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Washington and Lee Law Review

Summer, 2001

## Articles

**\*957 THE BUDDHA'S PARABLE AND LEGAL RHETORIC**

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**\*958** We don't see the world as it is. We see it as we are.

- Anais Nin

## I. Introduction

This Article is about rhetoric, truth, and legal scholarship. More specifically, it explores how legal scholars use rhetorical devices to illustrate their beliefs about the relationship between scholarship and truth. The vehicle for this discussion is a specific rhetorical device - the parable - and more particularly, an ancient Eastern parable that has found its way into our children's storybooks and into literally hundreds of law review articles and judicial opinions. Ultimately, this Article urges legal scholars in all fields of inquiry to consider more carefully both their epistemic assumptions and their rhetorical choices - for the sake of each scholarly project and to improve the quality of the debate over legal scholarship in the post-modern era.

But first, the parable. It is a story many of us know from childhood. A group of blind men encounter an elephant. Each blind man touches a different part of the elephant's body and then incorrectly proclaims that the entire elephant resembles his section. The blind man who felt the leg believes that an elephant is like a tree; the tusk-toucher compares the elephant to a spear; and so on. The trunk is like a snake, the body a house, the ears a fan, the tail a rope, until every blind man has spoken. [FN1] Disagreement then ensues. Nevertheless, the Westernized versions found in children's books, reporters, and law reviews in American libraries usually arrive at a happy ending. Eventually, the blind men are able to figure out that an elephant actually has all these qualities, either because of the intervention of an outsider, [FN2] because the wisest of the blind men has an insight, [FN3] or because the blind men finally listen to one another and piece it together as a group. [FN4] Thus, the moral of the modern **\*959** version, whether implicit or stated outright, is obvious: "To find out the whole truth, [one] must put all the parts together." [FN5]

Lawyers, law professors and jurists have invoked this simple parable in a startling quantity and array of contexts. [FN6] From former Vice President Al Gore to Judge Harold Kozinski to Professors Amar, Kramer, and Koh, [FN7] legal scholars and jurists by the dozens invoke the blind men and the elephant parable to dramatize their points or to enliven their prose. [FN8] However, because **\*960** the vast majority have no inkling that the simple tale they have appropriated has ancient roots in Eastern religion, they rarely recognize its epistemic implications or that their applications of the modern version turn the ancient parable's moral on its head.

Part II, therefore, begins by briefly tracing the origins of the blind men and the elephant parable to ancient South Asia and perhaps back to the Buddha himself. In the South Asian religions in which the parable arose, the story's moral endorsed perspectivism and proclaimed the ungraspable nature of truth. Agreeing that a search for ulti-

mate answers to theoretical questions is futile, Buddha advocated a "middle way" to personal enlightenment: a spiritual journey that requires letting go of all attachments, including self-aggrandizing intellectual views. Part II then contrasts this world view with the implicit model held by the many modern legal scholars who employ the parable unselfconsciously: in their minds, the parable serves merely as a rhetorical flourish. In these modern contexts, the parable's meaning now reflects not the Eastern attitude toward truth but rather Western philosophical beliefs about the ultimate triumph of logic and dialectic analysis. Part II goes on to explore why the meaning of the parable has changed and suggests why unconsciously adopted epistemic beliefs are detrimental to scholarly endeavors.

Part III explores the small group of legal theorists who have consciously invoked the parable because of its epistemic content. Interestingly, the parable's moral changes here too, chameleon-like, depending on each writer's now explicit epistemological arguments. Although this group includes scholars who have tried to integrate the original Eastern moral into Western legal contexts, Part III does not put forth one "correct" use of the parable. Instead, it merely explores how one's epistemic beliefs generally impact legal scholarship, whether it be a nihilist's tendency to "trash" other work or a pragmatist's effort to balance perspectivism with a continued search for a grounding of moral values. Second, Part III observes how well this parable acts as a mirror of each writer's epistemic beliefs.

This last observation leads to Part IV, which explores the blind men and the elephant parable more broadly as a rhetorical device. Rather than seeing parables, metaphors, and other tropes as mere rhetorical flourishes, Part IV \*961 contends that legal scholars should recognize that their work is as much about persuasion as about elucidation. Thus, examining a scholar's rhetorical choices can be a tool for deconstructing that scholar's implicit beliefs and, more broadly, for understanding the underlying rhetorical structure of legal discourse. Part IV also uses the blind men and the elephant parable's ubiquitous appearance across a wide range of legal writing as an entry into the debate provoked by the perspectivism of outsider scholarship and post-modern skepticism to the previously self-enclosed world of law and legal scholarship. Here, the Article suggests that rhetorical theory might provide a more rational basis for evaluating legal scholarship in the post-modern era.

The Conclusion turns more forcefully to advocacy. First, recognizing that the rhetorical structure of legal scholarship actively discourages an investigation of epistemic premises, the Conclusion urges legal writers to consider more carefully the epistemic implications of their arguments, even when their subject matter seems far afield from heady philosophical concerns. Second, the Conclusion suggests that writers also carefully examine their rhetoric because unexamined metaphors and parables may in fact reveal more about their agenda than they realize and because of the unique ability of rhetorical tropes to spur greater creative thinking. In this way, the Conclusion argues that legal writers will be better able to find their true epistemic voice: a voice that honestly appraises their claims about the relation of their work to truth without sounding arrogant, overly hopeful, or, at the other extreme, uncharacteristically insecure. In other words, the Conclusion urges that regardless of one's epistemic or political beliefs, the Buddha's advice - to seek a middle way between intellectual arrogance and the despair of nihilism - still has relevance for the enterprise of legal scholars today.

## II. The Parable as Epistemic Mirror

### A. The Original Parable and the Eastern View of Truth

The blind men and the elephant parable originated in South Asia at least two thousand years ago. [FN9] Given its ancient lineage, slightly different versions are preserved in different locales and religious traditions. My personal favorite is in Edmund Berkeley's *Ride the East Wind: Parables of Yesterday and Today*, entitled "The Six Blind Men of Nepal." [FN10] According to this tale, \*962 in the Nepalese highlands "there lived six blind men

who had heard many conflicting stories about a great beast called the elephant. And this led to many heated arguments among them." [FN11] To resolve their disputes, they went down to the lowlands and engaged "the help of a rather casual and careless guide who could see." [FN12] A sleeping elephant was found and each blind man touched the elephant for a minute or two "until the elephant waked up and trumpeted, whereupon they all fled." [FN13] Back home, their journey provoked even more disagreements, as their individual observations led to the familiar misconceptions. [FN14] However, unlike the ending of the Western versions, the Nepalese blind men never come to a full understanding of the beast. [FN15] Instead, they resolve their dispute by agreeing that while an animal could perhaps have some of these qualities, the men "could not possibly conceive of an animal that had all these qualities." [FN16] Thus, they concluded that the elephant was a legend like a unicorn and the noise they heard a mere "jungle illusion." [FN17] Moreover, they agreed to "forbid all discussion of the elephant - to avoid the arguments, the friction, and the waste of time." [FN18]

Although Berkeley's version appears to have been adapted from the texts of the ancient South Asian religion of Jainism, he appears to have misunderstood a central tenet of this religion. [FN19] The guiding principle of Jainism is *anekanta*, which holds that reality should be "looked at from various points of view." [FN20] To assert one's own point of view as the truth is *ekanta* or dogmatism. [FN21] Thus, intellectual and social tolerance is "the spirit of *anekanta*." [FN22] Jains use the parable of the blind men and the elephant to humbly remind us of our perceptual limitations. [FN23] Jains believe that with regard to theoretical or \*963 metaphysical truths, we are all blind, and Jainism makes no promise that such truths are discoverable through analytic reasoning. [FN24] In fact, dogmatism is seen to arise precisely from "discursive thought" and "intellectual discrimination." [FN25] Jainism, however, is not against intellectual inquiry. Rather, the goal of Jainist practice is to adopt a rational and objective point of view that "looks at other view points with understanding and sympathy" and to see that "conflicting and diverse theories of realities [deserve] equal respect." [FN26] This is not to say that Jains would, like the blind men in Berkeley's tale, simply throw their hands up when confronted with divergent points of view. Rather, synthesis is clearly a worthy Jainist goal so long as the impossibility of one observer making an absolute statement is recognized. [FN27]

Although the parable probably originated in Jainism, the similar Buddhist version has achieved much more widespread acceptance, in part because its telling is attributed to the Buddha himself. [FN28] In this version, various monks and priests of different sects fell to quarreling about spiritual matters such as the afterlife and the existence of the soul. Their controversy was presented to Buddha, whose response was to tell the parable as follows: A king has all the persons in his kingdom, blind from birth, gathered together. Each one is directed to feel a different part of the elephant and then give a description. Disagreeing, the blind men began to fight. Witnessing this, the king is said to be delighted. Buddha then pronounces that like the blind men in the parable, the disputing monks "don't know what is beneficial and what is harmful [nor do they know] what is the Dhamma [(truth)] or what is [not.]" [FN29] However, rather than resolve which monks were correct, Buddha's insight is to proclaim that "[s]ome of these so-called priests & contemplatives are attached. They quarrel & fight - people seeing only one side." [FN30]

\*964 Thus, like Jains, Buddhists do not believe there are answers to ultimate questions about religion, metaphysics, or reality. Such a quest is pointless because no theory can be clearly established and each metaphysician's point of view "inevitably reflects his variable passions and egoistic demands." [FN31] In fact, Buddhism has no semantic equivalent for the word "reality." [FN32] To Buddha, the more important issue is the harm done by the monks' attachment to their individual views, which produces their desire to fight and dispute one another. In response to schisms and disagreement, Buddha advocated instead "a willingness to prefer the ends of loving understanding." Buddha did not purport that such an approach would lead a group to the correct answer, only to

spiritual peace and harmony. Thus, Buddhism focuses not on philosophical problems in the abstract, but rather on the dangers of attachment to each person's well-being. Attachment is defined broadly and includes material things like possessions and "drsti," literally translated as "views," "but interpreted to mean opinions, speculations, beliefs, including all sorts of philosophical and religious opinions." [FN33] Buddhism offers a way of life, a practical guide for letting go of these attachments and thereby attaining the psychological and spiritual well-being known in Buddhism as enlightenment. This path, which Buddha called "the middle way," requires, among other things, the process of "humble self-searching." [FN34]

Buddhism differs from traditional Western epistemology because of its "ontological nondualism." [FN35] This means that while Buddhism denies the existence of a permanent self or reality (like post-modernism), at the same time, it posits "an existence before and beyond concepts." [FN36] This "unconditioned emptiness," however, is neither a concept nor a tangible thing. [FN37] Therefore, "emptiness" cannot be grasped by the language narrative because it is not part of the conceptual world. [FN38] This does not mean that emptiness is beyond consciousness, but only that it is beyond conceptual consciousness. [FN39] Buddhists believe that emptiness can "be experienced directly through the practice of 'mindfulness,' which is the ability to sustain a calm, intense, and steady focus when one intends to do so. . . . Mindfulness involves accessing a state \*965 of consciousness that is beyond and ungoverned by experience and context. Thus, much of the Buddhist practice of sitting is directed towards gaining access to the place that is empty of concepts." [FN40]

The immediate questions for a traditional Western philosopher about this "place" of unconditioned emptiness are: What is its nature? Is it unchanging like the Platonic ideal or unique and transitory for each individual? Unfortunately, even asking these questions brings one "back in the realm of conceptual duality and not in the 'un-patterned' space that is free of concepts." [FN41] The co-existing beliefs that (a) no definitive truths can be drawn from our transitory perceptions of the world, along with (b) a belief in a pre-existing, a-conceptual unity, are what also distinguishes Buddhist thought from post-modern perspectivism. While post-modern theory embraces Buddhism's anti-essentialist language with regard to the self and perception, no Western theory, pre- or post-modern, has at the same time asserted the seemingly contradictory essentialist concept of a unitary awareness that all persons can learn to experience temporarily. [FN42]

With the Eastern understanding of the parable clearly set forth, the next section returns to legal scholarship to explore why so many Western legal academics are, to use a Buddhist term, so "attached" to a very different moral for the blind men and the elephant parable.

## B. The Parable and the Implicit Essentialism of Legal Scholarship

### 1. The Parable in Doctrinal Scholarship and Judicial Opinions

Whether one writes about the tax code or the Constitution, every piece of scholarship has an epistemic component; that is, the author has an opinion about the relationship of his work to truth. An author may believe his conclusions reflect the "objective truth," or reflect a personal and partial "truth," or merely posit a tentative hypothesis to be tested by others. In legal scholarship, however, the author's position on this fundamental issue is usually implicit and must be teased out of his rhetoric. In this section, I explore how the blind men and the elephant parable serves as a mechanism for conveying legal scholars' implicit epistemic beliefs.

To be sure, some of the hundreds of references to the blind men and the elephant parable in legal literature are either decorative [FN43] or passing efforts to \*966 be humorous. [FN44] Significantly often, however, the parable is referenced in an article's title, [FN45] used as the organizing paradigm for its introduction or conclusion, [FN46] or used to anchor an important argument. [FN47] Despite the staggering spectrum of subject matters in

these articles, the vast majority of these authors use the parable to convey just two basic epistemic belief systems - what I shall call the "arrogant doctrinalist/judicial" model and the "interdisciplinary/ optimist" model. [FN48]

In doctrinal scholarship and judicial opinions, the parable is typically invoked to differentiate and elevate the author's perspective. In its strongest \*967 form, the author asserts that others who have examined a particular subject suffer from total or partial "blindness" and, therefore, have failed to properly see the elephant. The author then dresses his claim to greater vision in the evocative language of the parable and provides what he purports is a more accurate model or analysis of his subject [FN49] than either a particular individual [FN50] or a broader array of commentators have provided. [FN51]

Doctrinal scholars use the parable to criticize others in their field or to illustrate that practitioners, legislators, or judges lack the perspective to comprehend the full complexity of an issue. [FN52] Harold Koh's 1997 Yale Law Journal review of two books on international law provides a typical example of the former. [FN53] Koh first praises the authors, Abram Chayes of Harvard, Antonia Chayes, President of the Consensus Building Institute, and Thomas Franck of New York University, agreeing that their models of international law have some descriptive power. [FN54] However, he then declaims, "Yet both books, instructive as they are, give shape to only parts of the blind men's \*968 elephant" because both authors "omit . . . a thoroughgoing account of the transnational legal process." [FN55] In Koh's view, "this overlooked process . . . is pivotal to understanding why nations 'obey' international law, rather than merely conform their behavior to it when convenient." [FN56] The remainder of the book review explains and justifies Koh's thesis. [FN57] Thus, while polite and praising of these authors' efforts, the parable's real purpose is to emphasize that only Koh with his superior insight, rather than the authors of the reviewed books, can articulate a theory that actually explains "why nations obey international law." [FN58] Koh's tone, as is common in most law reviews of this stature, is genteel, and his appraisal of his fellow scholars does not sound abrasive. [FN59] Nevertheless, his conclusion that the Chayes and Franck models fail to include the "pivotal" concept suggests they are hardly useful models at all. In part, it is the cuteness and familiarity of the parable itself that serves to balm his harsh assessment. [FN60] Thus, the parable serves not only to illustrate the superiority of the author's contribution but to soften the hubris of the assertion.

Judicial opinions that cite the parable generally follow the same paradigm, although their assessments of the blind are frequently more cutting. Judges employ the parable to denigrate the "blindness" of the parties, [FN61] their experts, [FN62] and their attorneys, [FN63] who are alleged to have missed some critical \*969 aspect of the case, [FN64] often arguing that it is advocacy itself which causes the disability. [FN65] Some judges even turn the parable against their colleagues, [FN66] especially when battling over the interpretation of precedent. [FN67] For example, \*970 in a dissent later vindicated by the Supreme Court, Judge Kozinski wrote, "We are told that the blind man, when handed the elephant's tail, concluded that the creature looked like a rope. So does the panel err in building a whole theory of qualified immunity law on a paragraph dangling at the end of [a prior decision]." [FN68]

Clearly, time and cultural transplation have dramatically changed the epistemic import of the original version. First, among doctrinal scholars and judges, there is now an implicit assumption that the "elephant" (i.e., the truth about an area of law or a case) is out there, waiting to be deduced through proper analysis. Second, blindness is now a metaphor for the intellectual shortsightedness that afflicts others, rather than an element of the human condition. [FN69] Third, Eastern perspectivism is rejected, and "things" can only have a single meaning, not multiple ones. [FN70] Thus, what started out as a reminder of the limits of the human condition has now become, no matter how gently or humorously put, a tool for the intellectually arrogant to express their superiority.

The question is why this meaning, rather than the original moral, has such appeal to legal scholars and judges?

Perhaps for judges, it is something inherent in their position. While a debated point in academic circles, a court's public function is to discover "the truth" in each case. [FN71] Moreover, because live cases deal more with facts than \*971 with theory, judicial judgment about the truth of one party's testimony and evidence versus another's seems more palatable than assertions about the accuracy of doctrinal models. Regardless of the theoretical critique of the truth-finding function of judicial proceedings, [FN72] judges at the trial and appellate levels are required by institutional culture to justify their real-life decisions and at least cloak their decisions in apolitical reason. This functional difference, combined with the aura of invincibility of those cloaked in black robes, is probably sufficient to explain the allure of this version of the parable for judicial writers.

For scholarly writers, the answer seems more complicated and more interesting. Unlike judicial proceedings, there is no requirement that one theoretical model be correct and the others wrong. Certainly, one vein of the scholarly ideal is exactly the opposite - one of open-minded rationality rather than partisanship. [FN73] Perhaps for legal academics it is our adversarial training that lends itself to choosing metaphors that negate the position of our opponents, whether in court or in the pages of law journals. Others have suggested that the competitiveness and grandiosity of much of legal scholarship is a function of either the article selection process or tenure and promotion standards. For example, Daniel Farber argues that law journal selection process is biased in "favor of brilliant, 'paradigm-shifting' work" to the detriment of mere thoughtfulness. [FN74] He also believes this leads to adverse selection, with startling and novel ideas driving out the true but trite. [FN75]

Kenneth Lasson concurs that legal scholarship has seen an unwarranted proliferation of claims of theoretical breakthroughs. However, he blames not the inexperience of law review editors but the standards for promotion and tenure set forth in most law faculty handbooks. For purposes of promotion and tenure, most faculties require that scholarship must be "'analytical,' \*972 'learned,' 'significant,' 'well-written,' and 'disinterested.'" [FN76] Given these open ended criteria, Lasson contends that scholars feel pressure to write lengthy, arcane, heavily foot-noted articles, most of which are mediocre. [FN77] With the pressure to construct models that re-conceptualize well-trod areas of law in order to establish their uniqueness and expertise to the tenure and promotion committee, the blind men and the elephant parable becomes a perfect rhetorical trope to emphasize the alleged importance of an author's contribution to the field. Nor, given the increase in the number and size of law schools over the past twenty-five years (and hence the number of faculty writing articles), [FN78] should it come as a surprise that the percentage of articles that attempt grand theoretical or doctrinal synthesis has increased. [FN79]

On the other hand, it may be that legal scholars are participating, no more and no less, in a decidedly Western approach to intellectual inquiry. Certainly, other Western academic disciplines also use the parable in a similar manner. [FN80] In both modern legal and rhetorical theory, critics contend that, dating back to Plato and Aristotle, Western thinkers have presumed that there is "one true reality that can be discovered and defined through dialectical argumentation." [FN81] This epistemology, known as essentialism or foundationalism, goes hand in hand with another defining aspect of Western thinking - "omnipresent dualisms," such as right/left, faith/reason, religious/secular, etc. [FN82] Essentialism's legal equivalent, Langdellian formalism, shares this core \*973 "faith that legal concepts are tied to nature and logic in a way that can produce uncontroversial right answers to legal questions" [FN83] and its concomitant dualisms, such as guilty/not guilty, law/morality, and of course, true/false. Just as importantly, critics argue that legal academics generally adopt an essentialist outlook by default. Thus, scholarship is written within "a rhetorical hierarchy that channels inquiry away from the ontological to the epistemic, away from the epistemic to the normative, and away from the normative to the technical." [FN84] With the exception of the few who write in the rarified air of legal theory, this hierarchy allows the ma-

majority of legal scholars who toil in policy and doctrinal debates (i.e., the normative and technical domains) never to have to consider the epistemic assumptions that underlie their work. Thus, it is not surprising that many Western legal scholars write as if they believe they have discovered the truth and that those with whom they disagree are wrong in some absolute sense.

However, the important insight here is not that legal academics tend to share in Western essentialist assumptions. Rather, this Article is concerned with the cost to legal scholarship of adopting epistemological beliefs by default rather than by choice. [FN85] First, an unreflective essentialism may add to legal \*974 scholarship's tendency toward obfuscation and jargon. According to modern rhetoricians, the essentialist presumption that reality can be discovered through reason privileges true knowledge for an academic and philosophical elite because only they have the time and intelligence to engage in the necessary prolonged study. [FN86] However, the more refined the analysis, the further it moves away from the language and understanding of even the well-educated lay person. As a review of pages of many law review volumes reveals, the refined reason of legal elites has produced discourses so theoretical, complex, and filled with jargon that it is now beyond the comprehension of most lawyers and even other law faculty. In other words, irrespective of their essentialist claims to an accurate representation of reality, their expressions of those findings have become virtually incomprehensible and therefore of little use to those who live and work in the practice of law. [FN87]

Moreover, the presumption that a single reality exists and can be discovered creates a battle within the elites among their competing models and theories - a battle of course that no one ever really wins because absolute proof of a theoretical model, like the disputing monks' religious debates, is forever beyond proof. This is what Paul de Man ironically calls the "rhetoric of blindness." Because participants fail to "see the assumptions of the opposition \*975 inherent in [their] own positions," there is actually a tacit "agreement to disagree" and "to take positions that are assumed to be mutually exclusive and essentially at odds with one another" so long of course as all participants remain committed to the underlying foundationalist outlook. [FN88] Thus, by silent invocation of essentialist assumptions, all too often doctrinal scholarship becomes enmeshed in the creation and advocacy of endlessly competing models that all purport to describe the whole truth. What may thereby be lost in the process is the opportunity to highlight each author's partial insights and greater efforts to synthesize or harmonize conflicting theories. [FN89] This is unfortunate because with some reflection (and off the record), many legal scholars might admit that their actual ontological claims are actually quite moderate, along the lines of: "Here is a helpful, edifying insight/model, which in fact, I, the writer, believe does capture an important part of the truth. However, I am not asserting that my model has a monopoly on the truth or that the other models are without their own merit." But, because of our epistemic heritage, scholars too often unreflectively choose the most arrogant epistemic rhetoric, such as the strong essentialist version of the blind men and the elephant parable. [FN90]

## 2. The Blind Men Parable as Seen by Interdisciplinary Scholars and Other Optimists

While the arrogance of doctrinal use of the parable is a clear throwback to Langdellian formalism, the other dominant rhetorical use of the blind men and the elephant parable in legal writing appears at first glance to be much more modest. Chastened by the post-modern critique, this second group of writers generally begins by noting the difficulty in understanding their particular \*976 elephant; this is often because of the complexity or novelty of the subject matter. [FN91] In addition, they more generously credit those with divergent views on the subject with access to partial truth. [FN92] However, in a variety of ways, these writers hold unexamined epistemic assumptions that are still traditionally Western.

In the first instance, some of this apparent modesty is compromised by the author's assertion that his contribution is critical to the creation of a unifying theory that will deliver the whole truth in the not too distant future. For example, Samuel Donnelly argues that in rejecting formalism, Ronald Dworkin, the post-modernists, Judge Posner, and the other participants in the modern jurisprudential debates all have contributed to the beginning of a "recovery of the person" in the law. [FN93] Donnelly's thesis is that with a fully developed "personalist" jurisprudential theory, of which he is, not surprisingly, a proponent, "we will gradually be able to discern the outline of the elephant as we explore various portions of the body." [FN94] Other authors believe that their unique contribution is the very recognition that seemingly contradictory \*977 or limited positions are ultimately reconcilable parts of a whole, even if they are not able to propose a unifying definition. [FN95] For example, Paul Wangerin uses the parable as the organizing metaphor in his article, *Damages for Reliance Across the Spectrum of Law: Of Blind Men and Legal Elephants*. [FN96] He first demonstrates that five substantive areas of the law - contracts, agency, torts, insurance, and constructive trusts - each have different methods for dealing with the problem of relying promisees. [FN97] Wangerin then calls upon scholars in these fields to construct a unified theory to achieve consistency in this type of case. [FN98] In his conclusion, Wangerin refers back to the parable, claiming that while the traditional story ends with "confusion rampant," another less well-known version does not conclude until "someone standing nearby shouts out to them, 'But you're all describing the same thing.'" [FN99] The blind men gather and talk and "[g]radually they piece together a picture encompassing all their ideas." [FN100] Similarly, Wangerin urges scholars to break down the barriers between substantive areas of law and to abandon seeing only "what they wish to see." [FN101] If this is done, Wangerin is confident that a unified theory of damages will emerge. [FN102]

What differentiates the second paradigm is its choice of epistemic optimism in the face of perspectivism. Although these writers admit to some vision problems, they see blindness as curable, a condition created by circumstances or by specialization that will be overcome with time or by a concerted effort by a dedicated group to remove their intellectual blinders. This conception of blindness as a temporary rather than a permanent disability is especially \*978 typical of interdisciplinary scholars who advocate that legal problems can only be understood by tapping other disciplines, such as economics, psychology, and sociology. [FN103] Rather than simply conclude that legal issues, texts, or theories are not susceptible to a complete understanding, these writers exhort all to a greater effort and cooperation, expressing a mixture of hope and conviction that their elephant eventually will be comprehended fully if we just look at enough perspectives. [FN104]

Even in this more humble fashion, the epistemic meaning of this version of the parable is still critically different from that of its Eastern origins. To the interdisciplinarians and other optimists, although we can be partially blinded by new problems or our specialties, truth is still attainable. This implicit epistemic system is really just foundationalism that has been bitten but not overcome by the post-modern critique of modernist epistemology. While these scholars have abandoned the effort to create a closed Langdellian system limited to legal texts, they still hope for ontological deliverance - this time by a community of disciplines rather than just reliance on the law. A belief that participation in a religious, political, or intellectual movement will ultimately yield essentialist truth is still, at its core, a Western ontological system. Although more commonly recognized in Western religious traditions, such as Judeo-Christian theology, or as a political ideology, such as Marxism, these "isms" assert that the ultimate truth, knowing God, or the structuring of a perfect society, can be achieved if one accepts a specific program or approach. Thus, although dressed in intellectual tolerance, the desire for salvation from the perspectivist dilemma bends the original parable from an acceptance of the multi-variability of truth to a denial that it must always be so. Arguing that the elephant can be understood if we just incorporate enough perspectives reassures us that the elephant's contours are knowable. In other \*979 words, the interdisciplinary version

of blind men and the elephant still reifies its subject matter even as these authors concede that no one currently can see it as it truly is. Pierre Schlag argues that this use of the blind men and the elephant parable is indicative of the "weak perspectivist gambit" that, in his view, pervades American legal scholarship. [FN105]

Weak perspectivism provides a rhetorical escape hatch from the self-inflicted conundrum of positing that a legal problem has an answer but failing to provide it. In psychological terms, weak perspectivist scholarship can take the form of compensation. As scholars try to fill their legal elephants with input from various disciplines, so many contradictory meanings are included that it becomes a "super-full object" that "one would expect to burst." [FN106] Although many of these efforts seem confident, one critic argues that they are really not more than "desperate . . . performance[s] of the gesture - of the ascription of legal meaning" prompted by the "ontological vacancy of the [object]." [FN107]

Having examined the two dominant implicit epistemic models of parable users and the impact of these systems on their rhetoric, the next section turns to legal scholarship that deals directly with epistemic questions. Reacting to the challenge of critical legal studies and other post-modern theoreticians, American legal scholars have been addressing fundamental questions about the nature of law. [FN108] Quite naturally, some of these writers have more self-consciously employed the blind men and the elephant parable. Interestingly, \*980 however, the next Part shows that each invokes the parable in a manner that reflects his now explicit views.

### III. The Parable and Self-Conscious Scholarship

#### A. The Nihilist Version of the Parable

The mother of all self-aware articles that invoke the blind men and the elephant parable is Pierre Schlag's Hiding the Ball. This article is a wonderful exposition of the post-modern attack on foundationalism. [FN109] To help those confused by the jargon of many articles in this vein, Schlag starts at the beginning, which for lawyers is law school. He draws his title from the typical law student reaction to the Socratic method. Because traditional law professors never provide definitive answers to their questions, students come to believe the professor is hiding something - the "ball." The ball is any authoritative meaning of the law, whether it be common law doctrine, a particular case or statute, or especially, the Constitution. Schlag believes that the "hiding the ball" metaphor "seduces the law student into comforting ontological and epistemic presumptions." [FN110] Rather than question whether there is a ball, the student accepts that there is one and focuses on the serious, meaningful, and even contradictory things being said about it by lawyers, professors, and judges. Schlag says this process, begun in law school, "is a pattern that is repeated over and over in American law and ultimately in legal scholarship as well." [FN111]

As an example, Schlag explores the various and conflicting meanings ascribed to the Constitution. Schlag argues that because the Constitution cannot possibly be all these things at once, [FN112] scholars routinely turn to the blind men and elephant parable as part of the weak perspectivist gambit to alleviate either their angst that the Constitution might be made to mean "just about anything" or "the fear that the Constitution doesn't mean anything at \*981 all." [FN113] Schlag believes that although the parable is a cautionary tale, "it is nonetheless a soothing one: Even though the perception of each of the blind men is partial, each still has something to contribute to the understanding of elephants. We, as spectators, know this because we can see the elephant for ourselves." [FN114] Thus, rather than worry that all the conflicting accounts are "attributable to a defect in the master referent," the parable reassures legal actors that the Constitution really does exist. [FN115]

Despite my admiration for Schlag's essay, I believe there are limitations to his analysis of the blind men and the elephant parable in legal scholarship. First, he fails to note the pure essentialist use of the parable in doctrinal

scholarship and judicial opinions. Thus, Schlag misses the fact that, even more than the weak perspectivists, doctrinal scholars rely on the parable as a rhetorical device to reinforce their epistemic assumptions. Nor does it appear that Schlag was aware of the Jainist and Buddhist roots of the parable and its original epistemic meaning. [FN116]

More fundamentally, Schlag fails either to distinguish or to reconcile his epistemic view (which verges on but does not entirely embrace nihilism) with the non-dualism of the Eastern philosophy. I say that Schlag's essay verges on nihilism because he concludes with the claim that there is a "fundamental ontological emptiness, not in the penumbra, but at the very core (or cores) of American law." [FN117] In other words, because constitutional scholars cannot agree on a singular definition of the Constitutional elephant, he concludes there can never be one. This position can be understood to mean that there is no such "thing" as the Constitution, at least in the sense that the Constitution cannot be compared to a physical object. [FN118]

Schlag nevertheless contends that his argument does not mean that the Constitution does not exist or that there is nothing there. Still, he cannot specify exactly what this thing is except to describe it as a "super-filled object." He argues that he "does not want to say that there is nothing there at all." [FN119] Thus, although he maintains there is a fundamental emptiness at the \*982 core, it is "not just emptiness." [FN120] In a sense, Schlag's attempt to describe something that has content but cannot be compared to a physical object seems akin to the Buddhist paradox: the existence of an emptiness that is somehow full and which tolerates a radical perspectivism without losing its unitary integrity. Ultimately, however, Schlag cannot find words, other than metaphors like "super-full object," to describe his object/Constitution which meaningfully distinguishes his object from the corporeal ones with which we are more familiar (like elephants). Thus, although Schlag recognizes how the weak perspectivists use the parable to reify the unseen elephant, his ultimate conclusion (however he might fight it with metaphors) is really that something approaching nihilism is the only honest choice for Western legal theorists. [FN121]

Nihilism is a distinctly Western response to the radical perspectivism shared by both Western post-modernism and Eastern philosophy. However, because nihilism has been ascribed multiple meanings, many pejorative, let me first outline which definition(s) I am using before continuing. Mark Tushnet defines legal nihilism as the belief that there are no consistent principles that unify legal reasoning or the formulation and application of legal rules. [FN122] Thus, nihilism takes radical perspectivism to its logical conclusion. Joe Singer argues that nihilism has both an epistemological and a moral component. [FN123] Singer describes the moral component as follows:

As a theory of morality, nihilism claims that there is no meaningful way to decide how to live a good life. Any action may be described as right or wrong, good or bad. Just as there is no objective way to describe any action, there is no objective way to decide how to act . . . . Since we cannot know what to do, it does not matter what we do. [FN124]

The critics of nihilism abhor this moral relativism and contend that nihilism provides no basis for opposing the major evils of history. [FN125] Because \*983 of these implications, most theorists who embrace the radical perspectivist assertions of nihilism seek to distance themselves from its moral implications, or in the alternative, try to define the term to avoid these implications. Thus, even the most extreme nihilist leaning scholars have been accused of retreating from its precepts and acting "contrary to the radical consequences of their position." [FN126]

Nevertheless, the embrace of the epistemic, if not the moral implications of nihilism, has a profound impact on

one's rhetoric. Taken at face value, in fact, the correct response to nihilism for a legal scholar might be to give up or at least to think twice before setting pen to paper. According to Kelman, a leading proponent of legal nihilism, "Most of the arguments that law professors make are not only nonsensical according to some obscure and unreachable criteria of Universal Validity but they are also patently unstable babble." [FN127] But of course, neither Kelman nor any other nihilistically inclined post-modernists have stopped writing. The legal system continues to operate, and nihilist scholars continue to write articles. [FN128]

Nihilist based scholarship, therefore, must take one of two approaches. At its most effective level, it is essentially "gotcha" scholarship that seeks to expose the contradictions and essentialist premises of legal scholarship and doctrinal development. [FN129] Even within the nihilist leaning community, scholars \*984 are ever vigilant with each other, seeking to rout out any reintroduction of essentialist thought. The problem, of course, is that an honest nihilist has no new program to offer which might reconstruct the legal system to be something other than the naked exercise of power. Thus, the only constructive contribution of an honest nihilist-leaning scholar, such as Schlag, is to offer an awareness or understanding that encourages people to give up on seeking certainty in the law. [FN130] What comes after that is left blank. In fact, the entire conclusion of Schlag's Hiding the Ball essay consists of but three words - "There is none." [FN131] While honest for sure, the nihilist nevertheless runs out of gas when there is nothing left to deconstruct.

Therefore, much of the rest of nihilist influenced scholarship seems in some way to be running from its own implications. In seeking to defend themselves from the charge of moral relativism, nihilist leaning scholars try to find some way back to basic notions of morality. Rather than succeeding, they seem only to provide further opportunities for other nihilists to produce more "gotcha" critiques. [FN132] Thus, the radical perspectivism of nihilism leads in some ways exactly back to the self-referential, jargon-filled scholarship of essentialism. This is not surprising to modern rhetoricians, however, because to a large extent the post-moderns have defined themselves by oppositional rhetoric. By defining themselves by what they oppose, they are still trapped by dualistic thinking and, therefore, remain within an inherently Western ontological frame of reference. [FN133]

Thus, even in its most radically skeptical and self-conscious form, the nihilist use of the blind men and the elephant parable still reflects a Western epistemology, albeit a post-modern Western one, rather than the non-dualistic Eastern view. [FN134] However, an even smaller group of scholars has tried to integrate the broader lessons of the parable's non-dualistic Eastern roots with \*985 Western legal concepts or systems. These efforts are discussed in the next section.

#### B. The Parable and Eastern Concepts of Truth in Legal Scholarship

In the context of scholarly endeavors, the Eastern version of the parable has been used to gently remind other scholars of the need for humility in all "endeavors of inquiry" and that "[p]retensions to knowledge are as unscientific as ignorance, and more dangerous." [FN135] Others have used the parable as an antidote to specific essentialist assertions about a subject and note the value of using multiple perspectives rather than privileging one. [FN136] More significantly, although our legal system is based on an essentialist epistemology and the absolute dualisms that come with it, a number of scholars have recently tried to integrate the Eastern view of truth into Anglo-American legal concepts and practice.

David Chavkin's article, Fuzzy Thinking: A Borrowed Paradigm for Crisper Lawyering, is an excellent example of this effort. Chavkin contends that multivariant thinking will improve clinical teaching. [FN137] Chavkin uses the concept of "fuzzy sets" to challenge the essentialist Aristotelean notion that something is either part of a set or not. [FN138] For example, the question of whether a person is tall is a question of degree rather than of tall or

not tall. [FN139] He \*986 realizes that the legal system must ultimately express itself in a bivalent result, guilt or innocence, liable or not liable, but argues the importance of fuzzy thinking in interviewing, theory development, counseling, and devising a strategy to persuade the fact-finder to lean in the direction that helps the client. [FN140] One example Chavkin uses is the problem of "gap filling" in client interviewing. [FN141] Gap filling occurs when an interviewer fills in facts about the client's story based upon assumptions from the attorney's pre-existing schema. [FN142] Chavkin argues that such schema are an unhelpful product of bivalent thinking. [FN143] For example, in the typical fuzzy fact pattern, a criminal defense client may relay six facts that correlate with guilt and not mention two additional facts that might be indicative of innocence. [FN144] Instead of filling the story with more guilty facts from the schema, a good interviewer searches for and develops the two non-conforming, "fuzzy" facts. [FN145] From these non-conforming facts, an attorney can build a theory of the case in the face of adverse evidence. [FN146] Although the term "fuzzy thinking" was coined by an electrical engineer, Chavkin readily acknowledges its roots in Eastern philosophy, and he cites the Jainist version of the parable. [FN147]

Other theorists have used the Eastern version of the parable to shed light on areas where an essentialist vision of truth retards understanding and the possibility of reform. For example, Kim Scheppele uses the parable in reviewing Susan Estrich's book, *Real Rape: How the Legal System Victimized Women Who Say No*. [FN148] Scheppele argues that in acquaintance rapes, men and women frequently perceive the same events differently. [FN149] Therefore, "the version of facts that courts find to be true in particular cases is [not] the right or best or only truth. The idea of truth is not that simple . . . . Many different \*987 versions of a story all may correspond with reality, just with different parts of it, rather like the blind men with the elephant." [FN150] Facing a choice between two equally valid yet incomplete versions of the truth, however, presents a serious problem for a judicial system premised on separating truth from falsehood. Moreover, because judges and juries make decisions in a cultural context, women's disparate view of what constitutes a threat, resistance, force, or consent becomes buried or subjugated by the societally "objective" perspective which still favors the male perspective. Scheppele uses this perspectivist insight to support Estrich's attempt to "re-vision" rape law in a way that "see[s] differently. . . how men and women communicate and interact." [FN151] According to Scheppele, Estrich's proposal "attempts to restructure social practice through restructuring the kinds of facts that courts notice," and she hopes that "making women's perceptions visible in the law" will lower the incidence of acquaintance rapes. [FN152] Here, Scheppele employs the Eastern view as a frame shifting tool in the otherwise polarized debate over acquaintance rape and provides a neutral rationale for what otherwise might be perceived as too radical a solution. [FN153]

At its best, scholarship based upon Eastern epistemology offers a refreshing way to value different perspectives without privileging one over another. Writers such as Chavkin and Scheppele challenge the Anglo-American legal system to soften its strict essentialist view of the truth and to offer interesting opportunities to improve legal practice and to spur reform. Moreover, they develop depth and credibility by drawing on a 2000-year-old, fully developed philosophical system. Another Western scholar, Rebecca Redwood French, makes this exact point. She states that her study of the Tibetan legal system enabled her to "think more deeply about our own unacknowledged assumptions and the possibly contingent nature of what we assume to be essential in our cosmology of law." [FN154]

Another discrete group of articles has explored whether Eastern conceptions of truth might be used to effect a more radical transformation of Western legal culture. These articles are more problematic and ultimately betray a deep uncertainty about the potential for success. Much like critical legal \*988 studies, transformative articles based on Eastern concepts can be wonderful critique pieces but struggle to find a way to change a legal system

that is born of Western philosophic beliefs. One example is John Powell's article, *The Multiple Self: Exploring Between and Beyond Modernity and Postmodernity*. In this article, Powell argues that Western ideas about the essentialist self are "used to destructively frame the way we talk about the self and race." [FN155] By contrasting the unitary, stable, and transparent Western self with a construct of an anti-essentialist, intersectional self, modern theorists have "made great strides in pushing the dialogue on identity and the subject beyond those traditional concepts . . . that have functioned to marginalize and subjugate oppressed groups." [FN156] However, when one rejects the Western self, fundamental tenets of our legal system predicated on the individual, autonomous self are also called into question. [FN157] For example, notions of agency and choice, central to the individual responsibility and accountability for one's actions, "would clearly be altered by moving away from the unitary self." [FN158]

Powell looks for assistance from Freudian theory and Buddhism because each of these systems rejects the essentialist Western self. With insights from these disparate theories, he draws hope that the legal view of the individual could be constructed and fractured, without also having to believe that all else is constructed, leaving nothing essential or unconditioned on which to base a system of legal morality. [FN159] Nevertheless, Powell acknowledges the difficulty of this project. For example, in the context of racism, Powell recognizes that current discrimination law is based on a unitary concept of self. [FN160] Thus, when a racialized self is harmed, the legal systems sees its job as correcting the transaction so the racialized self is returned "to its original and rightful position." [FN161] However, "[b]ecause the postmodern self is intersubjective, and thus dependent upon others for definition, oppression is a relational function: . . . 'you cannot get rid of subordination without eliminating the privilege as well.'" [FN162] In other words, contrary to existing doctrine, "there is no \*989 original position to which we can return the racialized self." [FN163] Powell concedes that "[w]hat this may require in the form of jurisprudence is uncertain" and that while providing insights into the problem, neither Buddhism nor Freudian theory provides the key to solving the "discursive void that is left by rejection of the modern unitary self." [FN164] Thus, while a fascinating rumination, this attempt to find actual solutions to the post-modern dilemma remains for Powell an ongoing discourse, "with no fixed resolution on the horizon." [FN165]

The challenge to truly melding Eastern philosophy into Western legal theory ultimately lies in the perhaps unbridgeable differences in the fundamental starting principles and their practical implications. According to Rebecca French, in Buddhism "faith and reason, logic and compassion are all integrated." Thus, the Pali Buddhist scriptures use the "same word for truth and keeping one's promises. Morality and epistemology are therefore inextricably mingled." [FN166] One dramatic consequence of these beliefs is that under the Tibetan legal system, most civil, and even much of the criminal process depends on the defendant's consent, rather than imposition of positive law on the individual. [FN167]

Nevertheless, current legal theorists see similarities between Buddhist thinking and the postmodern approach because both positions start with an anti-foundationalist position with regard to truth. [FN168] More importantly, both struggle with answering the charge of moral relativism. Except for the most committed nihilists, Eastern theorists and post-modernists seem to assert that ethical implications can be teased out of current events and history, however tentative those conclusions may be. In this way, "the post-modern position is entirely consistent with the view of the Buddha, the Boshu, and Zeno." [FN169] The \*990 difference between the post-modern position and Buddhism, however, is that the latter "regarded the data acquired by introspective emptying-of-the-mind as a suitable foundation for justifying truth claims. Seen from this angle, postmodernism is early natural law minus meditation." [FN170] In other words, unlike the Buddhist who has "emptiness," postmodern theorists are still looking for some principled foundation upon which to base a system of values in an otherwise anti-foundationalist universe. Because of this fundamental difference between Eastern and Western ontology,

neither the post-moderns nor any other Western scholars have successfully translated the Eastern grand narrative into Western legal thought.

### C. Pragmatism, the Parable, and Legal Scholarship

The ontological divide discussed in the preceding section dissuades most legal scholars from looking for answers to the post-modern assault on essentialism in Eastern philosophy. Instead, more have turned to a distinctively American philosophical tradition - pragmatism - in search of a legal philosophy that provides a grounding for values in a perspectivist universe. Not surprisingly, some of these legal writers also turn to the blind men and the elephant parable to explain their epistemic positions.

Before turning to these examples, it would help to understand pragmatism and its epistemology. As it turns out, this task is not easy. Like nihilism, a definition of pragmatism is elusive. But, quite contrary to nihilism, the problem with pragmatism is that too many, rather than too few, seek to claim its mantle. Thus, while pragmatism is generally distinguished by its "orientation toward an American philosophical tradition tracing back to William James and John Dewey," [FN171] today, pragmatism "accommodates a variety of views ranging from Judge Richard Posner to philosopher Richard Rorty." [FN172] \*991 Legal pragmatism, although narrower than philosophical pragmatism, is still no more than "a loosely connected collection of anti-foundationalist views" that incorporates a wide range of divergent practices. [FN173] This diversity exists because legal pragmatism seeks to include rather than exclude consideration of anything that might be helpful in resolving a hard case. [FN174]

Given its diversity of method and ideology, legal pragmatism's epistemology is therefore best understood by how it distinguishes itself from the essentialist thinking it opposes. [FN175] Unlike foundationalism, which requires "unimpeachable connections between the foundation and the edifice," [FN176] pragmatists prefer to speak of a web of beliefs and thus have a greater degree of tolerance for open-ended and tentative solutions. [FN177] Some have, therefore, concluded that pragmatists equate "truth" with whatever "works." [FN178] Daniel Farber counters, contending that pragmatism should not be considered a reductionist theory of truth

but rather a reminder that the only available standards to apply in a given venture are the standards we actually already have. When those standards prove problematic, we must contend with the difficulty as best we can in each instance, without hoping for rescue from some acontextual theory of truth. [FN179]

\*992 Similarly, when Oliver Wendell Holmes, a jurist sometimes associated with the early pragmatist movement, [FN180] considered the question of truth, he said, "When I say that a thing is true, I mean that I cannot help believing it . . . . But as there are many things that I cannot help doing that the universe can, I do not venture to assume that my inabilities in the way of thought are inabilities of the universe. I therefore define truth as the system of my limitations . . . ." [FN181] One scholar, in an article about Holmes, uses the parable to make this point about the nature of truth:

A pragmatic legal theorist will embed questions about law in a context and address them for a purpose, and so may reach different and apparently inconsistent answers as context and purpose vary. The point of view of the judge, the legal commentator, the counselor, and the legal historian or anthropologist might produce analyses of the concept of law that seem mutually inconsistent. There is no reason to assume in advance that these alternative accounts, directed as they are to different purposes, are, like the different perceptions the blind men had of the elephant, to be reconciled in some all-comprehending meta-account, though a wise pragmatist will also accept as legitimate the 'philosophical' human need to generate such unifying accounts. [FN182]

Ian Hacking makes a further distinction with regard to pragmatists and truth. He identifies two veins of thought. [FN183] One group "identifies truth within a discourse with what the consensus will be in the long run; another

group \*993 identifies truth with the current consensus." [FN184] Nevertheless, these distinctions are not troubling to pragmatists because defining "truth," at least in its absolute sense, is not necessary to their project. In this way, pragmatism is not so much a philosophy as a methodology for the pursuit of knowledge. [FN185] Here, pragmatism is decidedly optimistic. While pragmatists share with post-modernists a recognition that "even natural scientific inquiry [has] unavoidably interpretive and culturally conditioned aspects; at the same time they believe that humanistic and explicitly evaluative inquiry can be pursued rationally and with the reasonable hope of progress." [FN186] Thus, for pragmatists, the socially contingent nature of reality is a functional rather than philosophic insight. Acknowledging the uniqueness of each person's viewpoint forces one to consider that each person is truly different, "not just at different stages on a unitary path to truth." [FN187] A pragmatist must engage in the "good faith practice of listening as a precondition for knowledge." [FN188] Thus, a perspectivist epistemology leads to an emphasis on dialogue and community rather than the isolation or despair of nihilism. This viewpoint also encourages non-judgmentalism even towards those with whom one actively disagrees. Thus, for example, Thomas Grey applies this inclusive, non-judgmental view even to theorists who create essentialist, meta-narratives, even though he personally believes such projects are unattainable. [FN189]

With its focus on the impact of philosophy on the individual's actual life in the world and its benign perspectivism, pragmatism shares some similarities \*994 with Buddhism's middle path. [FN190] In both, absolute truth is neither asserted nor stated as a goal. To the contrary, as in the Eastern parable, pragmatism suggests that the pursuit of absolute truth or even studying a subject from just one perspective is counterproductive. [FN191] Both are skeptical of essentialism's dualisms, such as the division of subject and object. [FN192] Finally, like Buddhism, pragmatism uses these insights as a guide for each individual's search for knowledge rather than as a particular path to a particular truth. There is, however, a critical difference between them. Unlike Buddhism, which suggests seeking individual enlightenment in the first instance by turning inward, [FN193] pragmatism's orientation is toward engagement and dialogue with others. It is this decidedly outward focus that distinguishes pragmatism from Buddhism's middle path and that also marks the distinctly pragmatic usage of the blind men and the elephant parable.

Catherine Pierce Wells's article, *Old-Fashioned Postmodernism and the Legal Theories of Oliver Wendell Holmes, Jr.*, illustrates the dialogic and optimistic elements of modern pragmatism's use of the parable. [FN194] In this article, Wells addresses the critics of Holmes and argues that despite his limitations and "bad man" image, a salutary pragmatism lies at the root of his jurisprudence. [FN195] Wells first uses the parable to explain pragmatism's communitarian approach to knowledge. [FN196] She notes that if she sees an elephant that "no one else seems to notice," she might believe the elephant is a figment of \*995 her imagination. [FN197] Normally this question is resolved by "engaging in a certain kind of discussion: 'I see an elephant. You don't. Am I hallucinating? Are you blind? What do other people see? How sure are you that there is no elephant there?'" [FN198] However, Wells is clear that this discussion does not presume a Kantian "elephant" is out there. Instead, it suggests a more tentative hypothesis suitable for investigation and explanation, rather than a matter of finality arrived at either by majority rule or by reconciling all viewpoints into a coherent whole. [FN199] In this way, Wells distinguishes the pragmatist version of the parable from the weak perspectivist gambit in which hope is held out that the complete elephant will be discovered.

Wells also distinguishes the pragmatist vision of reality from that of the extreme post-modernists. These post-modernists argue that power ultimately dominates and distorts the social construction of reality and that we are intellectually unable to free ourselves from our own epistemological privileges. Wells acknowledges the importance of power in this social construction of reality, but her concern is that such beliefs tend toward nihilism, which offers no basis for believing reform is possible. Pragmatism, which she calls old-fashion post-modernism,

contends that "the influence of power can be countered and minimized" by strategies that include freedom of speech and honoring differences. [FN200] Thus, while Wells acknowledges that post-modern perspectivism can mean nihilism, she argues that pragmatism offers the opportunity to "become engaged members of a human community. [While t]his membership will not solve substantive problems once and for all, [she contends] it can give us a manner of proceeding." [FN201]

The complexity and diversity of pragmatist scholarship make it difficult to summarize its strengths and weaknesses. Perhaps at its best, a pragmatist outlook brings a sense of dynamism and accessibility to the writing it inspires. \*996 By drawing on multiple disciplines, pragmatist legal scholarship infuses scholarly debate with fresh ideas and research. The pragmatists who stress historical context and current consensus add a degree of breadth not present in work written for a narrow elite of like-minded scholars. Moreover, pragmatism's emphasis on dialogue also seems to influence these scholars to make their work more accessible and somewhat less jargon-laden. Lastly, pragmatism's inclusive methodology correlates well with the practice of law. After all, good lawyers use whatever arguments advance their client's interest. Thus, pragmatist scholarship appeals to practicing attorneys and practitioner-scholars and can bridge the academic-practice gap frequently bemoaned in the literature on scholarship. [FN202]

The vein of pragmatism that stresses experimentation also has a distinct flavor. By promising a path for reform, this type of pragmatist scholarship brings a sense of hope and possibility that seems more attainable than the purely theoretical models for change proposed by the radical left. [FN203] This hopefulness has two aspects. In the larger sense, pragmatists believe that radical perspectivism alone leads to a paralyzing moral relativism. [FN204] Pragmatism's program for dialogue and self-examination of one's own perspective provides "an alternative to the paralysis of philosophical skepticism." [FN205] By \*997 positing a methodology that opens the law to more voices, pragmatism provides one who is both a perspectivist and an advocate for change a workable theory of law. Secondly, pragmatists who focus on the dialogic theme are also hopeful about the debate over legal theory and political change. [FN206]

The primary critique of pragmatist legal scholarship is related to the general critique of pragmatism as a philosophy. In short, some contend that pragmatism is not a philosophy at all but an excuse for not having one. [FN207] Other critics argue that pragmatism contains unresolved epistemic and normative conflicts that undermine its attempt to provide a basis for values despite its perspectivism. [FN208] Thus, nihilists "trash" pragmatist scholarship for failing to fully embrace the implications of anti-foundationalism. [FN209] Foundationalist critics, on the other hand, contend that pragmatism ultimately fails to provide a solid ground for making value judgments. [FN210] In other words, by giving up "the Archimedean standpoint, the pragmatist seems to have lost the leverage to move the world." [FN211] Thus, although pragmatists seek to interweave the tensions between coherence and experimentalism, and dialogue and projectivity, \*998 to avoid both sets of risks, [FN212] critics of pragmatism are left unconvinced.

In light of these criticisms and regardless of one's political perspective, pragmatist legal scholarship can also be seen as a complex and unstable house built upon unresolved tensions. While pragmatism is appealing because it attempts to balance competing strains of coherence and experimentation, dialogue and projectivity, and anti-essentialism and the grounding of values, pragmatism has no formula for the proper blend of each, either generally or in each specific situation. Any particular pragmatist's resolution of an issue becomes vulnerable to criticism that his program is utterly personal. Thus, finishing a pragmatist article, one may be momentarily energized by the author's hopefulness. However, often, upon further reflection, the program proposed often seems to be lacking in concrete parameters. Moreover, even if one agrees with the author's resolution of competing consider-

ations, one would have difficulty applying more than the most general insights to a situation because of the specific nature of the piece. In other words, pragmatism's emphasis on anti-theory, while as effective as nihilism's, often only creates an illusion of a bridge between radical perspectivism and essentialist truth.

#### D. The Parable and Legal Scholarship Revisited

In this section, an exploration of law review articles that employ the parable with an awareness of its epistemic implications seems to have led to a tour of current legal theory, with at least one representative of each major approach to legal epistemology represented. What explains the appeal of this story to such a diverse group? As alluded to earlier, the best answer is that legal theory, like current philosophy and indeed modern culture, is obsessed with epistemological concerns. [FN213] Unable to resolve the postmodern challenge to modernism's faith in rationality, the blind men and the elephant parable becomes a timely vehicle for encapsulating the centrality of perspectivism to this debate. In fact, the blind men and the elephant parable is not the only Eastern story of the perspectivist's dilemma to make its mark in current legal theory. Other perspectivist stories, such as the Japanese film *Rashomon*, have been repeatedly cited in the legal literature. [FN214] Thus, the frequent use of the \*999 blind men and the elephant parable in modern legal scholarship should be seen not as a unique phenomenon but rather as part of the search for analogies to the legal philosophy's most vexing issue.

### IV. Rhetoric, Legal Scholarship & the Parable

#### A. Rhetorical Theory and the Parable as Trope

Two important questions have not yet been fully answered. First, why do so many legal writers resort to a parable in conveying or elucidating their epistemic beliefs in the first place? Second, is it significant that the parable's point seems to depend on each author's underlying beliefs, even for those who are aware of the parable's epistemic implications? Answers to these two questions lie not in the parable itself but in rhetorical theory, both past and present. [FN215]

Classical rhetoric is defined as the analysis of persuasive discourse and argumentative technique. [FN216] In the Aristotelian model, persuasive rhetoric is divided into *logos*, *pathos*, and *ethos*. *Logos* refers to the rational dimension of persuasiveness wherein the speaker appeals to the listener's sense of reason "through structured argument and evidentiary proof." [FN217] The strength of *logos*, therefore, depends on the logic and consistency of the argument itself. [FN218] *Pathos* refers to the "emotional aspect of the matter." [FN219] A *pathos*-driven argument \*1000 can appeal to base needs or to the personal involvement of the listener, or more broadly, to how the audience "feels about concepts, values, conduct, and situations." [FN220] *Ethos* refers to the ethical appeal of an argument, which comes "from the character of the speaker, especially as that character was evinced in the speech itself. A man ingratiated himself with his audience - and thereby gained their trust and admiration - if he managed to create the impression that he was a man of intelligence, benevolence, and probity." [FN221] While today legal arguments are generally thought of and evaluated on the basis of their *logos*, [FN222] classical rhetoricians assumed to the contrary "that legal arguments and analysis do not succeed solely on the basis of their logical integrity." [FN223] In fact, in the classical tradition, "what we would today regard as legal education was to a significant degree education in rhetoric." [FN224]

Classic rhetoricians were particularly interested in techniques called tropes that could enhance all three aspects of an argument's persuasive appeal. Tropes are "striking or unusual configuration[s] of words or phrases that change the [ordinary] meaning of a word or words, rather than simply arranging them in a pattern of some sort." [FN225] The trope relevant to this discussion is "metaphor," defined as an "implied comparison between two things of unlike nature yet have something in common." [FN226] As scholars have recently explored, \*1001 judicial opinions are rich in metaphoric language. According to Michael Frost, "frequently and almost instinct-

ively lawyers use figurative and metaphoric language when they want to emphasize and crystallize their arguments and analysis." [FN227] However, metaphors do more for the logos of an argument than just condense or clarify. Metaphors can challenge "the audience to seek resemblances where none usually exist . . . . For Aristotle, the act of understanding or 'solving' a metaphor is similar to solving a riddle; in both cases the solving is itself an act of learning." [FN228] However, the rhetorical power of metaphors lies in their simultaneous appeal to pathos and ethos. [FN229] Metaphoric language invites the reader or listener to become emotionally involved with an argument by appreciating the connection and the surprise that a good metaphor inspires. [FN230] Aristotle also noted in his Rhetoric that the selection of an apt metaphor also "indicates the advocate's resourcefulness and insight" and thus enhances his ethos as well. [FN231]

Within rhetoric, parables are classified as extended metaphors. A parable teaches its moral lesson metaphorically because the details of the story stand for a larger meaning. [FN232] Parables, however, can have a rhetorical advantage over ordinary metaphors. When a parable comes from a dominant religious tradition or is deeply embedded in a culture's folkloric wisdom, it can be counted upon to evoke a strong pathos from the audience. Moreover, to the extent that the speaker allies himself with the parable's religious or historical \*1002 moral, his ethos is enhanced more so than if he merely employed a metaphor of his own creation. With this background, much like trial lawyers who have long relied on Bible parables to establish a rhetorical foundation for their closing arguments, it is not surprising that legal scholars have turned to an ancient, but still well known parable to convey their epistemic beliefs and arguments. [FN233]

Turning to the second question, the chameleon-like quality of the blind men and the elephant parable in legal scholarship also has its roots in a tropologic understanding of metaphor. A key feature of metaphors is their inherent malleability. This malleability arises from the condensed nature of metaphor; a metaphor asserts a comparison but does not make the comparison explicit. A consequence of this omission is that the boundaries of a metaphor's meaning are "left to the reader's imagination." [FN234] This feature leaves a metaphor open to disparate but supportable interpretations by members of the audience. [FN235] The malleability of metaphoric stories explains why although the original version of the blind men and the elephant parable endorsed perspectivism, the basic storyline is now used quite differently. Specifically, the meaning given to the critical symbol, "blindness," seems to determine the epistemic moral of the parable. To the extent that intellectual blindness is seen as an unalterable element of the human condition, the moral remains the Eastern version. If blindness is perceived either as afflicting only some or as a disability that can be overcome, whether by co-operation or technological progress, the moral begins to shift to a Western orientation. However, while malleability helps account for this parable's appeal to legal scholars holding very different epistemic views, the general rhetorical appeal of metaphors and parables to legal scholars goes much further.

\*1003 First, one must recognize distinct rhetorical agendas of the full-time legal academician engaged in scholarly work. Clearly, an author's first rhetorical agenda is to choose the best arguments available to support his or her thesis. The rhetoric that supports this agenda is both explicit and obvious. At the same time, academicians engage in scholarship for other reasons: i.e., to advance a political agenda or simply to improve their standing among their peers. [FN236] These more implicit agendas have their own rhetorical imperatives. Obviously, in a perfect academic world, each work would be evaluated on its merits, regardless of authorship. [FN237] But with thousands of articles being published in hundreds of student and peer edited journals, it is often an author's perceived status that influences an article's impact. Certainly, an author's status, or ethos, is often based on factors external to the work itself, such as the reputation of the scholar's academic home and the reception of their past work. [FN238] As the ancient rhetoricians noted, delivery also impacts ethos. Thus, some of the rhetoric of a typical piece of legal scholarship is designed to first persuade law review editors to publish and then to encour-

age scholars to read and cite the piece. [FN239]

Among the many factors that contribute to the perception that the work is important is the self confidence projected by the work itself. [FN240] Thus, for the arrogant doctrinalist, the parable's rhetorical assertions of breadth, originality, and truth are part of an implicit rhetoric of self-promotion that is distinct from the logos of the thesis. [FN241] For those I have called inter-disciplinarians and optimists, the parable's rhetorical message is slightly different, but functionally similar. Here the parable expresses confidence in the ultimate solution of a problem to which the author claims to be making a valuable contribution. Rhetorically speaking, this is wise, for there is little appeal to \*1004 an article that states it is a contribution to a problem that is unlikely ever to be solved. [FN242]

Metaphors and parables are not just the self-promotional tools of modern legal scholars. Just as they did for the classic rhetoricians, metaphors and parables contribute to the logos of legal scholarship - indeed to its very creation. The classic rhetorician's first step for every speech was *inventio*: the unique challenge of formulating the arguments for the topic at issue. [FN243] Thus, classic rhetoric disputed the opposition between rhetoric and substance. [FN244] Cicero also asserted that the speaker who had "a native, intuitive sense for proper arguments" had a great advantage over those who selected arguments by method or mere diligence. [FN245] *Inventio* is particularly critical to legal scholars because scholarship is most often judged on its creativity. [FN246] This evaluation depends in large part on an article's ability to make readers think differently about its subject matter. [FN247] Metaphoric language helps legal scholars face this challenge. Because every metaphor requires an interpretative act by the reader, a writer's ability to express a proposition in an apt metaphor creates a space for the audience to be stimulated by the idea across a range of meaning and even in directions unanticipated by the author. Moreover, because a succinct metaphor evokes a strong pathos of appreciation, legal scholars can get more \*1005 rhetorical bang from a comparison stated as a metaphor than as a simple logical proposition. Thus, legal scholars have frequently gone to the "metaphoric well" to craft critical elements of their theses. [FN248] In this context, the blind men and the elephant parable is simply a recurring example of how metaphoric language plays an important role in legal scholarly activity. [FN249]

Indeed, carrying this concept even further, some current rhetoricians have asserted that much academic scholarship "is only debased poetry, a mixture of metaphors, images and ambitious language." [FN250] Influenced by the same post-modern attack that provoked the epistemic crisis in legal theory, these rhetoricians argue that academicians can no longer deny the rhetoric they use to give their work the veneer of objectivity. [FN251] Instead, claiming an epistemic kindred with the early Greek sophists, [FN252] they use rhetoric to examine academic work as "an incomplete, ambiguous, and uncertain world, interpreted and understood by means of language." [FN253] Their basic premise, therefore, is \*1006 that "[s]cholarship uses argument, and argument uses rhetoric. . . . In matters from mathematical proof to literary criticism, scholars write rhetorically." [FN254]

As its task, post-modern rhetoric seeks to study the structure of academic discourse. While maintaining that all disciplines rely on rhetorical argumentation, post-modern rhetorical theory contends that "[e]very field is defined by its own special devices and patterns of rhetoric - by existence theorems, arguments from invisible hands, and appeals to textual probabilities or archives - themselves textures of rhetoric." [FN255] While the full range of insights that has resulted from the application of post-modern rhetorical theory to legal discourse is beyond the scope of this Article, the recent legal scholarship in this area generally shares the view that a more self-conscious approach to the rhetoric of legal discourse is the first step. [FN256] This process begins by looking at scholarship "as a practice that is carried out by a community." [FN257] This raises one more question: How does legal scholarship's treatment of epistemic issues impact the rhetorical structure of the discourse?

[FN258]

Some contend that the feature that most distinguishes legal scholarly rhetoric from other academic disciplines is its prescriptive voice - its consciously \*1007 declared desire to improve the performance of legal decision makers by critiquing judicial opinions. [FN259] This rhetorical model of legal scholarship does seem to capture the logos of much doctrinal scholarship, and it does distinguish legal scholarship from the still dominant objective rhetoric of the sciences and social sciences. However, the explicit rhetorical agenda of much of today's legal scholarship seems broader than just doctrinal advocacy. On one hand, there is still a strong vein of pretensions to objectivity, particularly in model building scholarship. On the other hand, from critical legal studies to the law and economics movement, scholars have a self avowed political purpose broader than just critiquing judicial opinions. [FN260] At the other end of the rhetorical spectrum, the typical nihilist piece, as discussed earlier, is usually devoted to deconstructing another's arguments much more so than advancing a favored interpretation. [FN261] Nevertheless, there does seem to be a less objective, distinctively normative aspect to legal scholarship.

Focusing solely on the explicit rhetorical goals of the author, however, yields little insight into the underlying structure of the discourse. For legal scholarship, I believe the epistemic crisis created by the post-modern critique of objectivity has had important structural rhetorical ramifications. Because so many legal scholars focus on the normative and technical and ignore the ontological and epistemic issues, they must structure their rhetoric to emphasize the former and avoid the latter. [FN262] Metaphors assist in this rhetorical frame shifting. It works like this: because a metaphor's openness is not readily apparent, each reader typically interprets the metaphor's meaning and boundaries unconsciously (as opposed to the explicit evaluation that takes place when one undertakes a logic-based comparison between two things is made). Thus, metaphors can also be used to cloak an uncertain or contradictory concept in evocative and convincing language for both the author and the audience. \*1008 [FN263] This is especially likely if the metaphor or parable is deeply ingrained in some cultural context or web of belief. [FN264] In legal scholarship, the blind men and the elephant parable serves this purpose because it allows an author to metaphorically assert essentialist beliefs without making them explicit. In the post-modern era, the parable thereby serves as a stabilizing mechanism to cloak the otherwise contradictory structure of legal rhetoric - explicit normative and political arguments side-by-side with unsupported essentialist beliefs about ontological and epistemic issues. [FN265]

This discussion of the blind men and the elephant parable as a rhetorical trope is, therefore, an example of the broader lesson of modern rhetorical theory - that there are benefits "from increased rhetorical self-consciousness." [FN266] Some of the benefits are practical. The more aware one is of one's own rhetorical agendas and the underlying structure of the discourse in which one participates, the more likely one is to be consistent and persuasive, and conversely, the less likely to undermine some aspect of one's agenda. For example, when a writer unselfconsciously chooses a rhetorical device, such as the arrogant version of the blind men and the elephant parable, his readers may be misled into thinking his epistemic agenda is grander than the more modest goal of sharing one scholar's slice of the truth. [FN267] In this way, rhetoric \*1009 is "essentially pragmatic in orientation, because it is directed to the solution of difficulties placed before the student." [FN268]

#### B. The Parable and the Debate Over Narrative Scholarship

This Article's exploration of the blind men and the elephant parable's role in the rhetoric of legal discourse may also shed some light on the debate over the legitimacy of outsider and narrative scholarship. In his influential 1989 article, *Storytelling for Oppositionists and Others: A Plea for Narrative*, Richard Delgado called for a new wave of legal scholarship. [FN269] He challenged academics to abandon the orthodoxy of formulaic, doctrinal articles and instead to experiment with form and content using personal narratives, stories, and parables.

[FN270] His agenda was overtly political. Delgado asserted that traditional scholarship's focus on the sanitized legal reasoning in judicial opinions necessarily excluded the voices of political "outgroups" such as racial minorities, the poor, gays and lesbians, and others. [FN271] By providing a forum for the views of these outgroups, Delgado hoped radical legal scholars could help undermine the ideology that disempowered these groups in the legal arena.

In some ways, Delgado has been wildly successful. The trickle of articles became a flood. Now, the most prestigious law reviews routinely publish narratives, imaginary dialogues, and autobiographical revelations that are considered the cutting edge of legal scholarship. [FN272] But there has also been a severe backlash, both in the literature and, some assert, in the promotion and tenure process. More traditional legal scholars have argued that outsider scholarship and storytelling is not legitimate and that it lacks the objectivity, rigor, and analytic content that have been the identifying features of academic discourse about the law. [FN273] Outsiders have vigorously defended themselves. Indeed, the debate for and against outsider scholarship comprises a literature on its own. [FN274] But by many accounts, this debate has gotten ugly, personal, and overblown. [FN275]

**\*1010** However, looking at this debate, in part, as a question of epistemic rhetoric takes a step back from absolutist arguments about legitimacy. First, it may be that an implicit essentialism has helped fuel the debate. In traditional doctrinal scholarship, while vigorously contesting each other's models, scholars basically agree about first principles; that is, scholarship is about law, theory building, and the pursuit of an elusive and disputed but ultimately singular truth. Outsider scholarship refuses to stay within this formalist universe because it elevates the significance of individual subjective voices. Arguing that the closed world of doctrine is intellectually limiting and used to exclude the interests of oppressed minorities, outsider scholarship explicitly rejects essentialism. [FN276] Because of their implicit assumptions about what the law is, some traditional scholars see narrative scholarship as unrigorous, unverifiable, and, ultimately, not legal scholarship at all. In this debate, the arrogant version of the blind men and the elephant parable can be seen as not merely a harmless rhetorical flourish but as a symptom of the reification of the scholarly enterprise as seen from an essentialist perspective. While an admonition to refrain from essentialist rhetoric and the concomitant goal of raising consciousness about our implicit epistemic beliefs may not resolve this debate, greater self-reflection about the grandiosity of traditional doctrinal models might perhaps temper the rejection of scholarship based upon very different epistemic assumptions.

As the storytellers have pointed out, majoritarian scholarship uses storytelling as well. [FN277] The difference is that majoritarian stories, such as the blind **\*1011** men and the elephant parable, are often so imbedded in culture that it is hard to see them as persuasive rhetoric. Moreover, because traditional stories evoke a shared understanding, they can be made in shorthand. [FN278] Outsiders, on the other hand, must be more explicit, precisely because they seek to counter some existing cultural understanding. These differences impact all aspects of the outsider scholar's rhetoric. Taking ethos as an example, much of traditional scholarship's ethos building is by citation to previous articles by prominent scholars on the same subject. A professed familiarity with a body of work establishes the legitimacy of the author as a participant in the dialogue. Because little outsider scholarship existed until recently, these scholars had no option but the risky rhetorical strategy of selling themselves and their own stories to establish their credibility. [FN279] Similarly, narrative scholarship intentionally places a greater emphasis on pathos, hoping to use emotion to unsettle accepted notions of law and culture. In these ways, rhetorical theory can help reframe and rationalize the ongoing debate over narrative scholarship. Moreover, the study of "neutral" stories, such as the blind men and the elephant parable, can be part of this project by clearly showing how all legal scholarship uses rhetoric's pathos and ethos as fundamental components of its enterprise.

## V. Conclusion

This Article has attempted to offer insights into the different groups of scholars who have employed the blind men and the elephant parable in their writing. For the majority of scholars who have used the parable unselfconsciously, the moral of this Article might be that you can run but you cannot hide from the ontological and epistemic questions at the heart of the discourse of legal scholarship. Regardless of whether we tackle the tax code or constitutional law, this exploration of one epistemically oriented parable suggests that our beliefs about the relationship between our work and truth will resurface in our rhetoric. However, because most writers choose their rhetorical tropes by instinct, as a spontaneous part of the creative act of writing, much of what they reveal about our deeply held beliefs about truth is communicated unintentionally. [FN280] Therefore, I suggest that the only choice we face is whether we \*1012 select, and then perhaps moderate, our epistemic rhetoric ourselves, or default to one of the two unreflective belief systems of current legal scholarship - that of either arrogant or optimistic essentialism.

As I noted in the Introduction, however, this Conclusion is focused more on advocacy than on recapitulation. But this first suggestion, that legal scholars of all stripes, not just legal theorists, more carefully consider their epistemic assumptions might seem banal. If taken seriously, however, one can never read or write a piece of legal literature the same way again. Once the seed of epistemic self-consciousness is planted, a sense of detachment begins to accompany one's participation in the discourse. As writers, this detachment can have great benefits. It can improve the persuasive appeal of our work and especially help to avoid an unintentional intellectual arrogance that seems all too often a part of the law professor's persona. It may also help us to develop our own epistemic voices. Because the rhetorical structure of legal discourse actively discourages an investigation of the epistemic and ontological in favor of the normative and technical, it is difficult to find the right voice to discuss our own claims about the truth of our work without sounding either arrogant, overly hopeful, or at the other extreme, uncharacteristically insecure. If legal scholars become willing to examine and then put their epistemic conceptions on the table, the discourse of legal scholarship will also be enriched by the depth and likely diversity of these views.

We must begin, however, by appreciating the difficulty of achieving epistemic distance from our own work. Legal scholarship is by its nature a solipsistic process. A germ of an original idea or insight leads to months or even years of intensive exploration and development. Thus, quite apart from the external pressure to sound original and profound, [FN281] it is easy to see how one can come under the spell that one has achieved a monopoly on the truth about the subject. Thus, the Buddha's advice not to become attached to our own views might seem unrealistic for the academician. Nevertheless, there is hope if one begins with epistemic self-awareness. This advice is similar to Steven Winter's call for "situated self consciousness." He suggests that even though each person's understanding is bound by their cultural and historical context, "[w]e constantly use our imaginative capacities to recast what we find and reconstruct our context in a variety of ways." [FN282] We must have confidence that the simple flux of the world produces anomalies that, when combined with the human power of imagination, provide plenty of fodder for articles that are worthwhile, useful, and original, and in some partial sense, still "true." [FN283] Under this approach, putting aside political objectives for the \*1013 moment, the ontological aspiration of scholarship is to help each other understand our dynamic world. It also recognizes that the best legal scholarship comes from the same place as all creative writing - from a need to express some personal truth. Thus, there is nothing wrong with believing that our ideas and insights say something about truth that has not been said before, nor with hoping that our truths will resonate and inspire others.

In essence, I am suggesting that even two thousand years later, the Buddha's version of the parable has a useful message for legal scholars - that there is a middle way through the arrogance of essentialism, the false hope for

epistemic deliverance, and the despair of nihilism. Properly understood, the middle way of scholarly inquiry does not require us to suppress the desire to re-conceptualize, to look for insights in other disciplines, or to deny our political agendas. The only requirement is that we resist the myth that the avenue we have chosen will be the one that leads to the essentialist vision of truth. In modern terms, this Buddhist approach to legal scholarship finds a close kin in pragmatism. In both world views, whatever we do is more a practice than a means to an end. Like the Buddhist practice of meditation, good scholarship requires concentration and self-discipline. But like pragmatism (and some aspects of Buddhism), a practice is also measured by whether it has a positive impact on one's community. [FN284]

My second major theme draws from Part IV. In that Part, I further warned that if we do not consider our epistemic beliefs, we risk conveying beliefs we do not hold and weakening our arguments with contradictory rhetoric. [FN285] I also suggested that there are other causes of contradictory epistemic rhetoric besides inattention, such as how the parable's Western versions appeal to our need to inflate our ethos for purposes of publication and tenure despite the more modest nature of our actual logos and the perhaps unresolvable nature of the issues we consider. Based on these observations, this Conclusion advances two additional suggestions about scholarly rhetoric. \*1014 First, beyond just avoiding contradictions, a self-conscious use of rhetoric is also about investing the same care in organizing rhetorical motifs and tropes that we give to tracing precedent and history. My research demonstrates that even when authors anchor a central argument with a story, parable, or well known metaphor, they rarely do more than give a casual citation for the trope. [FN286] The result can be akin to what Mark Tushnet calls the practice of "history lite" in legal scholarship - a term he uses to describe the practice of selecting snippets of original historical sources to support a contemporary position. [FN287] Similarly, Brian Leiter coined the phrase "intellectual voyeurism" for the superficial and ill-informed quotation of serious philosophers to impress or titillate the reader. [FN288] Similarly, one could apply the label of "Rhetoric Lite" or "rhetorical voyeurism" to the legal writers who use the blind men and the elephant parable as an organizing metaphor without an investigation of the story's history and meaning. [FN289]

In a more positive light, reflection upon our rhetorical choices can invigorate our creativity, spurring the invention at the heart of the scholarly endeavor. Consider this contrast: Trial lawyers choose their stories, parables, and other tropes to make juries comfortable. If a lawyer can convince the jury that their theory of the case is consistent with the jury's current understanding of the world in which they live, the lawyer's client prevails. Scholarship, on the other hand, is not always supposed to make the audience feel comfortable. [FN290] In other words, we can choose to use rhetorical devices to extend and \*1015 challenge our conceptions of the subject matter rather than reify it. [FN291] Thus, this Article challenges scholars to do more than just understand the history of the parable or well-known metaphor they select. If possible, instead of being satisfied with the conventional meaning, scholars should instead look for a way to use the familiar in unfamiliar ways. [FN292] In fact, several writers have done exactly this with the blind men and the elephant parable with great effect. For example, D. Marvin Jones argues in his essay, "We're All Stuck Here for Awhile": Law and the Social Construction of the Black Male, that "[w]e have a name for race but no name for the racialization of male identity." [FN293] To bring home this point metaphorically, he invokes the blind men and elephant story but with an intentional twist. He suggests that for this issue, it is not just that we all describe the elephant differently, but that

we bump into the elephant without "seeing" an elephant in the cave at all. It is not merely that we have no idea how the elephant looks as a whole, we have no paradigm, no discursive vocabulary in which we could examine with our mind's eye our observations of the phenomenon into which we keep bumping. [FN294]

This image of the blind men bumping into something in the cave and having no words to describe their impressions (rather than the familiar partial descriptions in the original story), drives home his point about the deep and

entrenched difficulty of his issue. [FN295]

**\*1016** Lastly, my suggestion to use rhetorical theory to evaluate and rationalize the debate over outsider scholarship would have come as no surprise to the original rhetoricians. In the ancient world, rhetoric was "a means for public deliberation about public issues under conditions of uncertainty." [FN296] What better description could there be for legal discourse in the post-modern era? [FN297] Whether phrased in terms of rhetorical theory, pragmatism or Buddhist philosophy, the practice of legal scholarly discourse can only benefit from a healthy dose of self-aware perspectivism. [FN298] As a counterpoint to overexposure to one's own ideas, pressure from a tenure committee, or the insidious pull of a persistent Western essentialism, Grant Gilmore's advice about our own work says it best -

[T]he principal lesson to be drawn from our study is that the part of wisdom is to keep our theories open-ended, our assumptions tentative, our reactions flexible. We must act, we must decide, we must go this way or that. Like the blind men dealing with the elephant, we must erect hypotheses on the basis of inadequate evidence. That does no harm - at all events it is the human condition from which we will not escape - so long as we do no delude ourselves into thinking that we have finally seen our elephant whole. [FN299]

[FNa1]. Associate Professor of Law, Roger Williams University School of Law. Harvard Law School, J.D. 1986. The author wishes to thank Colleen Murphy for encouraging him to pursue this topic as well as Susan Ayres, Diana Hassel, Peter Margulies, Pierre Schlag, and Michael Yelnosky for their comments on earlier drafts. Appreciation is also due to Bill Nelson of New York University School of Law for leading a series of round table discussions about scholarship that contributed to the development of this Article and to the faculty of the Boyd School of Law, University of Nevada-Las Vegas for their suggestions at a faculty colloquium. Finally, this Article could not have been completed without the dedicated research assistance of Helena Pacheco, Danielle Jenkins, Lucy Holmes, and Christy Hetherington.

[FN1]. The source of the parable for many modern writers is the verse version that appears in *The Poetical Works of John Godfrey Saxe, The Blind Men and the Elephant: A Hindoo Fable* 111 (1859). Saxe's poem has itself been the subject of American litigation. See *Mozert v. Hawkins County Pub. Sch.*, 582 F. Supp. 201, 202 (E.D. Tenn. 1984) (rejecting parent's claim that parable should be banned from school book because it was hostile to religion).

[FN2]. See Lillian Quigley, *The Blind Men and the Elephant* 24 (1959) (discussing how rajah reveals truth to blind men).

[FN3]. See Ed Young, *Seven Blind Mice* 29-34 (1992) (discussing how last blind mouse discovers truth by running across entire elephant).

[FN4]. See Al Gore, *Address at Rio Earth Summit*, 59 *Tenn. L. Rev.* 645, 646 (1992) ("Only after enough time had passed and enough communication had taken place was there a realization that they each had a separate part of the same beast."). The various English language versions are generally similar to this version with other minor variations, such as the number of blind men or the parts of the body touched. See Maria Leach, *Noodles, Nitwits, and Numskulls* 54 (1961) (discussing how four blind men touch leg, tail, ear, and body); Young, *supra* note 3 (discussing seven blind mice touching leg, trunk, tusk, head, ear, tail, and entire elephant); Quigley, *supra* note 2 (discussing six blind men feeling side, trunk, tusk, leg, ear, tail, and side).

[FN5]. Quigley, *supra* note 2, at 24; see also *Glenn v. State*, 511 A.2d 1110, 1121 (Md. Ct. Spec. App. 1986) (using parable to say that one should not assume that whole resembles part with which one is familiar); Young,

supra note 3, at 34 ("The Mouse Moral: Knowing in part may make a fine tale, but wisdom comes from seeing the whole."). Occasionally, the story is told with the moral implicit. See Leach, supra note 4, at 54 (ending one page version simply with challenging question, "Would anyone answer 'Elephant'?").

[FN6]. A Westlaw search yields more than one hundred and fifty law review articles and judicial opinions that cite the parable (results available on file with author). Some subjects, such as the O.J. Simpson murder trial and the Internet are repeatedly compared to the parable. See C. Keith Wingate, The O.J. Simpson Trial: [Seeing the Elephant](#), 6 *Hastings Women's L.J.* 121, 122 (1995) (comparing different views toward O.J. Simpson trial to blind men viewing elephant); see also Symposium, [Internet Entrepreneurs, New Traffic Patterns, and Policy Issues](#), 3 *B.U. J. Sci. & Tech. L.* 1, 9 (1997), at <http://www.bu.edu/law/scitech> ("When we look at the Internet, one of the things that concerns me is that it is a term that we use without any consensus as to what it means. I talk to people in virtually every industry and I get completely different images. It is like the three blind men and the elephant."). For a similar discussion, see Loftus E. Becker, Jr., [Children's Rights vs. Adult Free Speech: Can They Be Reconciled?](#), 29 *Conn. L. Rev.* 893, 894 (1997).

[FN7]. See [Elder v. Holloway](#), 984 F.2d 991, 994 (9th Cir. 1993) (Kozinski, J., dissenting) (stating that panel errs like blind men by relying on one paragraph of another case in isolation); Gore, supra note 4, at 645 (discussing how individual disasters that form greater global crisis are like parts of elephant); Larry Kramer, [Understanding Federalism](#), 47 *Vand. L. Rev.* 1485, 1485 (1994) (comparing parable to federalism because federalism is too big to grasp in its entirety). Professor Koh used the parable three years in a row in three different articles. See Harold Hongju Koh, [Ten Lessons About Appellate Oral Argument](#), 71 *Conn. B.J.* 218, 221 (1997) [hereinafter Koh I] (comparing ideal moot court panel positively to blind men); Harold Hongju Koh, [The 1998 Frankel Lecture: Bringing International Law Home](#), 35 *Hous. L. Rev.* 623, 635 (1998) [hereinafter Koh II] (stating that international law theorists each see only part of international law like blind men); Harold Hongju Koh, [Why Do Nations Obey International Law?](#), 106 *Yale L.J.* 2599, 2603-04 (1997) [hereinafter Koh III] (reviewing Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995); Thomas M. Franck, *Fairness in International Law and Institutions* (1995)).

[FN8]. See, e.g., [Application of Lustig](#), 368 F.2d 1019, 1022 (C.C.P.A. 1966) (Smith, J., dissenting) (stating that persons not looking at entire design are blind men); [Application of Rainer](#), 347 F.2d 574, 575 (C.C.P.A. 1965) (Smith, J., dissenting) (stating that two parties finding support for different things in same document are like blind men); Philip Soper, [Dworkin's Domain Law's](#), 100 *Harv. L. Rev.* 1166, 1172 (1987) (reviewing Ronald Dworkin, *Law's Empire* (1986)) [hereinafter Soper I] (comparing legal theorists who attempt to define "law" to blind men); Philip Soper, [Legal Theory and the Problem of Definition](#), 50 *U. Chi. L. Rev.* 1170, 1185 (1983) (reviewing John Finnis, *Natural Law and Natural Rights* (1980)) [hereinafter Soper II] (same). One Texas court used the parable in three cases involving the same legal issue. See [Ned v. State](#), 652 S.W.2d 404, 405 (Tex. Crim. App. 1983) (determining whether jury must be told what constitutes "in the course of committing theft"); [Olveda v. State](#), 650 S.W.2d 408, 411 n.\* (Tex. Crim. App. 1983) (Teague, J., dissenting) (same); [Rohlfing v. State](#), 612 S.W.2d 598, 602 (Tex. Crim. App. 1981) (same).

[FN9]. If the parable's origin is in Buddhism, it dates back to Buddha's lifetime of approximately 563-483 B.C. See Kenneth K.S. Ch'en, *Buddhism the Light of Asia* 14 (1968) (estimating dates of Buddha's life). If Jainism is the source, the parable may go back to as early as 2500 B.C. See David F. Chavkin, [Fuzzy Thinking: A y Borrowed Paradigm for Crisper Lawyering](#), 4 *Clinical L. Rev.* 163, 194 n.8 (1997) (estimating origin of parable to be in Jainism).

[FN10]. Edmund C. Berkeley, *The Six Blind Men of Nepal*, in *Ride the East Wind: Parables of Yesterday and Today* (Edmund C. Berkeley ed., 1973).

[FN11]. *Id.* at 116.

[FN12]. *Id.*

[FN13]. *Id.*

[FN14]. *Id.*

[FN15]. *Id.*

[FN16]. *Id.*

[FN17]. *Id.*

[FN18]. *Id.* at 117. Clearly, even a cursory review of any recent volume of the major law reviews reveals that legal scholars have not chosen the solution favored by the blind men of Nepal.

[FN19]. See T.G. Kalghatgi, *Jaina Logic* 15 (1981) (discussing Jaina view that different viewpoints are needed to attain fuller knowledge). Berkeley's misconception is the typical Western confusion with the Eastern idea that members of a group each can see the truth differently but feel no collective need either to ignore these differences or to resolve them.

[FN20]. *Id.* at xi.

[FN21]. *Id.*

[FN22]. *Id.*

[FN23]. *Id.*

[FN24]. *Id.* at 17.

[FN25]. *Id.* at 13.

[FN26]. *Id.* at 14.

[FN27]. *Id.* at 68. Jaina texts suggest that one should first study each point of view (Nayavada) and then attempt a synthesis "designed to harmonize the different view-points arrived at by Nayavada." *Id.* at 15. Jaina scholars have compared their philosophy as akin to Bertrand Russell's "doctrine of perspectives" and A.N. Whitehead's theory of "coherence." See *id.* at 66-67.

[FN28]. See Eugene Watson Burlingame, *Buddhist Parables* 75-77 (1922). The *Udana* is the third book of the *Khuddaka Nikaya*, a collection of short stories (suttas), each of which is followed by a short verse attributed to Buddha. The blind men and the elephant parable is found at *Tittha Sutta* (Ud. VI.4) and titled *Various Sectar-ians*. The *Udana* is part of a larger collection of texts in the Pali language, called the Pali Canon ("Tipitaka"), which is the foundation for Theravada Buddhism. See, e.g., [http:// www.accesstoinsight.org/canon/index.html](http://www.accesstoinsight.org/canon/index.html)

(last visited March 10, 2001).

[FN29]. See *Tittha Sutta*, in *Udana VI.4*, at [http:// www.accesstoinsight.org/canon/khuddaka/udana/ud6-4.html](http://www.accesstoinsight.org/canon/khuddaka/udana/ud6-4.html) (last visited March 10, 2001).

[FN30]. *Id.*

[FN31]. *The Teachings of the Compassionate Buddha* 36 (Edwin A. Burt ed., 1955).

[FN32]. Sangharakshita, *A Guide to the Buddhist Path* 177 (2d ed. 1996).

[FN33]. *Id.* at 84.

[FN34]. *Id.*

[FN35]. John A. Powell, *Multiple Self: Exploring Between and Beyond Modernity and Postmodernity*, 81 *Minn. L. Rev.* 1481, 1506 (1997) (citing Anne Carolyn Klein, *Meeting the Great Bliss Queen: Buddhists, Feminists and the Art of Self* 140 (1995)).

[FN36]. *Id.* at 1506.

[FN37]. *Id.* at 1507.

[FN38]. *Id.*

[FN39]. *Id.*

[FN40]. *Id.* at 1507 (citing Klein, *supra* note 35, at 11).

[FN41]. *Id.*

[FN42]. See *id.* (describing Western conceptions of self).

[FN43]. See *In re Garza*, 981 S.W.2d 438, 442 (Tex. App. 1998) (Rickhoff, J., concurring) (quoting prediction that revised code would end practice of different judges "passing on some facet of a child's welfare . . . [like] a blind man touching and describing an elephant;" but concluding that this case's history belied that prediction (quoting Eugene L. Smith, *Texas Family Code Symposium Supplement, Parent and Child*, 8 *Tex. Tech. L. Rev.* 19, 23 (1976))); see also *McSurely v. Ratliff*, 282 F. Supp. 848, 852 (E.D. Ky. 1967) (noting that American understanding of Communism is that of blind men viewing elephant). Some judges seem to believe that multiple (and mixed) metaphors are the sign of a subtle mind. See *In re Marriage of Schaffer*, 81 *Cal. Rptr. 2d* 797, 801, 802, 804 n.7 (Cal. Ct. App. 1999) (describing family law dispute using parable and other metaphors and analogies, including impressionist paintings, desert caravan, T.V. show *The Prisoner*, child's game of telephone, and lightning bugs and lightning).

[FN44]. See *Muirhead v. Zucker*, 726 F. Supp. 613, 614, 618 (W.D. Pa. 1989) (stating that court "stands here like the proverbial blind man holding the tail of an elephant . . . [and h]olding only the tail, it is difficult for use to divine what shape the rest of this beast takes. Nevertheless we endeavor to hold up our end, so to speak.").

[FN45]. See J. William Callison, *Blind Men and Elephants: Fiduciary Duties Under the Revised Uniform Part-*

nership Act, Uniform Limited Liability Company Act, and Beyond, 1 J. Small & Emerging Bus. L. 109 (1997); Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools*, 44 J. Legal Educ. 311 (1994); Michael B. Metzger & Dan R. Dalton, *Seeing the Elephant: An Organizational Perspective on Corporate Moral Agency*, 33 Am. Bus. L.J. 489 (1996); Beverly I. Moran & Daniel M. Schneider, *The Elephant and the Four Blind Men: The Burger Court and its Federal Tax Decisions*, 39 How. L.J. 841 (1996); Paul T. Wangerin, *Damages for Reliance Across the Spectrum of Law: Of Blind Men and Legal Elephants*, 72 Iowa L. Rev. 47 (1986); Wingate, *supra* note 6.

[FN46]. See J. Thomas Warlick, Jr., *Of Blue Light Specials and Gray-Market Goods: The Perpetuation of the Parallel Importation Controversy*, 39 Emory L.J. 347, 347, 409-10 (1990) (quoting parable in introduction and again in conclusion).

[FN47]. Upon closer examination, a surprising number of parable references suggest the parable's moral is not a good fit with the author's point. See, e.g., *Sharp v. Dep't of Revenue*, 945 P.2d 38, 46 (Mont. 1997) (Nelson, J., dissenting) (arguing that majority's focus on contacts with state rather than clear statutory criteria on what constitutes taxable intangible income "makes as much sense as the blind man trying to describe the elephant's trunk by reference to a tree"). The dissent's essential complaint is that entirely irrelevant criteria were used, not that parts were mistaken for the whole. *Id.*; see also *United States v. Mallah*, 503 F.2d 971, 987 (2d Cir. 1974) (stating that defining scope of narcotics conspiracy is akin to describing elephant from touch); *In re Special Investigation No. 228*, 458 A.2d 820, 834 n.26 (Md. Ct. Spec. App. 1983) (stating that appellate courts should not look at part in context and assume part applies to whole); *State v. Martin*, 470 N.W.2d 900, 907 n.13 (Wis. 1991) (confusing parable with forest/trees metaphor). While parable "misuse" is distinct from the epistemic concerns discussed in much of this Article, these examples are relevant to Part IV which advocates a more self-conscious use of rhetorical devices.

[FN48]. See *infra* Part III.

[FN49]. See, e.g., Moira T. Roberts, *Individual Rights and Government Power in Collision: A Look at Rust v. Sullivan Through the Lens of Power Analysis*, 49 Wash. & Lee L. Rev. 1023, 1033 (1992) (stating that both opponents and proponents of Rust decision are blind men).

[FN50]. See, e.g., Donald B. Ayer, *Stewardship*, 91 Mich. L. Rev. 2150, 2162 (1993) (stating that Judge Edwards's formulations are partial).

[FN51]. See, e.g., Bobby Jindal, *Justification of Justice: Intuitionism*, 59 La. L. Rev. 891, 892 (1999) ("Particular societies vary in their distance from the ideal."); Robert M. Lawless et al., *A Glimpse at Professional Fees and Other Direct Costs in Small Firm Bankruptcies*, 1994 U. Ill. L. Rev. 847, 848-49 (1994) ("Thus, like the parable of the blind persons and the elephant, our perception of the bankruptcy system is partly right but ultimately wrong."); Robert H. Roether, *The Forest for the Trees: Judicial Activism in the Tort Marketplace*, 78 Mich. B.J. 706, 709 (1999) (comparing critics of contingency fees to blind men). In some cases, the parable is inverted. The author argues that he sees multiple entities rather than the single entity disparately described by others. See, e.g., Nancy L. Simmons, *Memories and Miracles - Housing the Rural Poor Along the United States-Mexico Border: A Comparative Discussion of Colonia Formation and Remediation in El Paso County, Texas, and Dona Ana County, New Mexico*, 27 N.M. L. Rev. 33, 34 (1997) (stating that each "colonia" has its own characteristics). This is how this author originally used the parable in another article. See David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 Emory

L.J. 1377, 1381 (1999) (citing divergence of legal scholars' analysis of Scalia); see also *infra* note 286 (discussing genesis of Article).

[FN52]. See, e.g., Joe B. Brown, *The Sentencing Guidelines Are Reducing Disparity*, 29 *Am. Crim. L. Rev.* 875, 878 (1992) ("The use of statistics that are cut on such an artificial and arbitrary line produces a result that can be compared to three blind men feeling different parts of an elephant . . . none of them has a true picture of what the elephant looks like yet each believes himself to be accurate within his narrow frame of reference."); Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 *U. Mich. J.L. Reform* 689, 700 (1994) (stating that analysts have different perspectives on Housing Act).

[FN53]. See Koh III, *supra* note 7, at 2602 (stating that both books give shape to only part of blind men's elephant).

[FN54]. *Id.*

[FN55]. *Id.* Koh describes this process as "the complex process of institutional interaction whereby global norms are not just debated and interpreted, but ultimately internalized by domestic legal systems." *Id.* Therefore, both books also "avoid explaining the evolutionary process whereby repeated compliance gradually becomes habitual obedience." *Id.* at 2603.

[FN56]. *Id.*

[FN57]. *Id.* at 2603-59.

[FN58]. *Id.* The following year, Koh made the same pitch in his *Houston Law Review* article. See Koh II, *supra* note 7, at 635.

[FN59]. See Daniel Farber, *Gresham's Law of Legal Scholarship*, 3 *Const. Comment.* 307, 311 (1986) (noting that "[w]ith a few refreshing exceptions, one law professor never calls another a fool" and, therefore, silly ideas often survive entirely too long).

[FN60]. See, e.g., Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 *Stan. L. Rev.* 807, 807-08 (1993) (stating that use of stories is not always good idea); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 *Geo. L.J.* 251, 251-52 (1992) (noting that stories and other literary devices are often helpful to judges and commentators).

[FN61]. See, e.g., *United States v. Sanchez*, 969 F.2d 1409, 1411 (2d Cir. 1992) (stating that parties are blind in that each is only partially correct about Rule 33 interpretation); *Walker v. Harris*, 642 F.2d 712, 715 (4th Cir. 1981) (stating that parties are blind without good legal assistance); see *Kowalczyk v. Kowalczyk*, 1992 WL 884848, at \*1 (Va. Cir. Ct. Aug. 4, 1992) (stating that parents' "insights into their personal impact on the children had the clarity of two blind men describing an elephant - their point of view was directly limited to the part of the problem that touched them").

[FN62]. See *Walsh v. C.I.R.*, 1981 WL 10639 (T.C. June 29, 1981) (describing experts dueling about how to value reasonable compensation); *Hall v. City of West Des Moines*, 62 N.W.2d 734, 737-38 (Iowa 1954) (discussing how three experts used widely different methods of property valuation).

[FN63]. See *S.B. Thomas, Inc. v. Thompson*, 689 A.2d 1301, 1308 n.1 (Md. Ct. Spec. App. 1997) (criticizing

parties' for using self-serving citations to key precedent); [City of Gaylord v. Beckett](#), 144 N.W.2d 460, 484 (Mich. 1966) (Souris, J., dissenting) (claiming that "none of the parties . . . has included . . . any analysis of the Act as an integrated whole").

[FN64]. See [Heather S. v. Wisconsin](#), 937 F. Supp. 824, 832 (E.D. Wis. 1996) (decrying amount of testing of child with multiple disabilities and stating "that the parents, the educators, the psychologists, and all the other experts acted at times like the blind man and the elephant"); [S. Cal. Edison Co. v. United States](#), 91 F. Supp. 757, 759 (Ct. Cl. 1950) (resolving financial claims of parties in wartime just compensation case and finding that although parties claims are very different, each is partially correct); [Anglim v. Mo. Pac. R.R.](#), 1991 WL 113978, at \*13 (Mo. Ct. App. June 28, 1991) (Smith, P.J., dissenting) (arguing that doctrinal analysis of forum non conveniens cases often resembles parable); [Menzer v. Village of Elkhart Lake](#), 186 N.W.2d 290, 292 (Wis. 1971) (stating parties' definitions of statutory term is like parable).

[FN65]. See [United States v. Patriarca](#), 807 F. Supp. 165, 201 (D. Mass. 1992) (claiming that government failed to provide its expert witness with important information and expert's opinions were flawed like "the proverbial blind man who believed that an elephant resembled a snake because he had only felt its tail"); [Fleming v. County of Kane](#), 686 F. Supp. 1264, 1266 (N.D. Ill. 1988) (stating that parties' versions of facts were so one-sided that court deferred to jury's verdict); [United Parcel Serv., Inc. v. U.S. Postal Serv.](#), 455 F. Supp. 857, 875 (E.D. Pa. 1978) (decrying parties' "uncritical" and selective approach to precedent and refusing to be placed in position of blind man examining elephant); [Crawford-Gray v. Nelson](#), 485 N.W.2d 840, 1992 WL 126819, at \*4 (Wis. Ct. App. Mar. 6, 1992) (Sundby, J., dissenting) (deciding that hearing was required because parties' affidavits were biased and that relying on them would be like parable); see also [Tandy Corp. v. United States](#), 626 F.2d 1186, 1190 (5th Cir. 1980) (stating that interpreting debenture indenture requires looking at whole elephant); [Application of Rainer](#), 347 F.2d 574, 575 (C.C.P.A. 1965) (comparing attorneys who did not clearly define what an invention is to blind men in parable); [Transairco, Inc. v. United States](#), 366 F. Supp. 602, 604 (S.D. Ohio 1973) (comparing plaintiffs and defendant to blind men when analysis of mechanical device led to radically different conclusions).

[FN66]. In this context, the parable shows up in split decisions, with the parable users claiming that the dissent or majority has erred in some specific regard. See [Davies v. Comm'r of Internal Revenue](#), 715 F.2d 435, 439 (9th Cir. 1983) (Duniway, J., dissenting) (stating that majority fails to pay attention to critical parts of trial record); [McAuley v. Wills](#), 303 S.E.2d 258, 261 (Ga. 1983) (Weltner, J., dissenting) (arguing concepts of proximate cause, comparative negligence, contributory negligence, last clear chance, etc. are all "but differing aspects of the same inquiry - causation - so that their expositors seem uncomfortably akin to the fabled blind men describing in varying terms the same elephant"); see also [Gulyer v. United States](#), 314 F.2d 506, 509 (Ct. Cl. 1963) (stating that different interpretations of contract were result of blind men (parties and lower courts) looking at part of elephant (contract)); [Moore v. Lillebo](#), 722 S.W.2d 683, 691 (Tex. 1987) (Spears, J., dissenting) (criticizing majority's instruction on damages for mental anguish because instruction allows jury to award different damages for same injury).

[FN67]. See [Wilson v. County Ct.](#), 148 S.E.2d 353, 362 (W. Va. 1966) (Browning, J., dissenting) (using parable to highlight majority's failure to "look to any other applicable statutory or constitutional provision"); see also [Bhd. of Maint. of Way Employees v. Atchison, Topeka & Santa Fe Ry.](#), 138 F.3d 635, 645 (7th Cir. 1997) (Wood, J., dissenting) (noting that case calls for all interested parties to be joined in one action where there is jurisdictional dispute over work assignments, thus avoiding approaching case like the blind men in the parable); [TEC & Commercial Union Ins. Co. v. Falkner](#), 827 S.W.2d 661, 663 (Ark. Ct. App. 1992) (Mayfield, J., dissent-

ing) (stating that different interpretations of what qualifies as appealable order in workers' compensation cases resembles blind men and elephant parable).

[FN68]. [Elder v. Holloway](#), 984 F.2d 991, 994 (9th Cir. 1993) (Kozinski, J., dissenting); see [Elder v. Holloway](#), 510 U.S. 510, 516 (1994) (reversing panel's decision); see also [NLRB v. Creative Food Design Ltd.](#), 852 F.2d 1295, 1299 (D.C. Cir. 1988) (stating that "[I]ike the blind man with the elephant, our [dissenting] colleague lays hand on a few isolated quotes and pronouncements about the importance of turnover; yet each of these addresses situations radically different from the one this case presents"); [Skinner v. Mahomet Seymour Sch. Dist. No. 3](#), 413 N.E.2d 507, 510 (Ill. App. Ct. 1980) (using parable to describe dissent's selective use of quotes and claiming that dissent has created "a whole new creature").

[FN69]. See Bernard J. Hibbitts, [Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse](#), 16 *Cardozo L. Rev.* 229, 268 (1994) (stating that men use visual culture to keep women down); Jeanne L. Schroeder, [Abduction From the Seraglio: Feminist Methodologies and the Logic of Imagination](#), 70 *Tex. L. Rev.* 109, 173 n.200 (1991) (explaining author's intentional use of visual metaphor and addressing criticism that "Western logic is too rooted in the visual"); Steven L. Winter, [Bull Durham and the Uses of Theory](#), 42 *Stan. L. Rev.* 639 (1990) (discussing views of Stanley Fish).

[FN70]. See [La. Paving Co. v. St. Charles Parish Pub. Sch.](#), 604 So. 2d 593, 599 (La. Ct. App. 1992) (using parable to assert that contract could be interpreted in only one way when state wanted to classify it two ways for tax purposes).

[FN71]. See Robert Paul, [Arizona v. Fulminante: The Application of Harmless Error Analysis to Admission of a Coerced Confession in Violation of the Due Process Clause of the Fourteenth Amendment](#), 94 *W. Va. L. Rev.* 1061, 1080-81 (1992) (discussing how commentators of Fulminante decision are examining same case but express radically different opinions of its outcome).

[FN72]. Mirjan Damaska, [Truth in Adjudication](#), 49 *Hastings L.J.* 289, 302 (1998) (using parable to frame the debate about truth-seeking function of trials); see also Myrna S. Raeder, [The Better Way: The Role of Batterers' Profiles and Expert "Social Framework" Background in Cases Implicating Domestic Violence](#), 68 *U. Colo. L. Rev.* 147, 174 (1997) (recognizing that trial is only partly an objective search for truth and using parable to describe batterer's profiles).

[FN73]. On the other hand, some argue that legal scholarship's predominant mode is to mimic the argumentation style of a legal brief or judicial opinion. More specifically, the body of the article is a more elaborate and somewhat detached judicial opinion in waiting and the conclusion is the lawyer's prayer for relief. See Edward L. Rubin, [The Practice and Discourse of Legal Scholarship](#), 86 *Mich. L. Rev.* 1835, 1847-50 (1988) (stating that legal scholarship gives opinion as to how judges should decide cases); *infra* notes 254-61 and accompanying text.

[FN74]. Daniel A. Farber, [The Case Against Brilliance](#), 70 *Minn. L. Rev.* 917, 917 (1986).

[FN75]. Farber, *supra* note 59, at 308.

[FN76]. Kenneth Lasson, [Scholarship Amok: Excesses in the Pursuit of Truth and Tenure](#), 103 *Harv. L. Rev.* 926, 935 (1990).

[FN77]. See *id.* at 927. Nor are their fears unfounded. Lasson notes that a professor was turned down for promo-

tion because the committee felt his work "did not disprove an accepted understanding of what the law is or how it works." *Id.* at 941.

[FN78]. Michael J. Saks et al., [Is There a Growing Gap Among Law, Law Practice and Legal Scholarship?: A Systematic Comparison of Law Review Articles One Generation Apart](#), 30 *Suffolk U. L. Rev.* 353, 373 (1996).

[FN79]. See Lasson, *supra* note 76, at 941 (citing tenure requirements as reason for increased volume of articles).

[FN80]. See Marvin Mudrick, *The Blind Men and the Elephant*, 30 *Hudson Rev.* 426 (1977) (reviewing Alfred David, *The Strumpet Muse* (1977); John Gardner, *The Life and Times of Chaucer* (1977); John Gardner, *The Poetry of Chaucer* (1977); Donald R. Howard, *The Idea of the Canterbury Tales* (1976)) (comparing authors to blind men who disagree over and misunderstand Chaucer); William C. Spengemann, *Three Blind Men and an Elephant: The Problem of Nineteenth-Century English*, 14 *New Literary Hist.* 155, 155-71 (1982) (asserting that analysis of nineteenth-century English literature should not be broken into Romantic, Victorian, and American because literary works do not fit easily into categories, and defining these terms confuses study of nineteenth-century literature).

[FN81]. Mark Lawrence McPhail, *Zen in the Art of Rhetoric* 59 (1996); see Daniel C.K. Chow, [Trashing Nihilism](#), 65 *Tul. L. Rev.* 221, 264-65 (1990) (claiming that many nihilists and legal realists actually espouse positions that suggest there is objective truth "out there").

[FN82]. Andrew Huxley, [Golden Yoke, Silken Text](#), 106 *Yale L.J.* 1885, 1896 (1997) (reviewing Rebecca Redwood French, *The Golden Yoke: The Legal Cosmology of Buddhist Tibet* (1995)). Both McPhail and Charles Paine have suggested that many radical critics commit the same error by conceptualizing ultimate goals and adopting rigid political positions. Therefore, they "participate in the same essentialist discourse that they attempt to overthrow; without recognizing - or acknowledging - that they, in fact, are simply 'changing the currency.'" McPhail, *supra* note 81, at 36; see Winter, *supra* note 69, at 652 (claiming that Stanley Fish's argument would fail without apparatus of objectivist rationality).

[FN83]. Eric Blumenson, [Mapping the Limits of Skepticism in Law and Morals](#), 74 *Tex. L. Rev.* 523, 525 (1996). The modern defenders of a more sophisticated kind of neo-formalism still insist that purpose of scholarship "is to discover and communicate the truth." Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 *Stan. L. Rev.* 647, 650 (1994) (insisting that it is duty of scholars to discover and communicate truth). Exactly what the neo-formalists mean by truth, however, is less clear than the purist Langdellians. See Daniel Farber, [Missing the "Play of Intelligence,"](#) 36 *Wm. & Mary L. Rev.* 147, 170 (1994) (arguing that scholar's client is truth "with a small 't,' though [Farber] cheerfully admits [his] inability to define that term").

[FN84]. Pierre Schlag, [Hiding the Ball](#), 71 *N.Y.U. L. Rev.* 1681, 1685 (1996).

[FN85]. See *infra* Part III and accompanying notes 109-214. One can still find isolated examples of self-conscious yet traditional essentialism. In his article, *Speaking the Truth*, Judge Eric Bruggink strikes out against post-modern academia's assault on truth, and he attributes many of our culture's ills to a "crisis of truth." Eric Bruggink, *Speaking the Truth*, 34(3) *Procurement Law.* 1 (1999). Bruggink asserts that while discovering the truth may often be difficult, this does not mean that "there is not, in fact, an objective truth to be discovered." *Id.* at 28. Although he correctly notes that the moral of the story of the "five blind Hindu fakirs and the elephant" is

that "the truth is subjective," he argues this is demonstrably incorrect - "[s]omeone with two good eyes could give a very accurate description of the elephant." *Id.* His essentialism is traditional because he goes on to assert that there are moral truths as well as factual ones. *Id.* at 29. However, Bruggink's proposed solution is personal rather than systemic. He asks lawyers to try to tell the truth in their lives and in their practice for the next month as a method for preserving and revitalizing our culture and legal system. *Id.* at 30. While admirable as a goal, this article leads to a philosophical dead end, because Bruggink offers no methodology for when two lawyers' honestly held truths differ. Given the lack of a pure essentialist response to the post-modern assault on "truth," this one example of self-conscious essentialism has been relegated to a footnote rather than included in Part III, which deals with more serious efforts to confront the perspectivist dilemma. Some might also argue that Justice Scalia's constitutional formalism comes close to asserting essentialist principles about law. However, upon close analysis, Scalia's justification for his methodological formalism is not epistemic but pragmatic. He argues that his methodology is better not because it is "true" in an absolute sense but because it comes the closest to fulfilling the Constitution's requirement that the judicial branch base its decisions on an apolitical methodology. See Zlotnick, *supra* note 51, at 1382 (discussing Scalia's view that judicial branch should respect political judgments of executive and legislative branches). While Justice Scalia and many others may actually believe that there are fundamental values that are morally true, a democracy based on a written constitution luckily does not require the courts to implement natural law rather only the written text, however problematic that may be.

[FN86]. See McPhail, *supra* note 81, at 44 (discussing search for truth in academic world); John S. Nelson et al., *Rhetoric of Inquiry*, in *The Rhetoric of Human Sciences: Language and Argument in Scholarship and Public Affairs* 3, 6 (John S. Nelson et al. eds., 1987) [hereinafter *The Rhetoric of Human Sciences*] (discussing evolution of attitudes toward rhetoric).

[FN87]. Of course, much of post-modern scholarship is also guilty of creating a new and impenetrable language. Modern rhetoricians, however, suggest that as much as some post-modernists have tried to escape from Western epistemology, by defining themselves as in opposition to the formalists, they have unconsciously fallen back into a dualistic mode of thinking. McPhail, among others, has argued for a rhetoric of coherence and transformation to move beyond this conundrum. See McPhail, *supra* note 81; see also Ayer, *supra* note 50, at 2162 (citing need to strengthen law school teaching relevant to practicing law).

[FN88]. McPhail, *supra* note 81, at 59 (quoting Paul de Man, *The Rhetoric of Blindness*, in *Blindness and Insight: Essays in the Rhetoric of Contemporary Criticism* (1983)); see also *infra* notes 272-75 and accompanying text (discussing impact of outsider scholarship's challenge to this tacit agreement).

[FN89]. Ruth Gavison makes the same point in her review of two books, one about positivism and the other about natural law. Ruth Gavison, *Natural Law, Positivism, and the Limits of Jurisprudence: A Modern Round*, 91 *Yale L.J.* 1250, 1285 (1982) (reviewing Joseph Raz, *The Authority of Law: Essays in Law and Morality* (1979)). While these philosophies are usually portrayed as opposites, Gavison attempts to stress the agreement between these authors and justifies this focus by noting that "[t]oo much in the history of legal thought has been lost by granting primacy to debates and polemics." *Id.* Gavison then invokes the parable to support this point by noting that, "[l]ike the six blind men, we try again and again to describe an elephant, forever finding that we fail by emphasizing just one aspect, by illuminating one element while obscuring others." *Id.*

[FN90]. In these instances, discussed more fully in Part IV, the writer's unreflective rhetorical choices weaken the article because their rhetoric makes unnecessary and overblown epistemic assertions.

[FN91]. See Michael Unger, Statement at Press Conference, Eden Roc Americana Resort, Miami Beach, Florida (Mar. 7, 1985), in *Insurance Products Under the Securities Laws 257* (Practising Law Institute ed., 1985) ("We don't know how many financial planners are in business today. Right now, we're in the same position as the proverbial blind men trying to describe the elephant."); Franklin Pierce Law Center's Fifth Biennial Patent System Major Problems Conference: *IV. Prior User Rights*, 36 *IDEA* 406, 407-08 (1996) (comparing manner in which any one person can understand complex subject of prior user rights to blind men's individual understanding of elephant); Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 *Real Prop. Prob. & Tr. J.* 589, 591 (1993) (comparing classification of community associations to parable); James F. Short, Jr., *Trace Substances, Science, & Law: Perspectives from the Social Sciences*, 5 *RISK* 319, 320 (1994) (comparing his view as outsider looking at technological and scientific field of trace elements to impressions of blind men feeling elephant); see also *Miss. Chem. Corp. v. United States*, 431 F.2d 1320, 1326-27, 1335-36 (5th Cir. 1970) (Godbold, J., dissenting) (noting field of cooperative corporation law is new and needs new framework; while most judges do not see elephant, this judge does).

[FN92]. See, e.g., William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 *Ohio St. J. on Disp. Resol.* 367, 375 (1999) (noting how lawyers approach settlement differently); Paul, *supra* note 71, at 1080-81 (noting different approaches of scholars to Fulminante decision); Catherine J. Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 33 *Rev. Jur. U.I.P.R.* 311, 319 (1999) (comparing those attempting to define "unified family court" to blind men); J. Thomas Warlick IV, *Of Blue Light Specials and Gray-Market Goods: The Perpetuation of the Parallel Importation Controversy*, 39 *Emory L.J.* 347, 347-48 (1990) (noting different approaches to gray-market problem).

[FN93]. Samuel J.M. Donnelly, *Towards a Personalist Jurisprudence: Basic Insights and Concepts*, 28 *Loy. L.A. L. Rev.* 547, 568-71 (1995).

[FN94]. *Id.* at 571; see also Owen D. Jones, *Law and Biology: Toward an Integrated Model of Human Behavior*, 8 *J. Contemp. Legal Issues* 167, 167 (1997) (noting that integrated model of human behavior that taps numerous disciplines would benefit legal system in many ways).

[FN95]. See Eric T. Freyfogle, *A Sand County Almanac at 50: Leopold in the New Century*, 30 *Envtl. L. Rep.* 10058, 10058-59 (2000) (noting that two views of nature are not antagonistic but simply parts of greater whole); Makua wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 *Va. J. Int'l L.* 339, 346 (1995) (noting that Western view of human rights is perceived to be in conflict with traditions that emphasize group over individual, but that "all the accounts paint a complete picture"). Some authors begin by acknowledging the difficulty of knowing the elephant but then use the parable to point out that someone else's model is nevertheless a poor tool. In a sense, these writers are simply saying someone else is even more poor sighted than the rest. See Adam M. Finkel, *A Second Opinion on an Environmental Misdiagnosis: The Risky Prescriptions of Breaking the Vicious Circle*, 3 *N.Y.U. Env'tl. L.J.* 295, 362 (1994) (using parable to attack Stephen Breyer's book on risk management reform).

[FN96]. Paul Wangerin, *Damages for Reliance Across the Spectrum of Law: Of Blind Men and Legal Elephants*, 72 *Iowa L. Rev.* 47 (1986).

[FN97]. See *id.* at 48 (describing different reactions to hypothetical fact pattern).

[FN98]. *Id.* at 99.

[FN99]. Id.

[FN100]. Id. at 99.

[FN101]. Id.

[FN102]. Id.

[FN103]. For example, Cheryl Hanna argues that in the domestic violence arena, feminists and social scientists are like the blind men in the parable: "Each discipline not only feels something different, but also claims to possess what it touches." Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 *Wm. & Mary L. Rev.* 1505, 1512 (1998). But, she believes that "[a] discussion of punishment in domestic violence criminal cases presents an opportunity for feminists, social scientists and researchers from other fields to develop interdisciplinary insights into the phenomenon of battering. To do so, however, we each have to relinquish ownership of the problem." *Id.* at 1513; see also Herbert Kritzer & Frances Kahn Zemans, *The Shadow of Punitives: An Unsuccessful Effort to Bring It Into View*, 1998 *Wis. L. Rev.* 157, 168 (noting need for information from business leaders, social scientists and lawyers to understand impact of punitive damages on business).

[FN104]. See Finkel, *supra* note 95, at 362 (noting that specialists provide different perspectives); George A. Martinez, *The New Wittgensteinians and the End of Jurisprudence*, 29 *Loy. L.A. L. Rev.* 545, 547, 569 (1996) (providing new approach to jurisprudence); see also *Wegener v. Anna*, 296 N.E.2d 589, 591 (5th Dist. App. Ct. Ill. 1973) (reversing summary judgment for defendant because plaintiff's exercise of care involves many factors which needed full trial to properly develop, and court felt like blind man and elephant without trial record).

[FN105]. See Schlag, *supra* note 84, at 1693. He also agrees that there is little epistemic difference between foundationalists and these weak perspectivists. In both cases, the "entire enterprise of what is called 'legal theory' is generally aimed at a reductionist, integrative essentialization of the law." *Id.* at 1695.

[FN106]. *Id.* at 1704-05.

[FN107]. *Id.* at 1705. What is also interesting is that despite the conciliatory nature of their rhetoric, some weak perspectivists show a surprising lack of graciousness toward outsider scholars whose attraction to narrative is founded in part, on a more radical perspectivism. Perhaps, staying in the Freudian vein, in denial that their quest may be in vain, their sublimated fears that there is no elephant is projected into their attack on outsider scholarship. See Farber & Sherry, *supra* note 83; Tushnet, *supra* note 60.

[FN108]. See Roberto M. Unger, *Law in Modern Society* (1976) (discussing varying development of law in different times and places); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *Buff. L. Rev.* 205 (1979) (discussing development of law in middle ages); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *Yale L.J.* 1, 4 (1984) (discussing legal implications of nihilism, specifically epistemic and moral components of nihilistic claims that "it is impossible to say anything true about the world" and that "there is no meaningful way to decide how to live a good life"); see also Morton Horwitz, *The Transformation of American Law 1780-1860* (1977) (discussing change of legal rules over time to subsidize economic development and promote class interests); Catharine A. MacKinnon, *Sexual Harassment of Working Women* (1979) (arguing that legal system has both created and helped to enforce subordination of women in workplace).

[FN109]. See Schlag, *supra* note 84.

[FN110]. Id. at 1684.

[FN111]. Id. at 1685.

[FN112]. Schlag cites scholars who assert that the Constitution is a "text" versus a structural "charter," that its meaning is dependent on history versus political theory, that it is static or dynamic, a current dialogue, or a "prophecy for the future." Id. at 1689-92 (citing generally Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* (1969); Philip Bobbitt, *Constitutional Interpretation* (1991); Ronald Dworkin, *Law's Empire* (1986); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980); Paul W. Kahn, *Legitimacy and History: Self-Government in American Constitutional Theory* (1992); Akhil Reed Amar & Neal K. Katyal, *Executive Privileges and Immunities: The Nixon and Clinton Cases*, 108 *Harv. L. Rev.* 701 (1995); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1 (1971); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1 (1959)).

[FN113]. Schlag, *supra* note 84, at 1692.

[FN114]. Id. at 1693.

[FN115]. Id. at 1696. Schlag continues: "The story of the six blind men and the elephant is a kind of H.L.A. Hart for post-moderns . . . . "There must be a core settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out." Id. (quoting H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harv. L. Rev.* 593, 607 (1958)).

[FN116]. These oversights are not surprising given that Schlag never discusses a single actual use of the parable in legal scholarship (apparently, this is how you can write a law review essay when you are brilliant, tenured, and famous).

[FN117]. Schlag, *supra* note 84, at 1717-18.

[FN118]. Private correspondence with Pierre Schlag (on file with author).

[FN119]. Id.

[FN120]. Id.

[FN121]. Philip Soper's use of the parable in his review of *Law's Empire* has a nihilistic bent as well. He writes that disagreements among legal theorists are not the result of looking at different parts of the phenomenon like the blind men and elephant because "both sides are already looking at the same thing. Legal theorists disagree, not about the possible 'points of view,' but about which one, if any, can be said to be the most important in elucidating the concept of law." Soper I, *supra* note 8, at 1172.

[FN122]. Mark Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 *Tex. L. Rev.* 1307, 1340-59 (1979).

[FN123]. Singer, *supra* note 108, at 4. Like Tushnet, Singer agrees that, "[a]s a theory of knowledge, nihilism claims that it is impossible to say anything true about the world . . . . If one takes nihilism seriously, it is impossible, or in any event fruitless, to describe the world; all possible descriptions are equally invalid because we cannot be sure that any description is reliable." Id.

[FN124]. *Id.*

[FN125]. Often, these discussions reference the Nazi flirtation with Nietzschean nihilistic thought and argue that nihilism provides no basis for opposing the Holocaust. See, e.g. Laurence Douglas, [Wartime Lies: Securing the Holocaust in Law and Literature](#), 7 *Yale J.L. & Human.* 367 (1995); Gregory H. Hartman, [Is An Aesthetic Ethos Possible? Night Thoughts After Auschwitz](#), 6 *Cardozo Stud. L. & Literature* 135 (1994); Daniel Stern, [The Fellowship of Men That Die: The Legacy of Albert Camus](#), 10 *Cardozo Stud. L. & Literature* 183 (1998). One such critic argues that "[i]n the absence of some empirical truth about human nature or some transcendental realm of moral reality, there is no indubitable source for securing our most cherished moral values from a disabling skepticism . . . . With nothing else to secure moral justification, diverse or conflicting social practices seem to stand beyond rational approval or condemnation . . . . Postmodernism - with its rejection of meta- narratives, deconstruction of meaning, and decentering of the self - looks like a radicalized version of skepticism that threatens a frightening descent into intellectual and moral chaos." Steven L. Winter, [Human Values in a Postmodern World](#), 6 *Yale J.L. & Human.* 233, 236-37 (1994).

[FN126]. See Chow, *supra* note 81, at 223-24 n.4 (recognizing that nihilism is difficult position to maintain due to its "extreme skepticism").

[FN127]. Mark G. Kelman, [Trashing](#), 36 *Stan. L. Rev.* 293, 322 (1984).

[FN128]. Some of Schlag's other works come closer to embracing a pragmatist position. See, e.g., Pierre Schlag, [Authorizing Interpretation](#), 30 *Conn. L. Rev.* 1065, 1089-90 (1998) (stating that "there is never any answer to a question of constitutional interpretation other than to do the right thing"); Pierre Schlag, [Law as the Continuation of God by Other Means](#), 85 *Cal. L. Rev.* 427, 440 (1997) (stating that confusion and conflation between epistemic and ontological is crucial to American idea of rule of law because it enables faith in belief that social institutions and practices respond to reason).

[FN129]. See, e.g., Clare Dalton, [An Essay in the Deconstruction of Contract Doctrine](#), 94 *Yale L.J.* 997 (1985); Peter Gabel & Duncan Kennedy, [Roll Over Beethoven](#), 36 *Stan. L. Rev.* 1 (1984); Kennedy, *supra* note 108; Duncan Kennedy, [Form and Substance in Private Law Adjudication](#), 89 *Harv. L. Rev.* 1685 (1976); Gary Peller, [The Metaphysics of American Law](#), 73 *Cal. L. Rev.* 1151 (1985).

[FN130]. While I agree with Schlag that attempting to convince legal scholars to abandon the quest for certainty is a constructive act, he acknowledges that this is very unsatisfying for almost every other legal thinker. However, he argues that this has more to do "with their expectations and desires for law" which he again asserts are unattainable. Schlag, *supra* note 118, at 2.

[FN131]. Schlag, *supra* note 84, at 1718.

[FN132]. See Stanley Fish, [Fish v. Fiss](#), 36 *Stan. L. Rev.* 1325 (1984) (criticizing Owen Fiss); Stanley Fish, [Wrong Again](#), 62 *Tex. L. Rev.* 299 (1983) (criticizing Ronald Dworkin's response to his critique); Pierre Schlag, [Fish v. Zapp: The Case of the Relatively Autonomous Self](#), 76 *Geo. L.J.* 37 (1987) (criticizing Stanley Fish); Winter, *supra* note 69 (arguing that Stanley Fish's anti-foundationalist claims rest on "vestigial objectivist assumptions").

[FN133]. See McPhail, *supra* note 81, at 111-12 (indicating what postmodernism is not).

[FN134]. Once again, I draw this comparison not to privilege the Eastern version of the parable but simply to use contrast to reveal the various modes in which Western epistemic thinking manifests itself.

[FN135]. See Nancy Levit, [Listening to Tribal Legends: An Essay on Law and the Scientific Method](#), 58 *Fordham L. Rev.* 263, 273 n.51 (1989) (exploring application of scientific method to jurisprudence and suggesting that "attention to the principles of scientific inquiry is one method of improving the rationality of legal decisions and theories").

[FN136]. See Cynthia Price Cohen, Introduction, Symposium: Implementation of the United Nations Convention on the Rights of the Child, 6 *Transnat'l L. & Contemp. Probs.* v (1996) (using parable to describe symposium articles); Grant Gilmore, [Some Reflections on Oliver Wendell Holmes, Jr.](#), 2 *Green Bag 2d* 379, 392-94 (1999) (describing Holmes jurisprudence as deeply contradictory and noting how various legal movements have all claimed Holmes as their own; suggesting that "[w]e deal with Holmes in our successive generations as the blind men dealt with the elephant" and claiming "we shall never know" real Holmes); supra note 103. A smaller group of authors use the parable to suggest the multi-variability and inaccessibility of truth without necessarily noting the Eastern origin of the story. See Abner Mikva, [Foreword, Symposium on the Theory of Public Choice](#), 74 *Va. L. Rev.* 167, 176-77 (1988) (suggesting that public choice analysis makes claims of accuracy despite lack of data and also suggesting that no model can capture complexity of political decision makers in political system).

[FN137]. Chavkin, supra note 9; see also John W. Teeter, Jr., [The Daishonin's Path: Applying Nichiren's Buddhist Principles to American Legal Education](#), 30 *McGeorge L. Rev.* 271, 273 (1999) (arguing that attention to Buddhist principles of "compassion, critique, courage, and wisdom are essential for law students and teachers alike").

[FN138]. Chavkin, supra note 9, at 167.

[FN139]. *Id.* at 168 (suggesting that six-foot person may be "tall" under graded membership of .9 whereas person 5' 10" might only receive value of .7). In addition, Chavkin's evaluation of "tallness" is contextual because it depends both on the height of the observer and the group within which the person is being judged.

[FN140]. *Id.* at 194.

[FN141]. *Id.* at 177.

[FN142]. *Id.* at 178-79.

[FN143]. *Id.* at 181-82.

[FN144]. *Id.* at 182.

[FN145]. *Id.*

[FN146]. *Id.* at 183. In Chavkin's words, fuzzy thinking is a way for getting students "to utilize the client story rather than feeling trapped by it." *Id.*

[FN147]. *Id.* at 166-67. Chavkin also briefly comments on the potential of fuzzy thinking to "fundamentally alter our perception of the nature of law." *Id.* at 173 n.34. In a fuzzy legal system, he speculates, defendants would

not be either guilty or not guilty, either negligent or not negligent, but rather "the degrees of guilt and negligence would become the focus for issues of punishment and liability." *Id.* The trend toward sentencing guidelines and comparative negligence suggests such a move is underway in some areas of the law.

[FN148]. See Kim Lane Scheppele, *The Re-Vision of Rape Law*, 54 *U. Chi. L. Rev.* 1095 (1987) (reviewing Susan Estrich, *Real Rape: How the Legal System Victimized Women Who Say No* (1987)).

[FN149]. *Id.* at 1104-05.

[FN150]. *Id.* at 1095.

[FN151]. *Id.* at 1114.

[FN152]. *Id.* at 1115.

[FN153]. See also Sompong Sucharitkul, *A Multi-Dimensional Concept of Human Rights in International Law*, 62 *Notre Dame L. Rev.* 305, 306 (1987) (invoking Buddhist version of parable to argue that although concept of international human rights originated in West, it should be broadened to "tolerate the plurality of concepts of human rights" and different understandings of role of individual in society).

[FN154]. See Huxley, *supra* note 82, at 1896 (quoting Rebecca Redwood French, *The Golden Yoke: The Legal Cosmology of Buddhist Tibet* 347 (1995)).

[FN155]. Powell, *supra* note 35, at 1482.

[FN156]. *Id.* at 1482.

[FN157]. *Id.*

[FN158]. *Id.* at 1513.

[FN159]. With regard to Buddhism, while not advocating its explicit acceptance, Powell notes that it has "positive implications for personal and interpersonal interaction" because its model of "self-engagement [does] not denigrate or otherwise oppress." *Id.* at 1508-09 (quoting Anne Carolyn Klein, *Meeting the Great Bliss Queen: Buddhists, Feminists and the Art of the Self* 80 (1995)).

[FN160]. *Id.* at 1514-15.

[FN161]. *Id.* at 1515.

[FN162]. *Id.* at 1516 (quoting Trina Grillo, *Antiessentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 *Berkeley Women's L.J.* 16, 18-19 (1995)).

[FN163]. *Id.*

[FN164]. *Id.* at 1517-19.

[FN165]. *Id.* at 1520.

[FN166]. Huxley, *supra* note 82, at 1897.

[FN167]. Id.

[FN168]. Andrew Huxley's review of two recent books on Tibetan and Chinese legal history compares and contrasts Eastern and modern Western legal epistemologies. He believes Tibetans worked out a "unique compromise between anarchism and law" whereas Western legal thought has been much more "statist" and has "pushed anarchism into the background." See *id.* at 1949-50. He agrees that postmodern legal theory and Eastern philosophy share a hostility to the "[o]mnipresent dualisms . . . [that] permeate the investigation, modeling, and presentation of Western material on legal systems." *Id.* at 1949 (citing Rebecca Redwood French, *The Golden Yoke: The Legal Cosmology of Buddhist Tibet* 343 (1995)). However, Huxley poses the difficult question, can Westerners "think of law, history, education, and moral behavior as aspects of the same big phenomenon?" *Id.* at 1949. As noted above, this is where attempts to integrate Eastern thinking into a Western institution that is inherently dualistic are likely to founder.

[FN169]. *Id.* at 1948.

[FN170]. *Id.*

[FN171]. Daniel A. Farber, [Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century](#), 1995 U. Ill. L. Rev. 163, 168 (1995) (internal citations omitted).

[FN172]. *Id.* As Farber notes, Jack Balkin has provided "wry tribute" to the diversity of views that pragmatism accommodates in his "top ten reasons to be a legal pragmatist": 10. It works. 9. Being a legal pragmatist means never having to say you have a theory. 8. Buy American. 7. If you're left-wing, you can finally find something to agree with Richard Posner about. 6. You can read all your philosophical sources in the original. 5. If you're right-wing, you can finally find something to agree with Frank Michelman about. 4. You can avoid seeing the world in terms of rigid philosophical dichotomies (or not). 3. Because you're socially constructed, it really isn't your fault that you became one. 2. You can also be (a) a civic republican, (b) a feminist, (c) a deconstructionist, (d) a case-cruncher, (e) a crit, (f) a law-and-economics type, or (g) anything else. 1. No one has yet discovered John Dewey's anti-semitic writings for *Le Soir*. *Id.* (quoting Jack M. Balkin, *The Top Ten Reasons To Be a Legal Pragmatist*, 8 *Const. Comment.* 351, 351 (1991)).

[FN173]. *Id.* at 168; see J.M. Balkin, [Nested Oppositions](#), 99 *Yale L.J.* 1669 (1990); William N. Eskridge, Jr., [Gadamer/Statutory Interpretation](#), 90 *Colum. L. Rev.* 609 (1990); William N. Eskridge, Jr. & Philip P. Frickey, [Statutory Interpretation as Practical Reasoning](#), 42 *Stan. L. Rev.* 321 (1990); Anthony T. Kronman, [Alexander Bickel's Philosophy of Prudence](#), 94 *Yale L.J.* 1567 (1985) (two followers of "Aristotelean practical reasoning"); Martha Minow & Elizabeth V. Spelman, *In Context*, in *Pragmatism in Law and Society* 247 (Michael Brit & William Weaver eds., 1991); Margaret J. Radin, *The Pragmatist and the Feminist*, in *Pragmatism in Law and Society* 127 (Michael Brit & William Weaver eds., 1991) (three feminist theorists).

[FN174]. Ideally, most factors would suggest the same outcome, but when there is conflict, "the only recourse is to make the best decision possible under the circumstances." Farber, *supra* note 171, at 169. While this seems open-ended, pragmatists assert that in "concrete cases it is often possible to identify the most reasonable resolution." *Id.*

[FN175]. See *id.* at 167 (stating that legal pragmatism is not easy to define).

[FN176]. *Id.* at 169.

[FN177]. See *id.* at 169.

[FN178]. *Id.* at 168; see also Hannah Arendt, *The Human Condition* 306 (1958) (comparing pragmatism with idea that "man is the measure of all things").

[FN179]. Farber, *supra* note 171, at 168-69.

[FN180]. While Holmes was socially acquainted with James and other luminaries of the pragmatist movement and his writings have a decidedly pragmatist bent at times, he personally disavowed the label, calling James's pragmatism "an amusing humbug." Catharine Pierce Wells, *Old Fashioned Postmodernism and the Legal Theories of Oliver Wendell Holmes, Jr.*, 63 *Brook. L. Rev.* 59, 63-64 (1997) (quoting 1 Holmes-Pollock Letters 139 (Mark DeWolfe Howe ed., 1953)). Nevertheless, several recent articles suggest that Holmes's opinions and writings demonstrate a much closer correspondence with current pragmatism than his own direct statements might suggest. See *id.*; see also Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 *Stan. L. Rev.* 787 (1989). Thomas Grey suggests that Holmes rejected James's pragmatism both for personal reasons and because of his antipathy towards James's willingness to make room for religious belief in his writings. *Id.* at 865-68.

[FN181]. Wells, *supra* note 180, at 71 (quoting Oliver Wendell Holmes, *Ideals and Doubts*, in *Collected Legal Papers* 303, 304-05 (1920)).

[FN182]. Grey, *supra* note 180, at 805. Interestingly, Grey posits the essentialist version of the parable - that a sighted man could provide a "meta-narrative" of the elephant - but then disagrees that this is possible, thus arriving back at the Eastern understanding.

[FN183]. See John Stick, *Can Nihilism Be Pragmatic?*, 100 *Harv. L. Rev.* 332, 341 n.27 (1986) (citing Ian Hacking, *Representing and Intervening* 58-63 (1983)). To Charles Pierce, who along with John Dewey is most identified as the founder of pragmatism, cognition does not give us direct knowledge of an external world. Rather, we use cognition to hypothesize about reality based on our prior cognitions. Thus, "the test of truth becomes a matter of internal logic and coherence rather than a matter of correspondence to a preexisting noumenal world." Wells, *supra* note 180, at 66.

[FN184]. Stick, *supra* note 183, at 341 n.27. Hilary Putnam, identified with the first strand, suggests that not only is truth best judged by "a long term convergence of beliefs" but also suggests there is a "long term convergence of beliefs concerning the proper methods of rationality." *Id.*

[FN185]. See Wells, *supra* note 180, at 82 (suggesting that Holmes's pragmatism is one way to understand Holmes).

[FN186]. Grey, *supra* note 180, at 790-91.

[FN187]. Wells, *supra* note 180, at 83.

[FN188]. *Id.*

[FN189]. Grey, *supra* note 180. There are a few additional examples of articles which appear to use the pragmatist version of the parable although without explicit reference. Ruth Gavison compares two books, one on natural law and the other on positivism. Her review stresses where these authors agree rather than disagree, contending that

too much in the history of legal thought has been lost by granting primacy to debates and polemics . . . Like the six blind men, we try again and again to describe an elephant, forever finding that we fail by emphasizing just one aspect, by illuminating one element while obscuring others. Maybe we can never do better than that. Gavison, *supra* note 89, at 1285. But Gavison goes on to suggest that the authors under review have done a good job of benefitting from the insights of the other by refraining from "battling caricatures." *Id.*

[FN190]. I am not the first to suggest that pragmatism offers a "middle way" for American legal theory. See Peter F. Lake, *Posner's Pragmatist Jurisprudence*, 73 *Neb. L. Rev.* 545, 556 (1994) (noting Posner's claim that pragmatism is "middle way" between formalism and legal realism).

[FN191]. See Wells, *supra* note 180, at 63-68. Wells quotes Charles Peirce, one of the founders of pragmatism, who describes the essential nature of the movement as "a method of philosophy based upon a simple maxim: 'Consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then our conception of these effects is the whole of our conception of the object.'" *Id.* at 63 (quoting 5 Charles Sanders Peirce, *The Collected Papers of Charles Sanders Peirce* 5.402 (C. Hartshorne & P. Weiss eds., 1934)). Wells then goes on to describe Peirce's pragmatism and phenomenalism as demonstrating that view-point, perspective, and perceptual abilities are all necessary concepts for understanding the world. *Id.* at 66-67.

[FN192]. *Id.*; see also Catharine Pierce Wells, *Why Pragmatism Works for Me*, 74 *S. Cal. L. Rev.* 347, 352 (2000) (stating that pragmatism also denies distinction between "fact and value").

[FN193]. Many Buddhist tracts make clear that enlightenment can be found in daily life and engagement with society, not just by renouncing the world and entering a sangha permanently. See Lama Surya Das, *Awakening the Buddha Within* 207, 232 (1997). However, inward focus of meditation practice is the cornerstone of Buddhist's proscription in seeking the middle way.

[FN194]. Wells, *supra* note 180.

[FN195]. *Id.* at 60-61.

[FN196]. *Id.* at 67.

[FN197]. *Id.* at 67.

[FN198]. *Id.* at 76. Wells then goes on to explain how the process by which the public conception of reality can be tainted by powerful interests, noting that if she sees an elephant but the "Empress of the World" does not, she is likely to end up in the dungeon. *Id.* at 77.

[FN199]. Although she initially cites to the traditional version, see *id.* at 66 n.30, Wells then tries different riffs to illustrate additional points, such as the Empress who doesn't see the elephant and the blind man with acute smell and hearing who is as capable of finding elephants as the sighted. Her creative rhetorical use of traditional rhetorical devices adds an element of creativity and play to this piece, a style this Article endorses later. See *infra* notes 220-31 and accompanying text.

[FN200]. *Id.* at 78-79. Returning to the parable, she analogizes that when sighted people too easily conclude that "a person who is blind knows less about elephants than we do - [they] completely overlook the possibility that blindness may yield insights that are unavailable to those who are sighted" or that a blind person's heightened sense of smell or hearing might qualify them for the job of "evicting elephants from the palace grounds." *Id.* at

80.

[FN201]. *Id.* at 82.

[FN202]. See Harry T. Edwards, [The Growing Disjunction Between Legal Education and the Legal Profession](#), 91 *Mich. L. Rev.* 34, 38-40 (1992) (describing transfer of cynicism from law professors to their students); Alex M. Johnson, Jr., [Think Like a Lawyer: The Dissonance Between Law School and Law Practice](#), 64 *S. Cal. L. Rev.* 1231, 1231-32 (1991) (discussing likelihood that present system will create generation of lawyers dissatisfied with practice of law).

[FN203]. Compare Peter Margulies, [Public Interest Lawyering and the Pragmatist Dilemma](#), in *Renascent Pragmatism* (forthcoming 2001) (proposing model of integrative advocacy that includes both dialogic and projective aspects of pragmatism in change-oriented public interest lawyering) with Roberto M. Unger, *False Necessity: Anti Necessitarian Social Theory in the Service of Radical Democracy* (1987). Cf. Roderick M. Hills, Jr., [Romancing the Town: Why We \(Still\) Need a Democratic Defense of City Power](#), 113 *Harv. L. Rev.* 2009, 2023 (2000) (reviewing Gerald E. Frug, *City Making: Building Communities Without Building Walls* (1999)) (arguing that Unger "has given theory such a dominant role that the only constraint on our capacity to reshape ourselves and society is our lack of theoretical imagination").

[FN204]. See L. Scott Smith, [Truth and Justice on the Scaffold: A Critique of "Hired Gun" Advocacy](#), 62 *Tex. B.J.* 1096, 1098-1103 (1999) (arguing that holding the relativity of truth as one's guiding influence prevents one from condemning Holocaust). Smith seems to adopt pragmatism's dialogic view by suggesting that while each of us is limited to our own perspective, "when one blind man listens to the other five, he may reasonably conclude that there are truths about the elephant which surpass his own limited experience of it . . . . The fact that our goal of arriving at 'the truth' may never be fully realized in any case does not justify the assertion that truth is relative and a 'secondary concern' which is 'ancillary' to the litigation process." *Id.* at 1099.

[FN205]. Wells, *supra* note 192, at 350.

[FN206]. Catharine Wells argues that "[d]ifferent viewpoints do not necessarily create an irreducible chasm between each viewer." *Id.* at 359. Invoking the parable again, she argues that we "should not stop talking in the face of seemingly irreconcilable differences." *Id.*

[FN207]. See, e.g., David Luban, [What's Pragmatic About Legal Pragmatism?](#), 18 *Cardozo L. Rev.* 43, 45 (1996) ("The point is that if legal pragmatism is only eclectic, result-oriented, historically minded antiformalism, it turns out to be a remarkably uncontroversial doctrine. It stands free of philosophical controversy only because it stands free of all controversy, and it avoids controversy by saying very little.").

[FN208]. See Richard Thompson Ford, [Facts and Values in Pragmatism and Personhood](#), 48 *Stan. L. Rev.* 217, 231 (1995) (reviewing Margaret Jane Rudin, *Reinterpreting Property* (1993)) (discussing argument that pragmatists find values only by blurring line between facts and values); Robert Justin Lipkin, [Can American Constitutional Law Be Postmodern?](#), 42 *Buff. L. Rev.* 317, 337 (1994) (arguing that postmodern pragmatism cannot offer any more than way to view world coherently and cannot compel acceptance of any values).

[FN209]. See Singer, *supra* note 108, at 4 n.8 (offering jibe at pragmatism when he writes, "I prefer not to describe my position as 'irrationalism' - except for the purposes of this footnote - for the same reason that I decline to adopt nihilism as a way to describe myself. It would be misleading and confusing to appear to be advocating

that decisions be made 'irrationally' - without connection with discernable goals. A better term might be pragmatism."); see also Richard Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis* 1-49, 223-31 (1983); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 *Harv. L. Rev.* 1276, 1291-92 (1984) (arguing that world should not be understood in relation to objective/subjective distinction).

[FN210]. This philosophical critique is also mirrored by a political one. The left argues that "[t]o the extent that pragmatists rely on coherence with existing beliefs as the basis for decisions, those beliefs limit the possibility of radical improvement." See Farber, *supra* note 171, at 170. Conservatives critique pragmatism by focusing on the open-ended nature and the experimental side of pragmatism, raising the risk of "unconstrained activism." See *id.* at 171.

[FN211]. *Id.* at 170.

[FN212]. For example, Peter Margulies notes that pragmatism suffers from a tension between projectivity and dialogue. See Margulies, *supra* note 203.

[FN213]. See John S. Nelson, *Seven Rhetorics of Inquiry: A Provocation*, in *The Rhetoric of Human Sciences*, *supra* note 86, at 407, 412 (discussing modern philosophy's focus on epistemology).

[FN214]. See Orit Kamir, *Judgment by Film: Socio-Legal Functions of Rashomon*, 12 *Yale J.L. & Human.* 39 (2000). As this article describes, the film *Rashomon* consists of several different witnesses to a sequence of events relating their personal understanding of what happened. Each witness offers a completely different version of what took place with "evident sincerity." *Id.* at 41. When such an example is applied in a legal context, it implies "that objective truth is unattainable and perhaps nonexistent, and that the legal process is a place where subjective narratives can only be evaluated against each other." *Id.*; see also Ann Althouse, *Invoking Rashomon*, 2000 *Wis. L. Rev.* 503 (2000) (discussing political misuses of film); David Simon Sokolow, *From Kurosawa to (Duncan) Kennedy: The Lessons of Rashomon for Current Legal Education*, 1991 *Wis. L. Rev.* 969, 981 (1991) (discussing attempt to teach students with film that what really happens depends on personal perspective).

[FN215]. John Hollander, *Legal Rhetoric*, in *Law's Stories: Narrative and Rhetoric in the Law* 176, 176-78 (Peter Brooks & Paul Gewirtz eds., 1996); see also Michael C. Leff, *Modern Sophistic and the Unity of Rhetoric*, in *The Rhetoric of Human Sciences*, *supra* note 86, at 19 (discussing evolution of study of rhetoric).

[FN216]. See Edward P.J. Corbett, *Classical Rhetoric for the Modern Student* 34 (2d ed. 1971); Michael Frost, *Ethos, Pathos and Legal Audience*, 99 *Dick. L. Rev.* 85, 86 (1994) (citing Aristotle's *Rhetoric* as example of persuasive discourse and argumentative technique).

[FN217]. Corbett, *supra* note 216, at 34; John W. Cooley, *A Classical Approach to Mediation - Part I: Classical Rhetoric and the Art of Persuasion in Mediation*, 19 *U. Dayton L. Rev.* 83, 92 (1993) (citing Raymond Ross, *Understanding Persuasion* 7 (3d ed. 1990)).

[FN218]. Hollander, *supra* note 215, at 179.

[FN219]. Michael Frost, *Greco-Roman Analysis of Metaphoric Reasoning*, 81 *J. Legal Writing Inst.* 113, 115 (1996). Although "Aristotle expressed the wish that rhetoric could deal exclusively with rational appeals, . . . he was enough of a realist to recognize that man is often prompted to do something or accept something by his emotions." Corbett, *supra* note 216, at 34.

[FN220]. Cooley, *supra* note 217, at 92.

[FN221]. Corbett, *supra* note 216, at 35; see also Cooley, *supra* note 217, at 92 (citing James White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* 815 (1973)).

[FN222]. More recently, outsider and narrative scholarship has brought pathos into the picture, intentionally using the power of stories to create scholarship that makes the reader feel as well as think.

[FN223]. Frost, *supra* note 219, at 115.

[FN224]. J. M. Balkin, *A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reasoning*, in *Law's Stories: Narrative and Rhetoric in the Law* 211, 211 (Peter Brooks & Paul Gewirtz eds., 1996).

[FN225]. See Scott Brewer, [Figuring The Law: Holism and Tropological Inference in Legal Interpretation](#), 97 *Yale L.J.* 823, 828 n.24 (1988) (citing Richard Lanham, *A Handlist of Rhetorical Terms* (1968)) (discussing difficulty of finding core definition of trope that covers all rhetorical theories). The meaning and operation of the "trope" has differed throughout the Western rhetorical tradition and among different theorists. Brewer explains that "[t]he concept of the trope evolved from being only a minor element in rhetorical taxonomy to occupying its current predominant place in Western rhetorical and literary theory. The concept of the trope in Western culture had its origins in the elaborate rhetorical taxonomies of Aristotle, Cicero, Quintilian, and other theorists." *Id.*; see also James Murphy, *Rhetoric in the Middle Ages* 20 (1974) (discussing Cicero). Although in earlier Greek theories of rhetoric the trope played a relatively minor role as a means of achieving dignitas, Ciceronian rhetoric gave it a more prominent place in rhetorical theory. As Ciceronian theory came to dominate Western thinking about rhetoric, so did its emphasis on the trope (and the closely related figure of speech), so that rhetoric as a discipline has become almost identified with the use of tropes and figures. Peter Dixon, *Rhetoric* 36-38 (1971).

[FN226]. Corbett, *supra* note 216, at 479.

[FN227]. Frost, *supra* note 219, at 113; see also Michael J. Yelnosky, [If You Write It, \(S\)he Will Come: Judicial Opinions, Metaphors, Baseball, and "The Sex Stuff,"](#) 28 *Conn. L. Rev.* 813 (1996) (discussing judges' use of baseball metaphors in opinions); David M. Zlotnick, [Battered Women & Justice Scalia](#), 41 *Ariz. L. Rev.* 847, 859 n.82-86 (1999) (citing usage of metaphors by lawyers).

[FN228]. Frost, *supra* note 219, at 118. "Cicero too commended metaphors for their ability to convey complex ideas concisely. Quintilian observed that metaphors work subtly . . ." *Id.* at 119. Bernard Hibbitts argues that metaphors are "fundamental tools of thought and reasoning" and, therefore, they can be used as creative tools that extend and reshape legal language. Zlotnick, *supra* note 227, at 859 n.82 (citing Hibbitts, *supra* note 69, at 233-35).

[FN229]. See, e.g., Frost, *supra* note 219, at 129 (equating farm metaphor used by judge in [Tinker v. Des Moines School District](#), 393 U.S. 503 (1969), to style exemplified by Quintilian and his conscious attempt "to establish or increase his own credibility or ethos by playing on the emotional content or pathos of a particular metaphor").

[FN230]. Frost, *supra* note 219, at 121. As Quintilian observed, "[T]he more remote the [metaphor] is from the subject to which it is applied, the greater will be the impression of novelty and the unexpected which it produces." *Id.* (quoting 3 Quintilian, at 253) (emphasis added). "The most characteristic emotional response that

classical analysts ascribe to metaphors is pleasure." *Id.* at 120.

[FN231]. *Id.* at 126. While Aristotle and Cicero made only modest claims for a metaphor's contribution to ethos, Quintilian thought that "good metaphors make an appreciable contribution to the advocate's ethos." *Id.* at 126-27.

[FN232]. See Corbett, *supra* note 216, at 479-80.

[FN233]. Moreover, in addition to stories like the blind men and the elephant parable, classic hypotheticals and even individual scholars (such as Duncan Kennedy or Richard Posner) have become markers in legal scholarship for particular debates or ideas. By invoking these markers, scholars are placing themselves in a context or are using shorthand to express a complex set of ideas. See Pierre Schlag, *No Vehicles in the Park*, 23 *Seattle U. L. Rev.* 381, 389 (1999) (discussing misguided prevalence of articles discussing H.L.A. Hart's hypothetical statute that forbids "vehicles in the park.").

[FN234]. Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 *Geo. L.J.* 395, 407 (1986); see, e.g., Hibbitts, *supra* note 69, at 233-34 (noting that good metaphor may subvert original meaning); James E. Murray, *Understanding Law as Metaphor*, 34 *J. Legal Educ.* 714 (1984) (arguing that analogical, metaphoric thinking may be fundamental to law); Yelnosky, *supra* note 227, at 815-16 (noting that metaphor may confuse reader if he gives it different meaning than author intended).

[FN235]. Metaphors therefore permit the common law advocate or judge to extend an existing rule to a new situation or to create a new rule without saying so explicitly and without delineating the extent of the change. See Hollander, *supra* note 215, at 185-86 (questioning degree to which well known metaphors have authoritative, precedential value in judicial opinions).

[FN236]. Many faculty members view themselves as independent contractors, each doing essentially independent work and competing with each other for the perks doled out by the administration. While this model captures a great deal of academic life, I have always felt that the feudal model better summarizes the interactions among tenured and untenured faculty and deans.

[FN237]. This ideal runs counter to the old saw among legal academics about the three rules of the article selection process: "Something by somebody, nothing by somebody, or something by nobody."

[FN238]. See *supra* notes 76-79 and accompanying text. The status of the journal in which the article appears also seems to "count" to many law faculties' assessments of the worth of the work.

[FN239]. This is true regardless of whether the underlying motivation for the piece is the author's belief in the essentialist truth of his thesis, his desire to achieve his political objectives, or simply his attempt to advance his career.

[FN240]. Within law review articles, other rhetorical, stylized features are part of the rhetorical structure as well, such as an article's length and number of footnotes.

[FN241]. See *supra* notes 49-90 and accompanying text.

[FN242]. Another example far from the epistemic issues discussed in this Article demonstrates the importance of thinking about one's rhetoric of ethos. One of the most cited law review articles of all time is John Hart Ely's

article attacking the reasoning of *Roe v. Wade*. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *Yale L.J.* 920 (1973). In his introduction, however, Ely declares his personal support for a woman's right to choose abortion. *Id.* at 923. Certainly, this declaration of personal opinion does not support the logos of the article and its presence still serves to irk both supporters of abortion rights and purists in legal scholarship. See *id.* However, his stated opposition to the possible consequence of his arguments (the overturning of a decision whose result he supports), quite possibly garners credibility for his critique of the decision. *Id.* at 947. Spending one's hard won ethos in this fashion is exceedingly dangerous in academia, and it is unlikely that someone of lesser stature would have tried such a rhetorical ploy.

[FN243]. Corbett, *supra* note 216, at 33.

[FN244]. Invention is the first canon of rhetoric. "The skill of invention is concerned with discovering and formulating arguments on any subject, opinions on the resolution of any problem, or reasons for or against any proposed course of action." Balkin, *supra* note 224, at 212.

[FN245]. Corbett, *supra* note 216, at 33.

[FN246]. Certainly, scholarship is also evaluated on the depth of research and quality of writing, but those qualities alone translate as merely workman-like and enjoyable. See Lasson, *supra* note 76, at 935 (stating that scholarship must provide analysis that increases reader's understanding of problem).

[FN247]. One legal historian acknowledged that the impetus for many of his projects began with a sense of some insight that was different than the current consensus. He further acknowledged that his belief that he had something different to say was often the dominant reason for choosing a project. For this type of scholar, the underlying logos serves the personal rhetorical agenda - to be seen as someone who is clever, thoughtful, and even profound.

[FN248]. See, e.g., Pamela S. Karlan, *Politics by Other Means*, 85 *Va. L. Rev.* 1697, 1698 (1999) (examining how use of market terms affects problems in election law).

[FN249]. Examples of metaphoric legal rules have become commonplace throughout legal scholarship. See, e.g., Jonathan A. Beyer, *The Second Line: Reconstructing the Jazz Metaphor in Critical Race Theory*, 88 *Geo. L.J.* 537, 538 (2000) (commenting on use of jazz as metaphor when discussing critical race theory); Timothy A. Canova, *Global Finance and the International Monetary Fund's Neoliberal Agenda: The Threat to the Employment, Ethnic Identity, and Cultural Pluralism of Latina/o Communities*, 33 *U.C. Davis L. Rev.* 1547, 1556 (2000) (noting that "race to the bottom" metaphor, first introduced in corporate law scholarship, has wide application to transnational financial developments); Jim Chen, *The Second Coming of Smyth v. Ames*, 77 *Tex. L. Rev.* 1534, 1569 (1999) (noting phenomenon of life cycle metaphors throughout regulatory scholarship); Alani Golanski, *Kahn's Reign and Its Metaphors for Law - A Critique in the Philosophy of Legal Culture*, 27 *S.U. L. Rev.* 89, 133 (2000) (discussing use of "law-as-religion" metaphor); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *Yale L.J.* 1225, 1309 (1999) (noting use of tourism as metaphor describing some forms of comparative law scholarship); Joan Williams, *Do Wives Own Half? Winning for Wives After Wendt*, 32 *Conn. L. Rev.* 249, 252 (2000) (importing commercial metaphors into family law matters). This is not to say that creativity is not important to the rhetoric of attorneys and judges. I only suggest that for legal scholarship, it is more central to the task.

[FN250]. Nelson, *supra* note 213, at 416 (citing Anatole Broyard, *Sadder Music and Stronger Poetics*, N.Y.

Times Book Review, Apr. 27, 1986, at 14, 15). Another modern rhetorician states, "Every utterance come from somewhere, takes some shape, becomes knowable as a style, and occurs on some occasion for some audience, revealing in the process some usually unarticulated assumptions about epistemology, about human nature, about language." Jim Corder [handout on file with author].

[FN251]. Leff, *supra* note 215, at 22.

[FN252]. Nelson et al., *supra* note 86, at 5. Socrates was a sophist but beginning with his student Plato and through Descartes, Western philosophers saw themselves as truth seekers and relegated rhetoric to courtroom hacks. *Id.*

[FN253]. Eileen A. Scallen, [Classical Rhetoric, Practical Reasoning, and the Law of Evidence](#), 44 *Am. U. L. Rev.* 1717, 1724 (1995) (quoting Sonja K. Foss et al., *Contemporary Perspectives on Rhetoric* 3 (2d ed. 1991)).

[FN254]. Nelson et al., *supra* note 86, at 3; see also Rubin, *supra* note 73, at 1842 (contending that legal scholarship does not consist of "disembodied utterances, existing in some neutral space where they can be objectively evaluated. Rather, they are acts of speech, initiated by a particular speaker, or kind of speaker, and directed toward a particular audience. . . . Whatever voice they use, these acts of scholarly speech are intended to persuade their audience").

[FN255]. Nelson et al., *supra* note 86, at 4-5.

[FN256]. James Boyd White has written extensively on the rhetoric of legal discourse. See James Boyd White, *Hercules' Bow: Essays on the Rhetoric and the Poetics of the Law* (1985); James Boyd White, *Rhetoric and Law: The Arts of Cultural and Communal Life*, in *The Rhetoric of Human Sciences*, *supra* note 86, at 298. Others have endeavored to examine the rhetoric of particular legal issues. See Robert F. Bloomquist, [The Trial of President William Jefferson Clinton: "Impartial Justice," The Court of Impeachment and Ranked Vignettes of Praiseworthy Senatorial Rhetoric](#), 84 *Marq. L. Rev.* 383 (2000) (using tools of classic rhetoric including ethos, pathos, and logos to evaluate speeches in Clinton impeachment debate and particularly noting use of "cross-roads" metaphor in Senator McConnell's speech); Holly Doremus, [The Rhetoric and Reality of Nature Protection: Toward a New Discourse](#), 57 *Wash. & Lee L. Rev.* 11, 12 (2000) (examining how ingrained rhetoric employed in nature protection scholarship has severely constrained perception of this issue and its potential solutions); Eileen A. Scallen & William E. Wiethoff, [The Ethos of Expert Witnesses: Confusing the Admissibility, Sufficiency and Credibility of Expert Testimony](#), 49 *Hastings L.J.* 1143 (1998) (using concept of ethos to explore recent rulings on expert testimony).

[FN257]. Rubin, *supra* note 73, at 1842.

[FN258]. This Article takes as given that there are differences between academic and practitioner rhetoric. The accepted distinction is that scholarship is supposed to be devoted entirely to logos whereas for practitioner's appeals, pathos and ethos are seen as having a role. See Rubin, *supra* note 73, at 1846. While the discussion above refutes the notion that academic discourse is free of pathos and ethos, this difference still exists as a matter of degree. See also *infra* notes 272-75 and accompanying text for a discussion of outsider scholarship and pathos.

[FN259]. Rubin, *supra* note 73, at 1854.

[FN260]. "Crits" tried to unmask, and thereby undermine, the power structure that underlies the law. See, e.g.,

Eric Blumenson, [Mapping the Limits of Skepticism in Law and Morals](#), 74 *Tex. L. Rev.* 523, 523-24 (1996) (attacking antifoundationalist theory). Similarly, outsider scholarship seeks to bring new voices to legal discourse, again with deeper structural reforms of both academic scholarship and the larger legal and political world in mind. See *infra* notes 272-75.

[FN261]. See *supra* notes 129-31 and accompanying text. During a round table discussion on scholarship at my home institution, a variety of political motivations and epistemic positions were revealed. One colleague admitted he consciously chose theses that supported his political agenda and admitted that if he found historical evidence that undermined his political agenda, he would drop the project rather than hurt his cause or be dishonest in his writing. Another colleague chose to use classic liberal theory to analyze legal issues because he believes that this philosophy best represents the intent of the Declaration of Independence and the Constitution.

[FN262]. See Schlag, *supra* note 84.

[FN263]. This cloaked imprecision is what accounts for much of metaphor's appeal to common law lawyers and judges. See Boudin, *supra* note 234, at 407 (stating that imprecision makes metaphor sharper weapon and harder to parry); Hibbitts, *supra* note 69, at 268 (noting that men use metaphors in discussions to keep other groups from participating); Yelnosky, *supra* note 227, at 815-16 (noting that baseball metaphor is confusing to readers).

[FN264]. See, e.g., Zlotnick, *supra* note 227, at 872-73 (demonstrating how subtle metaphor, "species of a lesser included offense" was used to mask weak argument and modify doctrinal rule in double jeopardy doctrine).

[FN265]. Rubin admits that legal scholars still quite frequently "speak of law as if it has some fixed existence, or treat texts as repositories of unambiguous meanings that quietly await discovery inside their web of words," but he insists these examples are solely attributable to the less sophisticated or to lapses into professional shorthand. Rubin, *supra* note 73, at 1854-55. Moreover, he asserts that the important question is "how these scholars explain their enterprise when called upon to do so, not how they express themselves on all occasions." *Id.* I believe that residual essentialism is a more pernicious problem that Rubin suggests. While a scholar may begin his research with limited ontological goals, the process of research and writing feels to many like discovery rather than invention, leading to both unintentional and intentional essentialist claims. As an example, in a faculty seminar on scholarship, one professor exclaimed that he hoped we were doing something different than writing a brief. Another later confided that while he agreed that most scholars were unable to overcome their individual perspectives, he believed he was able to discover objective truth in his research.

[FN266]. Nelson et al., *supra* note 86, at 15. Rubin argues that this requires "a community of scholars to develop an understanding of their own pattern of thought, and to evaluate its operation." Rubin, *supra* note 73, at 1843-44.

[FN267]. When pressed (and in private), many legal scholars will admit that their particular insight in an article is not in all honesty a grand theory of the truth but merely a twist or insight on an existing idea that they found interesting. My point is that many fail to reflect on this issue and examine the epistemic component of their writing at all.

[FN268]. Balkin, *supra* note 224, at 212.

[FN269]. Richard Delgado, [Storytelling for Oppositionists and Others: A Plea for Narrative](#), 87 *Mich. L. Rev.* 2411, 2441 (1988).

[FN270]. [Id. at 2414.](#)

[FN271]. [Id. at 2425-35.](#)

[FN272]. See Farber & Sherry, [supra note 60](#) (discussing use of storytelling by legal scholars).

[FN273]. Ruthann Robson, [Beginning From \(My\) Experience: The Paradoxes of Lesbian/ Queer Narrativities](#), 48 *Hastings L.J.* 1387, 1401-08 (1997).

[FN274]. Mary Beth Beazley & Linda H. Edwards, [The Process and the Product: A Bibliography of Scholarship About Legal Scholarship](#), 49 *Mercer L. Rev.* 741, 759-66 (1998).

[FN275]. See Farber, [supra note 83](#), at 164 (noting that debate over pornography is ugly, personal, and overblown). Farber discusses the "unpromising" prospects for future intellectual debate about pornography in light of, first, feminist Catharine MacKinnon's "uncharitable" statements against participating in such a debate, and, second, the criticism that MacKinnon later received from Carlin Romano, who "[i]n a shrill attack on [MacKinnon's] most recent book . . . [began] by hypothesizing a decision on his part to rape MacKinnon, which becomes transmuted into a decision merely to write about this idea, for which he is then prosecuted." *Id.*; see also Carlin Romano, *Between the Motion and the Act*, 257 *Nation* 563 (1993) (reviewing Catharine A. MacKinnon, *Only Words* (1993)); Cass R. Sunstein, *Democracy and the Problem of Free Speech* (1993); *The Invention of Pornography: Obscenity and the Origins of Pornography, 1500-1800* (Lynn Hunt ed., 1993)) (beginning review with proposal that MacKinnon should be raped so she knows difference between rape and pornography). MacKinnon referred to Romano's book review as a "public rape." Richard Lacayo, *Assault by Paragraph*, *Time*, Jan. 17, 1994, at 62. As Farber suggests in his article, the "players seem intent on brutalizing each other rather than engaging in what sportswriters call 'playing with intelligence.'" Farber, [supra note 83](#), at 164.

[FN276]. Joan C. Williams, [Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory](#), 1991 *Duke L.J.* 296, 316 (1991) ("[M]ost outsider scholarship is not marred by the essentialism that characterizes both relational feminism and Matsuda's early work.") (emphasis added).

[FN277]. See Richard Delgado, [On Telling Stories in School: A Reply to Farber and Sherry](#), 46 *Vand. L. Rev.* 665, 666 (1993) (noting use of stories, narratives, conventions, and understandings by empowered groups).

[FN278]. Even today, most of the stories in legal writing or advocacy tend to reinforce existing social ideology. Nevertheless, there has been little study of the orthodox use of narrative, stories, and parables in case law and legal scholarship. This Article hopes to contribute to that effort.

[FN279]. See e.g., Delgado, [supra note 277](#), at 666-67 (noting that outsiders will not be taken seriously if they differ too much from traditional story); Robson, [supra note 273](#), at 1400.

[FN280]. Richard Delgado makes a similar point. Richard Delgado, [Mindset & Metaphor](#), 103 *Harv. L. Rev.* 1872, 1874 (1990) (stating that "the choice of metaphors and other word-pictures can give a glimpse into how the writer reasons and can show the hidden contours of his or her mental world").

[FN281]. See [supra notes 78-79](#) and accompanying text.

[FN282]. Winter, [supra note 69](#), at 664.

[FN283]. See *id.* at 676 (stating that "the imaginative process of metaphoric reasoning often produces the anomaly that prompts change").

[FN284]. This concept of impact on one's community bears some elaboration. First, while fine in the abstract, the divisions of culture create many "nested communities." Therefore, one must still be careful that actions that benefit one community do not harm another. Second, let me emphasize again that being a pragmatist or Buddhist about the practice of legal scholarship does not suggest that one cannot choose an essentialist or nihilist position in one's works, but only that one remain pragmatic or skeptical about the absolute truth of one's conclusions. Note also the quintessential pragmatic nature of my advice: it is optimistic and hopeful without specifying a particular program to be followed, or for that matter, any clear criteria for establishing that one has achieved the goal.

[FN285]. As an example, I suggest that few authors who reflexively invoke the strongest Western version of the parable actually intended to assert the degree of intellectual arrogance this version conveys. The loss to ethos can be devastating if the trope is susceptible to multiple meanings of which the author is unaware. See Frost, *supra* note 219, at 127 (offering Quintillion's comments on bad metaphors and their effect on ethos).

[FN286]. The inquiry I am suggesting is the genesis of this Article. While trying to decide whether to use the parable to describe the conflicting scholarship on Justice Scalia's jurisprudence, I became curious about its origins and searched WESTLAW for background on the parable. See Zlotnick, *supra* note 51, at 1381 (using parable to indicate perplexing divergence of opinion in Scalia's constitutional jurisprudence).

[FN287]. Mark Tushnet, [Interdisciplinary Legal Scholarship: The Case of History-In-Law](#), 71 *Chi.-Kent. L. Rev.* 909, 910-13 (1996).

[FN288]. Brian Leiter, *Intellectual Voyeurism in Legal Scholarship*, 4 *Yale J.L. & Human.* 79, 80 (1992). Although Tushnet used Leiter's article as a jumping off point, others feel that Leiter's attack on Gerald Frug was the ultimate "gotcha" scholarship aimed simply to prove that Leiter had a Ph.D. in philosophy and Frug did not, without further illuminating the underlying issues at stake in the subject piece.

[FN289]. See *supra* notes 6-8, 43-47, and accompanying text. Moreover, this critique reaches some of the scholars in Part III who clearly recognized the parable's epistemic implications. Note, however, that I am not suggesting that we must research every metaphor or literary allusion we use. That would be impracticable and pointless. Rather, I only suggest that when a legal scholar chooses a trope as a central motif, it behooves her to investigate it more than superficially.

[FN290]. This is not to be confused with conforming to a standard format with introduction and footnotes. In fact, even the outsider and narrative scholarship have their own internal norms. My point is directed to content.

[FN291]. This argument finds a home in Daniel Farber's desire for a return to a greater "play of intelligence" in legal scholarship (which he defines as a combination of imagination, detachment, and humor). Farber also argues that part of the problem is a "fixation on stylized rhetoric" which parallels my previous contention about uncreative uses of rhetoric. Farber, *supra* note 83, at 165.

[FN292]. This is similar to Justice Cardozo's famous aphorism that metaphors can both liberate and enslave. See *Berkey v. Third Ave. Ry.*, 155 *N.E.* 58, 61 (1926) ("Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.").

[FN293]. D. Marvin Jones, "We're All Stuck Here for Awhile": Law and the Social Construction of the Black Male, 24 J. Contemp. L. 35, 41 (1998).

[FN294]. *Id.* at 42.

[FN295]. This use of the parable also reinforces the better known image of black males as invisible in our culture, first coined by Ralph Ellison in *Invisible Man* with which Jones begins his essay. Ralph Ellison, *Invisible Man* (1952); see also Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 *Notre Dame L. Rev.* 886, 897 n.54 (1989) (using parable to compare positive notion of justice being "blind" with usual negative connotation of blindness in parable); Parren J. Mitchell & John Alfred Turner, Jr., "Adarand 101," 7 *Md. J. Contemp. Legal Issues* 451, 468 (1996) (suggesting that advocates for minority business must teach others about meaning of Adarand or risk being turned into parts of elephant by those who might misinterpret decision.); Zlotnick, *supra* note 51 (suggesting search for unitary elephant representing Justice Scalia's constitutional jurisprudence was fruitless as no such entity exists and that Scalia's opinions should be viewed as product of three warring influences).

[FN296]. Balkin, *supra* note 224, at 212.

[FN297]. Self-awareness will not, however, supply a particular consensus. Rather, "[b]y becoming aware of the inherently normative nature of the field, scholars can acknowledge that there is no consensus, and that lack of consensus itself provides the unified vision that defines the practice. . . . The entire point of standard scholarship is to explore and contrast the pragmatic implications of conflicting normative positions." Rubin, *supra* note 73, at 1892-93.

[FN298]. A few legal scholars invoke the blind men and the elephant parable in exactly this way while writing about topics far afield from epistemology. Thus, while these articles have a degree of self-awareness, they note rather than belabor the epistemic implications. See Metzger & Dalton, *supra* note 45, at 493-95 (using parable to criticize scholarly descriptions of corporation, then suggesting use of organizational theory, but noting that "[w]e merely hope to get a little better picture of the elephant and whatever incremental increase in understanding that such a picture can provide").

[FN299]. Grant Gilmore, *The Ages of American Law* 110 (1977). In this spirit, I conclude with the words of a Buddhist sage as my comment about my contribution: "Please understand that I am merely joining my one drop to the rivers and the oceans or adding my candle to the sun and the moon, hoping in this way to increase even slightly the volume of water or the brilliance of the light." Teeter, *supra* note 137, at 297 (quoting Nichiren, *The Fourteen Slanders*, in *The Major Writings of Nichiren Daishonin* 205, 215 (Gasho mittee ed. & trans., 1985)).

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