

# Constructing the Canon

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## I. INTRODUCTION

In the first volume of this journal, Robert Weisberg provided a useful topology of the "law/literature" world.<sup>1</sup> As he describes it, two kinds of inquiries dominate the field: the first is law *in* literature—such as *Billy Budd*,<sup>2</sup> and the second is law *as* literature—such as judicial opinions as a literary form. As is evident, Robert Ferguson's essay, "The Judicial Opinion as Literary Genre,"<sup>3</sup> is an example of the second version—judicial opinions as the objects of literary criticism.

I believe a third arena exists in which those intrigued by law/literature can, indeed should, work. The question is that of the canon: what (and who) is given voice; who privileged, repeated, and invoked; who silenced, ignored, submerged, and marginalized. Law and literature have shared traditions—of silencing, of pushing certain stories to the margin and of privileging others. An obvious example in literature is the exclusion of certain books from the canon of the "great books."<sup>4</sup> In law, white men have similarly enjoyed a place of power, speaking as if for us all, while women and minorities have been excluded—precluded from being judges, jurors, lawyers, and at times, even witnesses. We women might have been the subject of the discussion, as defendants<sup>5</sup> or as property,<sup>6</sup> but we were not the authors or the speakers;<sup>7</sup> we have been closed out of the hierarchy of holding the power to write the canon.

While noting the impact of audience on the speakers of the texts that are the subject of his analysis, Robert Ferguson seems to assume that judi-

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1. Robert Weisberg, "The Law-Literature Enterprise," *Yale Journal of Law & the Humanities* 1 (1988): 1.

2. Herman Melville, *Billy Budd*, ed. Barron Freeman, corrected by Elizabeth Freeman (New York: Signet Press, 1979).

3. *Yale Journal of Law & the Humanities* 2 (1990): 201.

4. See Sandra M. Gilbert and Susan Gubar, "The Queen's Looking Glass: Female Creativity, Male Images of Women, and the Metaphor of Literary Paternity," chapter 1 in *The Madwomen in the Attic* (New Haven: Yale University Press, 1979).

5. See, e.g., *Holt v. Florida*, 368 U.S. 57 (1961), *aff'd* 119 So. 2d 691 (Fla. 1960) (despite the functional preclusion of women from being jurors, the courts upheld the validity of a verdict against a woman accused of killing her husband).

6. See Patricia J. Williams, "On Being the Object of Property," *Signs* 14 (1988): 5.

7. See generally Robin West, "Economic Man and Literary Woman: One Contrast," *Mercer Law Review* 39 (1988): 867.

cial opinions are the relevant "law" to consider as "literature." Ferguson explains that the "most creative and generally read literary form in the law is the appellate judicial opinion"<sup>8</sup> (by which he really means the opinions of the highest appellate court in the nation, the United States Supreme Court), and therefore he uses that form as the basis for his analysis of *the* "judicial voice." His argument assumes his own passivity; he is simply the reader of the "most creative and generally read" form.

But we—that is "we" who are the commentators on (indeed the claimers of the relationships between) law/literature—sit in a particular part of the audience. We are not only readers; rather we have the opportunity to reiterate, repeat, include or exclude certain voices in the "literary form in the law." We are the people who contribute to what is considered the "most generally read" legal literature. As Barbara Herrnstein Smith puts it in her recent book, *Contingencies of Value*:

The recommendation of value represented by the repeated inclusion of a particular work . . . not only promotes but goes some distance toward *creating* the value of that work. . . . [F]requent citation or quotation by professors, scholars, critics, poets, and the other elders of the tribe . . . all . . . have the effect of drawing the work into the orbit of attention of potential readers and, by making the work more likely to be experienced . . . , they make it more likely to be experienced as "valuable."<sup>9</sup>

What, then, are the works that "we" draw into the circle of value? Although the law/literature enterprise is still young, it is appropriate to look at the emerging canon of law/literature, to examine what is being canonized and what is being left out.

## II. CANONICITY

I begin this inquiry in the context of Robert Ferguson's essay, about which I have been asked to comment. Ferguson takes as his topic "the ways in which law provides its own peculiar kinds of statement" in the "appellate judicial opinion."<sup>10</sup> Robert Ferguson claims that "judges, alone in American officialdom, explain every action with an individual writing."<sup>11</sup> He then turns to an examination of two Supreme Court opinions, *Minersville School District v. Gobitis*<sup>12</sup> and *Board of Education v. Barnette*,<sup>13</sup> to articulate the qualities of the judicial voice. From his examina-

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8. Ferguson, "The Judicial Opinion," 201-2 (cited in note 3).

9. Barbara Herrnstein Smith, *Contingencies of Value* (Cambridge, Mass.: Harvard University Press, 1988), 10 (emphasis in the original).

10. Ferguson, "The Judicial Opinion," 201-2 (cited in note 3).

11. Ferguson, "The Judicial Opinion," 202 (cited in note 3). Cf. note 38 and accompanying text, *infra*.

12. *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

13. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

tion of these Supreme Court opinions, Ferguson reaches conclusions about the sound, conventions, and tone of "the judicial opinion."

Robert Ferguson considers the judicial writing of United States Supreme Court justices as genre. I am not a literary critic, but I am interested in genre, and more specifically in the kinds of questions that Annette Kolodny raises about genre. As she explains: "[W]e read well, and with pleasure, what we already know how to read; and what we know how to read is to a large extent dependent upon what we have already read (works from which we developed our expectations and our interpretative strategies)."<sup>14</sup> My concerns are that, by virtue of his methodology, Robert Ferguson limits himself to the "already read" and thus, again in Kolodny's words, leads us to engage not with "texts but paradigms."<sup>15</sup>

I begin with questions: Should opinions by the United States Supreme Court be the texts that we (again, "we" law/literature commentators) study to learn the sound, the conventions, the structure of "the judicial voice?" When looking to understand the judicial voice in the flag salute cases, what should one read? How is the analysis of the "judicial opinion" affected when, for example, one reads both the Supreme Court opinion and the record before the Supreme Court when it decided *Barnette*?

I am not a flag-salute case expert. The first amendment is not my area of specialization. But I am a reader of law texts. So, when I first read Robert Ferguson's essay, I went to look at the record in these two flag salute cases.<sup>16</sup> As a consequence, I discovered other texts that I believe "we" (that part of the audience that gets to privilege texts by repeating them) should include before claiming to have captured the tones to ascribe to the judicial voice.

Recall the chronology. In *Gobitis*, decided by the Supreme Court in June of 1940, the Court held 8 to 1 that school children could be forced to salute the flag. Within less than two years, the issue was before a trial court again. On October 6, 1942, a three judge court in the federal district court in West Virginia decided the *Barnette* case at the first level.<sup>17</sup> According to that court, three persons, "belonging to the sect known as the 'Jehovah's Witnesses'," sought injunctive relief against a state board of education regulation requiring children in public schools to salute the flag.<sup>18</sup> Judges John J. Parker, Harry E. Watkins, and Ben Wheeler

14. Annette Kolodny, "Dancing Through the Mind Field" (1979), reprinted in *The New Feminist Criticism*, ed. Elaine Showalter (New York: Pantheon Books, 1985), 144, 154. See also Nancy K. Miller, *Subject to Change* (New York: Columbia University Press, 1988).

15. Kolodny, "Dancing Through the Mind Field," 153 (cited in note 14).

16. Such inquiry requires no special access to archival material or lawyers' files. Rather, by virtue of the practices of collection of many law libraries, Supreme Court "briefs and records" are readily accessible; in the Boston area, for example, five law school libraries have such materials available on microfiche, in bound form, and/or for more recent cases on LEXIS.

17. *Barnette v. West Virginia State Bd. of Educ.*, 47 F. Supp. 251 (S.D.W. Va. 1942).

18. 47 F. Supp. at 252.

Moore granted the injunction. The opinion was written by Judge Parker.<sup>19</sup> Here are his words:

Ordinarily we would feel constrained to follow an unreversed decision of the Supreme Court of the United States, whether we agreed with it or not. It is true that decisions are but evidences of the law and not the law itself; but the decisions of the Supreme Court must be accepted by the lower courts as binding upon them if any orderly administration of justice is to be attained. The developments with respect to the *Gobitis* case, however, are such that we do not feel that it is incumbent upon us to accept it as binding authority. Of the seven justices now members of the Supreme Court who participated in that decision, four have given public expression [in another decision] to the view that it is unsound. . . . Under such circumstances and believing, as we do, that the flag salute here required is violative of religious liberty when required of persons holding the religious views of plaintiffs, we feel that we would be recreant to our duty as judges, if through a blind following of a decision which the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties.<sup>20</sup>

Lawyer-readers know that this opinion is pretty rare stuff. The principle argument for why the United States Supreme Court texts get their place of privilege is that they are binding, that they are the "law" until the Supreme Court tells us otherwise. But, in 1942, in West Virginia, three hierarchically inferior judges said otherwise: that the law was not what the Supreme Court had said it was less than two years before.<sup>21</sup>

According to the record before the Supreme Court as it decided the

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19. Judge Parker was a judge in the Court of Appeals for the Fourth Circuit and sat in Charlotte, North Carolina. Judge Watkins sat in the district court for both the Southern and Northern Districts of West Virginia; his chambers were in Fairmont, West Virginia. Judge Moore, of the Southern District of West Virginia, sat in Charleston, West Virginia.

20. 47 F. Supp. at 252-53.

21. The career of one of those three judges, John Parker, has been the subject of much discussion. In 1925, President Coolidge appointed Parker, a Republican, to the Fourth Circuit. In 1930, President Hoover nominated Judge Parker to be a justice of the United States Supreme Court; that nomination was defeated by a vote of 41-39. See generally Paul A. Freund, "Appointment of Justices: Some Historical Notes," *Harvard Law Review* 101 (1988): 1146, 1154-55. A link between that event and Parker's decision in *Barnette* is possible. Some political scientists argue that Parker was criticized, in the 1930s, for his conservatism; apparently his defenders claimed that such conservatism was a result of his role, as a lower court judge, in following precedent. See Joel B. Grossman and Stephen Wasby, "Haynsworth and Parker: History Does Live Again," *South Carolina Law Review* 23 (1971): 345, 351-57. While such a comment might lead one to believe that Parker would thus have been inclined to be less deferential to the Court than other judges, one biographer states that, "[e]xcept for this one case [*Barnette*, Parker's] record clearly reflects a belief that it was the business of the Supreme Court to overrule its own precedents." William C. Burris, *Duty and the Law: Judge John J. Parker and the Constitution* (Bessemer, Ala.: Colonial Press, 1987), 203. See also 147-48. Burris reports that Parker drafted the opinion in *Barnette*. *Ibid.*, 194-95. Changes in the Court may have been a factor in the lower court's ruling. By 1942, Robert Jackson and Wiley Rutledge had joined the Court, and three sitting justices, Black, Douglas, and Murphy, had stated that *Gobitis* had been wrongly decided. *Ibid.*, 197-98.

*Barnette* case, the lower court judges were not alone in disavowing *Gobitis*. The *amicus* brief filed by the Committee on the Bill of Rights of the American Bar Association informed the Supreme Court that, of twenty-two "different legal publications," only two approved *Gobitis*.<sup>22</sup> The appellees, Walter Barnette, Paul Stull, and Lucy McClure, told the Court that other lower courts had either confined *Gobitis* to its facts or not enforced it and that newspapers throughout the nation condemned it.<sup>23</sup> Further, in 1942, Congress enacted a statute that, the American Civil Liberties Union argued, preempted state regulation and did not require that the flag be saluted.<sup>24</sup>

By opening up the canon to include texts not "already read," one learns of the context in which the Supreme Court wrote; in Kolodny's terms, that information enables the reader to be conscious of the difficulty of distinguishing "as primary the importance of *what* we read as opposed to *how* we have learned to read it."<sup>25</sup> As a consequence, the reading of the nature of the question for the Supreme Court in *Barnette* changes, as does the interpretation of the work of the justices when writing their opinions. Were I to choose to understand the genre of judicial opinions by analyzing the flag salute cases, were I to retell that story, pass it on so as to give value and meaning to it, I would want to include the other voices, the voices of the lower courts, other participants, and those not "in court," as well as the voices of the hierarchically superior court.<sup>26</sup>

Such inclusions lead to questions about some of the conclusions advanced by Robert Ferguson. First, given the absence of direct discussion in the *Barnette* opinions of the trial court's deviation from the norm of following precedent,<sup>27</sup> claims about the drama of the "monologic voice" seem overstated. Second, the four categories offered to describe this genre, the interrogative, monologic, and declarative tones and the rhetoric of inevitability,<sup>28</sup> seem incomplete. One would also want to add a fifth aspect—how

22. Brief of the Committee on the Bill of Rights, of the American Bar Association, As Friends of the Court, at 12-13, *Barnette* (No. 591).

23. Appellees' Brief at 79-80, *Barnette* (No. 591).

24. 36 U.S.C. § 172, Pub. L. 77-623, ch. 435, stated that "civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress." See Brief for American Civil Liberties Union, Amicus Curiae, at 20-22, *Barnette* (No. 591). This provision is mentioned by the majority in *Barnette* and described as a Congressional decision to make "flag observance voluntary." 319 U.S. at 638 & n. 17.

25. Kolodny, "Dancing Through the Mind Field," 154 (emphasis in the original) (cited in note 14).

26. The refusal to look at and hence the silencing of the lower court judges is somewhat different from the silencing of women that Tillie Olsen discusses in her book, *Silences* (New York: Delta/Seymour Laurence, 1978). The lower court opinions are often published; Supreme Court records and briefs are also readily available, so that, if one chooses, one can read several authors' telling of a particular case. (See note 16, *supra*.) In contrast, in many settings the voices of women and minorities have been literally silenced by the refusal to publish. Yet as Olsen and others remind us, although marginalized, the voices have been and can be heard; the silence has not been complete.

27. Given that the lower court judges were willing to ignore *Gobitis*, *Barnette* does not seem as much of a "hard case" as Robert Ferguson's description, and perhaps Frankfurter's dissent, suggest.

28. See Ferguson, "The Judicial Opinion," 204 (cited in note 3).

Supreme Court opinions routinely recreate and/or distort the "facts" and "law" that are the predicates of decisions. This "genre" includes recreation/distortion as surely as it includes inevitability.

Note that my comment is not an assertion that the Supreme Court "lied" and the "truth" emerges by virtue of looking to the lower courts. Rather, the argument is that there is no obvious reason to look only to the Supreme Court opinion as the source of the story, or *even* as the authoritative statement of the problem to which the Supreme Court justices must respond. To the contrary, one needs to look outside the opinion to read it. To the extent one wants to understand the genre of "the judicial opinions" of the United States Supreme Court, one needs to go beyond the "paradigm" of rereading that court's opinions.<sup>29</sup>

In addition to informing the inquiry about the judicial opinion as legal/literary genre, looking beyond those opinions reminds "us" not to focus exclusively upon the judicial opinion to read the work of law. When one looks at law as an activity of generating stories as well as of maintaining and deploying power,<sup>30</sup> there is more to decipher than the voices of the Supreme Court. One issue to consider is the role of the hierarchy and how its superior position is maintained. If the story of the flag salute cases is told only from the point of view of the two United States Supreme Court opinions, the idea of the Supreme Court as the central lawmaker is maintained. But, when the trial court opinion in *Barnette* is added, the hierarchy is not so powerful, so monolithic, so uncomplex as might have first appeared.<sup>31</sup> The addition of new voices raises complex questions—about the relationship among speakers, the ownership of stories, appropriation and control. With new voices come issues of which speakers have the power of validation and why.<sup>32</sup>

Let me offer another example of the hierarchy's efforts to maintain itself and of choices that we, as the canon creators of law, have to make—choices that either maintain or question that hierarchy. In the United States federal and state courts, judges are traditionally described as

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29. As Annette Kolodny explains, the "reader coming upon such fiction with knowledge of neither its informing literary traditions nor its real-world contexts will find himself hard pressed, though he may recognize the words on the page, to competently decipher its intended meanings." Kolodny, "Dancing Through the Mind Field," 155 (cited in note 14).

30. See Robert M. Cover, "Violence and the Word," *Yale Law Journal* 95 (1986): 1601.

31. None of the Supreme Court justices writing in *Barnette* explores the import of what the three judge court had done. Justice Jackson's only mention of the case below is the following description: "The cause was submitted on the pleadings to a District Court of three judges. It restrained enforcement as to the plaintiffs and those of that class." 319 U.S. at 630. To have "restrained enforcement" would have to mean not applying *Gobitis*, but Jackson offers no comment on that lower court's action. Arguably, Frankfurter's references to judicial obligations and duties could be understood as oblique digs at the lower court judges. 319 U.S. at 647-48.

32. See Robert Stepto, *From Behind the Veil: A Study of Afro-American Narrative* (Urbana, Ill.: University of Illinois Press, 1979) and Harriet Jacobs, *Incidents in the Life of a Slave Girl Written by Herself*, ed. Jean Fagan Yellin (Cambridge, Mass.: Harvard University Press, 1987) (the inclusion of a preface by a white woman to "authenticate" the narrative evidences the power of whites to speak for and to silence others).

"impartial," "disinterested," and "disengaged." An oft repeated phrase is "no man can be a judge in his own cause." Translated into constitutional, statutory and common law command, the rule is stated: a person cannot be the judge in a specific case if he or she has a personal or financial stake in that case.

In 1980, the United States Supreme Court sat on a case in which the question was: Had Congress illegally cut the salaries of the justices and judges of the federal courts? Recall that Article III of the United States Constitution protects judicial salaries from congressional cuts by the "No Diminution Clause."<sup>33</sup> The case, called *United States v. Will*,<sup>34</sup> had an obvious problem: all federal judges and justices had an interest, a direct financial stake, in the outcome of the case. However, the federal judiciary heard the case. As Chief Justice Burger explained for the Court, neither lower court judges nor Supreme Court justices were barred from participating because of what he called "the ancient Rule of Necessity."<sup>35</sup> The rule, he said, was that, if under ordinary rules of disqualification all the judges were disqualified, then "necessity" meant that they could all nonetheless sit and decide the case.

Note the assumption implicit in necessity: only the ones called "judges" could sit in judgment. By inventing a rule of "necessity," a hierarchy (in this instance, a patriarchal hierarchy) maintained its power. It sat in judgment, despite its rules of disinterest. The federal judiciary continued to judge, rather than be the subject of a judgment made by others.

But of course there is an alternative practice. At least seven states have constitutional or statutory provisions to permit the creation of ad hoc courts to sit when all the "regular" judges are disqualified. For example, in 1925, the members of the Supreme Court of Texas were disqualified in a case that involved a fraternal organization, the Woodmen of the World. Apparently, many male judges and lawyers were members of the organization, an insurance company that grew out of Modern Woodmen of America, founded in 1882.<sup>36</sup> Given the conflict of interest, regular judges did not sit. Instead, three women sat as "Special Associate Justices" and briefly held the power of the Supreme Court of Texas.<sup>37</sup>

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33. U.S. Const. Art. III, § 1 states that the judges "shall . . . receive for their Services, a Compensation which shall not be diminished during their Continuance in Office."

34. *United States v. Will*, 449 U.S. 200 (1980).

35. 449 U.S. at 212. On the merits, the Court held that some, but not all, of the salary decreases were permissible. *Ibid.* at 229. See generally Judith Resnik, "On the Bias: Feminist Reconsiderations of the Aspirations for our Judges," *Southern California Law Review* 61 (1988): 1878.

36. See *A Brief History of Fraternalism and The Woodmen* (pamphlet printed by the organization, on file with the author).

37. *Johnson v. Darr*, 272 S.W. 1098 (Tex. 1925). Hortense Ward, Special Chief Justice, Hattie L. Henenberg, and Ruth Virginia Brazzil, Special Associate Justices, sat on the case. According to a contemporary report, the women took the oath of office but none "of the women raised her right hand, as is customary among men taking an oath of office. They did not seem flurried by the experience." *The Texas Law Student*, 1 Apr. 1925, p. 3. For a reproduction of a photograph of that court, see Resnik, "On the Bias," 1895 (cited in note 35).

When ad hoc courts are created, regular judges not only give up their position in a hierarchy for a moment, they also agree to be judged by others. Thus, all are reminded (appropriately, in my view) that the judges are us, that they are amongst us, not other than us. Such are the stories that need to be reclaimed and retold. Reclaimed—literally, for tales of the relinquishment of judicial power are often hard to find. Despite Robert Ferguson's assertion that judges "explain every action with an individual writing,"<sup>38</sup> many courts do not have a tradition of documenting disqualifications or special appointments. Sometimes, a footnote might note that—but not explain why—a special court has been convened. In the federal system, the current custom is for judges not to provide an explanation when they voluntarily recuse themselves, thereby insulating themselves from examination and limiting the information available about when judges believe that recusal is appropriate.<sup>39</sup> Thus, with footnotes and silence, the fact of power relinquishment is hidden, and the conversation about how much power is held, distorted.

### III. SHIFTING THE FOCUS

We, who sit in the position of privilege, who help to construct the canon, must also decide how much time we devote to the voices of the highest courts. The admonitions of Judge Patricia Wald, Chief Judge of the Court of Appeals for the District of Columbia, are apt here. Judge Wald joined a panel of law professors and judges to speak about the topic "judicial review and constitutional limitations." Judge Wald said that she was not at all sure that the raging constitutional debate about the proper limits of constitutional analysis had much effect on the "behavior of ordinary judges."<sup>40</sup> As she put it, "constitutional cases for most federal judges are a rarity, gourmet fare, definitely not the bread and butter of our everyday worklives."<sup>41</sup> Judge Wald's comments go deeper than a claim of irrelevance. Her comment is that academics ignore the everyday experiences of judges, the realities of judging, which lead judges to avoid constitutional cases—with their potential battles of rehearing and Supreme Court review.

Compare Patricia Wald's comments with those of Justice Antonin

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38. Ferguson, "The Judicial Opinion," 202 (cited in note 3).

39. See John Leubsdorf, "Theories of Judging and Judge Disqualification," *New York University Law Review* 62 (1987): 237, 244. See also Tony Mauro, "Smoking Out the Ginsburg Story: How the Reporters Got the Dope," *Legal Times of Washington*, 16 Nov. 1987, p. 15, col. 1 (reporter attempted to see a recusal motion on file at the United States Supreme Court but was told that such a motion "was not part of the public record. . . . The bottom line, then, is that under Court practice the existence of a recusal motion . . . is unknowable by the public, unless a lawyer happens to mention it.").

40. Patricia Wald, "Judicial Review and Constitutional Limitations," *Golden Gate University Law Review* 14 (1984): 645, 648-50.

41. *Ibid.*



Scalia, who sat on the Court of Appeals for the District of Columbia and is now a member of the United States Supreme Court. Scalia and Wald share an essential insight: that the daily tasks of judging are at great distance from the academic conceptions of the activities. Justice Scalia (speaking to the American Bar Foundation) complained about the drudgery of the work of a federal judge, the processing of "many less significant cases, many routine tort and employment disputes."<sup>42</sup> Justice Scalia contrasted the everyday life of the judge with what he had learned in law school. He said that, when in 1960 as a law student he hoped to be a federal judge, he did not have the hope to dispose of "routine" and "trivial cases."<sup>43</sup> Both Scalia and Wald agree that the academic vision of judging is at odds with the daily life of judges. Patricia Wald wants to change the academic vision to fit the reality of judges' lives. Antonin Scalia wants to change the work of judges to fit the conception that important people do not do routine work.

#### IV. CONCLUSION

My hope is that, in the construction of the voices of judges, in the interpretation of their distinctive tones, we look beyond supreme courts' opinions to the lower courts and to the ordinary lives of judges. My hope is that we give voice to, repeat, empower, and value the tasks of those other than the justices and judges of the highest courts. Further, when we speak of "the judicial voice," we need to speak of what judges say not only when they sit on the bench but also when they wheel and deal in settlement conferences, when they speak *ex parte*, on and off "the record," and when they simply write "so ordered."

We need to look to these activities not only as an act of inclusion. We need to look to these activities before we draw conclusions about "the judicial voice" and how much judges actually are required to explain all of their actions. For example, in the fall of 1989, a New York Times reporter described the actions of Judge Jack Weinstein, a federal trial judge in Brooklyn, New York. After a civil trial under the Racketeering and Corrupt Practices Act (RICO) against the Long Island Lighting and Power Company (LILCO), a jury returned a verdict of 7.6 million dollars

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42. Antonin Scalia, remarks before the Fellows of the American Bar Foundation and the National Conference of Bar Presidents, 15 Feb. 1987, pp. 3, 5 (on file with the author). In the published version of these comments, "An Address by Justice Antonin Scalia, United States Supreme Court," *Federal Bar & News Journal* 34 (July/Aug. 1987): 252, Justice Scalia commented that the federal courts were not (in the 1960s) "the place where one would find many routine tort and employment disputes" but that, by the 1980s, federal judges were dealing with "more and more cases of less and less import." *Ibid.*, 252.

43. Scalia, remarks, 2, 6 (cited in note 42). Professor Marc Galanter has responded to Justice Scalia by analyzing the changes in federal court caseload since the 1960s. See Marc Galanter, "The Life and Times of the Big Six, or The Federal Courts since the Good Old Days," *Wisconsin Law Review* 1988:921.

to be awarded to Suffolk County. The loser, LILCO, asked the judge to set aside the verdict.<sup>44</sup> Instead of writing an opinion, instead of acting as "compelled," Judge Weinstein tried to settle the lawsuits against LILCO. The reporter described Weinstein's actions this way: "For almost seven hours yesterday a federal judge alternately lectured to and debated with more than 30 lawyers in an apparent effort to force a resolution. . . ."<sup>45</sup> Here, Judge Weinstein's voice does not appear declarative or monolithic. Instead, it could be described as posturing, argumentative, cajoling, or threatening.

Inclusion of texts other than the United States Supreme Court opinions is critical to the shape of the judgments we make about "the judicial opinion" and "the judicial voice." Jack Weinstein also has the name "judge," but his voice is, at least sometimes, quite different from what Robert Ferguson describes. And, when one listens to appellate judges and justices, in both oral and written work, one also finds argument and posturing,<sup>46</sup> recreation and distortion.

My hope is that, as "we" tell law stories, we tell not only stories from the vantage point of the privileged decision maker, the Supreme Court justice, the statute or constitutional writer, but from the vantage points of the other participants. My hope is that we will celebrate, privilege, and give value to the daily tasks of those who do not sit at the top of the hierarchy. When we tell the story of the flag salute cases, we must include not only the "paradigm, already read" but also the voices, the opinion, the text of Judges Parker, Watkins, and Moore.

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44. *County of Suffolk v. LILCO*, No. CV 87-646 (E.D.N.Y. Dec. 5, 1988) (Westlaw, 1988 WL 150700, digest of jury verdict proceeding).

45. *New York Times*, 2 Feb. 1989, sec. B, p. 1, col. 1.

46. See, e.g., the exchanges between Justices Powell and Stevens in *Pennhurst State School and Hospitals v. Halderman*, 465 U.S. 89 (1984), in which Justice Powell describes Stevens' dissent as "out of touch with reality" (at 107) and Justice Stevens counters by asserting that the majority's reasoning leads to a "perverse result" (at 127), and between Justices Scalia and O'Connor in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), in which Justice Scalia describes O'Connor's opinion as "irrational" (at 3067), while she calls for "restraint" (at 3061).