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# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

ESSAY

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## CREATING KAIROS AT THE SUPREME COURT: *SHELBY COUNTY, CITIZENS UNITED, HOBBY LOBBY,* AND THE JUDICIAL CONSTRUCTION OF RIGHT MOMENTS

Linda L. Berger\*

[M]yth leads people to give their attention to one possibility rather than another, and hence to change the direction of their intentions and their dreams. Columbus proposed his expedition at the right time—the Kairos—when people were ready to accept the discovery of a new world.<sup>1</sup>

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1. ROLLO MAY, *THE CRY FOR MYTH* 92 (1991). May credits Paul Tillich with the translation of kairos as the “destined time.”

## I. INTRODUCTION

Kairos captures the right moment within the chronos, or the entire sequence of moments. To realize kairos in this way, the author must grasp the right moment in time and space.<sup>2</sup> One aspect of kairos is sensing the most opportune moment—what point in time—to make a particular argument or claim. The summer of 2015 was, for example, the right time to argue in favor of same-sex marriage in the United States.<sup>3</sup> The second aspect of kairos is apprehending the essential moment—what space in time will “stand in” for and exemplify the crux of the problem.<sup>4</sup> This kind of right space is exemplified by the due process challenge that distills its argument down to the image of the judge advising the defendant to stay away from the courtroom in order to stay “safe from the rage of the crowd” when the verdict is read.<sup>5</sup>

Kairos is an ancient rhetorical concept that was long neglected by rhetorical scholars,<sup>6</sup> and its significance to legal

2. This essay’s definition of kairos is drawn from a number of sources (cited as appropriate), but it will differ from them in its emphasis and phrasing. The major difference is my use of both an internal chronological timeline (within the chronos of the problem to be solved) and an external chronos (within the often-judicial setting in which the claim or argument is being made).

3. That the time was right is of course confirmed by the June 2015 decision in *Obergefell v. Hodges*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2584 (2015); see also *Roadmap to Victory, FREEDOM TO MARRY* (n.d.), <http://www.freedomtomarry.org/pages/Roadmap-to-Victory> (noting that *Loving v. Virginia*, 388 U.S. 1 (1967), was decided after thirty-four states had ended bans on interracial marriage, and that *Obergefell* was decided after thirty-seven states had approved same-sex marriage).

4. This is similar to the use of metonymy to substitute a stand-in word or phrase for the whole argument (for example, money as a stand-in for corporate participation in political campaigns).

5. See *infra* part III(C). In *Frank v. Mangum*, 237 U.S. 309 (1915), Justice Holmes wrote that

we must look facts in the face . . . . And when we find the judgment of the expert on the spot [the trial judge] . . . to have been that if one jurymen yielded to . . . . reasonable doubt . . . , neither prisoner nor counsel would be safe from the rage of the crowd, we think the presumption overwhelming that the jury responded to the passions of the mob.

*Id.* at 349 (Holmes, J., dissenting).

6. See James L. Kinneavy, *Kairos: A Neglected Concept in Classical Rhetoric in RHETORIC AND PRAXIS: THE CONTRIBUTION OF CLASSICAL RHETORIC TO PRACTICAL REASONING* 79, 80 (J.D. Moss, ed., 1986) (characterizing kairos as “neglect[ed] by many rhetoricians, both historical and contemporary”); see also James L. Kinneavy & Catherine R. Eskin, *Kairos in Aristotle’s Rhetoric*, 17 *WRITTEN COMMUNIC’N* 432, 432–33 (2000)

argument and persuasion has been little discussed. Through their use of two words for time, *chronos* and *kairos*, the Greeks were able to view history as a grid of connected events spread across a landscape punctuated by hills and valleys.<sup>7</sup> In *chronos*, the timekeeper-observer constructs a linear, measurable, quantitative accounting of what happened. In *kairos*, the participant-teller forms a more qualitative history by shaping individual moments into crises and turning points.<sup>8</sup> From a rhetorical perspective, *chronos* is more closely allied with the narrative accounting for—how long? what next?—while *kairos* is the more metaphorical imagining as—at what point? in what space?<sup>9</sup>

I begin with a brief overview of *kairos*.<sup>10</sup> Suggesting that it represents a quintessential judicial use of *kairos*, I next examine Justice Holmes's dissent in *Frank v. Mangum*, the Supreme Court decision denying habeas relief to a Jewish factory manager later hanged by a mob in Georgia.<sup>11</sup> Then I discuss the crucial lessons in *kairos* that can be drawn from pairing that dissent with Justice Holmes's opinion for the Court in a seemingly indistinguishable case ten years later.<sup>12</sup> I next consider recent examples of *kairos*: first as "the most opportune time" in an opinion by Chief Justice Roberts marking a turning point in the life of the Voting Rights Act,<sup>13</sup> and then as "the essential moment" in an opinion by Justice Alito expanding the

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(suggesting that scholars' failure to examine *kairos* in Aristotle's work reflects general scholarly neglect of topic); Philip Sipiora, *Introduction: The Ancient Concept of Kairos in RHETORIC AND KAIROS: ESSAYS IN HISTORY, THEORY, AND PRAXIS* 1, 1 (Phillip Sipiora & James S. Baumlin, eds. 2002) (noting that *kairos* is broader than mere timing, including aspects of what we think of as "propriety, occasion, . . . fitness, . . . decorum, [and] convenience," among other concepts); John E. Smith, *Time and Qualitative Time*, 40 REV. OF METAPHYSICS 3, 3 (1986).

7. See Smith, *supra* note 6, at 6 (noting that time conceived as *chronos* "furnishes an essential grid upon which the processes of nature and of the historical order can be plotted and to that extent understood," but also that time conceived as *kairos* acknowledges that "the *chronos* aspect reaches certain critical points at which a qualitative character begins to emerge, and when there are junctures of opportunity calling for human ingenuity in apprehending when the time is 'right'").

8. See Smith, *supra* note 6, at 4–5 (discussing *kairos* as a special temporal position).

9. See *id.* at 4 (contrasting *chronos* as the quantitative with *kairos* as the qualitative).

10. See *infra* part II.

11. See *infra* part III.

12. See *infra* part IV.

13. See *infra* part V.

reach of the Religious Freedom Restoration Act.<sup>14</sup> The conclusion synthesizes these themes, addressing some advantages and limitations of kairos as rhetorical method.

## II. RECOGNIZING KAIROS

Clearly recognizable after the tipping point arrives, kairos in its sense as the most opportune moment is illustrated by the rhetorical developments that followed Justice Scalia's comment in *United States v. Windsor*<sup>15</sup> that there would be no turning back the clock after the Supreme Court decision on the Defense of Marriage Act.<sup>16</sup> The comment became a kairic fulcrum, a turning point for lower court judges who one after another began to invalidate state laws prohibiting same-sex marriages.<sup>17</sup> Similarly, *Citizens United v. FEC*,<sup>18</sup> characterized by some as having recognized free speech rights for corporations, appeared to carve out an opening for corporations to claim that they have the right to religious freedom and religious expression as well.<sup>19</sup>

As for kairos in the sense of capturing the essential moment, an illustration can be found in the petitioner's brief filed in *Miranda v. Arizona*.<sup>20</sup> Miranda had been charged with kidnapping and raping an eighteen-year-old girl.<sup>21</sup> According to the brief, "[o]n March 13, 1963, defendant was arrested at his

14. See *infra* part VI.

15. 570 U.S. \_\_\_, 133 S. Ct. 2675 (2013).

16. In dissent, Justice Scalia predicted that the ruling would extend to state statutes as well, declaring that

[a]s far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe.

By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition.

570 U.S. at \_\_\_, 133 S. Ct. at 2711 (Scalia, J., dissenting).

17. See *Winning in Court*, FREEDOM TO MARRY (n.d.), <http://www.freedomtomarry.org/pages/Winning-in-Court> (including litigation timeline that shows a win in Massachusetts in 2004, wins in Connecticut and Iowa in 2009, and then wins in twenty-one states between 2013 and early 2015).

18. 558 U.S. 310 (2010).

19. See *Burwell v. Hobby Lobby Stores, Inc.*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 2751 (2014).

20. 384 U.S. 436 (1966).

21. Brief for Petitioner at \*4, *Miranda v. Ariz.*, 1966 WL 87732 (U.S., Jan. 19, 1966) (No. 759).

home and taken in custody to the police station where he was put in a lineup consisting of four persons.”<sup>22</sup>

After being identified by two witnesses, “Miranda was then taken to Interrogation Room 2 at the local police headquarters and there interrogated on both [this matter and an unrelated robbery].” Lest the reader fail to grasp the essential moment, the brief repeats the information with more detail: “After the lineup, it was Officer Cooley, who had arrested Miranda, who took petitioner to Interrogation Room 2.”<sup>23</sup> The brief points out that no one told Miranda of his right to counsel,<sup>24</sup> and then returns again: “Here, Officer Cooley also testified as to interrogation in Room 2 of the Detective Bureau, and narrated extensively a confession he attributed to the petitioner.”<sup>25</sup> And yet again, the essential moment: “A written statement, obtained from Miranda while he was under the interrogation in Room 2, was then put into evidence.”<sup>26</sup> And finally, the argument itself:

When Miranda walked out of Interrogation Room 2 on March 13, 1963, his life for all practical purposes was over. Whatever happened later was inevitable; the die had been cast *in that room at that time*. There was no duress, no brutality. Yet when Miranda finished his conversation with Officers Cooley and Young, only the ceremonies of the law remained; in any realistic sense, his case was done.<sup>27</sup>

In the Miranda brief, Interrogation Room 2 became the actual physical place within a particular moment, a kairic space that captured the essence of Miranda’s argument: Unless the Constitution required police to tell a criminal defendant that he had the right to have an attorney present during his questioning, the defendant’s Constitutional rights at trial would be virtually meaningless. The defendant’s fate would rest on what he had said, without the benefit of counsel, while being interrogated by police, alone in a room for hours.

22. *Id.* at \*4–\*5.

23. *Id.* at \*4.

24. *Id.* at \*5.

25. *Id.*

26. *Id.* at \*5 (footnote omitted).

27. *Id.* at \*10 (emphasis added). The brief went on to quote Justice Douglas’s observation that “what takes place in the secret confines of the police station may be more critical than what takes place at the trial.” *Id.* (quoting *Crooker v. California*, 357 U.S. 433, 444–45 (1958) (Douglas, J., dissenting)).

### *A. Definitions from Classical to Contemporary*

The nuanced sense of timeliness afforded by the concept of *kairos* helps make an argument “more sensible, more rightful, and ultimately more persuasive.”<sup>28</sup> In leveraging a particular point in time that is better for a particular purpose than any other point, *kairos* blends three related concepts:

- At what point is this the right time (as opposed to any time)?
- At what point is this the right setting—a context of tension, crisis, or conflict that calls for something other than a generalized solution that might work at any time?
- At what point is this a fitting opportunity—a situation making a particular rhetorical response appropriate or presenting the chance to carry out a purpose that could not be accomplished at some other time?<sup>29</sup>

*Kairos* indicates that there is “an individual time having a critical ordinal position”—an actual turning point that is marked off from the time before and after.<sup>30</sup> Contemporary rhetoric scholar John Poulakos suggests that *kairos* might even be thought of as the concept that “ideas have their place in time and unless . . . they are voiced at the precise moment they are called upon, they miss their chance.”<sup>31</sup>

In comparison with *chronos*, the familiar notion that things unfold as they do because events follow one another not only in

28. John Poulakos, *Toward a Sophistic Definition of Rhetoric in CONTEMPORARY RHETORICAL THEORY: A READER* 29 (John Louis Lucaites et al., eds. 1989).

29. Smith, *supra* note 6, at 10–11.

30. *Id.* at 10 (referring to *kairos* as “turning points in the historical order, the opportunities presented, the opportunities seized upon and the opportunities missed, the qualitative changes and transitions in the lives of individuals and nations and those constellations of events which made possible some outcome that could not have happened at any other time”).

31. Poulakos, *supra* note 28, at 28.

time but in causal connection,<sup>32</sup> kairos is more ambiguous and complex. First, kairos is defined as meaning both the most opportune time—a particularly appropriate or fitting opportunity presenting itself to the writer or speaker—and the essential moment—the point in time that captures the essence of the problem or marks a crucial turning point.<sup>33</sup>

Next, while chronos appears closer to narrative, kairos is more metaphorical in both process and result. For example, in comparison with the storyline detailing the sequence of events over time, kairos is depicted as the discovery, creation, or capture of a crucial moment of time. Still, even though much of what we call storytelling is concerned with chronos—that is, with events arranged in a sequential chain to help us make sense of what happened (leading us to conclude, perhaps, that things happen for a reason)—kairos often plays the ah-ha-moment role in narrative. In the well-told story, we wait for the so-called tick-tock, the kairos moment when things fit into place.<sup>34</sup> The narrative arc of stories may depend on the magical moments when the curtain opens to unveil something previously unknown. Rather than a final act linking events together in a way that makes them understandable, this magical moment is an illustration of kairos within the chronos of a particular narrative.

Chronos and kairos suggest differing authorial techniques, but even these are overlapping. Unlike the storyteller's more passive passage through chronological time, kairos presumes that the author will intervene in history's causal chain. In one of its senses, the kairos moment may appear to the writer or speaker as a door to be opened to a new possibility, a thread to be pulled to unravel the existing fabric. In another of its senses, the kairos moment provides the writer or speaker with the

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32. As Jerome Bruner put it, “[w]e seem to have no other way of describing ‘lived time’ save in the form of a narrative.” Jerome Bruner, *Life as Narrative*, 54 SOC. RESEARCH 11, 12 (1987).

33. See Smith, *supra* note 6, at 10 (referring to turning points), 12 (characterizing a particular opportune moment as “‘right’ because it serves . . . [a] special purpose”). Smith writes that chronos is, in contrast to kairos, distinguished by three concepts: (1) the element of change or motion through a stretch of time, (2) the use of an appropriate unit of measurement, and (3) the element of serial order captured by the concepts of before and after. *Id.* at 6.

34. FRANK KERMODE, *THE SENSE OF AN ENDING: STUDIES IN THE THEORY OF FICTION* 64 (1970).



setting within which to portray what happens next as natural and inevitable. This natural inevitability is supplied by the things we already know, what the Greeks termed *doxa*—the implicit knowledge that operates automatically and unconsciously, so that it “goes without saying because it comes without saying.”<sup>35</sup>

Crucially, because what goes without saying depends on when, where, and who you are, the concept of *kairos* extends beyond time to include setting and to encompass author and audience. Aristotle’s descriptions of *kairos* include both the “right or opportune time to do something” and “the right measure in doing something.”<sup>36</sup> The inclusion of a sense of appropriateness as part of the meaning of *kairos* is shown in the description of *kairos* as involving qualitative time (in contrast to *chronos*, which addresses quantitative time) and the companion description of *kairic* time as “a season” when a particular action is fitting.<sup>37</sup> Thus, *kairos* incorporates a fully rhetorical sense of proportion—what is fitting or appropriate to this particular time and space.

Finally, although *kairos* requires action by the speaker or writer, a *kairic* moment does not come about because the actor wills it into being. The active quality of *kairos* is captured in its definition as “a passing instant in which an opening appears which must be driven through with force if success is to be achieved.”<sup>38</sup> That this is not only a subjective decision is suggested by the conclusion that even though *kairos* is initiated by action, it in fact enables a “dynamic interplay between objective and subjective, between opportunity as discerned and opportunity as defined . . . by including both objective and subjective dimensions of a moment in time.”<sup>39</sup>

To illustrate, compare *kairos* with the “rhetorical situation.”<sup>40</sup> A rhetorical situation exists when an exigence (or

35. PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 167 (1977).

36. Kinneavy & Eskin, *supra* note 6, at 433 (citing Kinneavy, *supra* note 6, at 80).

37. Smith, *supra* note 6, at 6 (indicating that *kairos* is necessary for understanding times “at which a qualitative character begins to emerge, and when there are junctures of opportunity calling for human ingenuity in apprehending when the time is ‘right’”).

38. ERIC CHARLES WHITE, *KAIRONOMIA: ON THE WILL-TO-INVENT* 13 (1987).

39. Carolyn R. Miller, *Kairos in the Rhetoric of Science in A RHETORIC OF DOING: ESSAYS ON WRITTEN DISCOURSE IN HONOR OF JAMES L. KINNEAVY* 312 (Stephen P. Witte et al., eds., 1992).

40. Lloyd E. Bitzer, *The Rhetorical Situation*, 1 *PHIL. & RHET.* 1 (1968).

imperfection) calls out for responsive rhetoric that is aimed at an audience with the potential to solve or address the imperfection.<sup>41</sup> This view posits the rhetorical situation as existing objectively outside the speaker and as being discovered by the speaker (rather than as being constructed by the speaker). The concept of kairos appears more welcoming: The right time may be found or it may be created. Thus, while adherents of the rhetorical-situation view would say that kairos occurs when a crisis (or an exigence) has punctured the *chronos*, a critic of that definition would say that every moment has its kairos that can be seized and developed in strategic ways.<sup>42</sup> Somewhere in between—and closer to the views of Miller, Smith, and Poulakos—is the view that the “tool” of kairos (the most opportune moment) and its “setting” (the essence of the problem) must act together.<sup>43</sup>

### *B. Examples from Fairy Tales to Science*

In one of its senses, the concept of kairos resembles metonymy: Its crystallization of the essential moment leaves us with a lasting image that stands in for and evokes a larger context, picture, or story. Fairy tales, for instance, may be captured in our memory as “a single event rather than a connected narrative.”<sup>44</sup> When we think of Rapunzel, “[t]he image of the yards of hair tumbling down from the window in the tower is unforgettable.”<sup>45</sup> Although we remember that

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41. *Id.* at 2 (indicating that the situation calls the discourse into existence and reporting that “Clement Attlee once said that Winston Churchill went around looking for ‘finest hours,’” and noting that “[t]he point to observe is that Churchill found them—the crisis situations—and spoke in response to them”).

42. Richard E. Vatz, *The Myth of the Rhetorical Situation*, 6 *PHIL. & RHET.* 154, 159 (1973) (asserting that the Cuban Missile Crisis was a political crisis largely created by rhetoric: “A President dramatically announced on nationwide television and radio that there was a grave crisis threatening the country. This was accompanied by symbolic crisis activity including troop and missile deployment, executive formation of ad hoc crisis committees, unavailability of high government officials, summoning of Congressional leaders, etc.”).

43. See Scott Consigny, *Rhetoric and Its Situations*, 7 *PHIL. & RHET.* 175, 181 (1974) (suggesting that the “real question” is how the user of rhetoric “can become engaged in the novel and indeterminate situation and yet have a means of making sense of it”).

44. PHILIP PULLMAN, *FAIRY TALES FROM THE BROTHERS GRIMM: A NEW ENGLISH VERSION* 63 (2012).

45. *Id.*

image, we forget what happened before and after. “What about her poor parents, for example? They long for years to have a child, and then she’s born, and the witch takes her away and then we hear no more about them.”<sup>46</sup> Rapunzel’s hair is the lasting image that crystallizes and forever after evokes the essence of the story.

Another example of kairos as a lasting image can be found in the metaphor used to describe changing scientific accounts of the development of the universe. “Only a century ago the universe was held to be eternal and unchanging. Then came the expanding universe and the Big Bang, an origin almost biblical in nature, like a girl bursting out of a cake.”<sup>47</sup> This singular moment—the metaphorical Big Bang—now marks our changed understanding of the nature of things. The image is isolated and essential, focusing our thoughts on one bead, rather than on a series of events strung together like links in a chain.<sup>48</sup>

As for kairos in its sense as “the most opportune moment,” an illustration can be found in the career path of the now-conventional metaphor that the mind is a computer.<sup>49</sup> When this metaphor was first used, it was novel, that is, the source domain (the computer) had not previously been applied to the target domain (the mind).<sup>50</sup> To understand the metaphor, the reader had to try to align the characteristics and relationships existing within a computer with those existing within a mind: For example, both appear to take in data and to process it before producing some kind of report.<sup>51</sup> Appearing at a most opportune time, when scientists had only recently begun to use computers in their everyday activities, the mind-as-computer metaphor generated not only a new way of seeing but also a new way of studying the mind.<sup>52</sup>

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46. *Id.*

47. Dennis Overbye, *A Quantum of Solace*, N.Y. TIMES, July 2, 2013, at D1 (crediting the cake metaphor to cosmologist Fred Hoyle).

48. *See id.* (noting that “a single moment of insight or beauty or grace . . . can illuminate eternity”).

49. Gerd Gigerenzer & Daniel G. Goldstein, *Mind As Computer: Birth of a Metaphor*, 9 CREATIVITY RES. J. 131, 131, 134–35 (1996).

50. *See id.* at 135–43.

51. *See id.* at 136.

52. *Id.* at 142–43.

To sum up, *kairos* may be understood as a concept incorporating time (the most opportune time); space (the essential point in time that embodies the story or the concept); action (the author's use of the time and space); and fittingness (each of these matching up with the other). These characteristics can be seen in the spatial metaphors for *kairos*: In both weaving and archery, the Greeks conceived of *kairos* as an opening or an aperture "through which an arrow or a shuttle must be passed for success."<sup>53</sup> When used in this sense, *kairos* has both objective and subjective dimensions: The opening must be one into which the writer can fit his claim as well as one that the reader recognizes as real.<sup>54</sup>

### III. JUDICIAL USE OF CHRONOS AND KAIROS

#### *A. Introduction: The Phagan Murder and the Frank Lynching*

In the late summer and early fall of 1913, Leo Frank, the Jewish manager of a pencil factory in Atlanta, Georgia, was convicted and sentenced to death for the murder of Mary Phagan, a thirteen-year-old girl who worked in the factory.<sup>55</sup> When Frank's case came before the Supreme Court at the end of a long line of motions and appeals, he was denied habeas relief.<sup>56</sup> Based on claims that the trial had been disrupted by mass public outcry and tainted by strains of anti-Semitism, Georgia's governor then commuted Frank's death sentence.<sup>57</sup> Within weeks, a group of Georgia residents planned and carried out Frank's abduction from the state prison farm and his subsequent lynching.<sup>58</sup> Decades later, Frank was posthumously

53. Miller, *supra* note 39, at 313.

54. *Id.* (discussing scholarship as the opening of a space in existing research that will both accommodate new work and invite the reader's acceptance of that work).

55. STEVE ONEY, *AND THE DEAD SHALL RISE: THE MURDER OF MARY PHAGAN AND THE LYNCHING OF LEO FRANK* 190, 340–45, 377 (2004) (indicating that Frank's trial started on July 28, that the jury returned its verdict on August 25, and that the court sentenced Frank on August 26).

56. *Frank*, 237 U.S. at 345.

57. ONEY, *supra* note 55, at 488–503 (recounting the governor's investigation and deliberation).

58. *Id.* at 513–28, 561–72 (naming participants in abduction plan and describing lynching).

pardoned, not on the grounds of innocence but on the basis that Georgia had failed to protect his rights.<sup>59</sup>

The Phagan murder and the Frank lynching are viewed as turning points in American history.<sup>60</sup> The group of Georgia citizens who formed the Knights of Mary Phagan would help revive the Ku Klux Klan.<sup>61</sup> Formed during the trial, the Anti-Defamation League gained momentum after Frank's lynching,<sup>62</sup> which is believed to have been the only lynching of a Jewish victim in the United States.<sup>63</sup> Some Jewish citizens left Atlanta after Frank's lynching; others worked harder to appear no different from their non-Jewish neighbors.<sup>64</sup>

In the hundred years since the Frank trial, many historical and fictional versions have depicted the events and the atmosphere surrounding the investigation, the trial, and its aftermath.<sup>65</sup> These histories demonstrate that common understandings of the events and their significance diverged

59. *Id.* at 647–49; see also *Georgia Pardons Victim 70 Years after Lynching*, N.Y. TIMES, Mar. 12, 1986, at A16.

60. See ONEY, *supra* note 55, at 649. Readers interested in historians' treatment of the case might consult Leonard Dinnerstein's *THE LEO FRANK CASE*, published in 1968 by Columbia University Press, for an influential account. Many other sources are cited in ONEY, *supra* note 55, at 709–12.

61. ONEY, *supra* note 55, at 605 (noting that several men associated with the abduction were "reputedly among" those who orchestrated the Georgia Klan's reappearance in 1915).

62. *Id.* at 617.

63. Peter Jacobs, *The Lynching of a Jewish Man in Georgia 100 Years Ago Changed America Forever*, BUSINESS INSIDER (AUG. 18, 2015), <http://www.businessinsider.com/leo-frank-lynching-in-georgia-100-years-ago-changed-america-forever-2015-8> (characterizing Frank's death as "[t]he only high-profile lynching of an American Jew"). Most victims of lynching were African-American. One recent accounting numbers nearly 3,500 African-American victims of lynching in the Southern states between 1877 and 1950. *Lynching, Whites & Negroes, 1882–1968*, TUSKEGEE UNIV. ARCHIVES REPOSITORY (Sept. 9, 2010), <http://192.203.127.197/archive/handle/123456789/511> (indicating in addition that from 1882 to 1968, 39 whites and 492 African-Americans were lynched in Georgia alone). Another account documents 3,959 terror lynchings of African-Americans in Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia between 1877 and 1950. *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR*, REPORT SUMMARY 4–5 (2015). Georgia was one of the states with the highest absolute numbers of lynchings. *Id.* at 5.

64. ONEY, *supra* note 55, at 616–19.

65. MAROUF HASIAN JR., *LEGAL MEMORIES AND AMNESIAS IN AMERICA'S RHETORICAL CULTURE* 135, 148 n. 1 (2000) (referring to "countless newspaper stories, hundreds of magazine articles, dozens of books, and at least four films" about the case, and collecting historical sources and scholarly studies).

along race, class, and gender lines; between the North and the South; and between progressives and populists.<sup>66</sup>

The section of this essay that follows this introduction concentrates on the interaction between historical and cultural turning points and the manner in which the Supreme Court addressed the habeas petition alleging that mob domination had overpowered the processes of justice in Frank's trial. First, I compare the Supreme Court's denial of Frank's habeas petition with the dissent from Justice Holmes.<sup>67</sup> After that, I contrast the Holmes dissent in *Frank* with Justice Holmes's opinion for the Court in a similar case decided ten years later.<sup>68</sup>

This extended discussion is intended to suggest some ways to think, both theoretically and practically, about the concepts of kairos and chronos. After-the-fact rhetorical readings are able to look through a wider lens than is available to an appellate judge constrained by a record, a role, a line of precedent, and a standard of review. In *Frank*, the Court was seemingly stuck in time—the time captured within the record of the appeal. According to that record, a series of events had unfolded in chronological order, easily demonstrating that due process standards had been satisfied.<sup>69</sup> In contrast to this chronological recounting, Justice Holmes's dissent isolated and focused on a kairos moment punctuating the passage of chronological time.<sup>70</sup> Like a documentary filmmaker, Justice Holmes turned the camera lens this way and that, and he was able to see and show not only the chronicle of events but also the crucial conflicts and tensions as they were embedded in the chronicle's symbolic and exemplary moments.

### *B. The Story of Leo Frank and Mary Phagan*

A few days after Mary Phagan's body was found in the basement of the National Pencil Company factory, Leo Frank

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66. *Id.* at 143–46.

67. *See infra* parts III(C) and III(D).

68. *See infra* part IV.

69. *Frank*, 237 U.S. at 344–45.

70. *Id.* at 345–46 (Holmes, J., dissenting) (noting “strong” anti-Frank hostility in courtroom crowd, applause upon announcement of guilty verdict, and the like).

was charged with her April 26, 1913, murder.<sup>71</sup> Frank, the twenty-nine-year-old superintendent of the factory, had moved to Atlanta nearly five years earlier; he had earned an engineering degree from Cornell and had gained experience at companies in Massachusetts and New York.<sup>72</sup> In Atlanta, he married Lucille Selig, the granddaughter of a co-founder of one of Atlanta's synagogues, and in 1913, he was elected president of a lodge of the B'Nai Brith.<sup>73</sup>

Phagan, the thirteen-year-old daughter of a white farmer, had moved with her mother and stepfather from Marietta (twenty miles away) to Atlanta. There she started working part-time in a factory at the age of ten. Following her first full-time job at eleven, she went to work at the National Pencil Company factory when she was twelve.<sup>74</sup> On the day before her body was discovered in the basement, she had visited the factory to pick up her paycheck from Frank.<sup>75</sup> He was the last person known to have seen her alive.<sup>76</sup>

Initially, there were several other suspects, including Newt Lee, the night watchman who found her body, and Jim Conley, a janitor at the factory.<sup>77</sup> But the prosecutors decided that the bulk of the evidence pointed to Frank, and he was tried for and convicted of the murder.<sup>78</sup> During the trial, the prosecutor portrayed Frank as a sexual pervert.<sup>79</sup> Conley, the janitor who had been arrested in connection with the murder, admitted writing two notes found near Phagan's body. During the trial, Conley claimed that Frank had confessed to the murder and that Frank had paid him to write down what Frank dictated and to help him move Phagan's body.<sup>80</sup>

On August 26, 1913, after four weeks of testimony, the jury found Frank guilty in less than four hours, and the judge

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71. ONEY, *supra* note 55, at 61–70.

72. *Id.* at 9–13.

73. *Id.*

74. *Id.* at 3–5.

75. *Id.* at 9, 29.

76. *Id.* at 62.

77. *Id.* at 22–33 (Lee), 118–44 (Conley).

78. *Id.* at 190–306, 340–44.

79. *Id.* at 363, 376 (referring to accusations of perversion and to “vile, vicious and damning stories”).

80. *Id.* at 238–57.

sentenced Frank to death.<sup>81</sup> Before the verdict, fearing a possibly violent public reaction, the judge had advised Frank and his lawyer not to be present in the courtroom when the verdict was announced.<sup>82</sup>

After a series of unsuccessful appeals and amidst continuing public controversy and national news coverage, the Supreme Court denied Frank's habeas petition.<sup>83</sup> Frank's sentence was subsequently commuted by Georgia Governor John Slaton.<sup>84</sup> The same day, a mob made its way to the governor's mansion, resulting in the declaration of martial law.<sup>85</sup> In Marietta, where Phagan's family had once lived, the governor was hanged in effigy, with a sign reading "John M. Slaton, King of the Jews and Traitor Governor of Georgia."<sup>86</sup>

Several days later, a group of men gathered in Marietta and started planning.<sup>87</sup> After an earlier effort was thwarted, the group of Marietta men who eventually traveled 150 miles to the Georgia State Prison Farm in Milledgeville encountered little resistance at its hospital, where they found and abducted Frank.<sup>88</sup> Taken by car back to the grounds of a cotton gin in Marietta, Frank was hanged.<sup>89</sup>

According to several rhetorical analyses of the Frank trial, characterizations of race, gender, and class were crucial to its conduct and results. Phagan was described as a "perfectly innocent child," and "the victim of a 'pervert'" while Frank was a "Northern Jew."<sup>90</sup> Frank was also characterized as "highly 'nervous,'" and the prosecutor introduced evidence intended to show "a history of womanizing and 'unnatural' behavior."<sup>91</sup>

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81. *Id.* at 340–44.

82. *Id.* at 340.

83. *Frank*, 237 U.S. at 345.

84. ONEY, *supra* note 55, at 469–512.

85. *Id.* at 503–04.

86. *Id.* at 504–05.

87. *Id.* at 513–28. The group included a former governor and a judge, although they would not personally participate in all the events that followed. *Id.*

88. *Id.* at 558–62. Frank was being treated in the prison hospital because he had been seriously injured in an attack by a fellow prisoner. *Id.* at 559.

89. *Id.* at 562–65.

90. HASIAN, *supra* note 65, at 132.

91. *Id.* at 136.



Conley played the role of the “‘good Negro,’ docile, single-minded, and truthful.”<sup>92</sup> According to one analyst, before the *Frank* trial, the public understanding of race in the South was predominantly binary: Blacks were poor, uneducated, and existed outside society.<sup>93</sup> In contrast, “[w]hites were . . . those by whom and for whom the law courts had been created; in the courts, whites dispensed justice and received justice.”<sup>94</sup> In Frank’s case, however, two black men had been considered as suspects and then passed over for prosecution.<sup>95</sup> “Moreover, one of the principal witnesses [against Frank] was black, and this case is often cited as the first time a black man was allowed to testify in a Southern court against a white man.”<sup>96</sup> What changed most, according at least one analysis, was the characterization of whiteness. “[W]hiteness was now openly contested and in some cases contingent.”<sup>97</sup>

Similarly, the trial affected the community’s views of gender and of what it meant to be “Southern.” Rather than the genteel Southern lady of means and refinement, a young girl who worked in a factory became the “iconic representation of a rural South that found itself violated by a financially healthy North.”<sup>98</sup>

### C. *Chronos and Justice Pitney*

Justice Pitney wrote for the Court in *Frank*.<sup>99</sup> Both his reasoning and his holding were confined by the timeline of chronos, the linear passage of events over time as accounted for within the appellate record. Justice Pitney describes this view of the process to which Frank was subject:

Frank, having been formally accused of a grave crime, was placed on trial before a court of competent jurisdiction,

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92. Lolita Buckner Inniss, *A Critical Legal Rhetoric Approach to In Re African-American Slave Descendants Litigation*, 24 J. OF CIVIL RIGHTS & ECON. DEV. 649, 683 (2010).

93. *Id.* at 684.

94. *Id.*

95. *Id.*

96. *Id.* at 685.

97. *Id.*

98. *Id.* at 683 (quoting Hasian, *supra* note 65).

99. 237 U.S. at 309–45.

with a jury lawfully constituted; he had a public trial, deliberately conducted, with the benefit of counsel for his defense; he was found guilty and sentenced pursuant to the laws of the state; twice he has moved the trial court to grant a new trial, and once to set aside the verdict as a nullity; three times he has been heard upon appeal before the court of last resort of that state, and in every instance the adverse action of the trial court has been affirmed; his allegations of hostile public sentiment and disorder in and about the court room, improperly influencing the trial court and the jury against him, have been rejected because found untrue in point of fact upon evidence presumably justifying that finding, and which he has not produced in the present proceeding; his contention that his lawful rights were infringed because he was not permitted to be present when the jury rendered its verdict has been set aside because it was waived by his failure to raise the objection in due season when fully cognizant of the facts.<sup>100</sup>

After recounting these events, one following the other without any conflict to interrupt the flow, Justice Pitney concluded that “[Frank] has been convicted, and is now held in custody, under ‘due process of law’ within the meaning of the Constitution.”<sup>101</sup> As Justice Pitney recounted the chronological lockstep of the judicial process, no outside facts from the defendant’s actual experience were allowed to intrude. The majority saw only that the appropriate forms of due process had been observed, one after the other:

- the court had jurisdiction,
- the jury was lawfully constituted,
- the trial was public, and
- the defendant had the benefit of counsel.

In his prefatory statement reviewing the findings of the Georgia Supreme Court, Justice Pitney minimized the effects of the public’s behavior on the courtroom atmosphere by labeling

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100. *Id.* at 344–45.

101. *Id.* at 345.

the claims as involving two “innocuous matter[s].”<sup>102</sup> He attributed the first claim, spectators laughing during the defendant’s evidence, to “a witty answer by the [defense’s] witness.”<sup>103</sup> As for the second, “spectators applaud[ing] the result of a colloquy between the solicitor general and counsel for the accused,”<sup>104</sup> he wrote that the judge quickly remedied the problem by expressing disapproval and calling on the sheriff to maintain order.<sup>105</sup>

Based on affidavits from jurors who said they were not affected, Justice Pitney rejected Frank’s claims that loud cheering in the streets had affected the jury as its members were polled.<sup>106</sup> He further discounted the effects of the public reaction on the jury by evaluating as a separate matter the trial judge’s advice to the defendant and his lawyer to stay out of the courtroom when the verdict was announced for fear of violent reprisal.<sup>107</sup> By isolating this point from his discussion of order within the courtroom, Justice Pitney was able to sidestep the combined inference that the judge and the jury felt pressured by the crowd inside the room and gathered outside in the streets.<sup>108</sup>

Although Justice Pitney addressed Frank’s account of what happened during the trial, both inside and outside the courtroom, he discussed it only to discredit it:

[T]he petition contains a narrative of disorder, hostile manifestations, and uproar, which, if it stood alone, and were taken as true, may be conceded to show an environment inconsistent with a fair trial and an impartial verdict. But to consider this as standing alone is to take a wholly superficial view.<sup>109</sup>

While acknowledging the “narrative,” Justice Pitney characterized it as incomplete or irrelevant. It had already been examined and dismissed by both the trial court and the Georgia

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102. *Id.* at 313.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 314.

107. *Id.* at 315–16.

108. *Id.*

109. *Id.* at 332.

Supreme Court, and so Justice Pitney implied that it was unnecessary for his Court to review it.<sup>110</sup>

Justice Pitney framed the issues narrowly, as questions of procedure, starting with whether the case was even properly before the Court.<sup>111</sup> Once he concluded that the case was properly brought, he emphasized the continuing procedural nature of the case:

[T]he essential question before us . . . is not the guilt or innocence of the prisoner, or the truth of any particular fact asserted by him, but whether the state, taking into view the entire course of its procedure, has deprived him of due process of law.<sup>112</sup>

Finally, he found that Frank had made a procedural error: He waited too long to raise an objection to his having been absent as the jury delivered the verdict.<sup>113</sup> By the time Justice Pitney reached the question presented, it was a foregone conclusion that Frank had received all the process that was due.

#### *D. Kairos and Justice Holmes*

Before filing the habeas petition raising the due process challenge, Frank had applied to two Supreme Court Justices for review of the denial of a new trial based on his absence from the court when the jury returned its verdict. As had Justice Lamar, Justice Holmes declined to issue the writ,<sup>114</sup> saying that he was bound by the decision of the Supreme Court of Georgia, but declaring that

[o]n these facts, I very seriously doubt if the petitioner (Frank) has had due process of law—not on the ground of his absence when the verdict was rendered so much as because of the trial taking place in the presence of a hostile demonstration and seemingly dangerous crowd, thought by

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110. *Id.* at 333.

111. *Id.* at 333–35.

112. *Id.* at 334.

113. *Id.* at 339–40 (noting that Frank’s first new-trial motion did not raise this ground).

114. ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 56 (2003).

the presiding Judge to be ready for violence unless a verdict of guilty was rendered.<sup>115</sup>

Later, in his dissent from denial of the habeas petition, Justice Holmes gave a much different account of the due process record than had Justice Pitney, focusing on moments during the trial rather than on the tidy chronology of the appellate process:

The trial began on July 28, 1913, at Atlanta, and was carried on in a court packed with spectators and surrounded by a crowd outside, all strongly hostile to the petitioner. On Saturday, August 23, this hostility was sufficient to lead the judge to confer in the presence of the jury with the chief of police of Atlanta and the colonel of the Fifth Georgia Regiment, stationed in that city, both of whom were known to the jury.<sup>116</sup>

Justice Holmes pointed out that members of the press had asked the court not to continue proceedings that evening because of the potential danger, and that the court had adjourned until the following Monday.<sup>117</sup> Further, “[o]n that morning, when the solicitor general entered the court, he was greeted with applause, stamping of feet and clapping of hands,” and the judge advised Frank’s counsel that it would be safer if not only Frank but also his lawyer were not present in the courtroom when the verdict was returned.<sup>118</sup> Finally, Justice Holmes focused again on the public’s response: “When the verdict was rendered, and before more than one of the jurymen had been polled, there was such a roar of applause that the polling could not go on until order was restored.”<sup>119</sup>

From Justice Holmes’s opinion, the reader learns that what Justice Pitney characterized as a routine “public trial” that proceeded according to form<sup>120</sup> was in fact a trial carried out in a courtroom packed with hostile spectators who clapped their hands and stamped their feet with approval when the solicitor general entered and then applauded again when the verdict was

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115. ONEY, *supra* note 55, at 449.

116. *Frank*, 237 U.S. at 345 (Holmes, J., dissenting).

117. *Id.* at 345–46 (Holmes, J., dissenting).

118. *Id.* at 346 (Holmes, J., dissenting).

119. *Id.* (Holmes, J., dissenting)

120. *See* text accompanying notes 100 & 101, *supra*.

rendered.<sup>121</sup> From Justice Holmes's opinion, the reader learns that even though Frank was represented by counsel, his counsel was advised that it would be safer for him and Frank to be absent from the courtroom when the verdict was returned.<sup>122</sup> Through these kinds of concrete details focusing on key moments from the conduct of the trial, Justice Holmes provided a basis for his conclusion that even if the process observed the appropriate form, the form itself was "empty."<sup>123</sup>

Even as he renders an apparently straightforward and chronological version of the facts, Justice Holmes carves out space, an opening for the distilled image of these points in time: As a result of these circumstances, "the trial was dominated by a hostile mob and was nothing but an empty form."<sup>124</sup>

#### IV. JUSTICE HOLMES AND KAIROS REALIZED

Not only does the past inform the present case, but the decision in the present case changes the past.<sup>125</sup>

Less than a decade after the decision in *Frank*, an almost indistinguishable trial and appellate process took place in Arkansas, where five African-Americans were convicted of murder and sentenced to death following a series of race riots.<sup>126</sup> Again the Supreme Court received a habeas petition raising the same due process issue decided in *Frank*, which had not been overruled or reconsidered in the intervening years. Yet the outcome in *Moore v. Dempsey*, with Justice Holmes writing for the Court, was an order directing the trial court to undertake an independent examination of the facts in the petition to determine if a due process violation had taken place.<sup>127</sup>

121. *Id.* at 345–46 (Holmes, J., dissenting).

122. *Id.* at 346 (Holmes, J., dissenting).

123. *Id.* at 346 (Holmes, J., dissenting).

124. *Id.* (Holmes, J., dissenting).

125. LINDA ROSS MEYER, *THE JUSTICE OF MERCY* 30 (2010).

126. *Moore v. Dempsey*, 261 U.S. 86, 89 (1923) (noting that, during the trial, "[t]he Court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result").

127. *Id.* at 92 (concluding that "the District Judge should find whether the facts alleged are true and whether they can be explained so far as to leave the state proceedings undisturbed" and directing that the case was "to stand for hearing before the District

Although the composition of the Court had shifted, *kairos* suggests that changed membership alone fails to explain the change in outcome.<sup>128</sup> Instead, Justice Holmes used the *kairic* opening he had begun to construct in *Frank* to send the denial of habeas back to the trial court for fact-finding.<sup>129</sup> When he wrote for the *Moore* majority, Justice Holmes gave no hint that he was in effect reversing the holding in *Frank*. In its structure and effect, Justice Holmes's decision in *Moore* is a quintessential example of the judicial use of *kairos* to bring about changes in the law.<sup>130</sup>

In *Moore*, the five defendants had been convicted of murder in the first degree and sentenced to death.<sup>131</sup> Their attorney called no witnesses, their trial lasted forty-five minutes, and the jury deliberated for five minutes.<sup>132</sup> After a lengthy appellate process, the defendants eventually filed a habeas petition in the United States District Court for the Eastern District of Arkansas, claiming that they had been denied due process because their trial was a trial only in form, not in substance, and that they were convicted under the pressure of a mob.<sup>133</sup>

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Court"). The hearing ordered in *Moore* was never held. J. S. Waterman & E. E. Overton, *The Aftermath of Moore v. Dempsey*, 18 ST. LOUIS L. REV. 117, 122 (1933). Instead, the defendants' counsel agreed to dismiss the petition if the prisoners' death sentences were commuted to twelve years. *Id.* Six years later, the prisoners received indefinite furloughs. *Id.* at 122–23.

128. See Eric M. Freedman, *Leo Frank Lives: Untangling The Historical Roots of Meaningful Federal Habeas Corpus Review of State Convictions*, 51 ALA. L. REV. 1467, 1499–1501 (2000) (indicating that almost half the Justices hearing *Moore* had not been on the Court when *Frank* was decided, but also pointing out that both lynchings and public concern about lynching were increasing when *Moore* was decided, and that the NAACP was then involved in a highly visible campaign in support of a federal anti-lynching law).

129. *Moore*, 261 U.S. at 92.

130. See Freedman, *supra* note 128, at 1472 (recognizing that both *Frank* and *Moore* "require in-depth federal habeas corpus review of state prisoner convictions" and concluding that their differing outcomes "reflect no more than differing discretionary determinations in specific factual settings"); see also Colin Starger, *Expanding Stare Decisis: The Role of Precedent in the Unfolding Dialectic of Brady v. Maryland*, 46 LOY. L.A. L. REV. 77 (2012) (mapping due-process doctrine as a continuing argument involving differing schools of legal thought).

131. 261 U.S. at 89–90.

132. *Id.* at 89.

133. *Id.* at 87.

According to the petition, as re-stated by Justice Holmes,

- On the night of September 30, 1919, a number of colored people assembled in their church were attacked and fired upon by a body of white men, and in the disturbance that followed a white man was killed.<sup>134</sup>
- [This event] was followed by the hunting down and shooting of many Negroes and also by the killing on October 1 of one Clinton Lee, a white man, for whose murder the petitioners were indicted.<sup>135</sup>

Following these killings, Justice Holmes notes, the government and the community responded in ways that were woven into the social fabric of the time and place:

- A Committee of Seven was appointed by the Governor in regard to what the committee called the “insurrection” in the county.<sup>136</sup>
- Shortly after the arrest of the petitioners a mob marched to the jail for the purpose of lynching them but were prevented by the presence of United States troops and the promise of some of the Committee of Seven and other leading officials that if the mob would refrain . . . they would execute those found guilty in the form of law.<sup>137</sup>

Justice Holmes then describes the defendants meeting their lawyer on the day their trial began, which was also the day on which it ended, for it took less than an hour:

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134. *Id.* For purposes of this analysis, I have presented individual sentences from the opinion as individual bullet points. In the original, some are combined and some are not.

135. *Id.*

136. *Id.* at 88.

137. *Id.* at 88–89.



- On November 3 the petitioners were brought into Court, informed that a certain lawyer was appointed their counsel and were placed on trial before a white jury—blacks being systematically excluded from both grand and petit juries.<sup>138</sup>
- The Court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result.<sup>139</sup>
- The counsel did not venture to demand delay or a change of venue, to challenge a juryman or to ask for separate trials.<sup>140</sup>
- He had had no preliminary consultation with the accused, called no witnesses for the defence although they could have been produced, and did not put the defendants on the stand.<sup>141</sup>
- The trial lasted about three-quarters of an hour and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree.<sup>142</sup>

After thus re-accounting for the facts as expressed by the *Moore* petitioners, Justice Holmes turned to the law, characterizing the majority opinion in *Frank* in a wholly new light. There, he said,

it was recognized of course that if in fact a trial is dominated by a mob so that there is an actual interference with the course of justice, there is a departure from due process of law; and that “if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced

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138. *Id.* at 89.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

by mob domination, the State deprives the accused of his life or liberty without due process of law.”<sup>143</sup>

Even though “mere mistakes of law” are not to be corrected by habeas corpus, Justice Holmes emphasized that these kinds of mistakes were not what was at stake in *Moore*.<sup>144</sup> Instead,

if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights.<sup>145</sup>

To further explain and support his reversal and order that the district court hear the facts of the case, Justice Holmes provided no further authorities or justification. And he referred not at all to the question of whether the Court’s opinion in *Moore* marked a change in the principles established in *Frank*. Instead, he wrote only that the Court would

not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void.<sup>146</sup>

Dissenting, Justice McReynolds uncovered the opening that Justice Holmes had quietly constructed and complained that the majority opinion in *Frank* had been set aside:

In [*Frank*], after great consideration a majority of this court approved the doctrine which should be applied here. The doctrine is right and wholesome. I can not agree now to put it aside and substitute the views expressed by the minority of the court in that cause.<sup>147</sup>

He went on to consider the record, virtually echoing the majority in *Frank* by finding that there was nothing unusual in a record silent about irregularities. Instead, the record as he recounted it

143. *Id.* at 90–91.

144. *Id.* at 91.

145. *Id.*

146. *Id.* at 92.

147. *Id.* at 93 (McReynolds, J., dissenting).

seemingly captured the deliberate due process of the judicial system:<sup>148</sup>

- There was the complete record of the cause in the state courts—trial and Supreme—showing no irregularity.<sup>149</sup>
- After indictment the defendants were arraigned for trial and eminent counsel appointed to defend them.
  - He cross-examined the witnesses, made exceptions, and evidently was careful to preserve a full and complete transcript of the proceedings.<sup>150</sup>
- The trial was unusually short but there is nothing in the record<sup>151</sup> to indicate that it was illegally hastened.
- November 3, 1919, the jury returned a verdict of “guilty”; November 11th the defendants were sentenced to be executed on December 27th; December 20th new counsel chosen by them or their friends moved for a new trial and supported the motion by affidavits.<sup>152</sup>
  - This motion questioned the validity of the conviction upon the very grounds now advanced.<sup>153</sup>

Given this accounting, Justice McReynolds concluded that he was “unable to say that the District Judge, acquainted with local

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148. As before, I have presented individual sentences from this opinion as separate bullet points.

149. *Id.* at 96 (McReynolds, J., dissenting).

150. *Id.* (McReynolds, J., dissenting).

151. *Id.* (McReynolds, J., dissenting).

152. *Id.* at 96–97 (McReynolds, J., dissenting).

153. *Id.* at 97 (McReynolds, J., dissenting).

conditions, erred when he held the petition for the writ of habeas corpus insufficient.”<sup>154</sup>

In *Moore* as in *Frank*, Justice Holmes appeared to provide a conventionally chronological accounting for the facts of the trial. But within that chronological account, he carved away the outward form of the trial to show the essential space within, the points in time from which it appeared clear that a mob had dominated the judicial process. Taking advantage of the opening that first emerged in his *Frank* dissent, Justice Holmes was able to move through it to order a new hearing in *Moore*: If in fact the trial has been dominated by a mob, there has been no due process. Given that, the trial court must be given the opportunity to make the crucial factual finding on remand.

The kairos explanation of Justice Holmes’s work turns on timely intersections. The time for recognizing the empty form of a trial was not yet opportune when Justice Holmes wrote his *Frank* dissent. But that dissent pulled a thread in the tightly woven judicial fabric constructed by law, history, culture, and social forces. By the time of *Moore*, the weave had loosened, the fabric had become more open, and Justice Holmes was able to tear an opening that was large enough to accommodate his ruling.

#### V. CHIEF JUSTICE ROBERTS, KAIROS, AND THE LIFE OF THE VOTING RIGHTS ACT

Much as Justice Holmes used his dissent in *Frank* to set up an opportune moment nearly ten years later in *Moore*, Chief Justice Roberts constructed a kairic moment by crafting a compromise majority opinion on the Voting Rights Act (VRA).<sup>155</sup> Through this means, Chief Justice Roberts was able

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154. *Id.* at 101 (McReynolds, J., dissenting).

155. Many thanks to Ruth Anne Robbins for reminding me that I expressed this concept at a presentation about kairos. Others have suggested similar concepts in different terms, including at least one reference to the embedding of “time bombs” in opinions to be detonated in later cases. Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779 (2012). Justices Kennedy, Breyer, and Ginsburg are said to have sent “messages about the kinds of cases they would like to hear” in recent opinions. Adam Liptak, *With Subtle Signals, Justices Request the Cases They Want to Hear*, N.Y. TIMES A14 (July 7, 2015) (referring to Justice Kennedy’s apparent interest in the Court’s receiving a case about

later to take advantage of an opportune moment that changed the course of the VRA.

The opportunity was seeded in *Northwest Austin Municipal Utility District No. 1 v. Holder*,<sup>156</sup> decided with only Justice Thomas in dissent. The opportunity was harvested in *Shelby County v. Holder*,<sup>157</sup> in which the Chief Justice “relied heavily on his opinion in a predecessor case [*Northwest Austin*] . . . that expressed strong constitutional doubts about the Voting Rights Act but stopped just short of pulling the trigger.”<sup>158</sup> The Justices who might have been expected to preserve the VRA were silent when the majority in *Northwest Austin* expressed its constitutional doubts.<sup>159</sup> And by that silence, they effectively

signed on to the chief justice’s critique of Section 5—his now famous claim that “things have changed in the South,” as well as his assertion that the Voting Rights Act’s past accomplishment was not by itself “adequate justification to retain the preclearance requirements.”<sup>160</sup>

Because they did not dissent, “the liberal justices even subscribed to the argument that ‘a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.’”<sup>161</sup> This “fundamental principle” was a centerpiece of Chief Justice Roberts’s later opinion in *Shelby County*, becoming “the constitutional basis for his critique of requiring some states but not others to obtain the federal government’s approval before making changes in voting procedures.”<sup>162</sup>

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solitary confinement and to Justices Breyer and Ginsburg’s apparent interest in its receiving a case about the death penalty).

156. 557 U.S. 193 (2009).

157. \_\_\_ U.S. \_\_\_, 133 S. Ct. 2612 (2013).

158. Linda Greenhouse, *The Cost of Compromise*, N.Y. TIMES OPINIONATOR (July 10, 2013, 9:00 PM), <http://opinionator.blogs.nytimes.com/2013/07/10/the-cost-of-compromise/>.

159. *Id.* (characterizing the Court’s “liberal bloc at the time” as consisting of Justices Ginsburg, Breyer, and Souter, and suggesting that they had joined the earlier opinion in order to buy the VRA a little more time—hoping, perhaps, that Congress would update it before another VRA case came before the Court).

160. *Id.*

161. *Id.*

162. *Id.*

Emphasizing the opening created by the compromise in *Northwest Austin*, Chief Justice Roberts reminded the *Shelby County* dissenters that they had agreed to this: “Eight members of the court subscribed to these views”<sup>163</sup> in *Northwest Austin*. He even chastised the dissent for “analyz[ing] the question presented as if our decision in *Northwest Austin* never happened,” and for “refus[ing] to consider the principle of equal sovereignty, despite *Northwest Austin*’s emphasis on its significance.”<sup>164</sup>

Chief Justice Roberts’s movement through the opening he created is kairic in every sense, emphasizing the crucial interplay of time, place, and opportunity for action. First, he characterized the VRA as a one-in-a-million legislative response to a once-in-a-lifetime situation: It “employed extraordinary measures to address an extraordinary problem.”<sup>165</sup> The requirement that states get federal permission before enacting laws about voting was “a drastic departure from basic principles of federalism,”<sup>166</sup> as was the requirement’s application to only some states—“an equally dramatic departure from the principle that all States enjoy equal sovereignty.”<sup>167</sup>

Then, he turned to the kairic setting he had created: Granted that voting discrimination still exists, the question of the moment was whether the “current burdens” were “justified by current needs.”<sup>168</sup> The existence of a question of the moment creates the need for action in that moment.

Like Justice Holmes, Chief Justice Roberts wrote as though his decision was unremarkable and strictly in line with both precedent and the expectations of the judicial role. It was, in his view, the dissent that was taking remarkable action, ignoring prior precedent by “refus[ing] to consider the principle of equal sovereignty, despite *Northwest Austin*’s emphasis on its significance.”<sup>169</sup> Moreover, everything about the history of the question pointed to the finding that a less-stringent enforcement

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163. *Shelby County*, 133 S. Ct. at 2621.

164. *Id.* at 2630.

165. *Id.* at 2618.

166. *Id.*

167. *Id.*

168. *Id.* at 2619 (quoting *Northwest Austin*).

169. *Id.* at 2630.

of the voting-rights requirements was needed because circumstances had changed: In *Northwest Austin*, the Court had “emphasized the ‘dramatic’ progress since 1965.”<sup>170</sup>

So as the Chief Justice saw it, the law and the facts were on his side. Further, the occasion was appropriate because *Northwest Austin* had put everyone on notice that something needed to be done:

[I]n issuing that decision, we expressed our broader concerns about the constitutionality of the Act. Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) unconstitutional.”<sup>171</sup>

Finally, the action was fitting and proper for the occasion. The decision was no bigger than the opening that had been created, and took only a small step because it “in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2,” and includes “no holding on § 5 itself, only on the coverage formula.”<sup>172</sup>

Even though others might have claimed that the right moment had not yet arrived, Chief Justice Roberts concluded that “[o]ur country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”<sup>173</sup>

## VI. JUSTICE ALITO, KAIROS, AND THE GROWTH OF CORPORATE RIGHTS

An unusually obvious setup of the most opportune moment occurred in *Citizens United v. FEC*.<sup>174</sup> After scheduling the case for re-argument and adding the question of whether two prior

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170. *Id.* (quoting *Northwest Austin*, 557 U.S. at 201).

171. *Id.* at 2631.

172. *Id.*

173. *Id.*

174. 558 U.S. 310 (2010) (striking down corporate campaign-finance spending limits and overruling both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and *McConnell v. FEC*, 540 U.S. 93 (2013)).

cases should be overruled,<sup>175</sup> the Supreme Court decided that the answer was yes.<sup>176</sup> This decision meant that corporations would thereafter be treated as if they were individual speakers when it came to spending (a stand-in for the free expression protected by the First Amendment) in political campaigns.

Once *Citizens United* had been decided, the most opportune moment for an argument to expand corporate rights to encompass religious expression appeared within grasp. As the Tenth Circuit wrote, “the First Amendment logic of *Citizens United* . . . where the Supreme Court has recognized a First Amendment right of for-profit corporations to express themselves for political purposes” applies as well to religion.<sup>177</sup> Thus, the Tenth Circuit could discern “no reason the Supreme Court would recognize constitutional protection for a corporation’s political expression but not its religious expression.”<sup>178</sup>

Indeed, apparently following just this logic, the Court decided in *Burwell v. Hobby Lobby Stores, Inc.*<sup>179</sup> that the protections provided for “a person” by the Religious Freedom Restoration Act (RFRA) should be extended to protect some corporations.<sup>180</sup> Thus, the Court held, requiring a closely held corporation to provide insurance for contraceptives in violation of its owners’ religious beliefs was prohibited under RFRA. This

175. Order in Pending Case 2–3, *Citizens United v. FEC*, <http://www.supremecourt.gov/orders/courtorders/062909zr.pdf> (U.S. June 29, 2009) (No. 08-205) (restoring case to calendar for reargument and directing parties to file supplemental briefs addressing whether the Court should “overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and . . . part of *McConnell v. Federal Election Comm’n*, 540 U.S. 93 (2003)”); see also *Citizens United*, 558 U.S. at 398 (Stevens, J., dissenting) (asserting that “[f]ive Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law”).

176. 558 U.S. at 365–66.

177. *Hobby Lobby Stores Inc. v. Sebelius*, 723 F.3d 1114, 1135 (10th Cir. 2013) (citation omitted). *Hobby Lobby* was consolidated at the Supreme Court with *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (3d Cir. 2013), in which the Third Circuit had rejected the same package of arguments.

178. *Hobby Lobby*, 723 F.3d at 1135.

179. \_\_\_ U.S. \_\_\_, 134 S. Ct. 2751 (2014).

180. *Id.* at 2768, 2769 (pointing out that “protecting the free-exercise rights of corporations like *Hobby Lobby*, *Conestoga*, and *Mardel* protects the religious liberty of the humans who own and control those companies,” and that “allowing *Hobby Lobby*, *Conestoga*, and *Mardel* to assert RFRA claims protects the religious liberty” of the families who control these closely held corporations).



holding was based on the Court's acquiescence in the corporate argument that a corporation takes on the religious beliefs of its owners.<sup>181</sup>

Writing for the Court in *Hobby Lobby*, Justice Alito captured essential moments in time by telling the story of the creation of the corporate plaintiffs. Isolating the creation moments from the chronological timeline of the case as docketed allowed him to distill the essence of his reasoning that “protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.”<sup>182</sup>

To construct an image of a corporate entity with religious beliefs, Justice Alito captured singular moments involving the humans who had owned and controlled those companies over the years. At the beginning of his description of the Hobby Lobby facts,<sup>183</sup> he wrote:

- David and Barbara Green and their three children are Christians who own and operate two family businesses.<sup>184</sup>
- Forty-five years ago, David Green started an arts-and-crafts store that has grown into a nationwide chain called Hobby Lobby.<sup>185</sup>
- There are now 500 Hobby Lobby stores, and the company has more than 13,000 employees.<sup>186</sup>
- Hobby Lobby is organized as a for-profit corporation under Oklahoma law.<sup>187</sup>

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181. *Id.* at 2774–75.

182. *Id.* at 2768.

183. As before, I have presented individual sentences from this opinion as separate bullet points.

184. *Id.* at 2765.

185. *Id.*

186. *Id.* (citation omitted).

187. *Id.*

- One of David’s sons started an affiliated business, Mardel, which operates 35 Christian bookstores and employs close to 400 people.<sup>188</sup>
- Mardel is also organized as a for-profit corporation under Oklahoma law.<sup>189</sup>

Concentrating on the long-ago creation moments of the corporation involved in the companion case, Justice Alito wrote:

- Norman and Elizabeth Hahn and their three sons are devout members of the Mennonite Church, a Christian denomination. The Mennonite Church opposes abortion and believes that “[t]he fetus in its earliest stages . . . shares humanity with those who conceived it.”<sup>190</sup>
- Fifty years ago, Norman Hahn started a wood-working business in his garage, and since then, this company, Conestoga Wood Specialties, has grown and now has 950 employees.<sup>191</sup>
- Conestoga is organized under Pennsylvania law as a for-profit corporation.<sup>192</sup>
- The Hahns exercise sole ownership of the closely held business; they control its board of directors and hold all of its voting shares.<sup>193</sup>
- One of the Hahn sons serves as the president and CEO.<sup>194</sup>

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188. *Id.* (citation omitted).

189. *Id.*

190. *Id.* at 2764.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

Analyzed from a kairic perspective, Justice Alito's text first isolated and then projected an extreme close-up of what he might characterize as the essential moments. The result was a necessarily narrow focus on the image of these corporations-as-religious-believers. In Justice Alito's view, these corporate characters acquired the sincere religious beliefs of their human creators. Just as *Citizens United* found that corporations should be able to express political views, Justice Alito found that corporations should be protected in their free exercise of religion. To support this result, the essential moment in the chronological timeline (which for these companies covered between forty-five and fifty years) was not the choice to incorporate, not the decision to have thousands of employees and to expand to 500 stores, and not the decision to pay taxes and to be subject to health and safety regulations. Instead, the essential moment was the founding of a family business or a closely held company by a family whose members included Christian believers. Even in the face of neutral laws of general applicability, in Justice Alito's view, these moments of corporate creation were the only times and places that counted.<sup>195</sup>

## VII. CONCLUSION

The art of rhetoric seeks to capture in opportune moments that which is appropriate and attempts to suggest that which is possible.<sup>196</sup>

As a century of Supreme Court opinions has demonstrated, kairos helps us capture the opportune and essential moments for effectively pursuing change. While chronological time equips us with a sense of movement, measurement, and before-and-after, chronos renders time as a continuous grid.<sup>197</sup> It is only through our use of kairos that we are able to discern openings and detect

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195. *Id.* at 2767 (noting that “RFRA was designed to provide very broad protection for religious liberty,” and suggesting that there was no reason “to think that the Congress that enacted such sweeping protection put small-business owners to the choice that HHS suggests”).

196. Poulakos, *supra* note 28, at 26.

197. Smith, *supra* note 6, at 6.

seasons. Without *chronos*, we lack the necessary background; without *kairos*, we would miss the conflicts and tensions that lead to discovery, decision, and action.

Critics might conclude that *kairos* is both relativistic and opportunistic. Through her understanding of *kairos*, the writer or speaker who recognizes the right time and space for a particular argument may be able to persuade others to adopt a position that is short-sighted, selfish, and unjust. Yet the concept of *kairos* itself suggests a rhetorician's answer to the resulting dilemma, though that answer is naturally—perhaps inevitably—not completely satisfying. Not only must a rhetorical claim be made at the right time and within the right space, it must also be made in the right way. In other words, it must fit the setting, including the audience and the occasion for the argument. These decisions of timeliness and appropriateness are “artistic elements” that “cannot be apprehended strictly cognitively and whose application cannot be learnt mechanically.”<sup>198</sup> Instead, they are “a matter of feeling,”<sup>199</sup> a kind of practical wisdom that can only be learned and tested through experience in the world.<sup>200</sup> And, as truly rhetorical questions, they are always subject to contest and argument.

Reassuring too is the conclusion that the world's happenings “have their own temporal frames and opportune times quite apart from human action especially the action of this or that individual.”<sup>201</sup> Like the vintner concerned with the right time to harvest her grapes, the members of the Supreme Court must depend not only on their own art and technique, including their sense of *kairos*, but also on the conditions that make up the whole of legal rhetoric.<sup>202</sup>

198. Poulakos, *supra* note 28, at 29 (footnote omitted).

199. *Id.*

200. *Id.* at 29–30.

201. Smith, *supra* note 6, at 5.

202. *See id.* (pointing out that “the vintner will be concerned with the ‘right time’ to harvest the grapes, but, while not meaning to minimize the art and ingenuity of the vintner, the fact remains that this time will be largely a function of conditions—soil, temperature, moisture—ingredient in the growing process itself, to say nothing of the organic structure of the grapes and the time required for their maturation”).