.html>. The sole recipient was Army specialist Salvatore Giunta, who received the honor for his bravery exhibited on October 25, 2007 in the face of a Taliban ambush in Afghanistan.

<sup>27</sup> *United States v Alvarez*, No. 08-50345. 11845 (9<sup>th</sup> Cir. Court of Appeals. 2010).

<sup>28</sup> *United States v Alvarez*, No. 08-50345. 11845 (9<sup>th</sup> Cir. Court of Appeals. 2010).

<sup>29</sup> *United States v Alvarez*, No. 08-50345. 11845 (9<sup>th</sup> Cir. Court of Appeals. 2010).

question.”<sup>30</sup> He was ordered to pay a total of \$5,100 in punitive fines, serve three years of probation, and to complete 416 hours of community service. Alvarez appealed the Central District Court of California’s decision under the First Amendment, which was then reviewed and taken on by the United States Court of Appeals for the Ninth Circuit. The specific issues under the First Amendment raised by the challenge magnified a foundational discussion of the Freedom of Speech and its long-disputed standards for regulation. The Ninth Circuit opinion was issued by Appellate Justice Milan D. Smith, who reviewed the general judicial landscape through precedents relating to the freedom of “pure” and “political speech.” One of his main concerns with the Stolen Valor Act of 2005 was that it “imposes a *criminal* penalty of up to a year of imprisonment, plus a fine, for the *mere utterance or writing* of what is, or may be perceived as, a false statement of fact- without anything more.”<sup>31</sup> The problem in the mind of Justice Smith was that the “Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize any test of truth”<sup>32</sup> without the “showing of *malice* (as opposed to mere negligence).”<sup>33</sup>

In order to convince the court of the act’s constitutionality, the government had several options for potential claims in order to meet their burden of proof. The first potential claim was that the Stolen Valor Act was consistent with one of the five “certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.”<sup>34</sup> These five categories were “the lewd and obscene, the profane [which was later struck down in *Cohen v. California* (1971)], the libelous, and the

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<sup>30</sup> *United States v Alvarez*, No. 08-50345. 11845 (9<sup>th</sup> Cir. Court of Appeals. 2010).

<sup>31</sup> *United States v Alvarez*, No. 08-50345. 11845 (9<sup>th</sup> Cir. Court of Appeals. 2010). Pg. 11850.

<sup>32</sup> *United States v Alvarez*, No. 08-50345. 11845 (9<sup>th</sup> Cir. Court of Appeals. 2010). Pg. 11856.

<sup>33</sup> *United States v Alvarez*, No. 08-50345. 11845 (9<sup>th</sup> Cir. Court of Appeals. 2010). Pg. 11862.

<sup>34</sup> *United States v Alvarez*, No. 08-50345. 11845 (9<sup>th</sup> Cir. Court of Appeals. 2010). Pg. 11854.

This precedent of a certain and well-defined list was established first in *Chaplinsky v. New Hampshire* (1942).

insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>35</sup> According to Justice Smith, the government relied far too much on the precedent of *Gertz v. Robert Welch* (1974), which made the general assertion that “the erroneous statement of fact is not worthy of constitutional protection.”<sup>36</sup> In the minds of the 9<sup>th</sup> Circuit Court, this failed to establish why it coincided with the well defined and narrowly tailored classes of speech outside of constitutional protection. Justice Smith took issue with the government’s reliance on the *Gertz* principle because of a similar source of dissatisfaction that he found the Stolen Valor Act of 2005 itself; he viewed both as “perhaps overbroad.”<sup>37</sup> More specifically, he concluded that in order for both the law and its application to be permissible, the act itself and the false speech it criminalizes must either: a) be the proximate cause of an irreparable harm to another’s reputation<sup>38</sup>, b) contain a *scienter* qualification, or a necessity of guilty knowledge that is sufficient to charge a person with the consequences of their actions<sup>39</sup>, c) be specifically injurious to another individual<sup>40</sup>, d) that the Act requires the establishment of either *publicity* or *victims*, or e) that there must be a demonstration that the defendant made a false representation of material fact with the successful intent of misleading the listener.<sup>41</sup> With respect to the specific circumstances arising out of Mr. Alvarez’s false factual speech, Justice Smith conceded that many of the elements with which he sought to find consistency were in fact present in the case itself. The problem, however, was that the congressional act under which Mr. Alvarez’s claims of military valor were found criminal contained none of those necessary elements. The view that “First Amendment protection does not hinge on the truth of the matter

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<sup>35</sup> *United States v Alvarez*, No. 08-50345. 11845 (9<sup>th</sup> Cir. Court of Appeals. 2010). Pg. 11855.

<sup>36</sup> *United States v Alvarez*, No. 08-50345. 11845 (9<sup>th</sup> Cir. Court of Appeals. 2010). Pg. 11855.

<sup>37</sup> *United States v Alvarez*, No. 08-50345. 11845 (9<sup>th</sup> Cir. Court of Appeals. 2010). Pg. 11855.

<sup>38</sup> *United States v Alvarez*, No. 08-50345. 11845 (9<sup>th</sup> Cir. Court of Appeals. 2010). Pg. 11863.

<sup>39</sup> *United States v Alvarez*, No. 08-50345. 11845 (9<sup>th</sup> Cir. Court of Appeals. 2010). Pg. 11866.

<sup>40</sup> *United States v Alvarez*, No. 08-50345. 11845 (9<sup>th</sup> Cir. Court of Appeals. 2010). Pg. 11867.

<sup>41</sup> *United States v Alvarez*, No. 08-50345. 11845 (9<sup>th</sup> Cir. Court of Appeals. 2010). Pg. 11870.

expressed”<sup>42</sup> (i.e. a truth test) became a deciding factor in viewing whether or not the congressional act was Constitutional in its application.

The only other possible strategies to prove the act constitutional, according to Justice Smith, were to either pass the test of *Strict Scrutiny*, or to establish the connection of a “case-specific application” to a “historical basis for or a compelling need to remove some speech from protection (in this case for some reason other than the mere fact that it is a lie).”<sup>43</sup> The strict scrutiny standard of judicial review requires the government to prove that a law is “narrowly tailored to achieve a compelling government interest.”<sup>44</sup> The “asserted government interest” in question was to prevent the “fraudulent” behavior committed by individuals who, by claiming that they themselves had received high military distinction, would “damage the reputation and the meaning of such decoration and medals.”<sup>45</sup> The court failed to see, however, that the ends justified the means, and that such ends were even obtained. Justice Smith surmised that the citizens most harmed by the lies of valor were not in fact the true recipients of a given military service medal, but more likely the liars themselves.<sup>46</sup> The attempt at proving the “narrowly tailored” standard was further drawn into question with the court’s stance that “other means exist to achieve the interest of stopping such fraud, such as by using *more* speech, or redrafting the Act to target actual impersonation or fraud.”<sup>47</sup> The Stolen Valor Act was subsequently found facially invalid under the First Amendment, and unable to pass the test of Strict Scrutiny. On March 21, 2011, the plaintiffs filed a petition with the Ninth Circuit Appellate Court for panel

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<sup>42</sup> *United States v Alvarez*, No. 08-50345. 11845 (9<sup>th</sup> Cir. Court of Appeals. 2010). Pg. 11855.  
This precedent was established by one of the most important precedents regarding Freedom of Speech, that of *New York Times co. v Sullivan*.

<sup>43</sup> *United States v Alvarez*, No. 08-50345. 11845 (9<sup>th</sup> Cir. Court of Appeals. 2010). Pg. 11860.

<sup>44</sup> *United States v Alvarez*, No. 08-50345. 11845 (9<sup>th</sup> Cir. Court of Appeals. 2010). Pg. 11878.

<sup>45</sup> *United States v Alvarez*, No. 08-50345. 11845 (9<sup>th</sup> Cir. Court of Appeals. 2010). Pg. 11878.

<sup>46</sup> *United States v Alvarez*, No. 08-50345. 11845 (9<sup>th</sup> Cir. Court of Appeals. 2010). Pg. 11880.

<sup>47</sup> *United States v Alvarez*, No. 08-50345. 11845 (9<sup>th</sup> Cir. Court of Appeals. 2010). Pg. 11880.

rehearing *en banc* (or with a full bench). A subsequent order seeking to deny this petition was filed by the representatives of Alvarez, and the original petition was denied.

Following the decision, a lingering question remains as to what Judge Milan D. Smith Jr. meant by his explicit inclusion of a possible “historical basis” for a “case specific application.” This method of proving a compelling government interest presents an avenue through which injurious harm could be potentially proven. The reference to a “historical basis” used in such an argument would almost certainly be in the form of precedent, of which there are many relevant to the Alvarez debacle. On Monday, October 17<sup>th</sup> of 2011, the United States Supreme Court announced the issuing of a writ of Certiorari to hear the case of *United States v. Alvarez* at the highest level of judicial appeal. A multitude of amicus briefs were filed; partly in consideration of the case’s implications for future First Amendment understandings, and partly in the hope that justice for the honor and valor of military service medals will become precedent.<sup>48</sup> Following the February 22, 2012 hearing, the decision has yet to be issued. The opinion itself, whatever it may proclaim, will surely inform the field of First Amendment precedent for years to come.

The Judicial branch has, at times, gone to great lengths in order to guard the exercise of free speech under the First Amendment. In some cases, this has meant the protection of controversial content considered undesirable within society. Similar rulings within First Amendment Jurisprudence shed light on the historical understandings of their importance within the Alvarez decision. The justice system’s uniquely spirited defense of Freedom of Speech says a great deal about the high value that we place in it as one of our nation’s most fundamental

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<sup>48</sup> "Supreme Court of the United States: Docket for No. 11-210- Proceedings and Orders." *Supreme Court of the United States: No. 11-210*. Supreme Court of the United States, 2 Mar. 2012. Web. <<http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-210.htm>>. As previously mentioned, fifteen amicus briefs were submitted in total.

liberties. In a contrasting light, honoring and supporting the sacrifice of our nation's armed services has long been emphasized as an important aspect of civic duty (despite what an individual may feel about the actions our military is taking). A significant measure of this occurrence is the societal antagonism that generally rises out of lies of military service record and achievement. Unfortunately, Mr. Alvarez's falsifications before the Three River Valley Water Board were by no means the first time a political figure has lied about military service while holding public office. Most notably, three other examples of this ostracized action are found in the misgivings of former Representative Douglas Stringfellow (R-Utah), former Representative Wes Cooley (R-Oregon), and current Senator Richard Blumenthal (D-Connecticut, Attorney General at the time of the controversy). In the case of Rep. Stringfellow, a meteoric rise to political significance in the early fifties rested largely on his astonishing accounts of WWII bravery.<sup>49</sup> He claimed to have led a team of twenty-nine other men from the Office of Strategic Services (a war-time precursor to the Central Intelligence Agency) through hostile territory in order to rescue famed German nuclear-chemist Otto Hahn, all in prevention of Germany's attempts to develop an atomic bomb.<sup>50</sup> On this mission, it was claimed that the team was "captured and then in a concentration camp after parachuting into Germany" and that Rep. Stringfellow was "the sole survivor."<sup>51</sup> This remarkable narrative of leadership and courage

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<sup>49</sup> Gizzi, John. "Truth Is The Casualty." *Human Events* 52.23 (1996): 18. Academic Search Complete. Web.

<sup>50</sup> Gizzi (1996)

<sup>51</sup> Office of the Clerk, U.S. House of Representatives. "The Controversial Career of Representative Douglas Stringfellow of Utah." Office of the Clerk of the U.S. House of Representatives Art & History-Historical Highlights. United States House of Representatives. Web. 2 Dec. 2011. <<http://artandhistory.house.gov/highlights.aspx?action=view>>.

served as the foundation for a political platform in 1952, which overtook the Congressional seat of six-term incumbent Representative Walter Granger (D- Utah).<sup>52</sup>

During the re-election campaign for the 1954 election, however, it came to light that much of Rep. Stringfellow's decorated past had been a fabrication, including his capture and involvement with the OSS.<sup>53</sup> Rep. Stringfellow did indeed serve in the armed forces, but as a private, first class. Contrary to the repetitious lie that he had become a paraplegic during his heroic escape from torture, in actuality he was injured "by a mine explosion while he was on a routine mission in France."<sup>54</sup> He had even been awarded a Purple Heart for this event, but some accounts tell of a fabrication that he had earned a silver star. The cognitive dissonance between the forged account and the factual caused uproar upon its publication in a 1954 issue of *The Army Times*.<sup>55</sup> He immediately resigned following a statewide speech of apologia on Utah television, October 16<sup>th</sup>, 1954.<sup>56</sup>

Similar in many ways to the account of Rep. Douglas Stringfellow, Representative Wes Cooley (R- Oregon) left a paper trail of military misrepresentations that even culminated in a criminal indictment. In a pamphlet that was dispersed for a 1994 Oregon Congressional seat primary election, future Rep. Cooley included that he had been in the "Army Special Forces in Korea."<sup>57</sup> Cooley ended up winning the seat of Oregon's 2<sup>nd</sup> District, but it wasn't before long

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<sup>52</sup> Office of the Clerk, U.S. House of Representatives. "The Controversial Career of Representative Douglas Stringfellow of Utah."

<sup>53</sup> Gizzi (1996)

<sup>54</sup> Gizzi (1996)

<sup>55</sup> Gizzi (1996)

<sup>56</sup> Office of the Clerk, U.S. House of Representatives. "The Controversial Career of Representative Douglas Stringfellow of Utah."

<sup>57</sup> Kershner, Isabel, and Mark Landler. "Congressman Indicted on Charge of Lying About Service in Korea." *Nytimes.com*. The New York Times. Web. 2 Dec. 2011.

<<http://www.nytimes.com/1996/12/12/us/congressman-indicted-on-charge-of-lying-about-service-in-korea.html>>.

until questions began to arise about his past.<sup>58</sup> As it turned out, the Vietnam War had ended by the time that Rep. Cooley's basic training had commenced.<sup>59</sup> He was repeatedly asked by reporters to either provide further detail or recall a military companion's name from his service. After repeatedly dodging the question, the only name that he produced was that of a commanding officer, "Sgt. Poppy."<sup>60</sup> Sgt. Major Clifford Poppy, a retired veteran who had in fact served in Korea, testified in a later hearing "he never served overseas with Mr. Cooley."<sup>61</sup> Following repeated disastrous public appearances where Rep. Cooley failed to calm the angered reporters, "party leaders [were] increasingly calling on him to step aside for a new nominee."<sup>62</sup> Following this Congressional flight, Mr. Cooley faced Oregon state charges that made it a felony to misrepresent information on "pamphlets [that] are published by the state and mailed to registered voters."<sup>63</sup> He was indicted by a state grand jury in December of 1996.

The third instance of political usage of military fabrications, and also the most recent, is found in the speeches given by current Senator Richard Blumenthal (D - Connecticut). At the time, he was serving as Attorney General of Connecticut, and would often give speeches at ceremonies honoring veterans and senior citizens.<sup>64</sup> At such events, Atty. Gen. Blumenthal would include quick remarks such as "We have learned something important since the days that I

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<sup>58</sup> "Sometimes the Joke's On the Voters." U.S. News & World Report 120.19 (1996): 13. Academic Search Complete. Web.

<sup>59</sup> "Sometimes the Joke's On the Voters." U.S. News & World Report 120.19 (1996): 13.

<sup>60</sup> "Sometimes the Joke's On the Voters." U.S. News & World Report 120.19 (1996): 13.

<sup>61</sup> Kershner, Isabel, and Mark Landler. "Congressman Indicted on Charge of Lying About Service in Korea."

<sup>62</sup> Gizzi (1996)

<sup>63</sup> Kershner, Isabel, and Mark Landler. "Congressman Indicted on Charge of Lying About Service in Korea."

<sup>64</sup> Hernandez, Raymond. "Candidate's Words on Vietnam Service Differ From History."

Www.nytimes.com. The New York Times, 17 May 2010. Web.

<<http://www.nytimes.com/2010/05/18/nyregion/18blumenthal.html?pagewanted=all>>.



served in Vietnam.”<sup>65</sup> As reported in an article by the New York Times, however, “Mr. Blumenthal, a Democrat now running for the United States Senate, never served in Vietnam. He obtained at least five military deferments from 1965 to 1970 and took repeated steps that enabled him to avoid going to war...”<sup>66</sup> The main trouble in current Senator Blumenthal’s case is the frequency with which such claims were made. Even after such discrepancies have been mentioned to his office, the suggestion of his service in Vietnam has been featured so regularly that magazines and periodicals have even included it as “an accepted part of his public biography.”<sup>67</sup> In response to such publications, the office of the Senator has generally responded by stating “he did not provide the information to reporters, was unsure how it got into circulation and was ‘astonished’ when he saw it in print.”<sup>68</sup> Atty. Gen. Blumenthal was sworn into office as Senator in January of 2011, despite the repeated reports of his remarks insinuating non-existent foreign tours of duty.

All three of these instances reflect the motive that some public officials have encountered in forging pasts related to military service. Only one of the accounts included the suggestion of a falsified medal of valor, that being Representative Stringfellow’s Silver Star. What united these mendacities was the judgment that espousing a higher level of military service would enhance their credibility, thereby raising their chances for political election. Even in the case of Attorney General Blumenthal, the subtle language choices made which skewed the extent and conditions under which he served reveal value judgments. While these are certainly value judgments based on the character of candidates who resort to lying to the public, these lies can also be viewed as reactions to societal value judgments. Douglas Stringfellow was elected to Congress largely on

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<sup>65</sup> Hernandez, nytimes.com

<sup>66</sup> Hernandez, nytimes.com.

<sup>67</sup> Hernandez, nytimes.com.

<sup>68</sup> Hernandez, nytimes.com.

his merit as a true war hero, while the other two sought to cover up a past that included less-than-active military service.

As history tends to repeat itself, one must begin to consider the cultural factors that inform a candidate that such an attempt at deceit would pay worthy dividends. It is possible that such a calculation is not so politically systematic. At the very least, the lineage of military claims falsely made displays an immoral utility of the extreme reverence and respect that our society pays to honored veterans. Service to one's country is undoubtedly a prevalent element in selecting a candidate on sacrifice and devotion. The principal issue with false claims of military bravery, however, is the effectiveness they have long exhibited in establishing high levels of credibility among the electorate. It is situations such as these, along with many others, that led to the Congressional initiative to criminalize any lies about the highest levels of military honor. The standing gained by falsely representing oneself as a recipient of high military recognition has historically proven to be substantial, especially in the political arena. In viewing multiple instances of the harms caused by these lies (and not even explicit medals of high military valor, but service alone), the focus must shift to understanding the historical rulings of the justice system as to why such a law might be unconstitutional. Especially In order to understand the analytical weighing of two esteemed cultural values such as freedom of speech and military service, it is first essential to review the historical development of First Amendment protections and legal decisions. Then, after understanding the methods used in legal decisions and the origin of such methods, one may begin to discern the way in which the language and strategies within those judicial opinions reveal specific value judgments. These value judgments are especially informative as the law ideally serves as a clear reflection of our society's views and standards on a controversial issue.

## **Chapter 3:**

### **A Review of Literature Regarding American Legal Communication Theories**

The development of communication theories related to law, particularly those attempting to illustrate the rhetorical techniques employed by judges, has become an increasingly emphasized area of study. A judge bears the burden of reflecting the adjudication process as well as presenting the legal outcome in a manner that espouses fairness, integrity, and authority. The choices of structure and language within a legal decision can at times be as impactful as the legal outcome itself and often contribute significantly to future court rulings. Justices must be able to convey their verdicts to the vastly diverse particular audiences that receive it. The members of these audiences often have differing proficiencies of legal knowledge; yet all maintain a significant interest in the outcome and its justification. The rhetorical structure of a court decision therefore holds crucial importance. Similarly, a judge authoring a decision will have many different options of rhetorical devices and judicial interpretation to select from, all with vastly different implications on an area of law. Therefore, these methods of interpretation also act as communicative constraints in the forms of traditional roles and responsibilities for a judge to fulfill. This chapter will outline the major literature focused on the intersection between communication theory and law. A special focus will be paid toward the articulation and expression of judicial decisions. The study of the rhetorical roles and burdens that judges face provides an essential area of research for understanding the discourse of a court's verdict. The legal application of these theories allows one to observe how the language and structure of a decision, even that which appears seemingly inconsequential, may have an impact on the delicate balance of the judicial system and its articulation of verdicts.

Federal courts of appeals<sup>69</sup> serve as a societal forum to assess which applications of rights, values, and laws best serve a pragmatic and resolute system of justice. A culture's traditionally conceived notions of jurisprudence and social norms may very well challenge an instance of perceived lawlessness. Through the act of upholding certain laws over others, a judicial determination establishes a general path for future laws and their perceived legitimacy. The opposite sides of a legal case attempt to portray which potential path is most consistent with both the previous route taken, as well as which provides the most apt cardinal direction for the future. The essential obligations of a judge, therefore, are to determine an outcome upholding the laws and the constitutional (or otherwise established) rights of a government, provide a fair deliberation for the individual case at hand, and produce a precedent, which will establish a jurisprudence that ensures justice for the future. Another way to conceptualize the fundamental responsibility of judges presiding over a case is that they "determine which specific issues to resolve in a case and determine which issues or problems are the salient ones."<sup>70</sup> Judges are additionally tasked with articulating a coherent framework of consistent moral and legal values, which emphasizes stability to reassure the population that their rights will be upheld against capricious applications of the law. These standards and determinations play a strong role in "modern judicial decision making [as] the argumentative process whereby the judiciary is persuaded to apply standardized but frequently conflicting legal principles to particular circumstances."<sup>71</sup>

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<sup>69</sup> As well as their counterparts in other legal systems

<sup>70</sup> Silver, Derigan. "Power, National Security and Transparency: Judicial Decision Making and Social Architecture in the Federal Courts." *Communication Law & Policy* 15.2 (Spring 2010): Pg. 141.

<sup>71</sup> Gross, Patricia. "Communications Research and the Rule of Law: An Opportunity for Access to Judicial Decision Making." *Communication Quarterly* 22.4 (1974): Pg. 47.

The history of unity between law and rhetoric stretches as far back as either independent discipline. While the full fruition of their pairing has not been continuously explored throughout scholarly history, a more recent push has been made to mend the broken ties between the two areas of study. In a journal article published in 1970, an initial attempt was made. Malthon Anapol wrote: "...one might expect to find an extensive literature revolving around the relationship between rhetoric and law. The fact is that no such literature exists in English... there does not appear to be a single twentieth-century treatment in English of the relationship between rhetoric and law."<sup>72</sup> Anapol's remark references the relatively abandoned bridge that has connected the fields of law and rhetoric throughout history. She cites varying cultural conception regarding symmetries of power in legal resolution as a major factor for this divide. Anapol continues to condition this preliminary generalization through a summary of historical instances, all of which portray this essential connection of complementary disciplines. Beginning with the Greco-Roman emphasis on rhetoric within law, primarily initiated from Aristotle's *The Rhetoric* and his discussion of *equity* and "forensic and courtroom speeches," Anapol highlights the intricate bond between the democratic necessity to represent oneself in matters of legal dispute, and the need to teach citizens how to be communicative advocates. In quoting the prominent German legal scholar Max Hamburger, Anapol mentions that "rhetoric played an essential part in the educational system of the Greco-Roman world; it was the vehicle of higher education... and constituted the medium in which the basic concepts of legal and political science were imparted to the young."<sup>73</sup> One would question, then, why more communication theories reflecting on law had not been developed by the time Anapol's article was published. She subsequently cites the increasing neglect of rhetoric as an inherent component within legal studies, and observes how

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<sup>72</sup> Anapol, Malthon. "Rhetoric and Law: An Overview." *Today's Speech* 18.4 (1970). 12.

<sup>73</sup> Anapol, 14., Taken from Max Hamburger.

“they tended to develop in isolation from each other.”<sup>74</sup> American legal figures, she notes, began to reconsider their significant interconnections. Chief Justice Arthur T. Vanderbilt, Columbia Law Professor Karl Llewellyn, and Judge Jerome Frank all stated as much, and expressed “considerable concern over the failure of law schools and lawyers to analyze such extra-legal considerations.”<sup>75</sup> Anapol concludes by expressing hope of a scholarly reuniting of communication theory and law. She specifically mentions great potential in how “this step has been taken however by the Belgian philosopher-rhetorician-lawyer Chaim Perelman in his writings... It is too soon to tell how great an impact Perelman will have on American rhetorical and jurisprudential theories.”<sup>76</sup> The article demonstrates the need for the traditional link that rhetoric and law once shared extensively, and admirably serves as a call to communications theorists and legal scholars alike to continue this work of studying and emphasizing intertwinement of disciplines.

One such individual who chose to accept this call was law professor James Boyd White,<sup>77</sup> who in 1985 authored an article entitled *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*. White advocated that law and rhetoric needed to be viewed as integral parts of one another, while also acknowledging “the tendency to think of rhetoric as failed science is especially powerful in the present age.”<sup>78</sup> White further lamented the “determined attempts... made to elevate, or to reduce virtually every discipline to the status of true science.”<sup>79</sup> In order to redefine law and rhetoric areas as interwoven, White proposed that an accommodating

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<sup>74</sup> Anapol, 16.

<sup>75</sup> Anapol, 17.

<sup>76</sup> Anapol, 17.

<sup>77</sup> Professor White serves as the L. Hart Wright Collegiate Professor of Law Emeritus the University of Michigan law school.

<sup>78</sup> James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. Chicago L. Rev. 688 (1985).

<sup>79</sup> White, 688.

“definition of the law might be the particular set of resources made available by a culture for speech and argument on those occasions... [t]hese resources include rules, statutes, and judicial opinions, of course, but much more as well: maxims, general understandings, conventional wisdom, and all the other resources, technical and nontechnical, that a lawyer might use in defining his or her position and urging another to accept it.”<sup>80</sup> White therefore concluded that the logical basis for elucidating the “resources for thought and argument, is an application of Aristotle’s traditional definition of rhetoric, for the law in this sense is one set of those ‘means of persuasion’ that he said it is the art of rhetoric to discover.”<sup>81</sup> This furthered Anapol’s claim that the very understanding of law as a cultural mechanism is grounded in rhetoric’s ability to communicate and find “means to persuade” or “resources” for argumentation. The concept of language serves as the basis for White’s further theories on how rhetoric serves an invaluable role in legal discourse. Much of his discussion attempts to stray from the notion of defining law as a science, and he therefore states “I want to start by thinking of law not as an objective reality... but from the point of view of those who actually engage in its processes as something we do and something we teach. This is a way of looking at law as an activity, and in particular as a rhetorical activity.”<sup>82</sup>

White suggests that further conceptualization of legal rhetoric may be represented in three major components. First, those producing legal discourse “like any rhetorician, must always start by speaking the language of his or her audience, whatever it... regards as valid and intelligible.”<sup>83</sup> The audience, as will be discussed further, is a vastly important consideration for lawyers and judges alike. The usage of both connotative-specific legal terms and the more

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<sup>80</sup> White, 689.

<sup>81</sup> White, 689.

<sup>82</sup> White, 688.

<sup>83</sup> White, 689.

expressive phrasings within justifications provide an interesting discrepancy that must be balanced. Especially in the context of precedent, outdated or antique legal adages may often be used as a display of credible aptitude. White acknowledges this special role of “ the technical language of the law- the rules, cases, statutes, maxims, and so forth, that constitute the domain of your professional... Law is in this sense always culture-specific. It always starts with an external, empirically discoverable set of cultural resources into which it is an intervention.” The meaning of this last utterance portrays the major challenge posed to lawyers and judges whose rhetoric is received by an expansive audience. The culture-specific nature of law is grounded in an articulation of the social norms and values that citizens expect to be upheld. The intervention represents the necessity of “technical legal language” in associating a case’s characteristics within the course of relevant jurisprudence. This dual role of “intervener” is therefore a complex one; it must simultaneously demonstrate a mastery of the advanced “domains” of legal terminology while also accounting for less mechanical cultural concerns. The act of “intervention” also represents the judicial system’s interception and resolution of perplexing conflicts within society.<sup>84</sup> The language of law is thus a mark, both of acquired knowledge and of respect for the role of the judiciary.

The navigation of obstacles in uniting the “cultural resources” and “technical language of the law” denotes the second main facet of rhetorical significance in legal discourse. As White

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<sup>84</sup> It is significant to note an alternative view; that the authority wielded by the court has, at times in American history, been construed as largely symbolic and somewhat depleted of any ability enforce a verdict. This observation was most famously made in Federalist 78, when Alexander Hamilton proclaimed: “The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the weath of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE NOR WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.” Hamilton, Alexander, James Madison, John Jay, and Lawrence Goldman. *The Federalist Papers*. Oxford: Oxford UP, 2008. Print. Federalist 78, pg. 380.



writes, “For in speaking the language of the law, the lawyer must always be ready to try and change it... One’s performance is in this sense always argumentative, not only about the result one seeks to obtain but also about the version of the legal discourse that one uses- that one creates- in one’s speech and writing.”<sup>85</sup> This ability to adapt and alter serves as a primary rhetorical maneuver necessary for modifying understandings of law. The act of justification requires a tailoring of an argument’s lexicon to the ultimate portrayal of cultural values. Slight variations from solidified legal conceptions require some provision of additional definitions. In order to effectively create new understandings for age-old views of precedents, for instance, explanatory reconsiderations of language and meaning may be necessary. To chart a new course of law one must redefine the previous path a specific jurisprudential area has followed, as well as why the proposed direction provides a comparatively beneficial continuance. White clearly makes this differentiation by stating “the lawyer is always saying not only, ‘Here is how this case should be decided,’ but also, ‘Here- in this language- is the way this case and similar cases should be talked about. The language I am speaking is the proper language of justice in our culture.’ The legal speaker acts upon the language that he or she uses, to modify or rearrange it...”<sup>86</sup> It is therefore not just the articulation of legal language, but the creation of frameworks through which the language is understood which must be implemented. Drawing on the cultural “resources” of meaning, any new legal direction must be expressed through the personification of societal norms and values, followed by an explanation of why this better serves the accepted notions of law.

The third and final aspect of White’s theory of legal rhetoric is labeled “its ethical or communal character, or its socially constitutive nature... One creates, or proposes to create, a

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<sup>85</sup> White, 690.

<sup>86</sup> White, 690.

community of people, talking to and about each other.”<sup>87</sup> More so than simply the “ethical identity” of the speaker, which White also includes, “[t]he lawyer’s speech is thus always implicitly argumentative not only about the result- how should the case be decided- and about the language- in what terms should it be defined and talked about? – but also about the rhetorical community of which one is at that moment a part. The lawyer is always establishing... what kind of community should we, who are talking the language of the law, establish with each other...”<sup>88</sup> The definition of this “community” could largely be considered a reference to the relevant “audience” of a legal discourse. The topic of “community,” however, holds a much more general connotation of not solely the individuals directly receiving the decision, but also those who may be impacted by the outcomes in later involvements. Especially with regard to any precedent’s ability to impact future proceedings, this has a far-reaching implication. The suggestion of collective dialogue also seeks to directly harvest the “cultural resources” by emphasizing an enhancement of *interaction*. By attempting to answer how the community can better interact within the spheres of law and communication, the speaker appeals to a broad sense of insightful credibility. Rather than appearing to change the laws, the advocacy takes on the appearance of attempting to improve the standing legal system. This rhetorical device may emerge in much more subtle and nuanced instances of shifts in communal interpretations. The foundational proposal for any type of definitional modification, however, will follow this pattern of alteration.

In viewing how communication theory can be specifically applied to relevant legal topics, Robert F. Forston published numerous papers on the integration of the two fields. A strong advocate for the promotion of communication studies as a pre-requisite to future legal studies, Forston presented a series of papers to communication association conferences, all

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<sup>87</sup> White, 690.

<sup>88</sup> White, 690.

seeking to initiate a program of study which would train aspiring lawyers in the foundational theories of communication. In his study of the uses of communication theory in legal settings,<sup>89</sup> Forston suggested that rather than limited readings of the First Amendment attempting to estimate a measure of the constitutionality of a discourse, “communicative game theory is proposed to enhance insight for distinguishing between lawful and lawless communication.”<sup>90</sup> By positioning the influence that “rules systems,” “tactics,” and “customs” all play on a judge’s decision, an understanding of how First Amendment cases are considered would become much clearer: “In a rhetorical sense, the tactical component of a game corresponds to the performative character of communication. Dissenters may choose to test a law’s constitutionality or they may wish to work within the rules to create newsworthy activities in order to present their ideas to a larger audience in a dramatic manner.”<sup>91</sup> Developed from Lawrence Rosenfield’s “A Game Model of Human Communication,”<sup>92</sup> a “rule” is defined as a limit or “regulation on behavior,”<sup>93</sup> “tactics” are deemed “the behavior patterns which conform to the rules and at the same time... exists room for many possible behaviors,”<sup>94</sup> while “customs” allude to “the status of conventions, norms or traditions...[and] derive their justification from tradition, whereas rules are determined by authority and tactics are teleological and are shaped by experience.”<sup>95</sup> The use of this model for judicial decisions, Forston suggests, is that it offers a “unique, flexible

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<sup>89</sup> Forston published a number of these theories in a 1972 paper entitled *How Communication Theory Could be Used to Improve Judicial Decisions on Freedom of Expression*.

<sup>90</sup> Forston, Robert F. "How Communication Theory Could Be Used to Improve Judicial Decisions on Freedom of Expression." Proc. of The Western Speech Communication Association Convention, Honolulu, Hawaii. November, 1972., 4.

<sup>91</sup> Forston, 6.

<sup>92</sup> Published in a book entitled *What Rhetoric (Communication Theory) Is Appropriate for Contemporary Speech Communication?* University of Minnesota Press, 1968

<sup>93</sup> “Rules possess several qualities: 1) Rules are often arbitrary rather than natural... they usually remain static... rules are seldom exhaustive or precise.” Forston, 5.

<sup>94</sup> Forston, 5.

<sup>95</sup> Forston, 6.

perspective from which to analyze a large variety of human communication situations.”<sup>96</sup> From this framework, “a communicative game theory” could “enhance insight for distinguishing between lawful and lawless communication.”<sup>97</sup> Forston’s promotion of game theory for judicial decisions exemplifies an early push to attribute rhetorical theory to jurisprudence. The generalities with which the author conducts his analysis are both useful in their vast applicability, as well as indicative of the pioneering quality of the article.

More direct theories of instilling communication theory in the scholarship of law were eventually constructed and sought to pay closer attention to the strategic management of rhetorical obstacles.<sup>98</sup> The specific structure of language was eventually understood as orchestrated around more standardized components of the judiciary’s obligation. Such theories attempted to convey the principal burdens that a justice had to meet in each circumstance, as well as where personal strategy and discretion became a strong component. The “Pragma-Dialectical” theory of a judge’s burden as generated by Eveline Feteris<sup>99</sup> consisted of two major, deceptively comprehensive factors. According to the first element of the burden, “A judge must defend his standpoint by showing that the argumentation schemes [s/]he uses are acceptable from the perspective of the common starting points in a legal context.”<sup>100</sup> The “common starting points” refer to the legal and evidentiary sources, which serve as the facts of a case and the inquiries they inform. In order for argumentation schemes to appease this requirement, they must form a foundation of values and legal understandings that conclusively answer the questions posed by a

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<sup>96</sup> Forston, 7.

<sup>97</sup> Forston, 4.

<sup>98</sup> This was in contrast to attempts such as Forston’s of displaying purely analogous conceptions of rhetoric and law.

<sup>99</sup> Dr. Feteris is a Communications and Rhetoric professor at the University of Amsterdam

<sup>100</sup> Feteris, Eveline. "Strategic Maneuvering with the Intention of the Legislator in the Justification of Judicial Decisions." *Argumentation* 22.3 (August, 2008): Pg. 338.

court case. Additionally, proper inclusions of “starting points” are necessary to establish a concrete link between the underlying exigency of a case and the potential outcome a judge advocates for. At the point which paths of judicial interpretation diverge toward differing resolutions, strong justifications from each judge for their variations prove vital. Judges must tailor their decision to account for the areas of law that are most prominently refuted, as it remains their primary responsibility to resolve the general pending legal question. As will be discussed, the use (and potential misuse) of precedent serves as one of the most important strategic decisions. As Feteris explains, “On the basis of Montesquieu’s doctrine of division of powers it is the task of the legislator to formulate the rules of law and it is the task of the judge to apply those rules as the ‘mouthpiece’ of the law. Although according to modern views the judge has more latitude in applying the law than in the traditional view, there are limits to the freedoms of the judge to apply and interpret the law.”<sup>101</sup> This highlights an interesting shift in the ability for “strategic maneuvering” to occur, which is proposed through “showing that the [judicial] solution best meets the requirements of reasonableness and fairness... by explaining that the legal rule was aimed at securing certain goals and values and that for this reason it was the intention of the legislator to evade situations that would hinder the realization of these goals and values.”<sup>102</sup> This suggests that the most efficient way to circumvent an undesirable jurisprudence of precedent is to promote goals and values that a law’s origin or traditional interpretations fail to account for. This further establishes the reoccurring theme of a power of “values” within a legal decision, similar in many ways to concepts of “cultural resources.”

The second “Pragma-Dialectical” burden of the judge is that he or she “must defend [their] standpoint by showing that the argumentation schemes [they use] are applied correctly by

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<sup>101</sup> Feteris, 337.

<sup>102</sup> Feteris, 337.

putting forward arguments that can be considered acceptable from the perspective of the common starting points in a legal context."<sup>103</sup> Proper application provides an additional measure the judge must meet, and shows that not only is the *method* or framework relevant to the legal common starting point, but so is the content that composes the argumentation itself. Various approaches of judicial justification, such as properly applied precedent, pertinent socio-political theories and data, or anticipation of ensuing jurisprudence must all be presented as conclusions based exclusively from logical consequence following the original starting points. No matter how complex a method of judicial interpretation may seem, or how advanced its formulation, it must still maintain a direct correlation with the legal "common starting points." It will otherwise appear as an instance of extreme judicial activism. The Pragma-Dialectic method forms an essential view of a judge's fundamental burden of communication when deciding a legal case. The subsequent methods and literature of legal communications theory all stem from the understanding of this foundational consideration for a judge.

Feteris has also more closely researched the "strategic maneuvering" employed by judges in their justifications of legal decisions. This work outlines the active process used when "Judges often try to present their decision as a self-evident result of the application of the law to the facts of the case"<sup>104</sup>. In many cases, however, it is not solely the "application of the law" that is of interest to judges. Especially if prior precedent does not provide an avenue to pursue the desired course of legal action, the legislation on which a law originates will become a source of interest. This allows a court greater reach towards a desired legal end that may stray from a strict reading of a law: "this requirement poses a problem in cases in which the meaning of a particular legal rule is clear for the concrete case but the judge nevertheless is of the opinion that in the

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<sup>103</sup> Feteris, 338.

<sup>104</sup> Feteris, 335.

circumstances of the concrete case an exception should be made to evade an unacceptable result.”<sup>105</sup> As it applies more specifically to the case of *United States v. Alvarez*, a similar desire is expressed when the law in itself does not achieve the ends with a proper means (the clearest indication of this being a failure to adhere to strict scrutiny). This scenario additionally applies to the judicial strategy of arguing “that a rational legislator cannot have wanted that a rule would lead to an unacceptable or absurd result.”<sup>106</sup> Using the fundamental claim by Feteris that every legal rule is “aimed at securing certain goals and values”<sup>107</sup>, a hierarchy of values is therefore developed and espoused by the court. It becomes the job of the court to decide which rights should be upheld in the best interest of the people, and of the functioning of the legal system. This creates an interesting governmental dynamic, whereby “the judge has more latitude in applying law than in the traditional view... [yet] there are limits to the freedom of the judge to apply and interpret the law.”<sup>108</sup> These limits are apparent in that a “judge must apply the law in accordance with the literal text of the law”<sup>109</sup>, along with “a significant portion of almost every... opinion is about how the decisions fit within, and flow from, the earlier cases.”<sup>110</sup>

Constitutional law scholar Erwin Chemerinsky<sup>111</sup> worked to cultivate a slightly more advanced model portraying the rhetorical hurdles of issuing a legal opinion. Chemerinsky

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<sup>105</sup> Feteris, Eveline. "Strategic Maneuvering with the Intention of the Legislator in the Justification of Judicial Decisions." *Argumentation* 22.3 (August, 2008): Pg. 337.

<sup>106</sup> Feteris, Eveline. "Strategic Maneuvering with the Intention of the Legislator in the Justification of Judicial Decisions." *Argumentation* 22.3 (August, 2008): Pg. 337.

<sup>107</sup> Feteris, Eveline. "Strategic Maneuvering with the Intention of the Legislator in the Justification of Judicial Decisions." *Argumentation* 22.3 (August, 2008): Pg. 337.

<sup>108</sup> Feteris, Eveline. "Strategic Maneuvering with the Intention of the Legislator in the Justification of Judicial Decisions." *Argumentation* 22.3 (August, 2008): Pg. 337.

<sup>109</sup> Feteris, Eveline. "Strategic Maneuvering with the Intention of the Legislator in the Justification of Judicial Decisions." *Argumentation* 22.3 (August, 2008): Pg. 337.

<sup>110</sup> Chemerinsky, Erwin. "The Rhetoric of Constitutional Law." *Michigan Law Review* 100.8 (Aug., 2002): Pg. 2019.

<sup>111</sup> Chereminsky currently serves as the Dean of the University of California Irvine Law School.

established four modern protocols that are generally followed by judges.<sup>112</sup> First, “Opinions are written to make results seem determinate and value-free, rather than indeterminate and value-based.”<sup>113</sup> This echoes the fundamental undertones of the Pragma-Dialectical method by necessitating a direct connection with relevant legal standards for the specific issue. This constraint portrays the need for a judge to *appear* as if the decision itself is formulated by pre-determined measures of legality and constitutionality. This conceptualization of judicial obligation also mirrors the forthcoming legal theory of “strategic maneuvering” in judicial decisions, which emphasizes: “Judges often try to present their decision as a self-evident result of the application of the law to the facts of the case.”<sup>114</sup> This general strategy crosses the hurdles of consistency and legal order, enhancing the opinion-issuer’s ethos by appearing solely concerned with logical, legal consequence for the development of the decision.

The second constraint determined by Chemerinsky is that “opinions are written to appear consistent with precedent, even when they are not...”<sup>115</sup> The role of precedent in judicial opinions is one of the most important topics to consider, as it serves as the basis for displaying compatibility with traditional and authoritative conceptions of laws and societal values. It gives the appearance that the decision is merely following in an honored lineage of judicial interpretations tracing back to the establishment of its legislative and Constitutional origins. Chemerinsky continues to advance the essential nature of precedent, as he states, “A significant portion of almost every... opinion is about how the decisions fit within, and flow from, the

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<sup>112</sup> This particular set of theories was first published in a 2002 article entitled *The Rhetoric of Constitutional Law*.

<sup>113</sup> Chemerinsky, Erwin. "The Rhetoric of Constitutional Law." *Michigan Law Review* 100.8 (Aug., 2002): Pg. 2010

<sup>114</sup> Feteris, Eveline. "Strategic Maneuvering with the Intention of the Legislator in the Justification of Judicial Decisions." *Argumentation* 22.3 (August, 2008): Pg. 335.

<sup>115</sup> Chemerinsky, Erwin. "The Rhetoric of Constitutional Law." *Michigan Law Review* 100.8 (Aug., 2002): Pg. 2010



earlier cases.”<sup>116</sup> It proposes a cohesive element within the desired verdict of judicial deliberation, and encourages the judge that such a decision would be furthering the previously established understandings of law. There are, as will be discussed later, an almost incalculable number of precedents from various jurisdictions. Most generally, a judge considers the specific applications of precedents as presented by the attorneys, and are confined to these conceptions. Alternatively, there is generally a reigning precedent for each jurisdiction, or that of a higher jurisdiction may be applied.

The third constraint included in this model is that “opinions are written to make decisions seem restrained, rather than activist; dissents criticize decisions as activist and not restrained...”<sup>117</sup> This constraint is highly reminiscent of the second “Pragma-Dialectical” burden, which is to show that the method by which a court arrives at a decision is well within a systematic approach of logical consequence. In this instance, “restraint” is defined by how closely the newly issued decision coincides with the entire previous body of legal precedent on an issue. The concept of “judicial activism” is the purposeful insertion of a judge’s own values in the face of a long-standing precedent. Some communications theorists, however, have largely questioned the phenomenon of judicial activism. Such views inevitably point to the fact that “in almost all cases there is some precedent to support either side of a case and judges are able to distinguish precedent without having to actually overrule a precedent, by asserting that the facts

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<sup>116</sup> Chemerinsky, Erwin. "The Rhetoric of Constitutional Law." *Michigan Law Review* 100.8 (Aug., 2002): Pg. 2019, The larger role of jurisprudence, dating back to English Common Law, is to formulate a cohesive system of understandable tenets of moral codes. This enshrined a particular motivation (though others are certainly present) to establish a sense of stability in the codes of behavior, when many could not access the specific legal writings.

<sup>117</sup> Chemerinsky, Erwin. "The Rhetoric of Constitutional Law." *Michigan Law Review* 100.8 (Aug., 2002): Pg. 2010

of the present case differ from the facts of the precedent.”<sup>118</sup> Chemerinsky supports this belief, stating, “the outcome of the vast majority of Supreme Court cases is indeterminate in the sense that reasonable Justices and people can differ as to the proper interpretation of the Constitution as it applies to a specific case. Phrased differently, rarely in constitutional cases can any result be justified as the one and only correct choice.”<sup>119</sup> It is for this reason that a large component of every decision is spent addressing all the relevant precedent which depicts the eventual decision as consistent and “restrained.”

The last constraint provided by Chemerinsky, although more of a grievance and observation is that “the language used by the Court has changed over time; my impression- and I present it as just that, a subjective sense- is that language is less eloquent and more sarcastic than before...”<sup>120</sup> Though the sarcastic nature of legal decisions may not be a documented progression, the observation of “less eloquent language” speaks to the desire of the people for a straight forward and easily understood decision. This directly alludes to White’s discussion of balancing “technical legal language” with the more basic “cultural resources” which can preponderate the perception of a legal case. The advantage of such a transition is found mainly in the ability of vast audiences to hear and comprehend the verdict of a decision, establishing further transparency and accessibility to the legal system. The greater the transparency of laws and their related legal decisions, the greater the civic understanding of the impacts these processes have on the institutions of law. Although based principally in legal theory,

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<sup>118</sup> Silver, Derigan. "Power, National Security and Transparency: Judicial Decision Making and Social Architecture in the Federal Courts." *Communication Law & Policy* 15.2 (Spring 2010): Pg. 138-139.

<sup>119</sup> Chemerinsky, Erwin. "The Rhetoric of Constitutional Law." *Michigan Law Review* 100.8 (Aug., 2002): Pg. 2010

<sup>120</sup> Chemerinsky, Erwin. "The Rhetoric of Constitutional Law." *Michigan Law Review* 100.8 (Aug., 2002): Pg. 2010

Chemerinsky's four fundamental aspects of legal opinions provide a crucial glimpse at the place of rhetorical choices in legal decisions. Chemerinsky's particular area of interest, that of Constitutional law, focuses on the determination of a societal values hierarchy of that promotes the tenets of morality most fervently protected. As Chemerinsky specifically states, "Often the Court deals with issues where there are no textual provisions to interpret... even when there are no textual provisions, interpreting them inevitably requires value choices as to their meaning... perhaps most commonly, constitutional cases involve balancing, and this inherently requires a value choice."<sup>121</sup> Inevitably, variability of personal views on judicial interpretation will play a role on how a case will be decided and inform the verdict. In cases specifically regarding the limitation or facilitation of Constitutional rights, however, showing prior legal consideration of a similar value hierarchy is essential in rhetorically legitimating a particular interpretation of a contested legal issue.

A fundamental factor that appears in nearly every basic communication theory on law is the distinct and diverse audience of most legal rhetoric. The question of audience serves as an essential concern in any rhetorical situation. The rhetoric of legal opinions, however, places a particularly intricate importance on the role of audience. Chemerinsky additionally recognized the particular ways in which, within the explicit context of legal discourse, "rhetoric exists to persuade an audience." As basic as the statement may appear, the complexity of the audience to any Constitutional court case deserves specific attention. Chemerinsky specifically includes seven groups of actors which compose an audience of legal decisions: "a) lower courts; b) government officials who must follow and implement the rulings; c) lawyers who will litigate future cases; d) the parties to that case; e) the public; f) professional critics (such as journalists

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<sup>121</sup> Chemerinsky, Erwin. "The Rhetoric of Constitutional Law." *Michigan Law Review* 100.8 (Aug., 2002): Pg. 2011

who cover the Court and especially law professors); and g) future Justices on the Supreme Court.”<sup>122</sup> This list identifies many key factors that accumulate into an advanced conception of the meticulous selection of language required in a legal decision. Lower courts, lawyers currently litigating, and the parties to a particular case all maintain an avid interest in the opinion of a case. Lower courts hold a strong motivation for observing how a superior jurisdiction rules based on the same evidence; lawyers working on a case stand to gain both a monetary benefit and a greater understanding for the current issue’s jurisprudence. The parties to a case are undoubtedly those most immediately affected by a verdict. The judge must therefore produce an opinion which explains why one side will be awarded a beneficial decision over another, all in a manner which resonates with the full spectrum of aforementioned audience members.

Possibly the most interesting component of a decision’s audience, as well as the one most relevant to *US v. Alvarez*, is that of government officials. A decision based directly on recent legislation instructs government officials “what is permissible and what is not allowed... the legislature... needs to be guided as to what future laws in the area are permissible and will not be struck down.”<sup>123</sup> The contentious judicial review process<sup>124</sup> provides an additional check on initiatives Congress has already approved. Chemerinsky views this role of the Supreme Court (in particular) as an important duty and responsibility *to* government officials, and allows for

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<sup>122</sup> Chemerinsky, Erwin. "The Rhetoric of Constitutional Law." *Michigan Law Review* 100.8 (Aug., 2002): Pg. 2022 One audience segment which Chemerinsky omits, although they may certainly be theoretically included in the “parties to that case,” are the “friends of the court” or individuals who file *amicus briefs*.

<sup>123</sup> Chemerinsky, Erwin. "The Rhetoric of Constitutional Law." *Michigan Law Review* 100.8 (Aug., 2002): Pg. 2025

<sup>124</sup> Judicial review was established early in the Supreme Court’s history in the landmark case of *Marbury v. Madison* (1803), “which firmly entrenched judicial review as a fundamental component of our constitutional system of government.” Eastman, John C. "Judicial Review of Unenumerated Rights: Does Marbury's Holding Apply in a Post Warren Court World?" *Harvard Journal of Law & Public Policy* 28.3 (Summer 2005), Pg. 713.

decisions to have an open and robust discussion regarding the aspects of a law that has infringed on fundamental constitutional rights. Additionally, “Government officials at all levels must understand the Supreme Court’s decisions and follow them in future actions.”<sup>125</sup> The tension may be especially strong if a lower circuit court produces a decision that is not favorable to Congress, whereby pressure may be put on the Supreme Court to issue a Writ of Certiorari to hear the case at the highest level of American legal jurisdiction.

The justice system is empowered by its ability to fairly bring about resolution so as to maintain order in society. It is the process of using the lens of precedent that allows courts to view the disputes at hand with an authoritative assurance. The importance of precedent is additionally demonstrated by “how the Court writes its opinions when it does overrule earlier decisions. The Court describes earlier rulings as aberrations and its current interpretation as the long-standing approach... the Court writes the opinions to avoid acknowledging that there is a value choice being made...”<sup>126</sup> According to Chemerinsky, “all of this illustrates the key point concerning the powerful role of precedent in constitutional opinions. Even when they are overruled, the Court works hard to justify why its new approach is actually consistent with long-standing decisions.”<sup>127</sup> In some respects, this emphasis on precedent and consistency acts as a form of transparency; its affect, however, is anything but. Value choices are inherently made both in the general method of judicial decision making, as well as the precise selection of which precedents to cite as credible and informative. The inclusion of precedent therefore reflects a thought process of a majority or minority opinion. By trumpeting a sense of consistency and

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<sup>125</sup> Chemerinsky, Erwin. "The Rhetoric of Constitutional Law." *Michigan Law Review* 100.8 (Aug., 2002): Pg. 2025

<sup>126</sup> Chemerinsky, Erwin. "The Rhetoric of Constitutional Law." *Michigan Law Review* 100.8 (Aug., 2002): Pg. 2018.

<sup>127</sup> Chemerinsky, Erwin. "The Rhetoric of Constitutional Law." *Michigan Law Review* 100.8 (Aug., 2002): Pg. 2019.

restraint, a desirable, value-free aura embraces a case's outcome. This strategy of the court is precisely why the rhetorical analysis of judicial opinions comprises a promising field. The critical quest to reveal and investigate values promoted by a court of law allows for both qualitative and quantitative insights of the subsequent weighing of prominent values in legal discourse.

## Chapter 4:

### The Methodological Perspective of Cluster Analysis

The rhetorical criticism method of Cluster analysis was first developed by Kenneth Burke as a means of discovering important symbolic relationships within language. It was to be used as a tool to further define and understand the meaning behind specific terms and their prevalence within a rhetor's work. According to Burke, "by charting clusters, we get our cues as to the important ingredients subsumed in 'symbolic mergers.' We reveal, beneath an author's 'official front,' the level at which a lie is impossible."<sup>128</sup> In this way, a critic is better able to learn of an orator's organization of relevant concepts, which can often allude to a less obvious framework of a discourse's intentions. According to Sonja K. Foss, they "help the critic discover a rhetor's world view and thus identify motive. In this method, the meanings that key symbols have for the rhetor are discovered by charting the symbols that cluster around those key symbols in the rhetorical artifact."<sup>129</sup> The secondary justifying symbols therefore provide context for the primary symbol, which they inform by developing a significant relationship of association. Especially when discussing commonly addressed topics within an academic or professional field, disparities in how individuals describe, justify, or connect certain concepts may display how personal uses of the concepts are employed.

The importance of this connection is further demonstrated by Burke's notion of "terministic screens," which highlight how the specific language we use holds substantial power

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<sup>128</sup> Burke, Kenneth. "Attitudes toward History." New York: New Republic, 1937. 77.

<sup>129</sup> Foss, Sonja K. "Rhetorical Criticism: Exploration and Practice." Prospect Heights, IL: Waveland, 1989. 367.

over the concepts that we attempt to convey.<sup>130</sup> Burke therefore states, “many of the ‘observations’ are but implications of the particular terminology in terms of which the observations are made. In brief, much of what we take as observations about “reality” may be but the spinning out of possibilities implicit in our particular choice of terms.”<sup>131</sup> For an example of how clusters can examine this situation, Burke offers, “If a man talks of *glory*, but employs the imagery of *desolation*, his *true subject* is desolation.”<sup>132</sup> This type of discernment may be particularly useful to a critic as “the equations or clusters that that the critic discovers in a rhetor’s artifact generally will not be conscious to the rhetor: ‘And though he be perfectly conscious of the act of writing, conscious of selecting a certain kind of imagery to reinforce a certain kind of mood, etc., he cannot possibly be conscious of the interrelationships among all these equations.’”<sup>133</sup> The methodology of cluster analysis will provide an especially insightful lens for the legal discourse of *United States v. Alvarez*. The careful legal language, which a judge deliberately selects for a decision, revolves around formal terms embedded in law. How formal terms are described, applied, and justified, however, will reveal the underlying level of importance they are attributed.

Foss, who further structured the application of rhetorical cluster analysis, listed four key stages by which the methodology is conducted: “(1) identification of key terms or symbols in the rhetorical artifact; (2) charting of terms that cluster around the key terms; (3) discovery of patterns in the clusters around the key terms to determine meanings of the key terms; and (4)

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<sup>130</sup> Greene, David. "Logology, Guilt, and the Rhetoric of Religious Discourse: A Burkean Analysis of Religious Language in Contemporary Politics." *International Journal of Religion & Spirituality* 1.1 (2011). 100.

<sup>131</sup> Greene, 100.

<sup>132</sup> Burke, 77.

<sup>133</sup> Foss, “Rhetorical Criticism,” 367, Partially quoting Burke, “*The Philosophy of Literary Form*.” Berkeley: University of California Press, 1973. 20.



naming the rhetor's motive on the basis of the meanings of the key terms."<sup>134</sup> The first step is further broken down into the selection of key terms ("generally, no more than five or six terms"<sup>135</sup>) and the discovery of the significance of terms. Foss highlights two specific characteristics by which a critic should make the judgment of significance; frequency and intensity. As Foss explains, "A term that is used over and over again by a rhetor is likely to be a key term in that persons thought and rhetoric, so if one term frequently appears in the artifact, that term probably should be selected as one of the rhetor's key terms... A second criterion to use in selecting the rhetor's key terms is intensity. A term may not appear very often in a rhetor's work, but it may be extreme in degree, size, strength, or depth of feeling conveyed."<sup>136</sup>

These two characteristics of significance are then supplemented by an analysis of "each place in which the key terms appear,"<sup>137</sup> which constitutes the charting of clusters. As Foss notes, the proximity of a term to a key term, as well as its strength of connection are highly informative factors. Thirdly, the rhetor engages in a "discovery of patterns in the clusters," through which they "attempt[s] to find patterns in the associations or linkages discovered."<sup>138</sup> By noticing repeating trends in the various frequencies and intensities of reappearing terms, larger conceptions of an artifact's prominent underlying themes can be developed. Findings such as the presence of constant qualifiers or restrictions placed upon important language serve as a possible basis for such discoveries. Finally, from the first three steps, the critic will attempt to realize the underlying motives for these crucial linkages, which allows for a unique insight into the reasoning behind an artifact.

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<sup>134</sup> Foss, "Rhetorical Criticism," 367-368.

<sup>135</sup> Foss, "Rhetorical Criticism," 368.

<sup>136</sup> Foss, "Rhetorical Criticism," 368.

<sup>137</sup> Foss, "Rhetorical Criticism," 368.

<sup>138</sup> Foss, "Rhetorical Criticism," 369.

Cluster analysis provides a fascinating method for unraveling the complex fabric of judicial decisions, and for examining the way in which certain values wrap around important concepts within the text. The reoccurring nature of significant associations between legal and cultural terms allows for a more complete comprehension on how the terms instruct one another, as well as how they are weighed. The completeness of cluster analysis, however, lies not in merely the comparisons or connections made, but the surrounding language of qualifying terms that depict the precise considerations of the legal author. The language used to discuss competing values of legal and social importance inevitably leads to a furthered understanding of the explicit relationships implanted by a judge. In viewing legal decisions such *United States v. Alvarez*, a rhetorical critic is afforded an analytical advantage; their focus is not on the resultant precedent, but on the discernible formation process of a verdict. Through this placement of emphasis, the repetitious phrases and combinations chart a new topography of the rhetoric; the clusters of important terms and concepts serve as peaks and inclines of importance, while the surrounding justifications complete the landscapes and hillsides. By viewing these ascents individually, patterns can be observed which help explain the structural organization of the discourse, and any insights it invites. The method is able to scrutinize the specificity of legal language, while also developing larger conceptions of an artifact's strategic offerings.

With regard to the rhetorical examination of *United States v. Alvarez*, there are three primary key terms which will serve as the foundation for performing the cluster analysis; “honor,” “freedom of speech,” and “false statements” or “false statements of fact.” These three phrases represent crucial values and conflicts within *United States v. Alvarez*, and will help to reveal the ordering of hierarchies around certain concepts within the judicial decision. The first of these terms is the word “honor.” The importance and relevance of the word “honor” is

immediately witnessed in its direct employment to describe the highest achievable medal of valor. It is the ultimate quality by which instances of military heroism are measured, as it denotes one of the fundamental tenets heralded by the armed forces. “Honor,” by its own definition, is also intertwined with the concepts of “public esteem or reputation,” “honesty,” and “the paying of respects.” The culmination of these symbols into a single term provides an immense opportunity to view their inclusion by the Ninth Circuit Court. More specifically, the ways in which the Court expresses the importance of “honor” within the context of their decisive value hierarchies may elucidate greater understandings of its place within First Amendment jurisprudence. This will effectively show under what conditions this value is promoted or elevated in a legal context. This finding can informatively depict how closely the views of the Ninth Circuit reflect the values and sentiments espoused by Congress in the original legislation, providing an all-important reflection on value hierarchies within the two branches of government.

The second term that will serve as a basis for analysis is that of “freedom of speech.” As the most commonly applied legal value within the *Alvarez* decision, the ways in which this First Amendment right is examined through constraints, exceptions, or interpretations will illustrate its vertical placement within the Court’s justifications. The language directly interacting with “freedom of speech” will reveal the lengths at which the court will go to uphold this value, as well as the strength by which it will do so. As a value that is heavily referenced in First Amendment legal disputes, it will also be interesting to view if, or in what ways, “freedom of speech” directly references or is conjoined with other key terms of analysis. Even more so than the Court’s legal weighing of values, the qualifying words implemented in the decision’s direct clash of key terms may reveal patterns which reflect important rhetorical associations. These

associations, which serve as an ultimate revelation of cluster analysis, are what provide a glimpse at the worldview of the author (more so than what their deliberate points of argumentation are).

The third and final term that will be closely scrutinized within the discourse of *United States v. Alvarez* is “false statement” or “false statements of fact.” Serving as the general wrong committed against society in this instance, the act of dishonesty within a setting of military service represents a grim offense. The language that justices use in relating this action to the protection of law and society exposes what determines a “compelling interest” in American culture. Specific judicial characterizations of the harms counteracted by a law can depict the view of this harm that the judge wishes the audience to hold (either in a mitigating or aggravating context). Further explanation of how the harm of “false statements of fact” can affect society, especially in potential comparison to other offenses, reveal a hierarchy of wrongs which define the Court’s view of society. Similarly, the aspects of society that a law may promote may act in the same way. In either form, the question of how a law serves as a reflection of a societal concern, and how it affects citizens in its application can serve as essential starting points of relevant judicial discourse. The discussion of these factors within the *Alvarez* decision will show how menacing the court considers “false statements of fact.”

The ability of cluster analysis to isolate and analyze key terms in a rhetor’s discourse allows for careful consideration of the ways in which such crucial language is implemented. Paying a special mind to the less obvious rhetorical combinations and connections within a discourse, the juxtaposition of notions to the principle topics of “honor,” “freedom of speech,” and “false statements” can lead to a greater understanding of the pattern and implementation of deliberate associations. With an issue as contentious as making false claims about military service medals, the rhetorical dissemination of tension from the clashing of cultural values may

be seen in the comparisons made among key terms and their associated concepts. Cluster analysis allows a rhetorical critic to filter out these essential associations from a complex discourse, and rigorously search for patterns and deeper meaning. The intersection of societal and legal conceptions of “honor,” “freedom of speech,” and “false statement” can be effectively viewed by this method, and the ways in which the Ninth Circuit Court implements these key concepts in their greater legal discourse.

## Chapter 5:

### Chaim Perelman, Lucie Olbrechts-Tyteca, and the Theories of Hierarchical Value Organization

The clash of incompatible legal and cultural principles creates an ample opportunity for judicial reflection. In the event of a constitutional appeal, it is important to address renewed notions of rights derived from the ever-changing course of cultural progression. Such circumstances necessitate the inevitable upholding of *some* principles over *others*, and give way to traditional and prevailing conceptions of cultural virtue. This practice is performed by the judiciary in the form of a qualitative measurement, and seeks to ensure that the pillars of legal tenets on which a society is built maintain their potency over time. The issues of precedent and stability, as previously and continuously discussed, are of critical importance as well. The systematic function of the judicial system itself, however, must pay heed to prevalent societal values and their order of importance. The ability of communication scholars to discern these societal principles or values, as well as the outcome of a court's assessment thereof, present an essential task in understanding the direction and magnitude of a judicial decision. The rhetorical theory of values and their hierarchical organizations owe much of their development to the efforts of Chaim Perelman, notably in his collaborative efforts with Lucie Olbrechts-Tyteca. Together, they authored *The New Rhetoric: A Treatise on Argumentation*, which sought to explain the ways in which non-Cartesian logic functioned in human interaction. It was Perelman and Olbrechts-Tyteca who confidently trumpeted the revival of *rhetoric* as the mechanism by which social determinations of truths were made when universal truths were not present. The rhetorical theories established by Perelman and Olbrechts-Tyteca provide an excellent framework within which a rhetorical critic may view the inner workings of legal rhetoric. With a

particular focus on the rhetorical concepts of values, their hierarchies, their role in the formation of a non-formal logic of argumentation, and their application to his additional theories of a “rule of justice” and “universal audience,” a window of insight into the precise language and organization of legal discourse may be used to recognize the most important values which a judge heralds in a decision.

Perelman and Olbrechts-Tyteca’s focus on values echo the “specific influence on action and on disposition toward action”<sup>139</sup> which are represented in the motivations of an argument:

...In the fields of law, politics, and philosophy, values intervene as a basis for argument at all stages of the developments. One appeals to values in order to induce the hearer to make certain choices rather than others and, most of all, to justify those choices so that they may be accepted and approved by others.<sup>140</sup>

In this manner, values function as a primary source of consubstantiality and allow for the orator to promote shared conceptions of societal importance. This is enacted within instances where “there is not unanimous agreement”<sup>141</sup> of a certain concept. The value itself, a reflection of supported cultural sentiment, acts as a foundation of familiar assuredness towards a way of viewing a dispute or inquiry, and can therefore inform opinion “by inserting these choices in a sort of empty frame with respect to which a wider agreement exists.”<sup>142</sup>

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<sup>139</sup> Perelman, Chaïm, and Lucie Olbrechts-Tyteca. *The New Rhetoric: A Treatise on Argumentation*. Notre Dame, [Ind.: University of Notre Dame, 1969. Print. 74.

<sup>140</sup> Perelman and Olbrechts-Tyteca, 75

<sup>141</sup> Perelman and Olbrechts-Tyteca, 76

<sup>142</sup> Perelman and Olbrechts-Tyteca, 76

Perelman's study of values stemmed from his broader pursuit to remedy the chasm he found in the faulty application of formal logic to discourse, thereby assuming "self-evidence."<sup>143</sup> The two theorists believed, "it is the idea of self-evidence as a characteristic of reason, which we must assail, if we are to make place for a theory of argumentation that will acknowledge the use of reason in directing our own actions and influencing others."<sup>144</sup> Specifically in the context of legal argumentation, Perelman asserted, "when the jurist defends a *logical* interpretation of law... the word 'logic' does not designate in any of these cases formal logic, the only one practiced by the majority of professional logicians, but juridical logic, which modern logicians entirely ignore."<sup>145</sup> The two theorists therefore surmised that in order to discover truth in the absence of "self-evidence" stemming from formal logic, the rhetorical act of argumentation could act as a process of inter-personal articulation of reason. The discovery of truth referred to Aristotle's rhetorical conceptions of analytical and dialectical communication as an alternative resource for understanding "when people dispute a definition."<sup>146</sup> In this way, Perelman and Olbrechts-Tyteca were largely credited as being "among the foremost of contemporary scholars struggling to reunite philosophy and rhetoric and to argue that rhetoric should not be viewed as merely 'the technique of an external persuasion' but as the basis of rational thought."<sup>147</sup>

Values themselves played a crucial role in this collaborative process as "successful argumentation involves the preliminary selection of facts and values, their specific description in a given language, and an emphasis which varies with the importance given them."<sup>148</sup> The

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<sup>143</sup> W. Jack Grosse, Chaim Perelman and the New Rhetoric, 1985 No. Ken. L. Rev. 12:3 (1985), xi

<sup>144</sup> Perelman and Olbrechts-Tyteca, 3.

<sup>145</sup> Gross, Alan G., and Ray D. Dearin. *Chaim Perelman*. Albany: State University of New York, 2003, 25, quoted from Perelman's Preface to Georges Kalinowski's *Introduction a la Logique Juridique*, pg. (v)

<sup>146</sup> Grosse, xi.

<sup>147</sup> Grosse, xii.

<sup>148</sup> Grosse, xii.



composition of an argument, as well as its legitimacy, was therefore largely determined by the precise amount of emphasis ascribed to each relevant “value.” Additionally, the particular vocabulary used in relation to that value offered additional meaning. The push for a non-formal logic originated with the examination of a “logic” instructing judicial reasoning, and an evident shortsightedness within traditional conceptions of consequential reasoning. The contents of legal decisions have often exemplified the role societal values play in composing the interests of both sides in argumentation and rhetoric. In order to better account for the clash of values occurring in any debate, dispute, or legal case, a systematic approach was needed to chart the rise, fall, and confrontation of values within human interaction.

Perelman developed this concept into one of his most cited theories of all: that of value hierarchies. According to Perelman and Olbrechts-Tyteca, “value hierarchies are, no doubt, more important to the structure of an argument than the actual values.”<sup>149</sup> Perelman saw the comprehensive study of communicative values within their structural hierarchies as being “too often neglected” by scholars of argumentation, and acknowledged critical potential in the ability of hierarchies to “solve the conflicts” between competing values.<sup>150</sup> By definition, arguments would arise when “values were... found to be ‘incompatible,’”<sup>151</sup> but their hierarchic structure would help discern “which value will be sacrificed”<sup>152</sup> for another. In the instance of an argument where a confrontation between value hierarchies occurred, Perelman and Olbrechts-Tyteca interpreted the presence of the “double hierarchy argument,” in which a second value hierarchy argument is proposed and implemented to define the organization of “terms in the

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<sup>149</sup> Perelman and Olbrechts-Tyteca, 80.

<sup>150</sup> Perelman and Olbrechts-Tyteca, 81-82.

<sup>151</sup> Perelman and Olbrechts-Tyteca, 82.

<sup>152</sup> Perelman and Olbrechts-Tyteca, 83.

contested one.”<sup>153</sup> Perelman and Olbrechts-Tyteca believed “behind any hierarchy there may be discerned the outline of another hierarchy; this is a natural and spontaneous occurrence because we realize that this is how the interlocutor would probably try to sustain his assertion.”<sup>154</sup> The implication of a secondary formation of values resonates with a motive for finding simpler commonalities through which to express a complex argument. Especially in fields that require a form of “technical” language by its practice, an argument containing formal representations of values may be accompanied by a hierarchy grounding those values in shared experience. This was considered by Perelman and Olbrechts-Tyteca to be an “express[ion] [of] an idea of direct or inverse proportionality,” which suggests potential for opposing value hierarchies to “invert” previously offered ones.<sup>155</sup> Double Hierarchy arguments therefore represented the fundamental interaction of two or more proposed hierarchies, and how their different forms either aided or competed with one another. The capacity of double hierarchies to both describe justifications and refutations in argument serves a vital purpose, especially in the field of legal rhetoric. The values themselves represent the principles and ideals serving as the foundation for laws, while supplementary hierarchies either seek to challenge or reinvigorate their ordered organization. A judicial decision would therefore not merely espouse the judge’s formulated hierarchy, but would reveal the weighing of hierarchies, the supplemental and confrontational double hierarchy arguments, and result produced from the process of law.

The assessment of values within a hierarchy gained further distinction when Perelman and Olbrechts-Tyteca began to draw definitional differences between “qualitative” and

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<sup>153</sup> Perelman and Olbrechts-Tyteca, 337.

<sup>154</sup> Perelman and Olbrechts-Tyteca, 337.

<sup>155</sup> Perelman and Olbrechts-Tyteca, 337. In this analogy, the framework of categorical differentiation instructs meaning within the text itself, and creates a value system based on the informative context the hierarchy is placed in.

“quantitative” value hierarchies, as “many hierarchies cannot be described or established by means of homogeneous elements capable of being counted or measured. It is when we are confronted with qualitative hierarchies which exclude counting or measuring, that argumentation has the most important role...”<sup>156</sup> The addition to the general theory of value hierarchies represented an initiative to better define hierarchies of values, recognize their presence in argumentation, and enhance understanding of the motives behind their implementation. The impassioned quality attributed to deeply held values was necessary to account for, and its inclusion allowed for full consideration of the impacts of conflict. Navigating the struggle of differing value hierarchies thus meant identifying which “hierarchy of intensity is derived from our attribution of greater value...”<sup>157</sup>

One of the primary ways in which hierarchies can be categorized is through the use of *Loci* or *Loci communes*. A speaker could use *loci* to either supplement hierarchies or replace the need for additional clarifying hierarchies within an argument, “As used by classical writers, *loci* are headings under which arguments can be classified. They are associated with a concern to help a speaker’s inventive efforts and involve the grouping of relevant material, so that it can easily be found again when required. *Loci* have accordingly been defined as storehouses for arguments... Originally, then, *loci communes* were characterized by their extreme generality, which made them available for use in all circumstances.”<sup>158</sup> Here, Perelman and Olbrechts-Tyteca reference the “commonplaces” as studied and instructed by Aristotle, and defended against logicians by Quintilian. They note Aristotle’s original separation of the general *loci*

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<sup>156</sup> Perelman and Olbrechts-Tyteca, 338.

<sup>157</sup> Perelman and Olbrechts-Tyteca, 338.

<sup>158</sup> Perelman and Olbrechts-Tyteca, 83.

*communes* and the “special topics.”<sup>159</sup> Perelman and Olbrechts-Tyteca’s *New Rhetoric*, however, sought to ease the disparity in this distinction: “The triteness characteristic of what we today call commonplace does not in any way exclude specificity. Our commonplaces are really merely applications of ‘commonplaces’ in the Aristotelian sense of the term to particular subjects. But because the application is made to a frequently treated subject, developed in a certain order, with expected connections between the *loci*, we notice only its banality and fail to appreciate its argumentative value. The result is a tendency to forget that *loci* form an indispensable arsenal on which a person wishing to persuade another will have to draw, whether he likes it or not.”<sup>160</sup>

While triteness may certainly represent some views on commonplaces, it is the very expected connections between *loci*, as well as their recognized form and application that contain vast rhetorical value. The recognition of these arguments, if collectively appreciated within a society, holds valuable credibility through meaningful connections of values. The specific role of commonplaces was often deemed a symbolic one, as Perelman and Olbrechts-Tyteca clarified “we shall only apply the term *loci* to premises of a general nature that can serve as the bases for values and hierarchies. . . . Such *loci* form the most general premises, actually often merely implied, that play a part in the justification of most of the choices we make.”<sup>161</sup> The role of *loci* in the justifications or warrants of an argument position them as an anchor of unity; they seek to form the societally-accepted foundation on which an articulated position can stand, and allow for this foundation to be easily recognizable. In their ability to replace supplemental value hierarchies, as Perelman describes, they contain innate hierarchies or understandings that work in a very similar way. The successful implementation of *loci* into an argument seeks to represent

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<sup>159</sup> Perelman and Olbrechts-Tyteca, 83.

<sup>160</sup> Perelman and Olbrechts-Tyteca, 84.

<sup>161</sup> Perelman and Olbrechts-Tyteca, 84.

culturally understood principles within a cohesive organization, which eases the burden of definition and explanation on the speaker. Justification must be included as to how a *loci* fits into a certain situation (so as to avoid the harms of its potential for previously-mentioned banality).

The Representation of ideas through an assembly of effective *loci*, however, provides a unique possibility to unite disparate audiences and measure their degree of accord. As Perelman and Olbrechts-Tyteca state, “it is undoubtedly worthwhile to examine the more specific *loci* which are accepted in various societies and are thus characteristic of them... It is accordingly possible to characterize societies not only by the particular values they prize most but by the intensity with which they adhere to one or the other of a pair of antithetical *loci*.”<sup>162</sup> The link between *loci*, values, and audience is an integral one. Just as in values, recognizing the emphasis and acceptance with which a certain *locus* is received allows a speaker to better frame their argumentation to address the primary concerns of the audience. In the instance of legal discourse, *loci* would function very closely to legal principles or societally-driven conceptions of valuable legal protections. Culturally defined issues such as “freedom of speech” or “due process” are largely recognizable, and each hold values by which citizens are protected against the government. Assessing the importance of these values in a legal decision, especially within the context of maintaining a legal rationale and explaining it, requires the ability of the speaker to place these arguments in a digestible manner. It could be contended to what degree a legal decision (or a similar piece of rhetoric with such a formal audience and exigency) relies on commonplaces outside of recognizable principles. The answer to this question could be discovered in the consistencies of language and repetition of values that readily appear within a judge’s rhetoric.

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<sup>162</sup> Perelman and Olbrechts-Tyteca, 85.

To form a complete understanding of how value hierarchies function within Perelman and Olbrechts-Tyteca's notion of rhetoric, it is essential to acknowledge the influence which two of his other flagship theories had on the topic. Perelman's continued focus on "universal audience," as well as his philosophical redefinitions of "justice" and its logic, was considered a landmark contribution to both the legal and rhetorical realms. The "new rhetoric" featured audience as "its central concern," as the very basis of "arguments are grounded in the beliefs of the audience."<sup>163</sup> *The New Rhetoric* alluded to a spectrum of potential scopes of intended audiences to which a speaker might direct their remarks. The polar opposites of the spectrum featured a dichotomy of *particular audience* and *universal audience* at the extremities. At the end of over-specificity, Perelman and Olbrechts-Tyteca warned of "argumentation aimed exclusively at a particular audience" that "might rely on arguments that are foreign or even directly opposed to what is acceptable to persons other than those he is presently addressing."<sup>164</sup> Should a speaker focus too intently on the interests of specific groups, "it is extremely easy for the opponent of an incautious speaker to turn against him all the arguments against each other so as to show their incompatibility or by presenting them to those they were not meant for."<sup>165</sup> The result of this threat was an added motivation toward promoting commonality and "the value attached to opinions that enjoy unanimous approval, particularly approval by persons or groups who agree on very few matters."<sup>166</sup>

Argumentation addressed to a universal audience," according to *The New Rhetoric*, "must convince the reader that the reasons adduced are of a compelling character, that they are self-evident, and possess an absolute and timeless validity, independent of local or historical

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<sup>163</sup> Grosse, xii.

<sup>164</sup> Perelman and Olbrechts-Tyteca, 31.

<sup>165</sup> Perelman and Olbrechts-Tyteca, 31.

<sup>166</sup> Perelman and Olbrechts-Tyteca, 31.

contingencies.”<sup>167</sup> The two authors contended that this resulted in “employing nothing but logical proof”<sup>168</sup> in an attempt to express an argument as “necessarily valid for everyone.”<sup>169</sup> Furthermore, this attempt would rest on a speaker’s problematic assumption that “there is really objective validity in what convinces a universal audience, of which he considers himself the representative...”<sup>170</sup> Perelman and Olbrechts-Tyteca rejected this notion and sought to further erode the rigid reason of Rationalism by describing the minimal distinction between facts and rhetorical values: “Is it not enough to say that facts and truths express the real, whereas values are concerned with an attitude toward the real? But, if the attitude toward the real were universal, it could not be distinguished from truths... It is indeed hard to see how purely formal criteria can be relevant.”<sup>171</sup> Much greater problems with the communicative portrayal of universal reason also arose, according to Perelman and Olbrechts-Tyteca, from individual perceptions of what the “universal audience” entails. Here they utilized historical sociologist and economist Vilfredo Pareto’s definition of universal consensus as “merely the unwarranted generalization of an individual intuition,” and conclude “for this reason it is always hazardous for a writer or speaker to identify with logic the argumentation intended for the universal audience, as he himself conceived it.”<sup>172</sup> A person’s own experiences would largely dictate how they viewed “objective truths” (or what these may consist of), which could potentially hold somewhat differing meanings or validity from audience to audience.

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<sup>167</sup> Perelman and Olbrechts-Tyteca, 32.

<sup>168</sup> Perelman and Olbrechts-Tyteca, 32.

<sup>169</sup> Perelman and Olbrechts-Tyteca, 32. Here they choose to cite Kant’s discourse on universality from *The Critique of Pure Reason*.

<sup>170</sup> Perelman and Olbrechts-Tyteca, 33.

<sup>171</sup> Perelman and Olbrechts-Tyteca, 75.

<sup>172</sup> Perelman and Olbrechts-Tyteca, 33.

Perelman and Olbrechts-Tyteca make sure to point out, however, that “audiences are not independent of one another... particular concrete audiences are capable of validating a concept of the universal audience which characterizes them,”<sup>173</sup> as “most values are indeed shared by a great number of audiences, and a particular audience is characterized less by which values it accepts than by the way it grades them.”<sup>174</sup> There is little surprise that a significant congruence of values exists in a vast number of audiences. The effects of different cultural and societal understandings are more aptly observed within the variation of these values’ strength and order of emphasis from culture to culture. It is therefore value hierarchies that are capable of defining, uniting, and distinguishing audiences all at the same time. A speaker must acknowledge these differences, however subtle or apparent they may be, in order to properly address all audiences which may encounter their argument. The proper selection of values which one must convey, as well as their justifications through “double hierarchies” or “loci,” culminate into a primary contribution of Perelman and Olbrechts-Tyteca to the field of rhetorical theory and argumentation.

The concept of “justice” appears repeatedly in the works of Perelman as a timeless term that undergoes significant reformation. Perelman constantly reassessed his theories on the role of “justice,” the implications of a “justice” within the context of rhetoric, and whether or not a true universal “rule of justice” could exist. This evolution of conceptualization, as discussed by Alan Gross and Ray Dearin’s book on the theorist’s complete works, functioned as a particularly fascinating intersection between Perelman’s many interests in scholarship. His extensive legal background eventually cemented the role of *justice* as the contentious bridge between formal logic and argumentation. Perelman initially took a largely positivist stance on “justice,” which

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<sup>173</sup> Perelman and Olbrechts-Tyteca, 35.

<sup>174</sup> Perelman and Olbrechts-Tyteca, 82.



required “emptying it of its emotive aspect... which everyone respects but which everyone conceives in his own way.”<sup>175</sup> Similar to a concept of universal logic or truths, the consequence of a universal *justice* was the assumed calculable manner in which every instance of justice was claimed to be mathematically determined (completely void of societal values or rhetorical relevance). Similar perspectives excluding the social capacity of justice were all too common at the time. Much like James Boyd White’s lament of the push to make every faculty the “status of a true science,” the late Edgar Bodenheimer<sup>176</sup> shared in Perelman’s similar grief that “the prima facie appeal of the Cartesian approach is apt to be particularly strong, because certainty and predictability are widely regarded as important legal values.”<sup>177</sup> This approach broadly neglected the indispensable notion of a *speculum juris*,<sup>178</sup> or the way in which the law reflects social notions of morality within evolving cultural definitions. As further noted by Bodenheimer:

Perelman posed an all-out challenge to the Cartesian approach because he... took issue with the Cartesian assumption that intellectual inquiry must produce a system of necessary propositions concerning which agreement is inevitable. He declared that Descartes had created a ‘perfectly unjustified and unwarranted limitation of the domain of action of our faculty of reasoning and proving.’<sup>179</sup>

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<sup>175</sup> Gross and Dearin, 22.

<sup>176</sup> Edgar Bodenheimer was a professor of law who taught on the faculties at University of Utah Law School and University of California, Davis Law School. Previously, he had served as an Attorney for the U.S. Department of Labor.

Bruch, Carol, Daniel Dykstra, Friedrich Juenger, and John Oakley. "Edgar Bodenheimer 1908-1991." *The American Journal of Comparative Law* 39.4 (Autumn, 1991).

<sup>177</sup> Edgar Bodenheimer, Perelman’s Contribution to Legal Methodology, 1985 No. Ken. L. Rev. 12:3 (1985), 396.

<sup>178</sup> Sylvester, Sawyer. *Sociology of Law: An Introduction*. Pettengill Hall, Bates College, Lewiston, ME. 7 Sept. 2011. Lecture. Translated from Latin literally as “a mirror of the law”

<sup>179</sup> Bodenheimer, 402.

The “unwarranted limitations” were illustrative of the Cartesian disdain for any pursuit of truth or reason that failed a test of “self-evidence.”<sup>180</sup> This theoretical barrier posed a threat to establishing any meaningful connection between the logic of law and the art of Rhetoric. The hazardous effects on a perception of the process of law would be the most damaging. Bodenheimer again referenced this consideration, stating that Perelman came to express his grave contempt for:

The thought that a lawyer or judge who draws moral principles or considerations of social welfare into his armory of ratiocination indulges in an exhibition of irrationality... According to Perelman, law does not lose its status as an instrument of reason if it becomes impregnated with argumentative methods that are not consonant with the Cartesian standards of certainty or the time-honored devices of legal reasoning.”<sup>181</sup>

Gross and Dearin sought to further define Perelman’s quintessential views on a concept of “formal justice.” They come to rest on his standard that “a principle of action in accordance with which beings of one and the same essential category must be treated in the same way.”<sup>182</sup> This initial attitude towards justice facilitated the development of a “rule of justice,” which he claimed could “determine the relative strength of arguments.”<sup>183</sup> According to the work of Perelman with Olbrechts-Tyteca, the Rule of Justice “requires giving identical treatment to beings or situations of the same kind.”<sup>184</sup> The principle of the rule itself was grounded in stability, as “the validity that it is recognized as having derived from the principle of inertia, from

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<sup>180</sup> Bodenheimer, 403.

<sup>181</sup> Bodenheimer, 407.

<sup>182</sup> Gross and Dearin, 27.

<sup>183</sup> Gross and Dearin, 24.

<sup>184</sup> Perelman and Olbrechts-Tyteca, 218.

which originates in particular the importance that is given to precedent.”<sup>185</sup> Much like the idea of universal audience, however, Perelman and Olbrechts-Tyteca believed these “essential categories,” beings, and situations all “ought to be identical”<sup>186</sup> for the rule of justice to function properly. The two theorists accounted for deviations by admitting: “However, this is never the case. These objects always differ in some respect, and the great problem, which gives rise to most controversies, is to decide whether the observed differences are negligible or not...”<sup>187</sup> Although the rule of justice was commended for its extension beyond basic formal logic, rhetorical and legal theorists found further practical deficiencies in its application.<sup>188</sup> If, for example, a law produced the same punishment or legal outcome to every instance of subsequent criminal action, but this punishment was grossly excessive or cruel and unusual, it would function properly under the “rule of justice.”<sup>189</sup> According to Gross and Dearin, Perelman later qualified this theory by stating, “the Rule of Justice... is altogether powerless when it comes to judging the law itself- that is, to determining whether the law is just or unjust.”<sup>190</sup> The inability of the “rule of justice” to provide such essential insight into the analysis of laws presented a grave error. To solve for this error, Perelman began to reconsider both the emotive aspects in law and their importance, as well as fundamental Aristotelian concepts that could justify their inclusion.

Perelman found Aristotle’s dealings with “equity” provided an expedient role, as this concept could function as “the crutch of justice” and “an indispensable complement to formal

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<sup>185</sup> Perelman and Olbrechts-Tyteca, 218-219.

<sup>186</sup> Perelman and Olbrechts-Tyteca, 219.

<sup>187</sup> Perelman and Olbrechts-Tyteca, 219.

<sup>188</sup> Gross and Dearin, 24. Here, the pair cites the concerns of Legal theorist H.L.A. Hart as a primary example of the shortcomings of a generalized rule of justice grounded in uniformity and lack of variation.

<sup>189</sup> Gross and Dearin, 24.

<sup>190</sup> Gross and Dearin, 24-25. Taken from Perelman, Chaïm. *Justice, Law, and Argument: Essays on Moral and Legal Reasoning*. Dordrecht, Holland: D. Reidel Pub., 1980, 41.

justice.”<sup>191</sup> Equity, according to Aristotle, served as “a correction of law where it is defective owing to its universality.”<sup>192</sup> Perelman and Olbrechts-Tyteca believed this to be true, as “equity” provided another source of reasoning when precedent and “the rule of justice” would be harmful to the case: “in a legal proceeding, the tendency to judge according to the law is combined with that of judging on the basis of equity... this appeal to his moral sense may lead him to discover new arguments that are valid in his conventional framework, or to see in a new light the arguments already before him.”<sup>193</sup> The recognition of a “moral sense” and its emotive implications in legal decisions led Perelman to his foundational observation that:

The judge, who is bound to make a decision after hearing both parties, will very seldom arrive at it solely through experience or through a calculation which could be effectuated or controlled by a mechanical device... ratiocination about values is much more like a juridical argument than a mathematical deduction.<sup>194</sup>

This fundamental perspective of the legal process of adjudication marked the progression of his desired union between value-assessment and law. Perelman therefore promoted an entirely new conception of “validity,” whereby the law could function as perceptive to human sentiments of integrity and fairness. The hierarchy of values provided a systematic method for observing the weighing of less calculable legal factors and discerning the shifts in social evolution.

Gross and Dearin specifically point out “As he pursued his quest for a logic of value judgments in conjunction with Olbrechts-Tyteca during the 1950’s, Perelman came to realize that juridical logic is similar to the process of deliberating about values outside the

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<sup>191</sup> Gross and Dearin, 25.

<sup>192</sup> Aristotle, *Nicomachean Ethics*, Book V, Chapter 10

<sup>193</sup> Perelman and Olbrechts-Tyteca, 104.

<sup>194</sup> Perelman, Chaïm. "How Do We Apply Reason to Values?" *The Journal of Philosophy* 52.26 (December 22, 1955). 798.

courtroom.”<sup>195</sup> This resolution marked a full departure from the positivist roots of his original conception of “justice,” and paved the way for value hierarchies to be of paramount importance within his theories of judicial logic and justice. In his efforts to attach value-meaning to applications of justice, Perelman continued to retrace his rhetorical roots back to the ancient forefathers of the discipline, particularly in his emphasis on Quintilian’s views of the *status quo* and *precedent*.<sup>196</sup> Perelman emphasized the role that “the physical and social inertia which are equivalents in consciousness and society of the inertia of physics”<sup>197</sup> played in justice: “It can be assumed, failing proof to the contrary, that the attitude previously adopted- the opinion expressed, the behavior preferred- will continue in the future, either from a desire for coherency or from force of habit.”<sup>198</sup> The addition of this generalized rule was essential; understanding and accounting for the legal tenet of precedent was a mandatory aspect by which legal discourse would be analyzed. Perelman understood this connection, and even discussed its importance in judicial considerations:

Inertia makes it possible to rely on the normal, the habitual, the real, and the actual and to attach a value to them, whether it is a matter of an existing situation, an accepted opinion... To justification of the change one will often substitute an effort to prove that there is no real change. This effort is sometimes made necessary by the fact that change is prohibited: thus, a judge who is unable to

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<sup>195</sup> Gross and Dearin, 26.

<sup>196</sup> Gross and Dearin 26.

<sup>197</sup> Perelman and Olbrechts-Tyteca, 105.

<sup>198</sup> Perelman and Olbrechts-Tyteca, 105-106.

change the law may maintain that his interpretation does not modify it but corresponds better to the intention of the legislator...<sup>199</sup>

Perelman perfectly defines the role that judicial activism and passivism play in decision making. The constraints of precedent and the status quo both function as “demands of inertia in the life of society,”<sup>200</sup> as well as the intention of the legislature. These all feature heavily in the reasoning behind the circuit court’s decision in Alvarez, as the competing frames of precedents based in societal values illuminate the clash of hierarchies between first amendment protections and the honor of military service medals. Taking Perelman’s directive that judge’s may have to justify any opinion as precedent, it could therefore be asserted that whatever precedent is strategically included in a decision *is* employing moral and emotive qualities, despite any attempt to conceal such actions. These precedents would subsequently be laden with representations of the value hierarchies, and each inserted precedent could be said to function as a “double hierarchy argument.” Additionally, the question of a legislative bill’s constitutionality requires serious deliberation on whether the intention and application of Congress’s language represents an overbroad rule. Other judicial determinations, such as what type of scrutiny must be applied (and other standards of justice) reveal the constraints placed upon a case as well as the

The rhetorical and legal theories that Perelman developed throughout his lifetime have been widely used by scholars and critics. The diverse background of law, philosophy, and rhetoric that Perelman utilized allowed for his theories to have a tremendous range of applicability. By reviewing the work which has been published on the rhetorical foundations which Perelman left behind, we may better understand both the role his work have played in the larger discipline of

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<sup>199</sup> Perelman and Olbrechts-Tyteca, 106.

<sup>200</sup> Perelman and Olbrechts-Tyteca, 106.

legal rhetoric, as well as how applications of his theories have successfully lent themselves to further areas of scholarship.

Carol K. Winkler employed the theories of *loci communes* and their implications of value hierarchies to examine the motives for key alterations in statistics relating to the reporting of terrorist activity.<sup>201</sup> A shift in the statistical development responsibility within the government<sup>202</sup> eventually rested with the National Counterterrorism Center (NCTC). The NCTC reports that followed contained startlingly different numbers due to several changes in the definitions used by the Center to collect relevant data. Winkler relies on the assertive link that a *loci commune's* "primary purpose... is to help advocates defend their value hierarchies."<sup>203</sup> Winkler also focuses *loci communes* "advanced as bases of choice only when a particular value hierarchy has to be defended and a contrary value must, at least temporarily, be subordinated or sacrificed."<sup>204</sup> The use of *loci communes* to justify the importance of certain values can obtain instant credibility can, according to Winkler, act on an argument in a much more subtle manner, "Advocates may explicitly articulate their reliance on *loci communes* to justify their new value hierarchies, but more routinely, they simply imply the usage of such commonplaces through the use of antithetical pairings (e.g., quality vs. quantity, lasting vs. fleeting, artificial vs. natural)."<sup>205</sup> A speaker can therefore instantaneously characterize a clash of values through culturally relevant

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<sup>201</sup> From Winkler's 2009 journal article entitled "The National Counterterrorism Center's Definitional Shift for Counting Terrorism

<sup>202</sup> Which began with the CIA before changing hands to the Terrorist Threat Integration Center (TTIC), through the state department.

Winkler, Carol K. "The National Counterterrorism Center's Definitional Shift for Counting Terrorism: Use of Loci Communes and Embedded Value Hierarchies." *Argumentation and Advocacy* 45.4 (Spring 2009), 217

<sup>203</sup> Winkler, 217.

<sup>204</sup> Winkler, 217. Taken from Olson, K. M. (2009). Rethinking *loci communes* and Burkean Transcendence: Rhetorical Leadership While Contesting Change in the Takeover Struggle Between AirTran and Midwest Airlines. *Journal of Business and Technical Communication*, 23, pg. 41.

<sup>205</sup> Winkler, 217.

dichotomies that interact with an audience. In her exploration of antithetical pairings, Winkler utilizes Perelman's distinction between *loci of quantity* and *loci of quality*.<sup>206</sup> In Winkler's application of these theories, four dimensions of *loci of quantity*, as well as three specific dimensions of *loci of quality* are highlighted in the definitional shift by the NCTC and its justification. These highlighted dimensions of *loci* lead to critical insight regarding the motivations for this change.

On their surface, the common lines of argumentation all seem to represent necessary undertakings of a modern response to terrorism. Winkler's further analysis of these *loci communes*, however, reveals a fascinating "embedded hierarchy of values" behind the moves which remained under the surface because of the *loci*. Several important findings led to this connection. First, "NCTC's simultaneous utilization of both the *loci* of quantity... and the *loci* of quality... suggests key entry points for examining the<sup>207</sup> embedded hierarchy of values." While many arguments attempted to focus on one of the two major types of *loci*, the option to employ both represented, according to Winkler, an innate desire to appear immune from feasible contention. The implied value hierarchy suggests the desire for an increased number of terrorist attacks to be reported. More so than the values of relying on stable government sources or sticking with the international and "significant" definition of terrorism, increasing the numbers of the attacks reported was considered the most important motive.

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<sup>206</sup> The New Rhetoric relies on Aristotle's definition on both *loci*: first, a *loci* of quantity represents that "a greater number of good things is more desirable than a smaller; a good thing useful for a comparative number of ends is more desirable than one useful to a lesser degree; that which is more lasting or durable is more desirable than that which is less so... [whereas for *loci* of quality come into play] when the strength of numbers is challenged... We note that Aristotle is not content just to mention the *locus*. He outlines an explanation. He links it to the person, to the effort. What is rare relates mainly to the object, and what is difficult, to the subject as an agent. A sure way of settling value on a thing is to put it forward as something difficult or rare."

Perelman and Olbrechts-Tyteca, 89-91

<sup>207</sup> Winkler, 220.



Even more astonishing, however, were the findings linked to *loci* of quality. According to Winkler, “various research organizations have already criticized the NCTC for inflating its annual casualty counts from terrorism by including many deaths in the Iraq war.”<sup>208</sup> Many also felt the 2007 numbers attributed to Iraq included “the intentional killing of civilians in civil wars as terrorism,” while omitting any such inclusion in the data representing African nations. The reports also significantly decreased the amount of terrorist activity occurring in Latin America, as much of it was disregarded for the first time ever as explicitly for “the purpose of raising money,” even if known terrorist entities were involved.<sup>209</sup>

Finally, in the category of terrorist victim identities, the NCTC opted to not include diplomats or U.S. business of any kind, which increased the proportional representation for new categories of “police, child, student, politically affiliated, and civilian.”<sup>210</sup> According to Winkler, this move revealed to major aspects of the embedded value hierarchy. First, “by focusing on deaths of children, students, and civilians, the agency buttressed the good vs. evil dichotomy that had functioned as the argumentative *topoi*...”<sup>211</sup> This allowed for further rhetoric on the innocent lives lost, as well as pointed to a newly calculated culprit in “Islamic Extremists (Sunni).” Second, “the decision to omit most attacks against U.S. businesses helped deflect controversy. The focus on civilian deaths deemphasized competing interpretations that the Bush

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<sup>208</sup> Winkler, 220.

<sup>209</sup> Winkler, 221. The “deaths by Perpetrator” statistics which the NCTC released in 2007 were in the form of a numberless pie chart which simply allocated the large majority of space to “Islamic Extremist (Sunni).” This was both the first statistical chart ever issued in such a report, as well as the first representation which lacked numerical values. The motivation of these decisions were said to enforce “a visual argument that united a myriad of Islamic groups into a unified collective responsible for more than a quarter of the terrorism conducted around the globe.”

<sup>210</sup> Winkler, 224.

<sup>211</sup> Winkler, 225.

administration's war on terror constituted nothing more than a strategy to protect the profit margins of the few."<sup>212</sup>

Winkler's use of antithetical pairings, *loci of quantity and quality*, (and most importantly) value hierarchies provide a shining example of how subtle motivations in language alteration may be revealed. Even when values and their hierarchies are intentionally embedded deep within a non-traditional discourse, focusing on the societal or particular sets of values can shed light on the slight alterations of contextual definition. This insight leads to further findings regarding the dichotomies within a text, which point to strategically set opposites. The simple choice to use language, however seemingly arbitrary, can be represented by culturally significant values. By additionally defining an object as the antithesis of a concept, a very precise definition is implied in the sense of the "negative." What is possibly most relevant and groundbreaking about Winkler's article, however, is the way in which commonplaces are used as a magnifying lens to seek out the hierarchies of values. The emphasis on key terms within the text suggests that hierarchies often revolve around the language with the most socially significant meaning; if the purpose of heralding a particular commonplace or important cultural concept is to invoke a reaction, this can often be to distract or modify a more elusive hierarchy of values and motivations. This validates the union between hierarchy of values and cluster analysis, as the isolation of "key terms," at least according to the research methods of Winkler, point directly to the most informative organizations of values. The focus of the analysis therefore remains on categorizing the dimensions of justifications as commonplace rationales. The benefit of working with value hierarchies and the "commonplace" nature of societal values within the specific context of judicial decisions is a clear explication of subtle justifications. There is therefore great

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<sup>212</sup> Winkler, 225.

tangible benefit in reviewing both how Winkler employs Perelman's theories of *loci* and value hierarchies, as well as how hidden value hierarchies may be revealed.

Many scholars, such as Law professor Kurt M. Saunders, have focused on understanding and extending Perelman's solutions for when "gaps exist between reason and justice" and "formal logic or demonstration fails to account for value judgment in everyday argument."<sup>213</sup> Saunders reflects positively on Perelman's work with legal argumentation as informal logic, and the prevalence which ambiguity maintains in legal reasoning. Saunders portrays Perelman's definition of ambiguity within the framework of a four-part list of possible contexts: "when there is no applicable rule because the case is one of first impression; when the applicable rule is subject to more than one meaning; when an otherwise applicable rule is claimed to be invalid; and, finally, when a conflict exists between two potentially applicable rules."<sup>214</sup> The only way for a speaker to hurdle this ambiguity and begin an argument, according to Saunders (citing Perelman), is to recognize a "starting point" with the audience: "In Perelman's theory, there must be some initial common ground between those involved in an argument before it can proceed. Arguments must be based on premises that the audience accepts, or considers reasonable, as the adherence of the audience denotes the measure of validity."<sup>215</sup> Saunders makes a further distinction between "real" and "preferable" starting points: "Facts, truths, and presumptions make up the real; values, hierarchies, and lines of argument relate to the preferable."<sup>216</sup> In this context, the validity of a fact is determined not by the speaker, but by the audience, which reinforces Perelman's focus in *The New Rhetoric* on focusing argumentation on this relationship.

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<sup>213</sup> Saunders, Kurt M. "Law as Rhetoric, Rhetoric as Law." *Legal Communication & Rhetoric: JAWLD*, Fall 2006. 170.

<sup>214</sup> Saunders, 171.

<sup>215</sup> Saunders, 171.

<sup>216</sup> Saunders, 171-172.

A further analysis is given of Perelman's distinction between homogeneous and heterogeneous value hierarchies:

“In homogeneous hierarchies, similar values such as mildness and severity are compared, making measures of degree and intensity crucial factors. In heterogeneous hierarchies, different values come into conflict; for example, honesty may conflict with kindness, or goodness may conflict with truth. Most often in legal argumentation, policy arguments involve the use of hierarchies and debates about the arrangement of values within those hierarchies.”<sup>217</sup>

Lastly, Saunders discusses the strategies of association, dissociation, and “presence.” The association of arguments brings together separate values, facts, or elements and ascribes either a cause and effect relationship or a complementary impact. Similarly, dissociation is employed when a value hierarchy proposed by the rhetor implies an outcome contrary to rule of law, but correlative to other values and justifications. The dissociation between the rule of law and its intended purpose serve to undermine its legitimacy and separate it from concept of “justice.”<sup>218</sup> Saunders' discussion of presence mirrors Perelman's discussion of an “emphasis” on values. This meaning of presence is best described as the parts of an argument which the orator wishes the audience to pay the most attention to. This emphasis can be best observed by intensity and frequency of such values. Presence may therefore give a helpful insight into the hierarchies employed within an argument, as well as the informative role of de-emphasis or omission of values.

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<sup>217</sup> Saunders, 172.

<sup>218</sup> Saunders, 174.

While Saunders provides strong analysis on the fundamental theories of law and communication that Perelman developed, his work lacks application to legal cases beyond generalized principles. Within these broader conceptions of Perelman's theory, however, lie vital advancements in the capabilities of their application. First, Saunders's four-part list of possible contexts reflects imperative characteristics of legal circumstances. In order to properly apply any theory of "formal justice" to the law, it is essential to consider the contexts of vague precedent, dual or competing meanings of precedent, the illegitimacy of a precedent, and the instance of competing precedents. Especially with regard to *United States v. Alvarez*, all of the four contexts hold significance. Alvarez is in fact the first individual tried under the Stolen Valor Act, meaning that while some relevant precedent will be usable, no judicial information on interaction with the precise law is available. Secondly, great ambiguity lies in the legitimacy of the applied law, and the values that inform it are also subject to multiple interpretations of meaning and importance. Thirdly, Alvarez sought to have the Stolen Valor Act ruled invalid, which was in fact done by the Ninth Circuit Court. The function of laws as "applicable rules" of behavior denotes an important consideration for a court that wishes to eradicate a Congressional act. Finally, since no exact precedent is set for the law at hand, competing precedents hold greater weight as they signify a less determinate clash of traditional notions of legal application. In addition to these particular articulations of circumstance, the Saunders's focus on audience further develops Perelman's concentration on the importance of relevant parties. The reliance on cultural values within constitutional law also necessitates a collective understanding and definition from the audience, proving this relationship as a vital one in the case. Finally, the discussions of association, dissociation, and presence may be perceived to reflect alternative rhetorical conceptions of cluster analysis, "negative" cluster analysis, and value hierarchies. Saunders

appreciates the significance that the specific complements of language hold in strategic placement. The role of dissociation simply outlines the important observation of a noticeable lack of meaningful connection, or more telling, the antithetical placement of language. The inclusion of a specific differentiation between “the rule of law and its intended purpose” proposes a strategy for avoiding damaging precedents, and directly connects more general legal communication theories to Perelman’s notion of “justice.” The goal of presence is to note which symbols or terms within a text hold the most meaning and place a particular “emphasis” on the values at play. Perelman’s theories of value hierarchies not only mirror this goal, but provide a mechanism for their intricate examination. In implying this link in theory, Saunders also shows the cohesiveness of much of Perelman’s work, and specifically the way in which his theory of “formal justice” is inherently connected to the concepts of “value hierarchies.” One could say that value hierarchies simply serve as the method for discerning when the “rule of justice” contains instructive emotive aspects, as well as when variations for the rule of justice occur. The justifications for why someone opts to mitigate the “inertia” of stability can reveal specific values, and strongly held ones at that.

One primary example of an application of Perelman’s theory on specific fields of law is Josina M. Makau’s journal article “The Supreme Court and Reasonableness.” Makau examined the standards of reasonableness that were used to assess the legitimacy of legal claims in the areas of economic regulation and racial discrimination cases. The standards of reasonableness that the Supreme Court uses, and their variation from legal issue to legal issue, highlight an inherent hierarchy of values which depicts varying levels of scrutiny and consideration depending on the emphasis of a legal field within society. Especially in Makau’s work with racial discrimination cases, her further distinctions of reasonableness in “non-random effects

cases,” “‘invidious’ discrimination cases,” and “‘remedial’ discrimination cases” allows for more specific analysis in various case studies. What remains a constant thread throughout these fields, however, is the way in which “reasonableness” is determined. For this, Makau relies heavily on Perelman’s concept of the Universal Audience to explain how a vast array of values must be considered in the formation of standards of reasonableness. As Makau explains, “the concept of reasonableness is central to jurisprudence, yet this field is value-laden, socially adaptive, and heavily reliant on rhetoric.”<sup>219</sup> In this way, standards of reasonableness are the main aspects of a decision that instruct all audience members how a determination is made in a case, and what values in a hierarchy are given legitimacy. Makau further justifies the importance of this role by recognizing “the important role that the judicial opinion has played in the maintenance of judicial authority.”<sup>220</sup> The daunting question left to answer quickly becomes “who is the primary audience of a judicial decision?” While this inquiry may yield a multitude of potential answers, Makau distinguishes eight primary groups which justices must consider: “Supreme Court Justices (both present and future), lower court justices, legal administrators, legislators, lawyers, participating litigants, legal scholars, and other educated members of the body politic. Each of these groups reflect unique, often conflicting sets of interests, values, and beliefs.”<sup>221</sup> Makau further employs much of Perelman’s work in defining not simply a “rule of justice,” but also its meaning within a universal context: “Despite their differences, the Court’s particular audiences share some fundamental assumptions regarding the judicial function. Whether viewed as Aristotle’s topics, Cicero’s Commonplaces, Stephen E. Toulmin’s warrants, Perelman’s loci, or clusters of implicitly accepted norms, the particular audiences’ shared beliefs and expectations

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<sup>219</sup> Makau, Josina M. "The Supreme Court and Reasonableness." *Quarterly Journal of Speech* 70.4 (1984): 380.

<sup>220</sup> Makau, 381.

<sup>221</sup> Makau, 381.

regarding the judicial function form a composite view reflective of the philosophy operating in the Supreme Court adjudicative context.”<sup>222</sup> In both dissecting the components of a judicial audience and addressing their commonality through “clusters of implicitly accepted norms,” Makau has observantly highlighted how judges account for the differences in the varying interests of particular audience groups. The values inherent in a decision’s justifications must necessarily account for these variances, and clearly do so by issuing language in the framework of societally recognized hierarchies. To further explain this expectation, Makau relies on Richard A. Wasserstrom’s definition of an “audience’s perception of judicial justification: “When viewed as *reasons*, precedents by themselves constitute justifications that require confrontation before they may be sensibly disregarded or altered.”<sup>223</sup> Makau continues to speak on the balance of constraints which judges face, and their indispensable connection to the audience, by stating, “While adherence to precedent fulfills important fundamental expectations, the Court is also expected to protect interests that emerge historically...The composite audience expects the Court to balance the need for doctrinal consistency against these compelling social demands. In turn, the Court uses argumentation to persuade the composite audience that the Court’s selected stability and change are appropriate responses to the relevant rhetorical situations.”<sup>224</sup> This delicate balance between doctrinal balance and compelling social demands serves as the focal point of *U.S. v. Alvarez*. Taking Makau’s analysis of this relationship and applying it to issues concerning the limitation of first amendment rights, the situations and categories of speech that are deemed outside the protection of pure speech could certainly function as standards of reasonableness. Especially with Makau’s emphasis on “appropriate responses to the relevant rhetorical situations,” the criminalization of military service medal falsification as an example of

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<sup>222</sup> Makau, 381.

<sup>223</sup> Makau, 382.

<sup>224</sup> Makau, 382.



a content-based restriction represents a historical value for either side. While Makau provides an excellent analysis of the ways in which Perelman's theories can be applied to understand judicial decisions and their constraints based on particular and composite audience, these applications are relatively absent in her own case studies. She instead chooses to focus much more heavily on the guiding legal principles which function as standards of reasonableness. Her analysis of the value choices made in the enforcement of doctrinal consistency, the size of scope in which a legal standard functions, as well as the composite legal audience's perceptions of these characteristics all provide essential extensions of Perelman's relevant theories.

The decision issued by the Ninth Circuit court in *United States v. Alvarez* aptly reflects the tremendous significance of the aforementioned works of scholarship: considerations of Winkler's methods for uncovering value hierarchies; Saunders' extensions on specific legal contexts, association, dissociation, and presence; Makau's insight on the application of Perelman's theories to further analyze precedent, the legal composite audience, and the values found in the legal constraints faced by judges: *all* represent pivotal aspects of Perelman's work that extensively enlighten legal rhetoric. These rhetorical theories are employed within a culmination of interwoven significance and specifically applied to a rhetorical analysis of a judicial opinion. The hierarchies of values which function in the analysis conducted by Winkler serve as a resolution rather than a study and a primary lens. While the works of Saunders and Makau expand on the theory of value hierarchies, justice, and audience, the application to the specific language of a legal discourse is, for the most part, omitted. Moving forward to critically analyze the judicial decision of *U.S. v. Alvarez*, however, Perelman's theories of societal values, their competing hierarchies, justice, and audience all provide a most intriguing way to gain insights into the navigation of a judiciary in issuing a controversial and contested opinion. The

theories covered in this chapter will surely provide an intriguing way to discern the societal values that hold the largest amount of significance within crucial discussions of military service medals and free speech.

## Chapter 6:

### The Critical Analysis of *United States v. Alvarez*

Significant representations of cultural values emanate from the United States Ninth Circuit Court's decision in *United States v. Alvarez*. The social motivations for the law in question find discordance with fundamental First Amendment understandings, and are therefore addressed with intense deliberation. The foundational concepts of "honor," "freedom of speech," and "false statements [of fact]" represent the essential catalysts for the jurisprudential hierarchies of values against which the legal argumentation is weighed. To this end, these three "key terms" are repeatedly used to express justifications for the verdict. Their strategic implementation is used to characterize the countervailing legal standards, and the terms are therefore placed adjacent to crucial language conveying the core of the decision. The tactical formations of important concepts, language, and justifications around certain key terms denote the vital "clusters" of the text. The critical analysis of legal clusters offers a unique insight into the interrelationships among three primary contemplations of the court: the important cultural interests (or values) being weighed, the determinations of a legislature's validity in creating a law, and the conciliation of competing legal value hierarchies within a case. By studying the clusters accordingly placed around the selected key terms of "honor," "freedom [of speech]," and "false statements [of fact]," crucial evaluations of the Ninth Circuit Court's decision may be made regarding the judicial determinations of legitimate protections, as well as discernment of the proximate clusters of terms and their modifying impacts on crucial legal language within judicial discourse.

The term "honor" contains an array of connotations within American culture, yet nearly all versions pertain to more general values of virtue, courage, and integrity. Its linguistic

inclusion signifies a distinct credibility in the object or person of reference, one that bestows a quality of exemplified morality and fortitude. When first examining the various ways in which the term “honor” is applied within the *Alvarez* decision,<sup>225</sup> it comes as little surprise that it features notably within the cluster of “Medal of Honor.” As the military service medal held in the highest regard, as well as the specific medal that Alvarez falsified, this symbol of “valor” edifies Judge Milan D. Smith, Jr.’s opinion. The initial examination of this award’s appellation is therefore necessary to interpret the key term’s significance within a legal and militaristic context. Firstly, it is an important rhetorical observation in and of itself that the term “honor” is used to describe the highest military decoration that one may earn. This establishes the value as of paramount importance to the military, and therefore institutes an apex to a value hierarchy assumed by a government branch deemed integral to society.

Of much greater interest, however, is the second observation that can be drawn from the decision’s dealings with the “Medal of Honor.” Remarkably, this crucial cluster appears a mere seven times in the main text of the majority decision.<sup>226</sup> The noticeable lack of frequency stands in direct opposition to the cluster’s level of importance and relevance as Alvarez’s offense, and within the Stolen Valor Act itself. The impacts of this realization are sustained by Judge Smith’s odd spacing of the cluster; five of these seven occasions reside exclusively in the introductory *Opinion* and *Factual and Procedural Background* sections. The technical and prescribed nature of these sections results in an innate lack of intensity or emotive quality of the clusters.

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<sup>225</sup> The key term “Honor” is included in Judge Milan D. Smith Jr.’s Majority decision a total of twenty-seven times; twenty-three of these instances occur in the main body of the text, while four appear in the footnotes.

<sup>226</sup> The cluster “Medal of Honor” also appears four times in the footnotes of the majority decision. Two of the footnote-embedded clusters are coupled in footnote 11, which describes the public lists of names publicized by *The Congressional Medal of Honor Society* and the *Congressional Medal of Honor Foundation*.

Furthermore, of the thirty-five total pages that compose the length of the majority decision,<sup>227</sup> these initial two portions comprise a total of six pages. The sixth appearance of “Medal of Honor” occurs immediately on the seventh page<sup>228</sup> in simply citing the statute in question. The final cluster remains relegated to the second to last page of the decision, where it states, “Even if we were to make the unfounded assumption that our troops perform their riskiest missions in the hope of receiving the *Medal of Honor*, there is no evidence- nor any reasonable basis for assuming- that some people’s false claims to have received the medal has a demotivating impact on our men and women in uniform.”<sup>229</sup> As the final mention of the “Medal of Honor” cluster within the majority decision, the language of this utterance continues the discussion of what function military service medals serve within society. In a placement which finalizes all attempts to modify an audience’s understanding of key concepts, the opinion characterizes “The Medal of Honor[’s]” role as simply a “motivational tool” for the armed services.

The additional phrasing by the court outlines a leap to an “unfounded assumption” portrayed as part of the government’s argument. From the act’s language of “damaging the reputation and meaning,” the court construes this to include a primary function of immediate motivation rather than a future acknowledgment of courage and sacrifice. The fundamental lack of engagement by the Ninth Circuit with the cluster of “Medal of Honor” shows an unwillingness to address it at all. Although a large portion of any legal opinion is inevitably

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<sup>227</sup> The pages included in the court’s majority opinion are listed as 11845 and 11849-11882.

<sup>228</sup> Page 11854. Continuing from 11853, this placement is merely a quoting of the United States Code subsection in question: “18 U.S.C. § 704(b). The Prescribed prison term is enhanced to one year if the decoration involved is the *Congressional* [continuing on to 11854] *Medal of Honor*, a distinguished-service cross, a Navy cross, an Air Force cross, a silver star, or a Purple Heart. *Id.* § 704(c), (d).”

<sup>229</sup> *U.S. v. Alvarez*, 11880-11881. This cluster is directly preceded by the informative “we agree with the reasoning of the District Court of Colorado, that suggesting ‘that the battlefield heroism of our servicemen and women is motivated in any way... by considerations of whether a medal be awarded simply defies... comprehension’ and is ‘unintentionally insulting to the profound sacrifices of military personnel the Stolen Valor Act purports to honor.’”

devoted to a much more general discussion of precedent and theory, the stark omission of “Medal of Honor” from nearly all associations and justifications displays a fascinating choice. Alvarez himself, as well as the specifics of his circumstances, are mentioned an abundance of times within the decision’s evaluative portions. If the author of the opinion wished to provide further mention of this medal, either because of the case facts or the medal’s heightened penalty within the scrutinized law, it would have been logically permissible to do so. The choice to exclude “Medal of Honor” from the justifications of the verdict, whether a cognizant tactic or not, establishes a lack of frequency to an astonishing extent within the decision. It is clear that the court accounts for the larger value of “honor” elsewhere, and less publicly recognized associations with this key term are much more common within the most deliberative portions. The court specifically maneuvers away from the most culturally persuasive cluster related to “honor” in a strategy easily lost on the audience. There is little doubt that a recurrent inclusion of “Medal of Honor” would only heighten its expected position on the court’s hierarchy of values, as well conjure strong sentiments in the audience from the values that the cluster holds. Instead, any decisive hierarchy of values offered by the court is depicted as being minimally confronted by an alternative hierarchy based on the Medal of Honor; the passion-laden support for legally shielding military service medals is effectively dismissed. The shift away from this potential hazard navigates around the contentious opposing values within the case. This could be viewed as an active attempt to avoid stoking the flames of ire that could arise within the military branch and society’s sympathetic factions from striking down the Stolen Valor Act.

The first eight appearances of the general term “honor” stem from factual discussions of either the Medal of Honor, its presence in the Stolen Valor Act of 2006 itself, the specifically prescribed punishment therein, or Alvarez’s false claims of its bestowment. Their

implementation in this section is directed more towards reviewing the law in question and “Alvarez’s propensity for making false claims about his military past.”<sup>230</sup> One critical instance of these initial clusters, however, is found in the second footnote explaining that “...the government was not required to prove anything before the district court except that Alvarez made a false statement about his having the Congressional Medal of Honor...”<sup>231</sup> The review of the government’s burden in district court is presented with the phrasing “...not required to prove anything,” which provides a revealing perspective. This comes well before an in-depth analysis of the legal standards applicable to the case (as well as being found within a footnote), yet the language divulges a perspective of ardent dissatisfaction. Judge Smith continues to explain that other variables such as “fraudulently obtain[ing] certain benefits” would understandably represent a more criminally liable action. This foreshadows the court’s continued assessment of what specific harms against society merit legal protection. This initial divulgence indicates that falsifying claims of a medal of valor does not constitute legal proof of a punishable activity. What constitutes a “crime” within a culture or society is largely determined by collective conceptions of social norms and actions, as well as recognition of actions that pose threats to those social norms.<sup>232</sup> The complexities of First Amendment jurisprudence provide an intervening complication while resolving cases that contemplate threats to expressive freedoms. Language such as “harm” or “injury” also holds a specific legal understanding, which will be explained later on.

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<sup>230</sup> United States v Alvarez, No. 08-50345. 11852 (9th Cir. Court of Appeals. 2010).

<sup>231</sup> *U.S. v. Alvarez*, 11853.

<sup>232</sup> The greater standards of review, or when this collective fails, results from either a fundamental constitutional right being abridged or “prejudice against discrete and insular minorities.” Brest, Levinson, Balkin, Amar, and Siegel. *Processes of Constitutional Decision Making*, 5<sup>th</sup>. Ed. New York: Aspen Publishers, 515. The basis for this standard is famously outlined in footnote 4 of *United States v. Carolene Products Co. (1938)*, 304 U.S. 144.

One of the most frequent sets of clusters that appear around the word “honor,” and similarly one of the most important, consists of language pertaining to speech “regulation.” Overbearing government “regulation” of speech or expression is diametrically antithetical to the rights enshrined within First Amendment, and therefore emphatically represents a value hierarchy based on fundamental freedoms.<sup>233</sup> As previously stated, the direct weighing of values promoted by each side is essential both for the sake of a decision’s clarity, as well as for displaying the judiciary’s own prevailing value hierarchy as the product of solely deductive reasoning. Through a procedure of logical consequence, the decision employs clusters combining “honor” and content “regulation” which underscore problematic abridgements of First Amendment rights. As Judge Smith writes; “The act proscribes false verbal or written representation about one’s being awarded Congressionally authorized military honors and decorations. The parties do not dispute that the Act ‘seek[s] to regulate ‘only... words.’”<sup>234</sup> This first cluster contains an abrupt shift from a factual tone to a critical one. The concept of military honors is first mentioned within the parameters of a basic legislative definition of the act. The subsequent sentence, however, performs an evaluative observation. The tactical effect of this cluster is threefold. First, the employment of direct quotes from Supreme Court precedent<sup>235</sup> (not to mention a quote used in a multitude of prior cases) lends instant legitimacy and authority to

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<sup>233</sup> Many figures in American history have considered the value of free speech to be the most intrinsic value within our culture. One such example is Oliver Wendell Holmes, Sr., father of the famous Associate Justice of the Supreme Court Oliver Wendell Holmes Jr., who ironically created the “clear and present danger” standard of limiting free speech in *Schenck v. United States* (1919). In Holmes, Sr.’s 1860 book *Professor at the Breakfast Table*, he wrote “The very aim and end of our institutions is just this: that we may think what we like and say what we think.”

<sup>234</sup> *U.S. v. Alvarez*, 11854. This quotation is taken directly from the precedential decision of *Broadrick v. Oklahoma* (1973), which first retrieved the language from *Gooding v. Wilson* (1972). Tracing the lineage of precedent, and then including direct quotations in a later decision, represents a fundamental judicial technique of establishing credibility from judicial restraint.

<sup>235</sup> Here, “‘seek[s] to regulate ‘only... words’” also represents not just a prior opinion, but a lineage of enforced rulings, tracing back through *Gooding* (1972), and *Broadrick* (1973).



the credibility of the opinion. As mentioned in review of literature involving precedent, there is a vast array of precedents for any given area of law that a judge could potentially implement. This implicates the specific quote chosen as holding a particular strategic importance. Much of the basis for deciding upon a previous case to cite may come from the relevancy of a precedent or its place of esteem within legal history. Using these two characteristic filters will still likely leave many strategic options for selecting a beneficial precedent.

Secondly, one must consider the discernable meaning of “regulation” of “only words” from a rhetorical standpoint. This characterization of the act confines its utility to an abridgement of speech, rather than discuss any potential values promoted by the Stolen Valor Act. The language implies that an act that “only regulates words” is uniformly outweighed by free speech, even with consideration of potential retributive, rehabilitative, and deterrent functions for maintaining an ethical society. This determination undermines the government’s inclusion of any value hierarchy promoting “regulation” as a permissible and necessary measure. As stated in the initial outset of the opinion, this casts a shadow of doubt that the majority will view any such law favorably. Additionally, although regulations are simply the codes of behavior constructed by Congress, they are given a negative connotation that devalues their symbolism. A regulation can prevent harmful or adverse behavior, yet here “Regulation,” or more specifically “regulations of words” are established as anti-thetical to the court’s value hierarchy. By describing the act itself and then attaching this modified meaning to language immediately following it, the act itself becomes an epitome of societal harm. The effect that this has on the legal argumentation, as will be highlighted throughout the case, forcefully plummets the government’s arguments while elevating the winning hierarchy.

Stemming from this initial fusion of terms, the cluster of “honor” is continuously associated with “regulation.” This establishes a concrete link between value and limitation, which modifies their contextual understanding to necessarily include each other. In additional instances, Judge Smith continues to describe that the Act is “about a specific subject: military honors. The Act is plainly a content-based regulation of speech.”<sup>236</sup> The concept of “content-based regulation of speech” (or a limitation of free expression regarding a specific subject of discourse) holds a very specific legal understanding, connotation, and history. Judge Smith further explains this significance by stating: “Content-based speech restrictions ordinarily are subjected to strict scrutiny... However, there is an exception to the ordinary rule for ‘certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.’”<sup>237</sup> In connection with the previously mentioned cluster, the language of this cluster indicates the use of a specific standard for judicial review: that of strict scrutiny.<sup>238</sup> The subsequent clusters that shape around the forged dichotomy of “honor” and “regulation” highlight understandings of exemptions to scrutiny. The foundation

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<sup>236</sup> *U.S. v. Alvarez*, 11854.

<sup>237</sup> *U.S. v. Alvarez*, 11854. The last section of this quote cites the precedent of *Chaplinsky v. New Hampshire* (1942), and is further elaborated by stating: “there is an exception to the ordinary rule for ‘certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem’... ‘As explained recently by the Supreme Court in *United States v. Stevens*:... ‘These historical and traditional categories long familiar to the bar [ ]’ [ ] include[e] obscenity, defamation, fraud, incitement, and speech integral to criminal conduct...”<sup>237</sup> *U.S. v. Alvarez*. 11854- 11855.

<sup>238</sup> In comprehending the legal power cultivated by interpreting “strict scrutiny” as flowing naturally from “honor” and content “regulation,” it is important to understand a formalized legal description of the term. The Cornell University Law School Legal Information Institute [LII] gives the explanation: “To pass strict scrutiny, the legislature must have passed the law to further a ‘compelling governmental interest,’ and must have narrowly tailored the law to achieve that interest... For a court to apply strict scrutiny, the legislature must either have significantly abridged a fundamental right with the law’s enactment or have passed a law that involves a suspect classification.”<sup>238</sup> The derived concepts of “compelling interest” and “narrowly tailored” are inevitably selected as frameworks for further argumentation. “Strict Scrutiny.” Cornell University Law School- Legal Information Institute- Wex Legal Dictionary and Encyclopedia. Cornell University Law School- Legal Information Institute, 19 Aug. 2010. Web. <[http://www.law.cornell.edu/wex/strict\\_scrutiny](http://www.law.cornell.edu/wex/strict_scrutiny)>.

of this cluster, however, remains the “content-based regulation” derived from the Stolen Valor Act and its potential for damaging restrictions on expression.

Another fundamental association formed through clusters with “honor” is that of the legislature’s specific motives in passing the Stolen Valor Act. In asserting the necessary and legitimate qualifications of the law, the decision characterizes the government as contending that “demonstrably false statements about having received military honors – fits within those ‘well-defined and ‘narrowly limited’” classes of speech that are historically unprotected by the First Amendment,”<sup>239</sup> as well as that the legislature “made ‘Findings’ that ‘fraudulent claims’ about receipt of military honors ‘damage the reputation and meaning of such decorations and medals.’”<sup>240</sup> The first of these justifications reveals that the plaintiff-appellee attorney accepts the premise of placing the Stolen Valor Act within one of the five traditional categories of unprotected speech. The adaptation of this historically approved legal framework solidifies its necessity of inclusion, and enforces comparisons with the established five areas of exemptions.<sup>241</sup>

The litigation strategy of abiding by previously accepted interpretations of judicial standards signifies an interesting study in White’s emphasis on legal redefinition and definitional alteration. Despite the potential availability of “cultural resources” supporting a differing path,<sup>242</sup> it signifies an attorney’s belief that operating within the status quo will somehow produce a landmark result. This also strays away from any notion of a “rule of law,” as a new concept would have to be included within the five specific categories of unprotected speech. This

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<sup>239</sup> *U.S. v. Alvarez*, 11855.

<sup>240</sup> *U.S. v. Alvarez*, 11867.

<sup>241</sup> For the five areas of “traditionally unprotected speech,” see footnote 13.

<sup>242</sup> Evidence for this support may be deduced from the prevalence of Amicus Briefs for appeal before the Supreme Court.

instance does, however, reveal a double hierarchy argument. The counsel is consenting to the notion that current conceptions of unprotected speech and their narrow number of firm categories are just in this circumstance. Instead of trying to alter this definition, arguments are proposed which reflect historical understandings of values and justifications in holding other types of expression unprotected. Additionally, the degree to which an attorney's argumentation replicates the precedent of accepted value hierarchies reveals the extent to which they are advocating or waiving the need for Judicial Activism. With consideration of the phenomenon of legal inertia, the secondary hierarchy would seek mirror the traditional value hierarchies of certain positive "regulations" place above "freedom of speech," with this hierarchy including an apex of "honor."

The second claim advanced by the government, that falsifications of medals of valor "damage the reputation and meaning of such decorations and medals," represents one of the most frequent clusters surrounding the inclusion of "honor." This is largely due to the language's direct citation from the Stolen Valor Act itself. As previously mentioned, both the value and the medal are presented by the petitioners as in need of legal preservation. Specific clusters of "damage to the reputation and meaning" and the "findings" by Congress serve as starting points to many of the discussions of "compelling government interests." The content of these clusters varies surprisingly, with some stating, "preserving the value of military decorations is unquestionably an appropriate and worthy governmental objective,"<sup>243</sup> while others surmise "the harm the Act identifies—damage to the reputation and meaning of military honors—is not the sort of harm we are convinced Congress has a legitimate right to prevent by means of restricting

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<sup>243</sup> *U.S. v. Alvarez. 11868.*

speech.”<sup>244</sup> Subtle differences exist to differentiate the two, most notably the distinction made between “government” and “Congress,” and that of “preserve” and “prevent.” The analysis of these two dichotomies seems to point to an issue of agency and appropriate action. As the previous section just before the first cluster explains, “we cannot ignore the fact that *nothing* in the Act requires a showing of either (1) publicity or (2) victims... the government may not restrict speech as a means of self-preservation.”<sup>245</sup> The link between “honor” and “victims” of “harm” is one that needs explication. The attempt to discern a tangible “harm” caused by the act is a dire problem, according to the court. While the act warns of the danger to the “reputation and meaning” of military service medals, the court seeks the type of “irreparable harm to another[ individual]’s reputation” as cited by protections against defamation.<sup>246</sup> The act itself, however, is written to protect “military service medals” and the values they represent. This reveals the importance that the court puts on protecting an *individual* as a necessary component to regulating speech. Should a law protect the *individual* from harms of free speech, such as libel or defamation, the court is perfectly fine with the creation and enforcement of such a law. At the point that the proof of “harm” for a law or regulation is articulated in the form of a non-individual harm, it receives a much lower placement on the hierarchy of values. Furthermore, seeking to protect abstract values, such as “honor” or “reputation,” leaves the court highly skeptical. The Stolen Valor Act therefore runs awry by defending against threats to these social values not in their specific imperiling of individuals, but against threats to the values generally enacted through social norms (hereby preserving honor). The general view of the court, as initially seen in the attempts to define a tangible “harm” caused by the act, is a highly skeptical one in what precisely deserves “protection.”

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<sup>244</sup> *U.S. v. Alvarez*. 11877.

<sup>245</sup> *U.S. v. Alvarez*. 11868.

<sup>246</sup> *U.S. v. Alvarez*, 11863.

In asserting the “harms” or “injury” which the Act protects against, the value of “honor” encounters a crisis of actor identity. Additional clusters that include “honor” and “government interests” most effectively reveal this occurrence. Firstly, “the government argues that the referenced interest is important to motivating our military. Especially at a time in which our nation is engaged in the longest war in its history, Congress certainly has an interest, even a compelling interest, in preserving the integrity of the system of honoring our military men and women for their service, and at times, their sacrifice.”<sup>247</sup> Apart from adding to the balance of compelling/not compelling government interest, the purpose of the act is articulated by the Ninth Circuit in a manner that acknowledges the very “preservation” of the military. In addition, this understanding is thrown into question by another cluster, which states “To the contrary, the most obvious reason people lie about receiving military honors is because they believe that being perceived as recipients of such honors brings them acclaim, suggesting that generally the integrity and reputation of such honors remain unimpaired.”

The reason for such acclaim would only seem to naturally exist outside of fabrications of such claims; Medals of Valor are reserved for those who persevered through the most trying of circumstances. They could similarly be deemed as ultimate symbols of courage, bravery, and credibility. It is not the medals themselves, but the actions and fortitude they represent. Within these clusters, however, supposing a harm to “the medals” and their reputation does not produce a compelling interest to the court. “Honor” is therefore relegated to a “compelling” but un-legislatable government interest. It is conclusively decided to be a value which holds

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<sup>247</sup> *U.S. v. Alvarez*. 11878-11879. Therefore, In order to fit within one of the five categories of unprotected speech, however, the court repeatedly references a need of the government to demonstrate both the aforementioned harm to an individual, as well as an “element of scienter,” meaning intent. *U.S. v. Alvarez*, 11866.

understandable merit, but falls short of reaching a place on the Ninth Circuit's value hierarchy which allows for its governmental protection without proving additional harm.

The second key term that requires critical cluster analysis within the Ninth Circuit's *U.S. v. Alvarez* is "false statements of fact," or "false statements" for short<sup>248</sup>. This terminology represents the court's examination of the role that mendacities may or may not play in Congressional development of restrictive laws. The frequency of "false statement" clusters is immense, as would seem natural with it composing a major portion of the issue at hand. Within the formation of these clusters, associations are most frequently and intensely developed with an explicit connection to "value." This allows the Ninth Circuit to openly determine the importance of protecting against false statements, often in a pejorative sense. "Values" are also used in an "evaluative" context, offering either low or high worth to false statements of fact or their policing. This often refers to the government's belief that "false statements of fact" are "of such slight social value that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."<sup>249</sup> This is also seen in the form of the <sup>250</sup>courts "noting our rejection of the government's suggestion that... '[f]alse statements of are particularly valueless...'"

These clusters of "false statements" and "values" clearly show the positioning of "false statements" as on the very bottom of the government's relevant hierarchy. The court, however, contests the very notion that "false statements of fact" should hold no weight in the hierarchy. As mentioned within the discussion of "honor," this serves as another instance when the court

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<sup>248</sup> "False Statements of fact," or alternatively "false factual statements," occur a total of thirty-five and twenty-five times in the body of the text, respectively, and a total of twelve and three times, respectively, in the footnotes.

<sup>249</sup> *U.S. v. Alvarez*, 11855.

<sup>250</sup> *U.S. v. Alvarez*. 11857.

attempts to portray a directly inverse definition of value than the losing argumentative framework. This modification and redefinition of a synonym of “lie” demonstrates a remarkable attempt in doing so, as well. Special interest can also be paid to the use of the court’s representation of a government motivation of “social interest in order and morality.” As “false statements” are positioned directly opposite to these two initiatives, the court seeks to establish a broad spectrum of intended goals. By limiting the efficacy by which these goals appear to be reached, and subsequently challenging the notion of “false statements” as “valueless,” the court positions itself to erode the basis for upholding the Stolen Valor Act.

The Ninth Circuit attempts a shifting of the balance away from “false statements” as valueless through correlating clusters regarding scenarios of subjective values. This further throws the specific concept of “honor” into contention, as well as elevates “false statements” to an understanding that nurtures democratic ideals. This is exhibited in the cluster stating: “How, based on the principle proposed by the government, would one distinguish the relative value of lies about one’s receipt of a military decoration from the relative value of any other false statement of fact... such an approach is inconsistent with the maintenance of a robust and uninhibited marketplace of ideas.”<sup>251</sup> The lack of “distinction” between military service medals and any other mendacity immediately suggests an additional lack of any unique content. Furthermore, the concept of a “robust and uninhibited marketplace of ideas” is introduced as a higher value that must be protected. The allowances of “false statements” in public discourse are therefore considered a necessary aspect of upholding First Amendment rights. The topic of “public” discourse or debate is additionally one of the most important in the case. Any time the court refers to the “public” or “public discourse,” it is a direct acknowledgement and call to the

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<sup>251</sup> *U.S. v. Alvarez, 11858.*



non-participating audience of the decision.<sup>252</sup> While the topic of public good is a necessary aspect of any case, speaking in terms of its preservation still wields a considerable amount of rhetorical might.

Further aspects of the Act's dealings with "false statements" are weighed for arbitrariness when the court reviews whether "false factual statements... may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary."<sup>253</sup> The role of "government" is determined to not include the right to determine certain speech as valueless or unnecessary. In fact, the very tenets of a democracy are portrayed as crumbling if, as the court suggests, the content of public discourse would be decided by value judgments of the government. This broad fear is expressed not through the specific context of the Stolen Valor Act, but through a link of clusters relating to general "false statements of fact." This once again allows the court to stray away from the supported values of "honor" and its protection, and discuss new significance for allowing "false statements." In doing so, the government's argumentation is momentarily forgotten as cleaner inclusions of precedents (such as *Chaplinsky v. New Hampshire, 1942* which is cited here) remain an authoritative voice within the legal discussion. This also recalls the phenomenon of a link of consequential clusters to shift from topics of social values towards more legal understandings. The more general legal context also allows for the court to attempt an explanation of reasoning somewhat removed from the most emotionally invested subjects of the case. Such considerations are reiterated in clusters comparing the use of precedent highlighting both sides: "Since the *Stevens* Court saw fit to name defamation specifically, rather than false statements of fact generally, as the historical category

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<sup>252</sup> Based on the immense focus paid by Perelman and Chemerinsky to the broad audience, this seeks to unite them in common interest.

<sup>253</sup> *U.S. v. Alvarez, 11859*.

excluded from constitutional protection, we believe the historical category of unprotected speech... is defamation and not all false factual speech...” and “The dissent erroneously relies on *Gertz* for its statement that false factual speech is valueless and unprotected, while ignoring what *Gertz* actually held.”<sup>254</sup> The substantial significance of these clusters are threefold. First, credibility is automatically added to the Court and detracted from the Government for acknowledging either proper or faulty application of precedent.

Second, both the precedent itself and recalling “historical categories of constitutional protections” brings with it an aura of ethos that exudes a reverence for the traditional interpretations of First Amendment jurisprudence. As has already been discussed, these decisions have amounted to a precedent which views regulations like the Act as entirely problematic. Repeated references to the history of the court in important clusters, especially in conjunction with precedent itself, discourages new interpretations which would stray from previous understandings of constitutional law. Thirdly, words within the clusters such as “erroneously,” “ignoring,” and “relies,” provide negative terminology which surround imperative notions of jurisprudence, actively casting the losing argument into disrepute. The carefully constructed words reinforce previously addressed notions of promoting “insufficiency” argumentation, not just through the arguments themselves, but through embedded and impactful language which function together to tip the legal scales.

The final appeal made by the court through clusters of “false statements” and the “value/valueless dichotomy” is through a discussion of public and popular discourse. The decision specifically makes reference to the fact that “there can be no doubt that there is affirmative constitutional value in at least some knowingly false statements of fact. Satirical

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<sup>254</sup> *U.S. v. Alvarez*, 11864.

entertainment such as The Onion, The Daily Show, and The Colbert Report thrives on making deliberate false statements of fact. Such media outlets play a significant role in inviting citizens alienated by mainstream news media into meaningful public debate over economic, military, political and social issues.”<sup>255</sup> This expresses the value of democratic inclusion and participation as of the utmost importance. The ability to engage in free speech, even with the dissemination of lies, is said to contribute to a more holistically involved society.

This serves as another example of court justification removed from the explicit values inherent within the Stolen Valor Act. Though “false statements” are certainly a major consideration, discussion is avoided regarding the potential negative effects of falsely perceiving someone within the marketplace of ideas to be a recipient of a medal of valor. In emphasis on the issue of “value,” however, the Court includes “even a false statement may be deemed to make a valuable contribution to public debate, since it brings about the clearer perception and livelier impression of truth, produced by its collision with error.” This highlights the general sentiment of the Ninth Circuit that in the end, the protection of open and public discourse serve a much more compelling national purpose than does the restriction of “false statements.” Within the spectrum of this hierarchy of values, a social interest in order and morality serve a compelling purpose, yet comparatively less so to the open exchange within the “marketplace of ideas.”

The final key cluster term that provides a breadth of critical analysis is that of “freedom of speech” or more general “freedoms.”<sup>256</sup> As one of the most culturally significant values within any branch of government, the way in which freedom is either attained or lost through certain

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<sup>255</sup> *U.S. v. Alvarez*, 11874.

<sup>256</sup> Shockingly, the key term of “freedom” only occurs eight times within the main body of the text, while it appears within the footnotes only once. The more general term “free,” as in “free expression,” however, occurs an additional eleven times in the main text.

federal actions serves as an expression of ultimate popular interest. The limitation of freedoms, especially those enshrined within the Constitution, are required to show vigorous justification. The court is able to use these reflections in their discernment of what freedoms would or should be sacrificed in the name of “honor.” The most common and expressive “freedom” cluster that repeatedly appears is that of First Amendment “breathing space.” According to the court, *“Erroneous statement is inevitable in free debate, and... it must be protected if the freedoms of expression are to have the breathing space they need to survive.”*<sup>257</sup>

This citation would seem to address the way in which precedent is used in further cases. This also summarizes the view of the court that, apart from failure to show a tangible harm to the individual, the Stolen Valor Act would open a potential floodgate for government intervention in regulating freedoms of expression. What also must be highlighted, however, is the continued use of “public debate” to describe the setting of a violation of the Stolen Valor Act. Any cluster’s use of this language immediately invokes a certain conception of scholarly or passionate discourse valuable for the country. While public debate is certainly the Court’s primary concern for harm, and understandably so, a value determination is made within the clusters themselves by constantly portraying this deliberate setting of commendable civic participation. No mention is made of medal falsifications that may occur in social settings excluding political debate or public discourse, which reinforces their argumentative clusters warning of the limitation of valuable discourse.

More mentions are made of “freedom[’s]” need of “breathing space” by relating the two with the “narrow specificity” required by the government in issuing regulations.<sup>258</sup> The

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<sup>257</sup> *U.S. v. Alvarez, 11856.*

<sup>258</sup> *U.S. v. Alvarez, 11878.*

legislature is therefore challenged to “punish only unprotected speech and not be susceptible of application to protected expression.”<sup>259</sup> While drawing on the language of “narrowly tailored” within strict scrutiny, this cluster furthers a conception of non-interventionism by the government. The references to narrowly tailored versus over-broadness are also mentioned with much harsher language: “we cannot adopt a rule as broad as the government and dissent advocate without trampling on the fundamental right to freedom of speech.”<sup>260</sup> While the term “broad” is repeatedly used to describe the Stolen Valor Act within this case, the explicit imagery of “trampling” on a “fundamental right to freedom of speech” in this instance employ a unique result; their inclusion almost inserts a direct counter of patriotism and nationalism to combat the same concepts which are easily found within the original Act. Within this cluster, specific language is used by the Court to expose a threat to the foundational value of “freedom” and “right to freedom” greater than expressed within the legislation in question. This culminates into one of the most “intense” clusters referring to the harms of the Act itself within the decision.

The Court also creates a series of clusters that directly pit “freedom” against the government, thereby reinforcing a directional definition of “freedom.” This represents the explicit dichotomies as mentioned by Winkler, as the court constructs language that necessarily puts the government as the threat to “freedom’s” existence. While also utilizing the concept of “breathing space,” the decision states “the general freedom from government interference with speech, and the general freedom to engage in public and private conversations without the government injecting itself into the discussion as the arbiter of truth, contribute to the ‘breathing space’ the First Amendment needs to survive.”<sup>261</sup> Rather than describe freedoms given and

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<sup>259</sup> U.S. v. Alvarez, 11878.

<sup>260</sup> U.S. v. Alvarez, 11850.

<sup>261</sup> U.S. v. Alvarez, 11860..

protected *by* the government, the court associates freedom as something to be abused by the government, removing from the legislature the privilege to know which laws will be beneficial for the country. While this conception of freedom is essential to understand and realize, it is the way in which associated words are grouped around it that reveal the court's world view towards restrictive legislation. A sense of distrust appears in a healthy dose, along with a refusal to be deferential. This is also directly seen by the court's questioning of the government in the role of "arbiters of truth." This serves as a ridiculous phrase that paints the government as unable to enforce the legislation that they pass. The language of "injection" is also very interesting in this particular "freedom" cluster, as it carries echoes of a situation requiring medicinal consent. This would suggest the government wishes to prescribe a remedy which would create far more severe side effect than the symptoms themselves. Within "freedom" clusters, it is thus the "intensity" that is created which attempts to explain how one of the pillars of any American value hierarchy would be thrust into a very tangible harm.

## Chapter 7:

### A Word of Conclusions

The Ninth Circuit Court's decision in *United States v. Alvarez* attempts to position adamantly venerated societal values in close proximity to more complex legal justifications. The overall strategy, however, sets up certain hierarchies of values against specific clusters of the key terms, while avoiding others. The contentious nature of value clash comprises a major hurdle for the court. Through the formulation of logical associations (or chains of clusters), the weighing of relevant values can be made momentarily removed from the societal values which weigh heavily on the decision, thus allowing for more "logical" factors such as precedent generalized concepts of harms to prevail. The repetitious frequencies of certain terms that appear in the clusters of multiple key terms represent continuity for clarification purposes. Terms like "government" or "Congress" and "prevention" as an action versus "protection" highlight some of the rhetorical dichotomies used to define specific actors and their allowable actions. Furthermore, the characterizations which the Court propagates of essential societal values, such as that of "freedom," "public debate," "injury/harm," or "history/tradition" all serve to inform the clusters in a specific context of non-interventionism. The result is a decision with subtlety and nuance, all working towards justifying why content-based regulations of speech are violations of inherent "freedoms," provided that they do not address a tangible harm in a narrow fashion. The "inverse" hierarchy mechanism of the court provides one of the most interesting and revealing observations. Though not used to an extensive degree, it completely counters and flips the hierarchy of argumentation that the court wishes to perceive as obsolete. The frequency of expected terms in the decision also produced surprising results, as "Medal of Honor" and "Freedom" appear far less than may be expected with the subject material. All of these

discoveries show how the use of cluster analysis, supplemented by examining the resultant value hierarchies of expressed concepts, aptly examines legal rhetoric by determining both the underlying connotations of a court's world view, as well as assessing what the ranking of values are within that court's conception of relevant jurisprudence. The use of rhetorical analysis to understand the complex strategies used in legal discourse allow for a promising course of study. The reunion of the two fields forms an essential objective; one that is undoubtedly both compelling and contributive to the marketplace of ideas.



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