



# CITING FICTION

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## I.

### INTRODUCTION

**A**LTHOUGH FEDERAL JUDGES undoubtedly read fiction, this fact is not readily apparent from reading their opinions. A comprehensive survey of over 2 million federal appellate opinions over the past 100 years reveals only 543 identifiable citations or references to works of fiction. Of these, less than half – 236 – were employed rhetorically to evoke an emotional response in the reader.<sup>1</sup> This type of citation, which I’ll call a “literary” citation, occurs in only about 1 out of every 10,000 federal appellate opinions.

This is surprising for two reasons. First, judges routinely cite to lots of sources, including works of history, social science, and economics, so the fact that literature is not “law” does not mean it is *per se* verboten. Also, legal opinions are often highly rhetorical and storytelling in nature, so one might expect judges to draw directly and explicitly from humanity’s vast literary repository. While “facts” are undoubtedly more persuasive to some readers, references to fictional accounts, especially when they are, like Shakespeare’s works, so integral to the human experience, can be a powerful tool

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<sup>1</sup> The methodology of this survey, and its limitations, are discussed in Section II.

of persuasion. As Judge Richard Posner has explained, in “areas not yet conquered by logic or science, we are open to persuasion by all sorts of methods, some remote from logic and science.”<sup>2</sup> Aristotle too praised the virtues of fiction for this purpose, noting that while history is a description of what *has* happened, fiction is a description of what *may* happen.<sup>3</sup> Therefore, enduring works of fiction could be a powerful source of persuasion.

Second, a central claim of the law and literature movement (which I’ll refer to as “the Movement”) is that reading fiction can provide judges with knowledge about how to solve real world problems. For example, Professor Martha Nussbaum writes that “the novel constructs a paradigm of a style of ethical reasoning ... in which we get potentially universalizable concrete prescriptions by bringing a general idea of human flourishing to bear on a concrete situation.”<sup>4</sup> If this is true and the Movement has had a significant effect on law, one would expect to see an increase in the use of literature in judicial opinions, since judges routinely cite to works that have a direct impact on their decisionmaking. We should also expect to see works cited for the reasons the Movement wants them to be – to reveal that the fiction has evoked feelings of pity and empathy for the less fortunate and given a voice to traditionally marginalized segments of society. Neither of these things is true.

There are many possible reasons why judges do not cite fiction: It is possible that the social norms of the bench suppress the citation of nontraditional sources; maybe judges are concerned about the impact of citing fiction on litigants; or maybe judges just do not find literature to be a reliable source of information. We cannot know for sure the reasons, but the fact that judges do not cite to fiction often is nevertheless interesting. While there are limits to this type of analysis, citation studies are a well-accepted method for measur-

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<sup>2</sup> RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 276 (1998).

<sup>3</sup> ARISTOTLE, POETICS (1997).

<sup>4</sup> MARTHA C. NUSSBAUM, POETIC JUSTICE 8 (1997).

ing influence.<sup>5</sup> Of course, a simple count of citations will not definitively answer the question of whether particular works of literature have influenced judicial decisions, but it can illuminate other interesting questions, such as: What authors do judges cite to and why? What does the citation to literary texts in judicial opinions tell us about the way cases are decided? What are the influences on a particular judge? Who is the implied reader of an opinion? And so on.

## II.

### METHODOLOGY

The list of authors and specific works of fiction that were searched included every novel and author from Martha Nussbaum's law and literature class at the University of Chicago Law School taught during the Spring of 1997, every novel and author mentioned in Richard Posner's book *Law and Literature: A Misunderstood Relation*, and every book listed as part of the "Law and Literature Canon."<sup>6</sup> This list includes both ancient and modern authors and books on nearly every conceivable subject matter; it is certainly not limited to books on the law. Overall, searches were run on approximately 110 authors and works. It is of course possible that a judge might cite to works not included in this list, but there is every reason to believe that the vast majority of citations to fiction will be to works on this list.

Searches were performed on Westlaw and Lexis. For each author, a search was performed using the author's last name and specifically excluding situations where the author's name comes up as a judge, as counsel, or as the named party. In some special cases, searches were further delimited by an author's primary work(s) because the author's name is also a relatively common proper name. The results of these searches were categorized as "raw." The "relevant" group excluded those situations where the author's name ap-

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<sup>5</sup> See William M. Landes et al., *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J LEGAL STUD 271, 271-72 (1998).

<sup>6</sup> See Elizabeth Villiers Gemmette, *Law and Literature: Joining the Class Action*, 29 VAL U L REV 665 (1995) (based on survey of professors).

peared as something other than the name. Each case in the relevant group was examined to determine if the author's name and/or work was in fact used as a literary tool.

A "literary" use is one where the author's name, the title of a book, or, most often, a quote or idea, is used to evoke an image that helps color the argument. For example, where a judge refers to something as "Orwellian," to make the point that it was authoritarian, the use is literary. On the other hand, where a judge refers to obscenity in the works of Chaucer, the use is not. Also excluded from the literary category are uses of fiction for historical purposes. The hardest cases to classify were those in which a judge referenced a piece of literature for the sake of citing a turn of phrase. In those cases, subjective judgment was used to determine if the particular turn of phrase being used helped color or provide context for the argument, in which case it was literary, or if it was being used to add a "well-readness" to the opinion, in which case it was not.

### III.

#### RESULTS

##### *A. Rare and modern*

Citations to literature are extraordinarily rare in federal appellate court opinions, appearing in only about 1 out of every 10,000 federal appellate cases. To put this number in perspective, this is about one third the citation rate of a single dictionary – the Oxford English Dictionary (over 600 citations) – and over sixty times less frequent than citations to Black's Law Dictionary (almost 15,000 citations). Citations to history, economics, and other social science texts also dwarf citations to fiction. Just to take one example, there were about the same number of citations to just two famous economic thinkers – John Stuart Mill and Paul Samuelson (245 citations combined) – as there were to *all* novelists and works of fiction.

Judges cite to dictionaries, basic economics texts, and famous thinkers to show their erudition and add credibility and persuasiveness to their arguments. Literature can do this too. Most benignly,

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literature can provide nearly the exact function of these other sources by offering documented support for a claim. For example, in *Coy v Iowa*, Justice Scalia – writing for the majority – used a line from Shakespeare’s “Richard II” to support his definition of the word “confront.” Scalia described the etymology of the word, broke it down by its Latin roots, and then quoted Shakespeare: “Shakespeare was thus describing the root meaning of confrontation when he had Richard the Second say: ‘Then call them to our presence – face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak . . . .’”<sup>7</sup> In this use, an appeal to Shakespeare is like an appeal to the dictionary or to history.

There is one big difference between citing to the dictionary and citing to Shakespeare: It isn’t easy or efficient to look up quotes in Shakespeare’s plays unless one has an idea of what one is looking for. It takes an extremely well read judge (or law clerk<sup>8</sup>) to go beyond obvious quotes to famous works. It is fair to assume that all of the Supreme Court justices throughout history read at least the major Shakespearian plays, but this doesn’t mean they can quote passages or analogize to themes in “Timon of Athens.”<sup>9</sup> The richness of Shakespeare requires close study and devotion before ideas from his work can be meaningfully applied to a court case. So it isn’t surprising that few justices seem willing to risk such citations.

Judges who do cite to fiction show a tendency to cite to a given author or work repeatedly. In fact, a single judge often accounts for more than half of the citations to a particular author. Judge Frank in the Second Circuit accounted for three-quarters of all citations to ancient literature in the survey, and Judge Cardamone accounted

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<sup>7</sup> 487 US 1012, 1016 (1988).

<sup>8</sup> It is difficult to imagine clerks would be the source for these citations, as the practice seems highly personal and the judge has to approve of the practice in any event.

<sup>9</sup> In *Brown v Felsen*, 442 US 127 (1979), Justice Blackmun cited to “Timon of Athens” for the proposition that “[b]ankruptcy deprives a debtor of his creditworthiness and so impairs his ability to repay.” He quotes: “‘When every feather sticks in his own wing, / Lord Timon will be left a naked Gull, / Which flashes now a Phoenix.’” 442 US at 137 n 8 (quoting Act 2 Scene 1).

for more than 50 percent of all references to Shakespeare. In the Seventh Circuit, Judges Posner and Easterbrook combined for nearly all citations to fiction, and over 80 percent of all references to George Orwell. On the Supreme Court, Justices Brennan and Douglas accounted for most references to Orwell. Judges have favorite authors or themes, and they cite to them again and again.

Familiarity with an author's work isn't a sufficient condition, however, as the personal style of the judge matters too; a judge must be the kind of person to consider it appropriate to use literature as a rhetorical technique. Adding these two things together means that we should see very few judges accounting for most of the citations. And the survey found just that. This is true both on the Supreme Court as well as on the Circuit Courts.<sup>10</sup> For example, of the 110 Supreme Court justices who have served, only 21 have ever cited to the authors or works in this survey. The leading Supreme Court fiction citers are Justices Douglas, Stevens, Brennan, and Rehnquist, each of whom has cited to fiction around five times.<sup>11</sup> These four justices account for almost 50 percent of all Supreme Court citations to fiction.

Judicial personality is often important because literature can do more than what Justice Scalia did in *Coy*. Dictionaries attest to meaning, and literature that is historically enduring can do the same thing. But literature can create meaning and an emotional response in ways unachievable by other citations. When judges cite to Dickens to comment on prison conditions or Orwell to characterize government behavior, the citation evokes not only the richness of the novel and its place in our collective history, but also readers' full experience with the novel and its meaning. As Martha Nussbaum has argued, those "who deny themselves the influence of emo-

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<sup>10</sup> For example, in the Second Circuit, three judges (Cardamone, Moore, and Frank) accounted for over 50 percent of all citations to fiction. In the Ninth Circuit, a single judge (Reinhardt) was responsible for about 25 percent of all citations. Finally, in the Seventh Circuit, two judges (Posner and Easterbrook) accounted for nearly half of all literary citations.

<sup>11</sup> When adjusted for the numbers of opinions written, Justice Scalia is the most likely to use a literary citation.

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tion deny themselves ways of seeing the world that seem essential to seeing it completely.”<sup>12</sup> It seems a few judges believe and practice this on occasion, although far fewer and far less than the Movement would want. Some of the powerful uses of literary citations are explored in section IV below.

Not only are citations to fiction rare, they are primarily a modern phenomenon: Over 80 percent are in cases decided since 1970.<sup>13</sup> This increase in citations to works of fiction tracks the increase in the federal case load since that time. If we normalize the citations by the total number of opinions, a slightly different picture, although still a “modern” one, emerges. In the Supreme Court, the dramatic increase in the number of citations per opinion occurred in the 1960s. The time period from 1950 to 1959 saw a citation in less than one half of one percent of cases, while the 1960s by contrast saw an increase to a citation in almost one and a half percent of all opinions. This change is perhaps explainable by the fact that the 1960s were a time when many major civil rights and constitutional issues were thrust onto the national stage. With the increase in controversial cases about such things as police power and privacy came an increased use of emotional appeals and non-legal forms of persuasion.

### *B. About familiar things*

Contrary to the aspirations of the Movement, most of the citations to novels involve matters about judges, not the parties before the court. Judges primarily cite to novels for concepts about their world, not the world of the criminal, the marginalized, or the less fortunate. About half of all citations are about the law’s delay, the definition of legal terms, and the role of courts in our system, not about generating empathy for litigants. This demonstrates that although we may give our judges the benefit of the doubt and imag-

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<sup>12</sup> NUSSBAUM, *supra* note 4 at 67.

<sup>13</sup> This figure is about 80 percent for the Supreme Court and about 85 percent for the Circuit Courts. There is variation across circuits, ranging from 75 percent in the Second Circuit to 98 percent in the Seventh Circuit.

ine they read more than just about their own world, they are most likely to cite to novels for propositions that are closely related to their own life and job. For the Movement, which has as a main goal the increasing of judicial empathy towards others, this must be a disappointment.

We can see this by looking at the list of most frequently cited authors: George Orwell (61 citations); William Shakespeare (35); Franz Kafka (34); John Milton (20); Homer, Chaucer, and Oscar Wilde (14 each). When adjusting for the “literary” usage, however, the list of most-cited authors changes. For example, only 7 of the 35 citations to Shakespeare are for literary effect, dropping him from second to eighth most cited author. The most cited authors for literary effect are: Orwell (35 citations); Kafka (25); Milton (11); Homer (11); John Donne (9); Robert Bolt (9); Camus (8); and Shakespeare (7). The remaining authors, including all those taught in law and literature courses, are either not cited one single time, or are cited so rarely as not to be worthy of further discussion. Such giants of literature as Dostoevsky, Voltaire, and Faulkner, who commented extensively on the human condition generally, and the law specifically, are all but totally excluded from the opinion record.

Notably, nearly one in four citations are to Orwell or Kafka, and, in each case, for one work: “1984” and “The Trial” respectively. Each of these is the author’s most famous work, and both can be distilled, although rather unfairly, to simple notions about government – the word-bites Orwellian and Kafkaesque. Although cited by conservative, moderate, and liberal judges, citations to these novels are for a particular political point of view, and not one that is routinely trumpeted by the Movement.

Kafka and Orwell are not the only authors that show the tendency of judges to cite to authors for primarily one work.<sup>14</sup> For example, Charles Dickens is known for his insightful social commentary, but he is cited most frequently for one aspect of “Bleak House.” This isn’t Dickens’ most famous or influential work, but

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<sup>14</sup>The single exception is Shakespeare.

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the endless litigation of *Jarndyce v Jarndyce* is the concept most close to judges' world of deciding cases. Each time the work is cited, it is for the proposition that litigation and bureaucracy are often absurdly wasteful of the time and energy of those involved. For example, in *Hughes Tool Company v TWA*, Justice Burger dissented and wrote that "[t]o describe this litigation as a 20th-century sequel to *Bleak House* is only a slight exaggeration. Dickens himself could scarcely have imagined that 56,000 hours of lawyering at a cost of \$7,500,000 would represent the visible expenses of only one party to a modern intercorporate conflict."<sup>15</sup>

### C. For rhetorical persuasion

When literary citations are present, they are used primarily for a highly rhetorical form of persuasion. The arguments are not really law but rather emotional appeals urging the reader to look beyond the law and logic for the "right" answer. Martha Nussbaum describes it this way: "emotions do not tell us how to solve ... problems; they do keep our attention focused on them as problems we ought to solve."<sup>16</sup>

The use of literary citations in this way is evident in three findings from this survey.

First, justices appointed by Democrats or with an otherwise liberal voting record made almost 80 percent of all literary citations.<sup>17</sup> The arguments made by these justices – in defense of criminal defendants, against business interests, in favor of broad privacy rights, and so on – are more amenable to emotional appeals.

Second, although we occasionally see literary citations used in a tremendous range of disputes – from admiralty cases to tax controversies – most citations are in cases implicating individual rights. In particular, cases about the constitutional rights of citizens (for example, Bill of Rights cases, due process cases, equal protection cases) account for about 45 percent of all citations, and criminal

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<sup>15</sup> 409 US 363, 393 (1973).

<sup>16</sup> NUSSBAUM, *supra* note 4 at 69.

<sup>17</sup> Of the remaining usages, about 70 percent are from Justices Rehnquist and Scalia.

procedure cases in particular account for over one third of all cites.<sup>18</sup>

Finally, the vast majority of literary citations are used in dissenting opinions, where judges are freer with their style of argument and may be willing to seem to be appealing to forces outside of the law for a change in the law. Majority opinions in the Supreme Court are primarily justified with legal analysis, and an appeal to fiction might in fact undermine the apparent lawfulness of the decision.<sup>19</sup> Thus, rarely does a majority opinion refer to materials other than statutes, cases, or the Constitution. When justices do cite to a novel or play in a majority opinion, it is stylistically or contextually quite different from a reference in a dissenting or concurring opinion. For example, in *Milkovich v Lorain Journal*, Justice Rehnquist used a quote from “Othello” for the obvious proposition that defamation is a well-established legal rule,<sup>20</sup> and in *U.S. v Apfelbaum*, he quoted “Measure for Measure” for the fact that criminal law requires both an act and a mental state.<sup>21</sup> The rare instances when majority opinions in the Court did include literary citations were in a distinct class of cases: where the opinion was a close call, a break from the past, or likely to be a hard sell to the public. For example, Justice Ginsburg used a literary reference (to Plato) to bolster her arguments in the case overturning the male-only admissions policy of the Virginia Military Institute.<sup>22</sup>

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<sup>18</sup> The other most common subjects in which literary citations appear are: civil procedure (9 percent), statutory interpretation (9 percent), and administrative law (7 percent). In contrast, only about 10 percent of citations are in private law subjects, like intellectual property (6 cites); tax (4); admiralty (4); securities (1); and antitrust (1).

<sup>19</sup> In addition, majority opinions are joint efforts, and subject to the need to sell the opinion and accept the edits of joiners, while dissents are usually sole proprietorships with more flexibility for the author.

<sup>20</sup> 497 US 1, 10 (1990).

<sup>21</sup> 445 US 115, 131 (1980).

<sup>22</sup> *US v Virginia*, 518 US 515, 555 n 20 (1996). Justice Rehnquist’s majority opinion in *Vermont Yankee v NRDC* is another example where a literary reference was used in a majority opinion that was somewhat radical. 435 US 519 (1978) (citing Kafka).

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By contrast, non-majority opinions are quite different in tone and purpose. When a judge dissents or concurs, the shackles are removed and she is free to cite to materials that might be considered inappropriate for a majority opinion. The soapbox of a dissenting or concurring opinion is a forum for an individual justice not only to comment and offer separate analysis but also to suggest possible changes for when the issue or similar issues are again before the Court. Many of the most famous reversals in Supreme Court history were based in part on the legal and rhetorical appeal of prior dissenting opinions. The implied reader of a dissenting opinion may be different too, as the justice may be trying to persuade lawyers, law professors, legislators, the media, and citizens, some of who may be moved to action more by emotional appeals.

In the Supreme Court, nearly three-quarters of literary citations are in dissenting or concurring opinions (63 percent in dissenting; 27 percent in majority; and 10 percent in concurring). In the circuit courts, by contrast, the reverse is largely true, with about 64 percent in majority opinions and 36 percent in dissenting and concurring opinions. Appeals court majority opinions are speaking in two directions at once – up to the Supreme Court and down to the district courts. Each of these two roles played by the opinion allows for the inclusion of literary references.

When the implied reader is the Supreme Court, the opinion may serve as a piece of advocacy from the judge on a particular issue that is resolved differently in various circuits. Judge Reinhardt's majority opinion in *Compassion in Dying v Washington* provides a good example.<sup>23</sup> In that case, the circuit courts were split on the issue of physician-assisted suicide and it was clear that the question would almost assuredly be resolved eventually by the Supreme Court. In addition to providing the Supreme Court with legal analysis, Judge Reinhardt cited to numerous literary sources for the purpose of echoing the voices of the terminally ill, with the evident goal of convincing the Supreme Court that this was something that they as a policy-making entity should consider.

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<sup>23</sup> 79 F3d 790 (9th Cir 1996).

When the implied reader is the district courts, which must apply the standard announced by the appeals court, the use of a literary reference may serve as a scolding or a reprimand to a particular judge or result, or it may serve as an educational tool in a particular area of the law. Given the discretion that lower court judges have in applying the law to facts, storytelling may be extremely useful to help open the minds of lower court judges on matters where they must use considerable judgment.

#### IV.

#### LITERARY USAGE

A few judges have, albeit infrequently, deployed citations to literature in the manner advocated by the Movement – to evoke the empathy of the reader for a litigant or argument that would not otherwise get it. A good example is whales. Dissenting in *Japan Whaling Association v American Cetacean Society*,<sup>24</sup> from a technical administrative-law holding about the ability of the executive branch to ignore whaling restrictions passed by Congress, Justice Marshall quoted “Moby Dick”:

I am troubled that this Court is empowering an officer of the Executive Branch ... to ignore Congress’ pointed response to a question long pondered: ‘whether Leviathan can long endure so wide a chase, and so remorseless a havoc; whether he must not at last be exterminated from the waters, and the last whale, like the last man, smoke his last pipe, and then himself evaporate in the final puff.’<sup>25</sup>

Although the majority characterized the legal issue as one of administrative law, Justice Marshall countered with law *plus* a reference to “Moby Dick” to serve as a broader social commentary and to create an emotional response in the reader that, even if the majority had answered the “legal” question correctly, the case posed a problem that society needed to solve in another way.

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<sup>24</sup> 478 US 221(1986).

<sup>25</sup> Id at 249 (Marshall dissenting).

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Another simple literary technique used occasionally is historical framing. Consider Justice Blackmun's use of Dickens to ridicule an obscure legal device that allows a debtor to contract in advance that the holder of the debt will be able to collect without notice or hearing. In *Overmyer v Frick Co.*,<sup>26</sup> the Court held unconstitutional an Ohio statute that allowed the use of the cognovit, noting that it was criticized by case law, legal commentators, and Charles Dickens: "Mr. Dickens noted it with obvious disfavor. *Pickwick Papers*, c. 47."<sup>27</sup> The reference to case law and the legal commentators was likely sufficient to support the new rule, but the reference to Dickens colored the obscure legal device with the imagery of absurdity and cruelty commonly associated with Dickens's fictional world.

Another example comes from Justice Brennan's dissent from the holding in *Florida v Riley* that the police may search a person's property from a helicopter without a search warrant.<sup>28</sup> After a legal analysis that criticized the majority's reading of Supreme Court precedents, and a public policy analysis, Justice Brennan ended his opinion with an emotional plea:

The Court today approves warrantless helicopter surveillance from an altitude of 400 feet. ... I hope it will be a matter of concern to my colleagues that the police surveillance methods they would sanction were among those described 40 years ago in George Orwell's dread vision of life in the 1980's:

'The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said. ... In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows.' *Nineteen Eighty-Four* 4 (1949).

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<sup>26</sup> 405 US 174 (1972).

<sup>27</sup> *Id.* at 177.

<sup>28</sup> 488 US 445 (1989).

Who can read this passage without a shudder, and without the instinctive reaction that it depicts life in some country other than ours? I respectfully dissent.<sup>29</sup>

The power of citing fiction can be seen clearly in this excerpt. Imagine if these words were not from “1984”, and Justice Brennan nonetheless used them to make his point. It would have been completely ineffective at conveying anything to the reader, and perhaps even a bit silly. But why is it that fiction from George Orwell is evocative and (perhaps) persuasive, while “fiction” from Justice Brennan (if he wrote those words instead of Orwell) would not be? The answer lies in the ability of a short passage, word, or even citation to bring forward all of the meaning and context of the work, even for readers with only a superficial understanding of the novel. “Big Brother” is more real because the novel has been absorbed by the culture and placed in a position of meaning and symbolism. Readers can imagine not only the acts of surveillance more vividly as a result, but – and this is the key point – imagine what flows from those acts. This was Aristotle’s point about fiction: It tells us what *can* happen. Justice Brennan seizes upon this in his dissent to tell future justices, lower court judges, politicians, the media, and citizens that the Court’s ruling will lead to the world of “1984.” No other citation could have packed this wallop. Regardless of whether or not the Fourth Amendment was intended to (or optimally would) protect against such a search, Brennan’s quotation from “1984” makes the reader feel like the Constitution *should* protect us from such police behavior.

## V.

### CONCLUSIONS

Citations to works of fiction are extremely rare in judicial opinions. Less than one-half of one percent of all appellate opinions contains a reference to a work of literature. When judges do cite to literature, they do so for a variety of purposes. Citations are used to

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<sup>29</sup> Id at 466-67 (Brennan dissenting).

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help the reader understand the definition of a legal term, sometimes to make the reader laugh, and occasionally to create a feeling of pity in the reader for the plight of a party or issue in the case.

The Supreme Court, being more prone to policy debates, is approximately five times more likely than a federal appellate court to use a literary citation. Citations are found mostly in cases involving the Bill of Rights or other individual rights; are used primarily by left-leaning justices; and are found overwhelmingly in dissenting opinions. These facts are all consistent with the idea of literature being used for rhetorical and emotional effect.

In terms of authors and works, Kafka and Orwell are the dominant literary figures used by the courts, and their works “1984” and “The Trial” are the most commonly cited. Judges generally do not cite to literature for ideas beyond their ken and uniquely within the province of storytellers, but rather for things – like law and the functioning of the judicial system – with which they are already intimately familiar. Viewed in this way, the Movement has failed to exert sufficient influence on judges to move from an unknowable tacit influence to a citation-rich explicit one. Justices Marshall, Brennan, and Douglas occasionally deployed literature to convince the reader of human possibilities and move them toward pity, but this type of usage has been very, very rare.

