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OF MORAL OUTRAGE IN JUDICIAL OPINIONS

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Moral outrage is a substantive and remedial feature of our laws, and the Article addresses three questions overlooked in the scholarly literature. What do judges mean when they currently express moral outrage in the remedies portion of their opinions? Should judges express such moral outrage at all? If so, when? Relying on a branch of legal philosophy known as hermeneutics that deals with the interpretation and understanding of texts, the Article argues that in interpreting and understanding cases judges should express moral outrage when faced with individuals from communities whose voice has historically been at risk, is currently at risk, or is likely to be at risk of being silenced. The Article draws from water law, tort law, employment

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discrimination, property, and family law, among others, to offer the core insight that moral outrage should be its own emphatic remedy, and a philosophically informed approach to judicial interpretation requires expressions of moral outrage from the bench to address ongoing injustice or the threat of injustice directed at vulnerable communities such as women and religious minorities in the current political climate in the United States.

INTRODUCTION

The present political and cultural moment is one of perpetual outrage. The president is constantly outraged, so much so that he communicates his displeasure to the world at all hours, and in the process, outrages others.[1] Members of Congress and their constituents

1. *See* Stephen Castle, *Trump's Tweets Manage a Rare Feat: Uniting Britain, in Outrage*, N.Y. TIMES (Nov. 30, 2017), https://www.nytimes.com/2017/11/30/world/europe

are outraged by this president and this moment in time.[2] Members of both parties are outraged at each other, so much so that they are shocked, *shocked,* that the other party and its supporters are doing what they are doing, which is an incomprehensible way of doing things, after all.[3] Newspapers are appalled, *appalled,* at what things have come to under these leaders in this moment in time.[4] Americans are disgusted, *disgusted,* at how bad things are in Washington [D.C.].[5] To live in the United States in this moment is to be angry, appalled, disgusted, indignant, shocked—that is, outraged—about something, some things, or about everything.[6] Indeed, to not be outraged about something—even at the amount of outrage in public discourse—might be considered somewhat anomalous at this moment in time.

Moral outrage is a fixture of our laws.[7] It encompasses such doctrinal landmarks as "the tort of outrage" (intentional infliction of emotional distress or IIED), the "shocks the conscience" standard in constitutional law, contempt proceedings at equity, jury deliberations in general, and—not so doctrinally—whenever a judge elects to insert outrage into a case or opinion.[8] Moral outrage includes a number of

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/trump-tweets-uk-visit.html [https://perma.cc/9VXU-LPEB]; Ben Jacobs, *Trump Uses Twitter to Bash New York Times Coverage and Letter to Subscribers*, GUARDIAN (Nov. 13, 2016), https://www.theguardian.com/us-news/2016/nov/13/trump-twitter-new-york-times [https://perma.cc/57A7-UUGN].

2. *See, e.g.*, Burgess Everett & Rachael Bade, *Conservatives Floored by Trump's Gun Control Lovefest*, POLITICO (Mar. 1, 2018, 6:49PM), https://www.politico.com/story/2018/03/01/trump-gun-control-conservatives-gop-nra-432783 [https://perma.cc/A29A-RYLF]; Tom Howell, Jr., *Conservatives outraged at Trump's Funding to Subsidize Obamacare Insurers*, WASH. TIMES (Feb. 18, 2018), https://www.washingtontimes.com/news/2018/feb/18/donald-trumps-obamacare-funds-anger-conservatives [https://perma.cc/5V9C-Y9SC].

3. *See, e.g.*, Nicholas Kristof, *You're Wrong! I'm Right!*, N.Y. TIMES (Feb. 17, 2018), https://www.nytimes.com/2018/02/17/opinion/sunday/liberal-conservative-divide.html [https://perma.cc/Y3GA-7264]; Sean Sullivan, *Sen. Orrin Hatch apologizes for calling Obamacare supporters "dumbass" people*, WASH. POST (Mar. 2, 2018), https://www.washingtonpost.com/news/powerpost/wp/2018/03/02/sen-orrin-hatch-apologizes-for-calling-obamacare-supporters-dumbass-people/?utm_term=.8c46ceb5d817 [https://perma.cc/4N2L-2JSF].

4. *See, e.g.*, *Trump's 'Best People' and Their Dubious Ethics*, N.Y. TIMES (Feb. 18, 2018), https://www.nytimes.com/2018/02/18/opinion/trump-best-people-ethics.html [https://perma.cc/X4QU-VRZ2]; Paul Krugman, *The Uses of Outrage*, N.Y. TIMES (Feb. 27, 2017), https://www.nytimes.com/2017/02/27/opinion/the-uses-of-outrage.html [https://perma.cc/P4Y8-GT66].

5. *See, e.g.*, Alan Greenblatt, *Voters Angry at Washington Gridlock May Want to Look in the Mirror*, NPR (Oct. 1, 2012, 1:03 PM), https://www.npr.org/sections/itsallpolitics/2012/10/01/162084449/voters-angry-at-washington-gridlock-may-want-to-look-in-the-mirror [https://perma.cc/6AJB-G8CJ].

6. *See, e.g.*, Charles Duhigg, *The Real Roots of American Rage*, THE ATLANTIC (Jan. 2019), https://www.theatlantic.com/magazine/archive/2019/01/charles-duhigg-american-anger/576424 [https:perma.cc/7Z3V-9NHM].

7. *See* Cass R. Sunstein, *Outrage*, 2 UTAH L. REV. 717, 717–18 (2002).

8. *See infra* Part I.

remedies including punitive and compensatory damage awards, as well as injunctions, among others.[9] That is, both substantively and remedially, moral outrage is a mainstay of our laws and our courts use these legal tools daily.[10]

In engaging with these legal tools, commentators have mainly focused on public expressions of outrage embodied in a number of substantive areas, including constitutional law, corporate governance, criminal law, environmental law, remedies law, securities law, and tort law, among others.[11] Much attention has been devoted to punitive damage awards, in particular, and very little to expressions of *judicial* outrage in the remedies phase of a proceeding or opinion.[12] Indeed, judicial outrage has also received scant attention from remedies scholars despite the centuries-deep trajectory of remedies law.[13] For the purposes of my argument, judicial outrage includes not only what the judge herself does but also how she interacts with the work of the jury and the legislature.

Given the existence of moral outrage in our laws, the question becomes one of channeling. However discomfiting moral outrage might be, to what uses should judges put the outrage that is already available to them in our legal system, and when, for whom, why, and how should they do so? Since commentators have largely focused on the

9. *See id.*

10. *See* Sunstein, *supra* note 7, at 717–18.

11. For constitutional law, see Andrew Coan, *Well, Should They?: A Response to* If People Would Be Outraged by Their Rulings, Should Judges Care?, 60 STAN. L. REV. 213, 213–16 (2007) (public outrage)*;* Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 157 (2007) (public outrage). For corporate governance, see LUCIAN ARYE BEBCHUK & JESSE M. FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 64–66 (2006) ("outrage constraint," which limits managerial arrangements); Miriam H. Baer, *Choosing Punishment*, 32 B.U. L. REV. 577, 583 (2012) [hereinafter Baer, *Choosing Punishment*] (public outrage). For criminal law, see Baer, *Choosing Punishment*, *supra*, at 589 (public outrage); Sunstein, *supra* note 7, at 718 (the public and outrage). On the expressive function of punishment in criminal law, see Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 598, 602–03 (1996) (public morality, values, and social meanings of punishment as expressive language). For environmental law, see Christopher H. Schroeder, *Cool Analysis Versus Moral Outrage in the Development of Federal Environmental Criminal Law*, 35 WM. & MARY L. REV 251, 255 (1993) ("the morally outraged"); David B. Spence, *The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law*, 89 CALIF. L. REV. 917, 929–30 (2001) (public outrage). For remedies law, see Sunstein, *supra* note 7, at 718 (the public and outrage); Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2095–96 (1998) [hereinafter Sunstein et al., *Punitive Damages*] (public outrage). For securities law, see Baer, *Choosing Punishment*, *supra*, at 621–24 (public outrage). For tort law, see Sunstein, *supra* note 7, at 718; *see also* Eric L. Muller, *Constitutional Conscience*, 83 B.U. L. REV. 1017, 1077 (2003) (shocks the conscience); Merle H. Weiner, *Domestic Violence and the Per Se Standard of Outrage*, 54 MD. L. REV. 183, 183, 225, 228 (1995) (tort law).

12. *See infra* Part I.

13. *See id.*

substantive dimension of moral outrage, my argument dwells on its *remedial* implications, which bears on every other area of the law.[14]

The range of cases selected in this Article attests not only to the omnipresence of remedies in American law but also to the centrality of remedies in the resolution of a diversity of legal disputes from areas as divergent as water law and family law, among others.[15] Remedies matter because whenever we discuss a substantive claim in any area of the law we also imply a remedy the plaintiff seeks. The remedy is the anticipated judicial result that informs and often frames the outcome of the dispute, and it often determines whether a case should be brought in the first place or not.[16]

My argument is straightforward. A philosophically grounded approach to legal interpretation (hermeneutics) underscores the necessity of expressions of moral outrage when the human dignity of vulnerable communities is at risk, such as women and religious minorities, in a range of selected cases.[17] The three anchor cases on which I rely reflect when judicial moral outrage would be appropriate and when it would be misguided.[18] Two cases are federal cases (water rights, employment discrimination) that were decided by the Supreme Court of the United States, and one is a state law case (family law) that did not reach the state's highest court.[19] The cases attest to the conditions under which moral outrage is appropriate and when its expression is misguided.[20]

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14. *Id.*

15. *See* Kansas v. Nebraska, 574 U.S. 445, 448 (2015); Sheridan v. Sheridan, 589 A.2d 1067, 1068–69 (N.J. Super. Ct. Ch. Div. 1990); Sunstein, *supra* note 7, at 717–18.

16. *See* Douglas Laycock, *Introduction to Symposium, Remedies: Justice and the Bottom Line*, 27 REV. LITIG. 1, 2 (2007). As Laycock observes, it is the pursuit of a remedy that makes a lawsuit meaningful:

> The remedy is what the client gets, the practical payoff of litigation, the bottom line of justice. Even when the client cares about the precedent, the precedent is important because it will lead to the grant or denial of remedies in future cases, and because the deterrent effect of those remedies, or the prospect of not having to worry about any more remedies, will guide the defendant's behavior. Without the prospect of an effective remedy, a claim of right is meaningless.

Id.

17. On the human dignity of vulnerable communities, see David Luban, *Human Rights Pragmatism and Human Dignity*, *in* PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 263, 273–74 (Rowan Cruft, S. Matthew Liao & Massimo Renzo, eds., 2015) [hereinafter Luban, *Human Rights Pragmatism*]; David Luban, *Human Dignity, Humiliation and Torture*, 19 KENNEDY INST. ETHICS J. 211, 220 (2009); David Luban, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 838 (2005) [hereinafter Luban, *Lawyers as Upholders*]; Duane Rudolph, *Workers, Dignity, and Equitable Tolling*, 15 NW. J. HUM. RTS. 126, 139, 148, 158 (2017).

18. *See infra* Introduction.D.

19. *See* Kansas v. Nebraska, 135 S. Ct. 1042, 1048–49 (U.S. 2015); EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2031 (U.S. 2015); *Sheridan*, 589 A.2d at 1068.

20. *See infra* Introduction.D.

A. The Kansas-Nebraska Story

Kansas and Nebraska were signatories to an interstate water compact apportioning water in the Republican River Basin, which straddles the boundaries between Colorado, Nebraska, and Kansas.[21] The compact apportioned roughly 40% of the Basin's water to Kansas, roughly 49% to Nebraska, and roughly 11% to Colorado.[22] In the first lawsuit, Kansas faulted Nebraska's sinking of several thousand wells in the Basin that depleted groundwater in an area that produces wheat and corn, among other crops.[23] The Supreme Court of the United States agreed with Kansas and the states negotiated a settlement.[24] Within five years of the settlement, the states again relied on the Supreme Court's original jurisdiction to resolve their complaints about each other's conduct.[25] This time, Kansas argued that Nebraska "had substantially exceeded its allocation of water" and Nebraska contested how water was accounted for under the settlement agreement.[26] Kansas requested monetary and injunctive relief and Nebraska modification of the accounting procedures governing water use in the Basin.[27]

B. The Elauf Story

Samantha Elauf, a seventeen-year-old Muslim, applied for a job as a "model" in 2008 at an Abercrombie & Fitch Kids Store in a Tulsa, Oklahoma mall.[28] Abercrombie & Fitch (Abercrombie) refused to hire Ms. Elauf because she wore a head scarf or hijab, which the retail chain deemed would violate its "Look Policy" prohibiting "hats" or "caps" of any kind.[29] Based on their sex, Abercrombie's sales associates, known as "models," were required to observe certain dress codes; these requirements did not apply to job applicants.[30]

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21. *Kansas*, 135 S. Ct. at 1049.
22. *Id.*
23. *Id.* at 1049–50.
24. *Id.* at 1050.
25. *Id.* at 1050–51.
26. *Id.*
27. *Kansas*, 135 S. Ct. at 1051.
28. EEOC v. Abercrombie & Fitch Stores, Inc., 798 F. Supp. 2d 1272, 1275–76 (N.D. Okla. 2011).
29. *Id.* at 1275, 1278, 1283 n.6.
30. *Id.* at 1275 ("[Abercrombie requires] employees to dress in clothing and merchandise consistent with that sold in the store; requires that male employees be clean shaven; prohibits female employees from wearing necklaces and bracelets; requires employees to wear specific types of shoes; and prohibits 'caps' but does not mention any other head wear.").

Ms. Elauf had chosen to wear a hijab since puberty as she considered it "a representation and reminder of her faith, a religious symbol, a symbol of Islam and of modesty."[31] For religious reasons, Ms. Elauf did not drink, gamble, or party; she prayed and read the Quran twice a month; prayed and fasted during Ramadan; and she tried to wear clothing that covered most of her arms and legs.[32] To her interview Ms. Elauf wore a black hijab, "an Abercrombie & Fitch like T-shirt and jeans," and her interviewer testified that she had previously seen Ms. Elauf wear a hijab around the mall; Abercrombie disapproved of the color black for models' clothing.[33] Disapproving of Ms. Elauf's hijab, the district manager allegedly ordered that Ms. Elauf's interview evaluation scores be retroactively lowered to make her ineligible for hiring, which was done.[34]

On Ms. Elauf's behalf, the United States Equal Employment Opportunity Commission (EEOC) brought suit against Abercrombie, alleging workplace religious discrimination in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(f)(1) & (3)) and Title I of the Civil Rights Act of 1991 (42 U.S.C. § 1981a).[35] The EEOC "sought injunctive relief, back pay, and damages."[36] Under federal law, absent the likelihood of undue hardship on its business, Abercrombie was required to make a reasonable accommodation of Ms. Elauf's sincerely held religious beliefs, which would include accepting her wearing a hijab in the workplace.[37]

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31. *Id.* at 1276, 1284 (Ms. Elauf also testified that not all women in her family wore a hijab).

32. *Id.* at 1276.

33. *Id.* at 1277.

34. *Abercrombie*, 798 F. Supp. 2d at 1279.

35. *Id.* at 1275, 1282 (In discrimination cases, Title VII imposes a burden-shifting regime on employee and employer, known as "McDonnell Douglas burden shifting." As rehearsed in *Abercrombie*: "First, the plaintiff initially bears the burden of production with respect to a prima facie case by showing that (1) she had a bona fide religious belief that conflicts with an employment requirement; (2) she informed the employer of this belief; and (3) she was not hired for failing to comply with the employment requirement. The burden then shifts to the defendant, who must: (1) conclusively rebut one or more elements of the plaintiff's prima facie case, (2) show that it offered a reasonable accommodation, or (3) show that it was unable to accommodate the employee's religious needs reasonably without undue hardship." (internal citations and quotation marks omitted)).

36. EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1114 (10th Cir. 2013).

37. *See Abercrombie*, 798 F. Supp. 2d at 1282, 1285 (indicating that the reasonable accommodation discussion initiates an "interactive process of accommodation" between employer and employee); *see also Religious Discrimination,* U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/types/religion.cfm [https://perma.cc/A7GH-BH56] (last visited Nov. 24, 2019) ("An accommodation may cause undue hardship if it is costly, compromises workplace safety, decreases workplace efficiency, infringes on the rights of other employees, or requires other employees to do more than their share of potentially hazardous or burdensome work.").

C. The Sheridan Story

Suzanne E. Sheridan and Charles L. Sheridan's twelve-year marriage was a "rags-to-riches affair" that reverted to rags in 1989.[38] The New Jersey couple's "economic rollercoaster ride" was the result of unreported income obtained from Mr. Sheridan's work as a truck driver in which position he "conspired with his employer to skim large corporate and institutional oil deliveries (billing for more oil than delivered).[39] Mr. Sheridan and his employer "would then sell the undelivered, excess oil to third entities."[40] The illicit income allowed the Sheridan family to abandon their home and its furnishings to foreclosure following which they purchased a new home with cash taken out of a paper bag.[41] "From a safety-deposit box, a shoe box, a dog biscuit box and from other hiding places, more cash withdrawals followed. Occasionally, they even withdrew funds from a checking or savings account, those withdrawals being primarily cash."[42] Under oath, Mr. Sheridan lied about the source of his income, and it became clear that the family had not paid any taxes.[43] Mr. Sheridan had also been abusive to Mrs. Sheridan, and he had periodically assaulted her.[44] Their illicit earnings spent, Mr. Sheridan was now unemployed and the family went hungry.[45] As everything collapsed, Mrs. Sheridan sued under state law for divorce based on extreme cruelty; equitable division of marital assets; and for alimony, attorneys' fees, and child support.[46]

D. The Argument

Although moral outrage should have been expressed in both *Sheridan* (family law) and *Abercrombie* (employment discrimination), only the *Sheridan* court expressed moral outrage and for the wrong reasons.[47] Relying on public morality, conscience, and public policy, the *Sheridan* court denied Mrs. Sheridan the equitable distribution

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38. Sheridan v. Sheridan, 589 A.2d 1067, 1069 (N.J. Super. Ct. Ch. Div. 1990). Given how much the opinion both fascinates and disturbs me, I have briefly discussed the *Sheridan* case in a previous paper but do so at a greater length here. *See* Duane Rudolph, *Why Prior Appropriation Needs Equity*, 18 U. DENV. WATER L. REV. 348, 386–87 (2015).

39. *Sheridan*, 589 A.2d at 1069.

40. *Id.*

41. *Id.* at 1069–70.

42. *Id.* at 1069.

43. *Id.*

44. *Id.* at 1075.

45. *Sheridan*, 589 A.2d at 1075.

46. *Id.*

47. *See* Kansas v. Nebraska, 135 S. Ct. 1042, 1048–49 (U.S. 2015); EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2031 (U.S. 2015); *Sheridan*, 589 A.2d at 1069.

of the illicit marital assets.[48] The court held that an equitable court was "an impermissible forum for the division of marital property primarily purchased with funds from illegal activities."[49] Given that "it is repugnant to [judges'] oath that [they] sit mute in the face of acknowledged, demonstrated or potential wrongdoing," the court took the extraordinary step of reporting the Sheridans' failure to divulge their illegal income to the relevant authorities after citing the state's Code of Judicial Conduct at some length.[50] "We do not reward wrongdoers!" the outraged court exclaimed.[51] The court found that the state and federal governments were "potential innocent entities" in the *Sheridan* case and it granted both leave to intervene.[52] Finally, the appalled court exclaimed at the fact that Mr. Sheridan "just did not bother to get a job!"[53] Relying in part on Blackstone, the court then awarded Mrs. Sheridan alimony, child support, and attorneys' fees.[54]

For their part, all three federal *Abercrombie* courts failed to express moral outrage.[55] Since her beliefs were sincerely held, since Ms. Elauf had provided Abercrombie with notice of her need for an accommodation of her religious beliefs, and since Abercrombie had not shown that it would face undue hardship by accommodating Ms. Elauf's beliefs, the trial court denied summary judgment to Abercrombie.[56] At a trial on damages, $20,000 in compensatory damages were awarded but prospective injunctive relief was denied.[57] On appeal to the United States Court of Appeals for the Tenth Circuit, Abercrombie prevailed on the basis that Ms. Elauf had failed to provide Abercrombie with the necessary notice or knowledge of her need for a reasonable accommodation.[58] The Supreme Court of the United States subsequently held that, for her to succeed under a disparate treatment theory for employment discrimination under Title VII, Ms. Elauf need not show that Abercrombie had actual knowledge of her need for an accommodation but instead that her need for an accommodation was a motivating factor in Abercrombie's decision to deny her employment.[59]

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48. *Sheridan*, 589 A.2d at 1075–77.
49. *Id.* at 1068.
50. *Id.* at 1073.
51. *Id.* at 1071.
52. *Id.* at 1075.
53. *Id.*
54. *Sheridan*, 589 A.2d at 1076.
55. *See* EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (U.S. 2015); EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106 (10th Cir. 2013); EEOC v. Abercrombie & Fitch Stores, Inc., 798 F. Supp. 2d 1275 (N.D. Okla. 2011).
56. *Abercrombie*, 798 F. Supp. 2d at 1284–87.
57. *Abercrombie*, 731 F.3d at 1115.
58. *Id.* at 1116.
59. *Abercrombie*, 135 S. Ct. at 2032.

Even though Nebraska had "blithely proceeded" to ignore Kansas's water rights, the *Kansas* court similarly did not express outrage.[60] The Supreme Court of the United States agreed that Nebraska's "misbehavior" had resulted in its overconsumption of its water rights by 17%, which "resulted in a $3.7 million loss to Kansas," and also that "Nebraska recklessly gambled with Kansas's rights, consciously disregarding a substantial probability that its actions would deprive Kansas of the water to which it was entitled."[61] Indeed, the court had already found that Nebraska had breached Kansas's water rights in a preceding lawsuit.[62] However, the court denied Kansas's request for treble damages, full disgorgement of Nebraska's gains, and an injunction in this case.[63] Exercising its equitable powers, the court ordered $3.7 million for Kansas for its losses, an additional $1.8 million in partial disgorgement of Nebraska's gains since water was sold at much higher rates in Nebraska, and the court agreed to changes in the accounting procedures on Nebraska's behalf.[64]

Indeed, given that *Kansas* was a lawsuit between states, the case correctly did not express moral outrage.[65] *Sheridan* (family law) and *Abercrombie* (employment discrimination), on the other hand, were wrong not to do so when presented with disenfranchised individuals. Outrage should have been expressed in both *Sheridan* and *Abercrombie* but neither for the reasons espoused by the *Sheridan* court nor on behalf of the parties identified as "innocent" victims (the state and federal governments) in the same case.[66] *Sheridan* involved a battered woman subject to domestic violence who was wholly dependent on her spouse for her financial well-being.[67] As such, outrage should have been voiced on Mrs. Sheridan's behalf. Sidestepping the domestic violence in the case, *Sheridan* expressed outrage instead over seeking a remedy after failing to report income, but not about the physical violence that was directed at a woman.[68] Moral outrage should also have been expressed in the *Abercrombie* federal cases on behalf of a Muslim, a woman, and a teenager (Ms. Elauf) who had been discriminated against—a clear violation of federal law—by a powerful retail chain.[69] While *Kansas* involved a key resource on which all life depends, expressions of moral outrage should be reserved

60. Kansas v. Nebraska, 135 S. Ct. 1042, 1056 (U.S. 2015).
61. *Id.* at 1053, 1055–56.
62. *Id.* at 1050.
63. *Id.* at 1058.
64. *Id.* at 1058, 1059.
65. *Id.* at 1055–57.
66. Sheridan v. Sheridan, 589 A.2d 1067, 1075 (N.J. Super. Ct. Ch. Div. 1990).
67. *Id.* at 1069–70.
68. *Id.*
69. EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (U.S. 2015).

for cases involving human beings and not involving state or institutional entities.[70]

Not only does my Article identify moral outrage as a legitimate remedial result but it also addresses the normative question regarding the conditions under which moral outrage should be expressed, and this, significantly, by relying on a branch of philosophy known as hermeneutics. In Part I, I show how moral outrage is already part of remedies law. In Part II, I deploy the work of the German philosopher, Hans Georg Gadamer, to show that Gadamer's insights regarding how we understand and interpret cases (hermeneutics or the art of understanding) are relevant to a legal discussion of moral outrage. Gadamer's philosophical approach to hermeneutics is distinctive because it calls on the interpreter of a text (the one whose task it is to apply her understanding to a given text, like a judge) to acknowledge and confront the particular traditions and prejudices under which she labors and to account for their bearing on the interpretive exercise she undertakes at a given moment in time.[71] Gadamer's focus on the situation of the particular interpreter is powerful because it asks the interpreter to struggle with her own historical context or horizon as well as the traditions and prejudices that sustain that context as she approaches a given case or text.[72] The interpreter's task is to transcend the limitations of the traditions and prejudices in which she is steeped.[73] While it already has a powerful footprint in the legal literature, Gadamer's work has yet to be applied to discussions of moral outrage in judicial opinions, which I do for the first time here.

Part III draws from Gadamer's work and argues that moral outrage involves judicial vociferation of its rejection of misconduct at a given moment in time. That a judge expresses moral outrage at all tells us about that judge, about the context that she brings to her legal interpretation, and indeed about her particular context as it meets that of the case before her. Gadamer calls the encounter between judge and case the "fusion of horizons," and I argue that moral outrage puts such a fusion of horizons on display.[74] Fundamentally, my argument is about the deployment of moral outrage in the service of human dignity, which is why a court like *Sheridan* is wrong to express moral outrage on behalf of an aggrieved party like the government, a sovereign party. When it comes to expressions of moral outrage, human dignity should trump concerns about sovereign and institutional dignity.

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70. Kansas v. Nebraska, 135 S. Ct. 1042, 1048–49 (U.S. 2015).
71. *See infra* Part II.
72. *See infra* Part II.
73. *See infra* Part II.
74. *See infra* Part II.

Given the obstinacy of noxious traditions of sexism/misogyny and islamophobia/religious intolerance in current American life (to name issues directly raised by *Sheridan* and *Abercrombie*), applying Gadamer's insights allows me to focus on the need for moral outrage from the bench at this moment in time so as to emphatically increase the opportunities for judicial redress for social injustices long directed at vulnerable communities and to deter the targeting of individuals from such at risk communities.[75] Such an emphasis also explains why the necessity for moral outrage is obviated in a case like *Kansas* (water rights), no matter how irksome Nebraska's conduct might appear in a water rights case, since *Kansas* involves a lawsuit between states.[76] Part IV thus focuses on both judicial and social commentary regarding key social issues embedded in this particular moment to which judges and jurors approaching cases like *Sheridan* and *Abercrombie* must be both sensitive responsive under Gadamer's philosophical model.

My argument extends groundbreaking work by Georgia Warnke, Francis J. Moots, III, and William N. Eskridge, among many others, in the area of philosophical hermeneutics.[77] In the area of remedies, it builds on similarly influential work by Margo Schlanger, Cass R. Sunstein, and Henry E. Smith, among others.[78] My project empowers judges to express moral outrage on behalf of certain groups but only under limited circumstances. As such, my argument also builds on Martha Nussbaum's powerful work on emotion in the law.[79]

Specifically, a judge should, I argue in Part V, reserve her moral outrage for cases involving *individuals* from communities or classes that have been (1)(i) historically threatened or at risk; (ii) that are currently threatened or at risk; or (iii) that are likely to be threatened or at risk; and (2) whose voices have (i) been historically silenced or muted; (ii) are currently silenced or muted; or (iii) that risk being silenced or muted. Such a test would not cover governments or similar parties suing each other (à la *Kansas*).

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75. *See* EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015); Sheridan v. Sheridan, 589 A.2d 1067 (N.J. Super. Ct. Ch. Div. 1990).

76. Kansas v. Nebraska, 135 S. Ct. 1042, 1055–57 (2015).

77. *See infra* Part II.

78. *See infra* Part I.

79. *See* MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 5, 13 (2004) (exploring the roles of disgust and shame in the law because "law without appeals to emotion is virtually unthinkable."); *see also* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 367–68 (1996) (relying on Nussbaum's work and observing that "The law perpetuates the illusion of emotionless lawyering and judging by portraying certain 'hard' emotions or emotional stances as objective and inevitable. Yet even a legal process devoid of such 'soft' emotions as compassion or empathy is not emotionless; it is simply driven by other passions").

The test I propose would embolden expressions of moral outrage when communities at risk are targeted in any substantive area of our laws since outrage is about the voicing of displeasure (and even disgust and anger) in the service of a cause.[80] Women and religious communities, for example, meet these requirements because these are the kinds of communities that have long been relegated to what Christine Desan refers to as "marchlands" in another context, that is, the peripheries of legal and social discourse.[81] It is time we brought these communities back from the "marchlands" to the center of our legal discussions by conscripting powerful remedial tools in the service of their inherent human dignity.[82]

Under the model that I propose, once the test outlined above is met, a presumption will exist in favor of an aggrieved individual from such a vulnerable community that an outrage remedy should issue, and the effect of that presumption will be to strengthen the case for the requested remedy. Indeed, the presumption may increase the amount of damages available to that individual under the facts of a given case. No legislative act is necessary to empower judges to express moral outrage since they often already do so as a matter of public policy (*à la Sheridan).*[83] Judges unsettled about relying on public policy might locate authority to express moral outrage on dignitary grounds in recent constitutional precedent from the Supreme Court of the United States that favors dignitarian approaches to individuals from historically vulnerable communities.[84] At its most fundamental level, my argument wishes to provoke open and transparent discussion within our remedies laws of the injustices under which marginalized communities have long toiled and despaired.

Given the doctrinal elements of my argument—it is after all a doctrinal reworking of our remedies laws as they stand—it might be criticized for its doctrinal bent. But the doctrinal aspect is at the service of the Article's normative power, given the Article's original reliance on philosophical hermeneutics as it opposes and seeks to deter expressions of ingrained prejudices or those that might become ingrained.[85] Doctrine is a potent tool in our endeavors to uproot and

80. *See* NUSSBAUM, *supra* note 79, at 6–8, 10–12; Cass R. Sunstein, *Some Effects of Moral Indignation on Law*, 33 VERMONT L. REV. 405, 407, 408 (2009) (associating outrage with indignation, which may involve anger, disgust, and contempt).

81. *See* Christine A. Desan, *Writing Constitutional History Beyond the Institutional/Ideological Divide*, 16 L. & HIST. REV. 391, 395 (1998).

82. *See id.*

83. *See* Sheridan v. Sheridan, 589 A.2d 1067, 1069 (N.J. Super. Ct. Ch. Div. 1990).

84. *See* Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1, 4, 7 (2017).

85. *See infra* Part II.

discard injustice.[86] As Todd Rakoff has argued, "[i]t is one thing to say that doctrine is not the only thing that matters, and quite another to claim that doctrine does not matter at all. The first contention is true; the second is false."[87] Doctrine matters because it "highlights certain social processes and hides others; doctrine sets the terms on which some voices will be heard, and others will be kept silent; doctrine creates incentives for certain kinds of behavior out of court; doctrine establishes an image of where the psychological center of a lawsuit lies."[88] Doctrine thus matters, and I explore the extent to which it matters in this Article, while advancing the normative framework to which the doctrinal element is subordinated.

My conclusion follows.

I. REMEDIES OF MORAL OUTRAGE

Outrage has long been an essential element of American remedies law.[89] Commentators, however, have long overlooked its importance.[90] The focus on remedies is central to my argument because, although American law casts "outrage" in both substantive and remedial terms, given my focus on outrage as a remedy, I focus solely on the remedial dimension of moral outrage.[91]

Even after the merger of law and equity in American law in 1938 under the Rules Enabling Act of 1934, American courts have generally observed distinctions between two types of remedies, that is, legal and equitable remedies.[92] The availability of a remedy at law

86. *See* Todd Rakoff, Washington v. Davis *and the Objective Theory of Contracts*, 29 HARV. C.R.-C.L. L. REV. 63, 98 (1994).

87. *Id.*

88. *Id.* at 63.

89. *See* DAN B. DOBBS, THE LAW OF TORTS 826–32 (2000).

90. *See* Toni M. Massaro & Ellen Elizabeth Brooks, *Flint of Outrage*, 93 NOTRE DAME L. REV. 155, 184 (2017).

91. Substantively, for example, "outrage" includes both "the tort of outrage" (intentional infliction of emotional distress or "IIED") and the "shocks the conscience" standard in constitutional law. On outrage in IIED cases, see DOBBS, *supra* note 89. On outrage in "shocks the conscience" in constitutional law, see Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 284, 287 (2015) (focusing both on the outrageousness test in constitutional law (also known as the "shocks the conscience" test) and on the irrationality test to argue that they are "close cousins" that "promote justice in modest steps while maintaining the analytical coherence of the rest of the Constitution"); Massaro & Brooks, *supra* note 90 (discussing the "shocks the conscience" test in the context of the Flint water crisis, which was "an outrage of epic proportion").

92. On the merger of law and equity in 1938 under the Rules Enabling Act of 1934, see Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1184 (2005). On distinctions between legal and equitable remedies, see Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 536 (2015) (arguing in favor of the continued importance of equitable remedies post-merger); Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent*

(a "legal" remedy) often implies the availability of monetary damages in that case.[93] The availability of a remedy at equity (an "equitable" remedy) often implies the deployment of the court's coercive powers in ways that often do not require awards of monetary damages.[94] I begin first with the discussion of moral outrage at law before discussing moral outrage at equity.

A. Outrage at Law

Although some courts warn that a "judge may not permit his or her sense of moral outrage . . . to overwhelm the legal process," outrage is an integral part of American legal remedies.[95] Traditionally, the legal remedy most associated with moral outrage is punitive damages awards.[96] Punitive or exemplary damages are extra-compensatory monetary awards whose function is both to deter and punish.[97]

Injunctions, 112 COLUM. L. REV. 203, 249 (2012) (criticizing the equitable jurisprudence of the Supreme Court of the United States).

93. For legal remedies often not involving monetary damages but including a coercive aspect, see DAN B. DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION 165, 585 (2d ed. 1993) (replevin for repossession of chattel to be contrasted with equitable injunctions; prerogative writs of habeas corpus, mandamus, and prohibition issued by law courts as opposed to equity courts).

94. By "equity" I mean an approach to litigants' facts that originated in Medieval English law and that continues in American law as a distinct class of remedies generally distinguished from monetary damages. On the history of equity, see JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 268–70 (2009). For arguments against the endurance of equitable remedies post-merger of law and equity, see DOBBS, *supra* note 93, at 51 (rejecting "equitable" remedies as "anomalous" post-merger); DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 6–11 (1992) (arguing that courts no longer enforce the irreparable injury rule, which separates legal from equitable remedies in cases suing for an injunction (an equitable remedy)). On the coercive power of equitable remedies, see DOBBS, *supra* note 93, at 49. On the availability of monetary damages at equity, see DOBBS, *supra* note 93, at 370 (noting that restitution, which involves awards of damages, can be either legal or equitable, depending on the circumstances.). On "compensatory contempt" (also involving grants of monetary damages) at equity, see Doug Rendleman, *Rejecting Property Rules-Liability Rules for Boomer's Nuisance Remedy: The Last Tour You Need of Calabresi and Melamed's Cathedral*, at *28 (Washington & Lee Pub. Legal Stud. Res. Paper Series, Paper No. 2013-02, 2013), http://papers.ssrn.com/sol3/papers .cfm?abstract_id=2212384.

95. *See* State v. Tindell, 10 A.3d 1203, 1228 (N.J. Sup. Ct. App. Div. 2011).

96. Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 84 MINN. L. REV. 83, 102 (2007).

97. *See* DOBBS, *supra* note 93, at 312; Alexandra B. Klass, *The Expansion of Punitive Damages in Minnesota: Environmental Litigation After* Jensen v. Walsh, 30 WM. MITCHELL L. REV. 177, 180 (2003); Alexandra B. Klass, *Punitive Damages after* Exxon Shipping Company v. Baker: *The Quest for Predictability and the Role of Juries*, 7 ST. THOMAS L. J. 182, 183 (2009); Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 84, 90 MINN. L. REV. 83 (2007); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L. J. 347, 351 (2003); Sunstein et al., *Punitive Damages*, *supra* note 11, at 2122.

They can also vindicate societal interests in a given case.[98] Inasmuch as they can express anger or indignation, punitive damages awards also "have an expressive function."[99] As a matter of law, punitive damages are generally available in cases involving "outrage and humiliation."[100] Typical punitive damages cases involve medical and legal malpractice, toxic tort, and products liability.[101]

Given the ostensible elasticity of the "outrage" element in punitive damages cases, punitive awards have courted controversy as well as constitutional review since courts worry about unreasonable and disproportionate punitive jury awards.[102] Courts reviewing punitive damages awards often deploy a "shocks the conscience" test for such awards.[103] Thus, punitive damages imply two outrage components.[104] First, to warrant an award of punitive damages, outrage must be imputed to the defendant's objectionable act, and, second, to warrant an overturning of (or reduction in) a grant of punitive damages, outrage must be imputed to the award of punitive damages itself.[105] Findings of outrageousness thus persist in American legal remedies in punitive damages cases.[106]

Outrage also plays a role in compensatory damages awards.[107] Traditionally, compensatory damages, also known as actual damages, are meant to make the plaintiff whole by placing her in the position

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98. Sharkey, *supra* note 97, at 453.

99. Sunstein et al., *Punitive Damages*, *supra* note 11, at 2086, 2096.

100. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003); *see also* Haddad v. Wal-Mart Stores, Inc., 914 N.E.2d 59, 63 (Mas. 2009) ("While discrimination of all types is wrong and unacceptable, certain discriminatory conduct is more outrageous than others. Punitive damages have been, and remain, permissible only where the defendant's behavior is particularly outrageous or egregious."); Loitz v. Remington Arms Co., 563 N.E.2d 397, 398, 402 (1990) (internal quotation marks omitted) (quoting Restatement (Second) of Torts) ("Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."); Wackenhut Corp. v. Canty, 359 So. 2d 430, 435–36 (Fla. 1978) ("A legal basis for punitive damages exists where torts are committed in an outrageous manner or with fraud, malice, wantonness or oppression.").

101. DOBBS, *supra* note 93, at 317.

102. *See, e.g.*, State Farm Mut. Auto Ins. Co., 538 U.S. at 412 (reviewing punitive damages award under Fourteenth Amendment's Due Process Clause); Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) (same); BMW of N. Am. v. Gore, 517 U.S. 559, 562–63 (1995) (same); Txo Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 446 (1993) (same); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 10 (1991) (same).

103. May v. Nationstar Mortg., LLC, 852 F.3d 806, 815–16 (8th Cir. 2017) (citing *State Farm Mut. Auto Ins. Co.*, 538 U.S. 408 (2003) and applying three-factor test to determine whether punitive damages award "shocks the conscience"); Bachrach v. Covenant Transp. Inc., 636 Fed. Appx. 404, 406 n.2 (9th Cir. 2016) ("Arizona courts have also allowed remittitur of *punitive* damages when the remittitur shocks the conscience.") (italics in original).

104. *See May*, 852 F.3d at 816.

105. *Id.*

106. *Id.* at 815–16; *Bachrach*, 636 Fed. Appx. 404, 406–07.

107. *See* DOBBS, *supra* note 93, at 312.

in which she would have been had she not been injured by the defendant.[108] Actual damages awards typically allow recovery for medical expenses, lost wages, as well as pain and suffering.[109] So as to prevent windfalls to the plaintiff, courts often require that all damages claims arising from the same transaction be litigated at the same time.[110] Courts also often require that actual damages be awarded before an award for punitive damages can be made.[111] Nevertheless, compensatory damages can include a punitive element, which incorporates outrage.[112] As the Supreme Court of the United States has stated in reliance on the Restatement (Second) of Torts: "[c]ompensatory damages, however, already contain this punitive element."[113] Thus, the outrage element exists in both punitive and compensatory legal remedies.

B. Outrage at Equity

Equity, the other half of American remedies law, also incorporates the outrage element.[114] While punitive damages have traditionally been considered legal remedies (given their monetary nature), courts sitting at equity have also awarded punitive damages, making punitive damages and their outrage element equitable as well.[115] More usually, however, outrage at equity is associated with contempt of court proceedings where, for example, a pro se litigant continually interrupts testimony and the court orders her "to put her hand over her mouth, or to have her mouth taped, until the witness ha[s] answered the question."[116] When the litigant disregards the court's order and informs the court that it has been "threatening" her throughout the proceedings, the court finds her in contempt.[117] When she disregards court orders a day later and calls

108. *See id.* at 209.
109. *See id.* at 211–12.
110. *See id.* at 210.
111. *See id.* at 215, 315.
112. *See id.* at 312 ("Punitive damages may have some incidental compensatory effects; and 'compensatory' damages may have some incidental punitive effects.").
113. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003) (citing Restatement (Second) of Torts § 908, Comment c, p. 466 (1977)) ("In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.")).
114. *See* David L. Feldman & Michelle Whitman, *As if Equity Mattered—Common Themes and Enduring Issues in the Symposium*, 50 NAT. RESOURCES J. 291, 294 (2010).
115. *See* DOBBS, *supra* note 93, at 315.
116. Naunchek v. Naunchek, 463 A.2d 603, 605 (Conn. 1983).
117. *Id.*

witnesses liars, the court finds her conduct "absolutely outrageous."[118] After she refuses to apologize to a witness for calling him a liar and thus "purge herself of contempt," the court subsequently orders her imprisoned.[119] Contempt is also found where a litigant's "outrageous conduct" involves calling the judge by an "obscene name," denigrating the court, and where the litigant's conduct also involves stating that the court was "railroading him."[120] Thus, outrage thrives in both punitive damages and contempt cases at equity.

Injunctions, another coercive remedy, also exist to quash outrageous conduct at equity.[121] In asking courts to grant injunctive relief, litigants themselves use the language of outrage.[122] Litigants request injunctions to prevent "outrageous conduct" "designed to annoy, torment, pester, plague, molest, worry, badger, harry, heckle, persecute, irk, bully, bullyrag, vex, disquiet, grate, bother, tease, nettle, tantalize, ruffle, assault, display obnoxious behavior or disturb the [plaintiffs'] peace . . . ."[123] Injunctions issue to stop "outrageous and inflammatory" remarks made by a party to a bankruptcy proceeding.[124] They issue to prevent the "outrageous" and involuntary submission of individuals to vaccination in the absence of proof of the medication's effectiveness and safety.[125] Injunctions also issue to stop the "outrageous" non-provision of appropriate food medication to diabetic inmates.[126] Equity thus anticipates a litigant's outrage and it makes a variety of remedies available to litigants able to prove that their outrage is legally significant, including punitive damages, contempt, and injunction remedies.

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118. *Id.*

119. *Id.*

120. Butler v. State, 330 So. 2d 244, 245 (Ct. App. Fl. 1976) ("Appellant continued his outburst, expanding his original description of the judge and offering to assault the judge if his handcuffs were removed. By the time appellant ceased his performance he had accumulated six counts of contempt.").

121. *See* Henry E. Smith, *Equity as a Second-Order Law: The Problem of Opportunism*, at *9 (Harvard Public Law Working Paper No. 15-13, 2015), http://papers.ssrn.com/so13/paper/cfm?abstract_id=2617413 [https://perma.cc/E7W2-TQDY].

122. *See* Hanson v. Estell, 997 P.2d 426, 429 (Wash. Ct. App. 2000).

123. *Id.*

124. *See* Patriot Grp., LLC v. Fustolo (*In re* Fustolo), 2015 Bankr. LEXIS 939, *14 n.5 (Bankr. D. Mass. Mar. 24, 2015).

125. *See* Doe v. Rumsfeld, 341 F. Supp. 2d 1, 17, 19 (D.D.C. 2004) (citing McCargo v. Vaughn, 778 F. Supp. 1341, 1342 (E.D. Pa. 1991)) (granting injunction to six civilian employees of the Department of Defense (DoD) required to receive anthrax vaccine absorbed without consent because Food and Drug Administration's determination of vaccine's licensing to combat inhalational anthrax on which DoD had relied in mandating involuntary immunization had not followed the procedures to certify the vaccination).

126. McCargo v. Vaughn, 778 F. Supp. 1341, 1342 (E.D. Pa. 1991) (issuing permanent injunction on the basis of a "finding of defendants' outrageous unlawful practices" and "directing defendant prison to establish a system for diabetic inmates to receive special diets and to assure them access to insulin").

C. Commentators and Outrage

In engaging with the outrage element in American remedies law, commentators have expended considerable effort evaluating the relationship between *public* outrage and punitive damages awards as a remedy at law (as opposed to a remedy at equity).[127] Commentators tell us that public outrage cannot be generated at will and "the degree of sanction is driven by moral outrage and various cognitive biases, not by scientific calculations of optimal deterrence. Deterrence may . . . be invoked as . . . justification for punishment, but lay intuitions about culpability and moral outrage . . . outweigh the factors that ought to matter most under a deterrence-based scheme."[128] Public outrage influences policy makers in the definition of criminal punishment and it results in irrational punitive jury awards that are both unpredictable and incoherent.[129] Group deliberation increases outrage.[130] Public outrage is at the basis of the punitive intent, which is then "translated" into a legal remedy or outcome.[131] Category-bound thinking, exacerbated by the difficulty of "translating" a moral determination into a legal remedy or outcome, results in unjust departures from the foundational legal coherence principle that "the similarly situated [be] treated similarly."[132] Scholars show that public outrage is expressed in constitutional law, corporate governance, criminal law, environmental law, remedies law, securities law, and tort law, among others.[133] In other words, while commentators have generally focused on *public* outrage and punitive damages awards in particular, they have not told us as much about *judicial* outrage in remedies law in general, which includes, but is not restricted to punitive damages awards at law and at equity.[134]

Outrage has also received scant attention from equity's commentators, despite equity's history and jurisprudence, which spans several centuries.[135] Flirtatious references to moral outrage appear in scholarly discussions of equity but no sustained account of the

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127. *See* Cass R. Sunstein, *On the Psychology of Punishment*, 11 SUP. CT. ECON. REV. 171, 171 (2004).

128. Baer, *Choosing Punishment*, *supra* note 11, at 588, 589 (footnotes omitted).

129. *See* Sunstein, *supra* note 127, at 171 ("When legislators penalize misconduct, they are typically responsive to the outrage of their constituents.").

130. Sunstein, *supra* note 7, at 718.

131. Cass R. Sunstein, Daniel Kahneman, David Schkade & Ilana Ritov, *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153,1154–56, 1165–67 (2002).

132. *Id.* at 1154–56.

133. *See supra* note 11 and accompanying text.

134. *See id.*

135. *See* W.S. Holdsworth, *The Early History of Equity*, 13 MICH. L. REV. 293, 293–94 (1914).

remedial importance of outrage at equity has been made.[136] Commentators observe that addressing outrage has characterized the equitable remedy from its founding in the fourteenth century.[137] Equity courts themselves have acted outrageously over time leading to much-needed reforms to the law-equity divide in American law under the Rules Enabling Act of 1934.[138] Similarly, equity's commentators tell us that equity has a strong foundation in morality.[139] They tell us that equity courts can be considered courts of outrage.[140] But commentators have not focused on the importance of outrage as an equitable remedy.

Equity's commentators have focused on the civil rights dimension of equitable remedies.[141] They have argued that equity is a coherent remedial system, that it effectively identifies and uproots opportunistic conduct, and that it upholds human dignity.[142] And

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136. *See* T. Leigh Anenson & Donald O. Mayer, *Clean Hands and the CEO: Equity as an Antidote for Excessive Compensation*, 12 U. PA. J. BUS. L. 947, 1009–11 (2010).

137. *See* WILLIAM F. CLARKE, THE SOUL OF THE LAW 234 (1942); DAVID S. GARLAND ET AL., THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 151 (2d. ed. 1899) (observing that equity courts originally acted "to prevent the infliction of outrage and violence, the remedies of the common law being in many such cases clearly inadequate"); William F. Walsh, *Is Equity Decadent?*, 22 MINN. L. REV. 479, 481 (1938) (equity courts, in the original sense of the term, targeted conduct "in cases of outrage committed by powerful lords in clear violation of the common law"). *But see* Dennis J. Klinck, *Lord Eldon on Equity*, 20 J. LEGAL HIST. 51, 65 (1999) (doubting that "Lord Eldon [1751–1838, an important chancellor in the history of equity] would ever have acknowledged that 'moral outrage' was part of the equitable jurisdiction; rather there seem to have been cases in which he failed to restrain or conceal it as a factor in his judgment").

138. *See* JOHN H. LANGBEIN, RENEE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 351–52 (2009) (observing that equity's chancellors were sensitive to the discretionary excesses associated with equitable remedies); Stephen N. Subrin, *How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 923, 925, 974 (1987) (providing an overview of the reform movements targeting equity since the 19th century).

139. *See* DOBBS, *supra* note 93, at 55; Bray, *supra* note 92, at 536; Bradley M. Elbein, *The Hole in the Code: Good Faith and Morality in Chapter 13*, 34 SAN DIEGO L. REV. 439, 484–85 (1997); Gergen, Golden & Smith, *supra* note 92, at 238; Irit Samet, *What Conscience Can Do for Equity*, 3 JURISPRUDENCE 13, 13 (2012); Henry E. Smith, *The Equitable Dimension of Contract*, 45 SUFFOLK U. L. REV. 897, 903 (2012) [hereinafter Smith, *Equitable Dimension*]; Smith, *supra* note 121, at *4; Kevin M. Teeven, *A Legal History of Binding Gratuitous Promises at Common Law: Justifiable Reliance and Moral Obligation*, 43 DUQ. L. REV. 11, 69 (2004).

140. Rudolph, *supra* note 38, at 375.

141. On the civil rights component of equitable remedies, see OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 1, 4–5 (1978); Margo Schlanger, *Against Secret Regulation: Why and How We Should End the Practical Obscurity of Injunctions and Consent Decrees*, 59 DEPAUL L. REV. 515, 515 (2010); Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 552 (2006); and Margo Schlanger, *The Just Barely Sustainable California Prisoners' Rights Ecosystem*, 664 ANNALS OF THE AM. ACAD. POL. & SOC. SCI. 62, 63 (2016).

142. On equity as a system, see Bray, *supra* note 92, at 536. On equity as targeting

yet, implicit in all these treatments of equity is what is made both explicit and the focus of this Article. That is, quashing opportunistic misconduct so as to uphold human dignity in a civil rights case in the equitable system, for example, is not incompatible with the expression of outrage in that case. In fact, a constellation of particularly egregious facts of the sort emphasized in this Article may compel the expression of judicial outrage so as to uphold human dignity in such a case. The question then becomes—and the focus of this Article is—what does outrage mean in such cases and when should courts engage in its expression, for whom, and why?

I now turn to the philosophical paradigm that will inform my discussion of remedial outrage in American law. That approach suggests that it is urgent to rely on such a paradigm in discussions of moral outrage at this moment in time.

II. GADAMER'S HERMENEUTICS

In this section I lay the theoretical groundwork for my discussion of the necessity for judicial expressions of moral outrage. Relying on the philosophical hermeneutics of the German philosopher, Hans-Georg Gadamer, I examine first Gadamer's approach to a universal hermeneutics that validates humanistic modes of understanding texts, including in legal cases. Before situating the importance of my work among Gadamer's commentators, I consider the key insights for which Gadamer remains noteworthy and on which I will rely in my argument.

A. Humanities and Sciences

Responding to the charge that the humanities must espouse methodological approaches reminiscent of the sciences, Gadamer's groundbreaking and highly influential work argues that understanding and interpretation are inseparable from the individual's status as a being in the world no matter her disciplinary perspective.[143] Since

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opportunistic conduct, *see* Gergen, Golden & Smith, *supra* note 92, at 238; Smith, *Equitable Dimension*, *supra* note 139, at 903; and Smith, *supra* note 121, at *4. On equity as upholding human dignity, *see* Rudolph, *supra* note 17, at 130.

143. A fuller discussion of Gadamer's interpreters follows below in Section II.C. Nevertheless, on the ontological aspect of Gadamer's hermeneutics and the limits of Gadamer's appraisal of science for a reader today, *see* William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 614, 617 (1990) (situating Gadamer's theories and cautioning that "When Gadamer published his tome in 1960, scientific positivism—the belief that appropriate use of the scientific method yields objectively truthful facts—was already on the wane"). On the ontological dimension of Gadamer's hermeneutics, *see also* Francis J. Mootz, III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer*, *Habermas*, *and Ricoeur*, 68 B.U. L. REV. 523,

the 17th century, Gadamer tells us, the French philosopher René Descartes' ("Cartesian") influence on western thought has been pervasive to the detriment of humanistic modes of understanding.[144] Cartesian separation of the subjective and the objective led to a privileging of so-called "objective" approaches to interpretation deemed more "scientific," "rational," "unbiased," and "empirical," while humanistic approaches were deprecated as non-rigorous, irrational, biased, value-laden and, therefore, subordinate to the "superior" scientific ways of approaching the human experience.[145] Our understanding, Gadamer posits, is an "art," and the work of interpretation—the hermeneutic task—which also applies in law, is to appreciate how all understanding happens.[146] Since understanding is universal, the hermeneutic task is itself universal and is universally applicable.[147]

Gadamer is concerned that so-called "objective" modes of approaching texts disparage consideration of the interpreter herself, her context, and her prejudices, and yet these all shape and condition the interpreter's understanding of a given text.[148] Nonetheless,

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533 (1988) (observing that Gadamer's insistence on the importance of "play" "reveals our ontological openness to the world").

144. *See* HANS GEORG GADAMER, TRUTH AND METHOD 278–79 (Joel Weinshemer & Donald G. Marshall, trans.) (2d ed. 2004) [hereinafter GADAMER, TRUTH AND METHOD] (observing that Descartes separated subject and object and that Descartes' idea of method was that the "methodologically disciplined use of reason can safeguard us from all error"). Indeed, the deprecation of the humanities remains a pervasive ongoing problem globally as the humanities and the training that they provide come under sustained attack in the name of those disciplines that are perceived more profitable. *See* MARTHA NUSSBAUM, NOT FOR PROFIT: WHY DEMOCRACY NEEDS THE HUMANITIES 143 (2010):

> If we do not insist on the crucial importance of the humanities and the arts, they will drop away, because they do not make money. They only do what is more precious than that, make a world that is worth living in, people who are able to see other human beings as full people, with thoughts and feelings of their own that deserve respect and empathy, and nations that are able to overcome fear and suspicion in favor of sympathetic and reasoned debate.

145. *See* GADAMER, TRUTH AND METHOD, *supra* note 144, at 279–80; RICHARD E. PALMER, HERMENEUTICS 144 (1969) (discussing the "subject-object polarity" in Descartes and its privileging of the sciences); JENS ZIMMERMANN, HERMENEUTICS: A VERY SHORT INTRODUCTION 22–23 (2015) (discussing Descartes' influence and the hermeneutic response to it); Francis J. Mootz III, *Rhetorical Knowledge in Legal Practice and Theory*, 6 S. CAL. INTERDIS. L.J. 491, 499 (1998) ("According to [Gadamer], hermeneutical understanding has been devalued because it stands outside the empiricist and rationalist accounts of knowledge, when in fact hermeneutical understanding is the primordial experience of knowledge that makes possible the derivative experience of scientific thought.").

146. *See* GADAMER, TRUTH AND METHOD, *supra* note 144, at 157 ("The classical discipline concerned with the art of understanding texts is hermeneutics."); *see also* PALMER, *supra* note 145, at 40 (discussing the origins and uses of the "art of understanding" in the field of hermeneutics).

147. *See* HANS GEORG GADAMER, PHILOSOPHICAL HERMENEUTICS 10–11 (David E. Linge, ed. & trans.) (2d ed. 2008) [hereinafter GADAMER, PHILOSOPHICAL HERMENEUTICS] (discussing hermeneutical construction of a "bridge built between the once and the now").

148. *See* ZIMMERMANN, *supra* note 145, at 22; Mootz, *supra* note 145, at 500 ("Gadamer's principal philosophical claim is that our truthful relation to the world subtends but is

Gadamer shows, the "rational sciences" are themselves products of the "art of understanding."[149] The choice of a question to which the scientific interpreter will devote her research is itself a hermeneutic question that reflects the traditions and concerns of that interpreter's particular time.[150] The manner in which the scientific interpreter will approach her work is also hermeneutic or interpretive because it, too, is tied to the interpreter's being in time or history.[151] Indeed, the fact that science communicates through the medium of language underscores its interpretive nature.[152] Even in the sciences, thus, the hermeneutic element is present because such an element is bound to the interpreter's place in time and it cannot be completely overridden or uprooted.[153] It shapes the questions asked, the manner in which results are interpreted, and the manner in which they are conveyed to a general audience.[154]

Gadamer's argument does not disparage the sciences.[155] His approach acknowledges the achievements of the sciences but denies that theirs is the only way of engaging with the human experience.[156] Gadamer does not seek to supplant scientific methodology and to prescribe instead methods for either the humanities or other disciplines to follow.[157] His work is about identifying the philosophical bases for all interpretative understanding and what those bases imply for the interpreter of any text, including in the sciences.[158]

B. Mediation and Horizons

But what exactly is "the art of understanding" to which Gadamer refers and why is it important?[159] The art of understanding, Gadamer

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not exhausted by modern technical-empirical science and that the Enlightenment picture of a monadic, prejudice-free subject decoding the world of objects must therefore be viewed as a mirage.").

149. *See* GADAMER, PHILOSOPHICAL HERMENEUTICS, *supra* note 147, at 10–11.

150. *See id.* at 11 ("Thus what is established by statistics seems to be a language of facts, but which questions these facts answer and which facts would begin to speak if other questions were asked are hermeneutical questions.").

151. *See id.* at 13 ("[T]he scholar—even the natural scientist—is perhaps not completely free of custom and society and from all possible factors in his environment.").

152. *See id.* at 24 ("Even Descartes, that great and passionate advocate of method and certainty, is in all his writings an author who uses the means of rhetoric in a magnificent fashion.").

153. *See id.* at 11, 13, 23.

154. *See id.*

155. *See* GADAMER, PHILOSOPHICAL HERMENEUTICS, *supr*a note 147, at 35.

156. *See id.* ("But nobody would deny that the practical application of modern science has fundamentally altered our world, and therewith also our language.").

157. *See* GADAMER, TRUTH AND METHOD, *supra* note 144, at xxvi; Eskridge, *supra* note 143, at 679; Francis J. Mootz III, *Rethinking the Rule of Law: A Demonstration that the Obvious is Plausible*, 61 TENN. L. REV. 69, 143 (1993); ZIMMERMANN, *supra* note 145, at 6–7.

158. ZIMMERMANN, *supra* note 145, at 7.

159. GADAMER, TRUTH AND METHOD, *supra* note 144, at 157.

says, is the act of mediation inherent in all interpretation.[160] Mediation implies that when an interpreter brings herself to understand a text she must bridge the gulfs imposed by temporal, cultural, geographic and other differences separating the text at the moment of its inscription from the interpreter in the current moment in time.[161] Interpretive bridging is necessary because the "texts handed down to us from the past are wrenched from their original world."[162] That world is neither coterminous with that of the interpreter nor is it self-revealing to the interpreter's interest or curiosity.[163] The interpreter thus traverses the chasm that would defy her attempts to bring the text both into her time and her understanding.[164] Assiduous as she might be, the interpreter's temporal location, her situation vis-à-vis the moment of the text's inscription, prevents her from excavating, resurrecting, and imposing the text's *true* past on the present.[165] What she can and should do, instead, is thus bring the text and its past into "thoughtful mediation with contemporary life."[166]

Given that understanding is mediation by a given interpreter, mediation is meaning at work.[167] Gadamer's dated use—by his own admission—of the example of the "North American Eskimo tribes" is telling.[168] The "Eskimo tribes," Gadamer tells us, have a history "certainly quite independent of whether and when these tribes had an effect on the 'universal history of Europe.'"[169] According to Gadamer, an interpreter's quest to understand what we now refer to as the Inuit people is thus motivated by her position in time.[170] The interpreter's

160. *Id.* at 324 ("The judge seeks to be in accord with the 'legal idea' in mediating it with the present. This is, of course, a legal mediation."); *see also* ZIMMERMANN, *supra* note 145, at 47 (emphasis in original) ("For Gadamer, understanding works essentially as *mediation*. Mediation is the heart of hermeneutic experience.") (italics in original).

161. *See* GADAMER, TRUTH AND METHOD, *supra* note 144, at xxix (observing that legal adjudication attempts to arrive at a "'correct' interpretation, which necessarily includes the mediation between history and the present in the act of understanding itself."); *see also* GADAMER, PHILOSOPHICAL HERMENEUTICS, *supra* note 147, at 22 (discussing hermeneutical construction of a "bridge built between the once and the now").

162. *See* GADAMER, TRUTH AND METHOD, *supra* note 144, at 158.

163. *See id.*

164. *Id.* at 159–60.

165. *See* Eskridge, *supra* note 143, at 617:

> The implication of [the fact that understanding is being] for Gadamer is that interpretation is neither the discovery of the text's intended meaning, nor the imposition of the interpreter's views upon the text; rather, interpretation is the common ground of interaction between text and interpreter, by which each establishes its being.

166. GADAMER, TRUTH AND METHOD, *supra* note 144, at 161 (referring to G.W. F. Hegel with approval).

167. *See id.*

168. *See id.* at xxix.

169. *Id.*

170. *See id.*

mediation of the history of the Inuit people thus creates meaning that is reflective both of the interpreter and of the time in which that interpreter makes Inuit history meaningful for the interpreter herself and her own place in time:

> In fifty or a hundred years, anyone who reads the history of these tribes as it is written today will not only find it outdated (for in the meantime he will know more or interpret the sources more correctly); he will also be able to see that in the 1960s people read the sources differently because they were moved by different questions, prejudices, and interests.[171]

Meaning is thus both temporally inscribed and circumscribed, and it is also dependent upon the experiences that the interpreter brings to bear on the text in her moment of understanding.[172] Meaning is thus indicative of the individual creating meaning. That is, at the moment of understanding, the interpreter may reveal more about herself and her time than she might about the text and its own time.[173] "Even the restorer or the preserver of ancient monuments," Gadamer reminds us, "remains an artist of his time."[174]

The interpreter's situation in time means that she brings to her mediation particular traditions and prejudices.[175] Traditions are the formative backdrop that infuse, inform, expand and/or limit her understanding.[176] Traditions place the interpreter within a temporal paradigm that predetermines her hermeneutic posture and they predispose her to certain prejudgments, fore-understandings, or fore-conceptions.[177] These prejudgments or fore-understandings are the prejudices that mold her perspective and inflect her interpretation.[178]

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171. *Id.*; *see also* NUSSBAUM, *supra* note 79, at 34 ("Today we probably hold some views that are just as mistaken as [those of the past that we reject], but it is difficult to know which views these are . . . .").

172. GADAMER, TRUTH AND METHOD, *supra* note 144, at 269.

173. *See* Eskridge, *supra* note 143, at 622 ("Thus, a critic analyzing Dickens's *David Copperfield* in 1880 will inevitably draw different insights from the novel than would a critic in 1960."); *see also* FEMINIST INTERPRETATIONS OF HANS-GEORG GADAMER 125 (Lorraine Code, ed. 2002).

174. GADAMER, TRUTH AND METHOD, *supra* note 144, at 150.

175. *See id.* at 272.

176. *See id.* at 352 ("For tradition is a genuine partner in dialogue, and we belong to it, as does the I with a Thou."); Mootz, *supra* note 157, at 144 ("We can never read a text for the first time, so to speak, because the way in which the text will speak to us is already shaped by the tradition.").

177. *See* GADAMER, TRUTH AND METHOD, *supra* note 144, at 269 (citing Martin Heidegger for the proposition that "interpretation begins with fore-conceptions that are replaced by more suitable ones.").

178. *See id.* at 304 ("We started by saying that a hermeneutical situation is determined by the prejudices that we bring with us."); GADAMER, PHILOSOPHICAL HERMENEUTICS, *supra* note 147, at 9 ("It is not so much our judgments as it is our prejudices that constitute our

The text to which these prejudgments are brought is in constant tension with both the traditions that the interpreter brings to bear upon it and with the particular prejudices that act as a prism through which the interpreter's understanding is refracted.[179]

The existence, nevertheless, of such traditions and prejudices neither makes the interpreter conservative as a matter of principle nor does it imply that a hermeneutic approach is antagonistic to transformative readings in the face of tradition and prejudice.[180] Instead, the interpreter's task is to be aware of the pressures exerted upon her by her traditions and prejudices (indeed, not all of them nefarious); her task is to bring such pressures to consciousness in her mediation; and her task is also to reach through and beyond them so as to engage in an open and potentially transformative conversation with the otherness against which they might inherently militate that exist in the text before her.[181]

For Gadamer, the interpreter is thus already "situated" vis-à-vis the text.[182] That is, her position in time, her particular place in history, informs the scope of her vision when engaging with the text before her.[183] The contextual or historical situation of the interpreter thus evokes her particular "horizon," which is the field of vision that characterizes her space in time, and she might transcend her horizon by "see[ing] beyond it":

> Hence essential to the concept of situation is the concept of 'horizon'. The horizon is the range of vision that includes everything

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being. . . . Prejudices are biases of our openness to the world. They are simply conditions whereby we experience something—whereby what we encounter says something to us.") (citation omitted).

179. *See* GADAMER, TRUTH AND METHOD, *supra* note 144, at 305 (mentioning the "tension between the text and the present"); GADAMER, PHILOSOPHICAL HERMENEUTICS, *supra* note 147, at 19 (mentioning the "tension and release that structure all understanding and understandability"); *id.* at 9 ("Prejudices are biases of our openness to the world. They are simply conditions whereby we experience something—whereby what we encounter says something to us.").

180. *See id.* at 32–34 (rejecting Jürgen Habermas's criticism of Gadamer's views of tradition and prejudice as overlooking the possibility of transformative engagements with authority).

181. *See* GADAMER, PHILOSOPHICAL HERMENEUTICS, *supra* note 147, at 38 ("[T]he prejudgments that lead my preunderstanding are also constantly at stake, right up to the moment of their surrender—which surrender could also be called a transformation."); GADAMER, TRUTH AND METHOD, *supra* note 144, at 305 ("The hermeneutic task consists in not covering up this tension [between the text and the present] by attempting a naive assimilation of the two but in consciously bringing it out."); Francis J. Mootz III, *Nietzsche and Legal Theory (Part II): Nietzschean Critique and Philosophical Hermeneutics*, 24 CARDOZO L. REV. 967, 968 (2003) ("Philosophical hermeneutics challenges methodological approaches to interpretation by claiming that genuine understanding is possible only when the interpreter risks her prejudiced horizon of preunderstanding in dialogic experience.").

182. *See* Mootz, *supra* note 181, at 967–68.

183. *See* GADAMER, TRUTH AND METHOD, *supra* note 144, at 269.

> that can be seen from a particular vantage point. Applying this to the thinking mind, we speak of narrowness of horizon, of the possible expansion of horizon, of the opening up of new horizons, and so forth.[184]

A text, too, has its own horizon, which must be embraced and confronted in the act of understanding.[185] The discovery of a text's horizon makes its ideas comprehensible to the interpreter even if she does not agree with their substance.[186] By their nature, horizons past and present are "always in motion."[187] The interpreter moves into horizons and they move with her.[188] When horizons meet, there is a "fusion of horizons" that "does not entail passing into alien worlds unconnected in any way with our own; instead, they together constitute the one great horizon that moves from within and that, beyond the frontiers of the present, embraces the historical depths of our self-consciousness."[189] In other words, the hermeneutic "horizon" that permanently surrounds and engulfs both interpreter and text is at once limitation and transcendence, specific and universal, individual and contextual.[190]

Since mediation between differences is at the basis of the "fusion of horizons," the concept of application, Gadamer shows, is inherent in such a fusion.[191] "Application," the "motivating power, [the hermeneutic] soul," is also part of a unified hermeneutic process involving understanding and interpretation.[192] Application in interpretation brings together past and present, tradition and interpreter, "I and Thou."[193] Application implies that the text is read by a given individual within a given hermeneutic context on which, as regards legal texts in particular, it has concrete bearing.[194]

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184. *Id.* at 301.

185. *See id.* at 302 ("If we fail to transpose ourselves into the historical horizon from which the traditionary text speaks, we will misunderstand the significance of what it has to say to us.").

186. *Id.* at 302.

187. *Id.* at 303.

188. *See id.*

189. *Id.*; *see also* PALMER, *supra* note 145, at 244 ("The hermeneutical encounter is not a denial or negation of one's own horizon (for one must see through it and can never see at all without it) but a willingness to risk it in a free opening of oneself.").

190. These antinomies recall the hermeneutic circle. The idea of a hermeneutic circle envisions the movement between the part and the whole and vice versa, each dependent upon the other in the act of understanding. *See* GADAMER, TRUTH AND METHOD, *supra* note 144, at 268–78, 293–99.

191. *See id.* at xxix ("[T]here is mediation between the past and the present: that is, application.").

192. GADAMER, TRUTH AND METHOD, *supra* note 144, at 318–19; ZIMMERMANN, *supra* note 145, at 51.

193. GADAMER, TRUTH AND METHOD, *supra* note 144, at 354.

194. *Id.* at 316; *see also* PALMER, *supra* note 145, at 235–37 (discussing the "Significance of Application" for the hermeneutic undertaking).

In application, the legal interpreter thus engages with the text in a "new and different way" and applies it to her chosen context.[195] The hermeneutic task of application, nevertheless, presents problems for any interpreter for she cannot apply what she does not possess.[196] Her engagement with the text—her ability to apply as regards that text—is necessarily constrained or enlarged by her inherent ability, itself circumscribed within a particular tradition and its prejudices.[197] She thus applies and understands herself while interpreting the text before her.[198] As regards legal texts in particular, "[t]he work of interpretation is to concretize the law in each specific case—i.e., it is a work of application."[199] In other words, hermeneutic application in the legal context has both individual and broader dimensions to which the legal interpreter must be responsive.[200]

Does this mean that "truth" is irrelevant and Gadamer leaves us with nothing but a cacophonous world of subjective voices competing for dominance? Far from it. Under Gadamer's insights, "when we say we understand, we are laying claim to truth."[201] Understanding, however, is not a benign undertaking that embeds each interpreter further in the refuge of the familiar.[202] Gadamer underscores that conversation or dialog is a means of exposing individual prejudices and traditions to the challenge of others, which might thereby allow both sets of traditions and prejudices to transcend their contextual confines and approximate truth, if not truth itself.[203]

Conversation thus requires the individual to transcend the limits of the particular and touch the universal by upholding, modifying, or abandoning the familiar refuges within which the particular might easily claim refuge.[204] Hermeneutics exposes what lies *behind*, what is *before,* and it concerns itself with *fore*-understanding, *pre*-understanding, *pre*-judgment, *ant*[*e*]-cipations, and the *un*-said, as these are all conditions of understanding that might undermine understanding

195. *See* GADAMER, TRUTH AND METHOD, *supra* note 144, at 307–08.

196. *Id.* at 313. In some sense, what she already possesses informs her hermeneutic posture. *See* GADAMER, PHILOSOPHICAL HERMENEUTICS, *supra* note 147, at 9 ("Rather, we are possessed by something and precisely by means of it we are opened up for the new, the different, the true.").

197. *See id.* at 21 ("[The art of understanding] is a skill in which one gifted person may surpass all others, and theory can at best only tell us why."); *id.* at 9 ("It is not so much our judgments as it is our prejudices that constitute our being.").

198. *See* HANS-GEORG GADAMER, GADAMER IN CONVERSATION: REFLECTIONS AND COMMENTARY 37–38 (Richard E. Palmer, ed. & trans. 2001) [hereinafter GADAMER, REFLECTIONS].

199. GADAMER, TRUTH AND METHOD, *supra* note 144, at 325.

200. *See id.* at 316.

201. JEAN GRONDIN, INTRODUCTION TO PHILOSOPHICAL HERMENEUTICS 141 (1994).

202. *See* Eskridge, *supra* note 143, at 623.

203. *See id.* at 612–13.

204. *See id.* at 623.

and the conversation to which it aspires.[205] As Gadamer puts it, "[w]e do not need just to hear one another but to *listen to* one another. Only when this happens is there understanding."[206] In other words, conversation (and the truth it might generate) are participatory exercises in which openness and transparency are sought and shared.[207] Hermeneutics "remains continually ready to alter its opinion when better insight comes along."[208]

C. Gadamer's Interpreters

Both courts and commentators have cited to Gadamer.[209] Before providing a brief overview of the commentators explicitly engaging with Gadamer (as so many implicitly rely on his insights), I offer first a summary of the court cases citing to his work. I conclude with a discussion of how my Article engages with Gadamer's legal commentators and why it is important to rely on Gadamer's work at this moment in time.

Courts have cited to Gadamer with approval.[210] They have taken for granted his theories of interpretation and have appreciated his insight regarding understanding as an alternative to scientific positivism.[211] They have cited to Gadamer at some length for his understanding of interpretation when they interpret the federal constitution.[212] They have referred to Gadamer when noting that "successful communication depends on meanings shared by interpretive communities."[213] Thus, for judges Gadamer's arguments regarding interpretation and understanding have particular force and are worthy of citation.[214]

More significantly, Gadamer's work has generated an extensive legal commentary since the appearance of *Truth and Method* in

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205. *See* GADAMER, PHILOSOPHICAL HERMENEUTICS, *supra* note 147, at 67, 88–94, 117, 121.

206. GADAMER, REFLECTIONS, *supra* note 198, at 39.

207. *See id.* at 40 ("I have suggested that the ideal of objective knowledge which dominates our concepts of knowledge, science, and truth needs to be supplemented by the ideal of sharing in something, of participation."); GADAMER, TRUTH AND METHOD, *supra* note 144, at 271 ("All that is asked is that we remain open to the meaning of the other person or text.").

208. GRONDIN, *supra* note 201, at 113.

209. *See, e.g.*, Continental Can Co. V. Chicago Truck Drivers, Helpers & Warehouse Workers Union Pension Fund, 916 F.2d 1154, 1157 (7th Cir. 1990); Mercado v. Ahmed, 756 F. Supp. 1097, 1099 n.2 (N.D. Ill. 1991); Doe v. Daily News, L.P., 660 N.Y.S. 2d 604, 607 (N.Y. Sup. Ct. 1997).

210. *See, e.g.*, *Continental Can Co.*, 916 F.2d at 1157.

211. *See Mercado*, 756 F. Supp. at 1099 n.2 (noting also Gadamer's "high regard for legal interpretation may explain the high regard in which he is held by some legal interpreters").

212. *See, e.g.*, *Daily News, L.P.*, 660 N.Y.S. 2d at 604.

213. *Continental Can Co.*, 916 F.2d at 1157.

214. *See, e.g.*, *id.*; *Daily News, L.P.*, 660 N.Y.S. 2d at 607.

1960.[215] Recent legal commentators have cited to Gadamer for his challenge to "pure rationality," and they have also extended the application of his insights to constitutional law, contract law, copyright law, environmental law, evidence law, human rights law, immigration law, international law, patent law, and statutory interpretation, among others.[216] They have derived from Gadamer a "critical

215. Given that a search for "Gadamer" returns 1,101 responsive articles on LexisNexis, I cite selectively to that literature in this Article. *See* LEXISNEXIS ADVANCE, https://advance.lexis.com (last visited Nov. 24, 2019). I also set aside the philosophical disagreements with Gadamer by Emilio Betti, Jacques Derrida, Ronald Dworkin, Jürgen Habermas, E.D. Hirsch, and Paul Ricoeur, among many others, which are taken up in detail in many of the sources to which I cite. For Betti, see, for example, ZIMMERMANN, *supra* note 145, at 133; Eskridge, *supra* note 143, at 624. For Derrida, see, for example, ZIMMERMANN, *supra* note 145, at 48; Eskridge, *supra* note 143, at 627; Mootz, *supra* note 157, at 157 & 172. For Dworkin, see, for example, Eskridge, *supra* note 143, at 646; Allan C. Hutchinson, *Hermeneutics and Critique in Legal Practice—Work in Progress: Gadamer, Tradition and the Common Law*, 76 CHI.-KENT L. REV. 1015, 1021 (2000). For Habermas, see, for example, ZIMMERMANN, *supra* note 145, at 134; Fred R. Dallmayr, *Borders or Horizons? Gadamer and Habermas Revisited,* 76 CHI.-KENT L. REV. 825, 826 (2000); Mootz, *supra* note 181, at 971. For Hirsch, see, for example, ZIMMERMANN, *supra* note 145, at 60; Eskridge, *supra* note 143, at 624. For Ricoeur, see, for example, ZIMMERMANN, *supra* note 145, at 62–63; Eskridge, *supra* note 143, at 632; Mootz, *supra* note 143, at 597. I also set aside discussion of Gadamer's application to the humanities and religion. For a very brief overview, see ZIMMERMANN, *supra* note 145, at 57–98.

216. For "pure rationality," see Carrie Menkel-Meadow, *Why We Can't "Just All Get Along": Dysfunction in the Polity and Conflict Resolution and What We Might Do About It*, 2018 J. DISP. RESOL. 5, 8–9 n.20 (2018). For constitutional law, see, for example, Eskridge, *supra* note 143, at 609, 614 (gay rights); Mootz, *supra* note 181, at 968 (same); Mootz, *supra* note 143 (death penalty, race); Mootz, *supra* note 157 (abortion); Francis J. Mootz III, *Law in Flux: Philosophical Hermeneutics, Legal Argumentation, and the Natural Law Tradition*, 11 YALE J.L. & HUMAN. 311, 312 (1999) [hereinafter Mootz, *Natural Law*] (affirmative action, assisted suicide); Shlomo C. Pill, *Valuing Our Constitutional Discourse: Autonomous-Text Constitutionalism and the Jewish Legal Tradition*, 64 BUFF. L. REV. 349, 350 (2016) (constitutional interpretation generally); Mark E. Brandon, *Originalism and Purpose: A Précis*, 16 U. PA. J. CONST. L. 413, 424 (2013) (same); Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1964 (2013) (same). For contract law, see, for example, Shahar Lifshitz & Elad Finkelstein, *A Hermeneutic Perspective on the Interpretation of Contracts*, 54 AM. BUS. L.J. 519, 541 (2017). For copyright law, see, for example, Omri Rachum-Twaig, *A Genre Theory of Copyright*, 33 SANTA CLARA HIGH TECH. L.J. 34, 43 n.17 (2017); Lior Zemer, *Dialogical Transactions*, 95 OR. L. REV. 141, 172 n.146 (2017). For environmental law, see, for example, Edward L. Rubin, *Rejecting Climate Change: Not Science Denial But Regulation Phobia*, 32 J. LAND USE & ENVTL. L. 1, 5 n.16 (2016). For evidence law, see, for example, Jennifer L. Mnookin, *Atomism, Holism, and the Judicial Assessment of Evidence*, 60 UCLA L. REV. 1524, 1536 n.27 (2013). For international law, see, for example, Martti Koskenniemi, *Histories of International Law: Significance and Problems for a Critical View*, 27 TEMP. INT'L & COMP. L.J. 215, 230 (2013). For human rights law, see, for example, Bernard K. Freamon, *ISIS, Boko Haram, and the Human Right to Freedom from Slavery Under Islamic Law*, 39 FORDHAM INT'L L. J. 245, 274 n.70 (2015); Samuel Moyn, *The Secret History of Constitutional Dignity,* 17 YALE HUM. RTS. & DEV. L.J. 39, 64 n.76 (2014). For immigration law, see, for example, Eskridge, *supra* note 143. For patent law, see, for example, Huang Yan, *A Dynamic Framework for Patent Claim Construction: Insights from a Philosophical Hermeneutic Study*, 21 TEX. INTELL. PROP. L.J. 1, 19 (2013). For statutory interpretation, see, for example, Eskridge, *supra* note 143; William N. Eskridge, Jr. & Phillip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

legal hermeneutics" that puts the interpreter's own traditions and prejudices at risk.[217] They have shown the transformative power of Gadamer's dialogic emphasis for legal analysis, and they have extended even further the reach of his work by supplementing it with the work of other philosophers and thinkers in the service of justice.[218] Commentators have also identified openness as a key political virtue in Gadamer's thought.[219] In sum, as commentators have underscored the centrality of a Gadamerian approach to the practical issues posed by legal cases, commentators have displayed the appealing depth and breadth of Gadamer's importance for lawyers.[220]

To the extent that it extends Gadamer's reach to a different area of American law while building on the work of previous commentators, my argument is consistent with these approaches. By applying Gadamer's work to an area of American law to which it has not already been applied (remedies law), my work underscores Gadamer's universal appeal.[221] Similarly, my project shows that Gadamer's work has powerful social justice and civil rights reverberations beyond those already identified by other commentators (that is beyond the important and often controversial areas of abortion, assisted suicide, capital punishment, gay rights, and race, among others).[222] Here, I apply Gadamer to sexism/misogyny and religious intolerance. My work thus draws from the interpretive work that precedes it and pursues its social justice impetus in other areas of the law.

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217. *See, e.g.*, Mootz, *supra* note 157, at 76 *et seq.*; Mootz, *supra* note 181, at 1017 *et seq.*; GEORGIA WARNKE, JUSTICE AND INTERPRETATION 137, 160–64 (1992).

218. On Gadamer's advancing the ends of justice by questioning tradition, see generally GEORGIA WARNKE, GADAMER: HERMENEUTICS, TRADITION AND REASON (1987). On the dialogic aspect of Gadamer's work, see, for example, Eskridge, *supra* note 143, at 613; Mootz, *supra* note 145, at 501–14; Mootz, *supra* note 181, at 971 *et seq.* On reading other philosophers and thinkers as consistent with Gadamer, see, for example, Mootz, *supra* note 145, at 493 *et seq.* (Chaim Perelman); Mootz, *supra* note 181 (Nietzsche and Perelman); WARNKE, *supra* note 217, at 129–31 (Ronald Dworkin and Alasdair MacIntyre); Steven Paul Cauchon, *Openness to Critical Reflection: Gandhi beyond Gadamer*, *in* INHERITING GADAMER: NEW DIRECTIONS IN PHILOSOPHICAL HERMENEUTICS 102–20 (Georgia Warnke ed., 2016).

219. On openness in Gadamer, see Whitney Mannies, *Elements of Style: Openness and Dispositions*, *in* INHERITING GADAMER: NEW DIRECTIONS IN PHILOSOPHICAL HERMENEUTICS 81–101.

220. *Supra* note 216 and accompanying text.

221. Legal commentators have also criticized Gadamer on a number of bases. *See, e.g.*, Robert M. Cover, *The Supreme Court: 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 6 n.11 (1983) (Gadamer is "disappointingly provincial"); Robin L. West, *Are There Nothing but Texts in This Class? Interpreting the Interpretive Turns in Legal Thought*, 76 CHI.-KENT L. REV. 1125 (2000) (Gadamer conflates moral and interpretive capacities, overridingly focuses on the human condition as essentially interpretive to the detriment of other approaches when in fact interpretation is a choice and is not intrinsically inevitable, and his work lacks social criticism).

222. *See supra* note 218 and accompanying text.

Since my horizon differs from that of other interpreters, my work is, more importantly, a departure from that which precedes it.[223] As with the remedies literature, I have found no commentator that has examined the importance of moral outrage in the literature on Gadamer.[224] As is the case in remedies literature, there are tantalizing references to outrage in the literature on Gadamer but no sustained treatment of the subject.[225] My work thus introduces moral outrage both to remedies law and to the literature on Gadamer and it argues that judges should express moral outrage in their opinions.

Some might object to the normative dimension of my engagement with Gadamer. They might say that Gadamer is descriptive rather than normative, and that he explicitly abjures the deployment of a particular methodology in the service of truth, which I am doing by telling courts what to do when faced with individuals from communities at risk.[226] In support of their argument, they might rely on other interpreters of Gadamer, many of whom I have cited above, who read Gadamer with other thinkers so as to provide normative impetus to Gadamer's insights.[227] Theirs, however, is one interpretation of Gadamer. Mine is another, and it is supported by other readings of Gadamer.[228]

Relying on Gadamer's focus on openness, my Article focuses on the context surrounding a judicial trial at a particular moment in time as part of the relevant horizon to which a judge must attend in her adjudication of a case.[229] Under my reading of Gadamer, a judge

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223. *See* Hassan El Menyawi, *Same Sex Marriage in Islamic Law*, 2 WAKE FOREST J. L. & POL'Y 375, 410 (2012).

224. *See infra* note 225.

225. Of course, this is not to say that the word "outrage" does not appear in the literature referring to Gadamer; it does. It is instead to say that "outrage" appears as one word among many in the Article and is not the hermeneutic concern of the Article. *See, e.g.*, Paul C. Chevigny, *Philosophy of Language and Free Expression*, 55 N.Y.U. L. REV. 157, 157 (1980); Mark Kingwell, *Let's Ask Again: Is Law Like Literature*, YALE J.L. & HUMAN. 317, 351 (1994); R. Shep Melnick, *Statutory Reconstruction: The Politics of Eskridge's Interpretation*, 84 GEO. L.J. 108, 108, 121 (1996) (reviewing WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 1994); Mootz, *supra* note 143, at 614; Emmanuel Voyiakis, *International Law, Interpretative Fidelity, and the Hermeneutics of Hans-Georg Gadamer*, 4 GERMAN Y.B. INT'L L. 385, 388 (2011).

226. Cauchon, *supra* note 218.

227. *See supra* note 221 and accompanying text.

228. *See, e.g.*, Eskridge, *supra* note 143, at 629 ("Most of *Truth and Method* sounds descriptive (this is what interpretation essentially *is*), but there is an element of choice and normative prescription in Gadamer's advice"); Mootz, *Natural Law, supra* note 216, at 319 ("Gadamer concludes that 'putting at risk' is the guiding normative implication of his philosophy, emphasizing that 'hermeneutic philosophy understands itself not as an absolute position but as a way of experience. It insists that there is no higher principle than holding oneself open in a conversation.' ").

229. *See* Eskridge, *supra* note 143, at 620 ("Horizon is context, 'the range of vision that includes everything that can be seen from a particular vantage point.' Our vision might be focused on one thing, but we also have a field of vision, a horizon, that conditions what

must both explicitly take into consideration her own particular horizon and the context surrounding a trial at a given point in time (the judge's and the case's horizons).[230] In doing so, the judge must account for the bearing of the case's horizon on the parties to the case before her and she must also consider that horizon in her opinion in an overt manner in the service of social justice as she places her own traditions and prejudices at risk.[231]

The judge is encouraged to draw on a wide range of contemporary sources, including newspapers, journals, and other secondary materials, which will provide the basis for her opinion that will express moral outrage in a given instance at a particular point in time because it is necessary. Such a requirement of reliance on a wide source materials is hardly a departure from what judges already do and it is hardly a departure from the horizon that they already bring to cases each day since they are immersed in a culture awash with such materials.[232] Thus, "horizon" remains central to my reading as it is to Gadamer's.[233]

Why Gadamer? Why now? Outrage is not only a fixture of the current American and global horizons, but it is also a compelling way to address ongoing problems such as sexism/misogyny and religious intolerance, which are the concern of this Article.[234] Current public discourse in the United States—in which American judges, jurors, and litigants are steeped and to which they all contribute—is rife with references to the traditions and prejudices that both bind and rend us.[235] Gadamer's work is about the place of such traditions and

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we see when we focus."); William M. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 346 (1989) ("Every text has a context (horizon) of assumptions the author makes about the world around her. The interpreter also has a context (horizon), but one that is different from the text's, because the world has changed and the interpreter is a different person from the author."); Menyawi, *supra* note 223 ("Every person brings their own horizon, or context, to a text. This is linked to Gadamer's idea of the 'history of effect' that historically situates a person's understanding.").

230. *See* Eskridge, *supra* note 143.

231. Taking the context—and the state in which the particular plaintiff's horizon arises—into consideration is hinted at the trial court level in Ms. Elauf's case. *See Abercrombie*, 798 F. Supp. 2d at 1278 ("Elauf has, since age 13, worn the head scarf consistently and continuously when in public or in the presence of men who are strangers—this despite the fact that she resides in Tulsa, Oklahoma").

232. *Definition of Admissible Evidence*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/admissible_evidence [https://perma.cc/C84P-B5QS] (providing definition of admissible evidence is broad).

233. *See* GADAMER, TRUTH AND METHOD, *supra* note 144, at 313.

234. It is important to state that while I focus on the issues directly raised by *Sheridan, Abercrombie* and other cases*:* sexism/misogyny and islamophobia/religious intolerance this is not to say that these are the only issues bedeviling American public and political discourse. It is to say, however, that these issues are indicative both of the kinds of challenges facing American litigants and judges and of the kinds of cases in which outrage should be expressed under my approach.

235. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (U.S. 2015) ("The right to

prejudices in our lives in this particular moment as we engage with a difficult and often impenetrable past and about openly confronting and transcending them.[236] Discussions regarding women in America, Muslims in America and religious intolerance in general (to name only a few) have become even more central to American public discourse in both troubling and novel ways.[237] Women and minority religious communities have long been under sustained attack (again, among so many others to which I refer below).[238] We need a Gadamerian approach in this moment given its liberating dialogic effect for vulnerable constituencies and communities. In sum, this is why Gadamer and why now.

III. MEANINGS OF MORAL OUTRAGE

But first, what is moral outrage, what does it do, and why should we have it in judicial opinions? To respond to this question, I return to the *Sheridan* case, the rags-to-riches-to-rags oil-skimming story with which I opened my discussion.[239] In that case, recall that on the

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marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone."); United States v. Windsor, 133 S. Ct. 2675, 2693 (U.S. 2013) ("The House concluded that DOMA expresses 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.'"); Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia & Thomas, JJ., dissenting) ("Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct."); Boy Scouts of Am. v. Dale, 530 U.S. 640, 700 (2000) (Stevens, Souter, Ginsberg & Breyer, JJ., dissenting) ("As Justice Brandeis so wisely advised, 'we must be ever on our guard, lest we erect our prejudices into legal principles.'"); Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, Rehnquist & Thomas, JJ., dissenting) ("The constitutional amendment before us here . . . is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws."); Bowers v. Hardwick, 478 U.S. 186, 194 (1986) ("Against this background, to claim that a right to engage in [homosexual] conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious.").

236. *See supra* Part II.

237. *See Women's Rights*, ACLU, https://www.aclu.org/issues/womens-rights#current [https://perma.cc/F4TM-C3E4] (see current issues facing women); Shadi Hamid, *For Religious American Muslims, Hostility from the Right and Disdain from the Left*, THE BROOKINGS INSTITUTE (Aug. 5, 2019), https://www.brookings.edu/blog/order-from-chaos/2019/08/05/for-religious-american-muslims-hostility-from-the-right-and-disdain-from-the-left/ [https://perma.cc/2E56-RFFT].

238. *See* Roe v. Wade *Turns 40, but the Debate is Even Older*, NPR (Jan. 22, 2013), https://www.npr.org/sections/health-shots/2013/01/22/169637288/roe-v-wade-turns-40-but-abortion-debate-is-even-older [https://perma.cc/WD4E-DEUK] (as an example, the abortion debate started at least as far back as the 1950s); Kenneth C. Davis, *America's True History of Religious Tolerance*, SMITHSONIAN MAG. (Oct. 2010), https://www.smithsonianmag.com/history/americas-true-history-of-religious-tolerance-61312684/ [https://perma.cc/7G6F-S75J].

239. *See supra* Introduction.

basis of public morality, conscience, and public policy the court was outraged at the Sheridans.[240] The court also reported the Sheridan couple to the relevant authorities for failing to report their illicit income for tax purposes.[241] "We do not reward wrongdoers!" the appalled court wrote.[242] The court also balked at the fact that Mr. Sheridan "just did not bother to get a job!"[243]It awarded Mrs. Sheridan alimony, child support, and attorneys' fees.[244] Here, I identify the vocal aspect of outrage, its Gadamerian "fusions of horizons," and its dignitary aspect as constitutive parts of outrage's importance in this moment.[245]

A. Outrage as Vociferation

Moral outrage is judicial vociferation of its disapproval regarding a particular infraction at a given point in time.[246] In engaging with the litigants' arguments, the *Sheridan* court referred both to the equitable nature of the remedy sought and it referred to public morality.[247] "As the ultimate repository," the *Sheridan* court stated, "the gatekeeper of that conscience and morality, equity's forum can never be used to promote or condone crime or clearly defined breaches of public morality."[248] The court observed that "[t]he morality of which equity speaks is that of society and not the judge's personal view of right and wrong."[249] Suzanne and Charles Sheridan's marriage contract and the legal arguments that they advanced were only enforceable to the extent that they were compatible "with the laws or public policies of the state."[250] In other words, the remedy the Sheridan couple sought was moral in nature, which meant that the judicial response to their request for a remedy could be vocalized in writing freighted with the appropriate moral disapproval of their objectionable conduct *at that moment in time* in 1990.[251]

There was something Gadamerian about the *Sheridan* courts' approach to the equitable division of marital assets (and the accompanying outrage that the court voiced).[252] Indeed, the court need not have approached the issues before it in the outraged manner in which

240. Sheridan v. Sheridan, 589 A.2d 1067, 1070–71, 1075 (N.J. Super Ct. 1990).
241. *Id.* at 1072–74.
242. *Id.* at 1071.
243. *Id.* at 1075.
244. *Id.* at 1076–77.
245. *See* GADAMER, TRUTH AND METHOD, *supra* note 144, at 301.
246. *See generally supra* Section I.C.
247. *Sheridan*, 589 A.2d at 1070.
248. *Id.*
249. *Id.*
250. *Id.*
251. On the morality of an equitable remedy, see *supra* note 138 and accompanying text.
252. *See generally Sheridan*, 589 A.2d 1067.

it did, but for some reason it felt compelled to do so. Cases citing to *Sheridan,* some of which also mention morality and equity, make this point clear when they do not express moral outrage.[253] *Sheridan*'s distinctive—and some might say "quaint"—reliance on equity's conscience to express moral outrage is more likely to find analogs in opinions from before the passage of the Rules Enabling Act in 1934 than after.[254] Writing in 1990, like the *Sheridan* court does in a memorable manner about equity's "conscience"—and referring to that conscience a number of times in the same opinion—is, therefore, saying something about the meeting of the *Sheridan* judge's particular horizon and of that case's horizon, which gave rise to the judge's iconoclastic vociferation of moral outrage in the case.[255]

B. Outrage as "Fusion of Horizons"

To make clear the importance of a particular judge's and case's horizons in remedies cases, we need only consider the following facts from a Vermont property case. Roland and Leita Pion sued for an equitable remedy to resolve a boundary dispute regarding land that had once belonged to Mrs. Pion's grandfather.[256] At trial, Mrs. Pion admitted that she had forced "4 or 5" people off the land that the defendants now owned.[257] She had threatened a previous neighbor with a firearm and had called him "cripple."[258] She had struck another's dog with a broom, had called that particular neighbor a "fucking crazy bitch" and had told the neighbor's children that "that their Mommy

253. *See, e.g.*, Monmouth Cty. Div. of Social Services on Behalf of Div. of Youth and Family Services v. C.R., 720 A.2d 1004, 1014 (N.J. Sup. Ct. Ch. Div. 1998) (quoting *Sheridan's* discussion of morality and conscience); Hoefers v. Jones, 672 A.2d 1299, 307 (N.J. Sup. Ct. Ch. Div. 1994) (citing to *Sheridan* for the proposition that "[a] Court of Equity, as a Court of Conscience, cannot be used as a forum to advance or condone wrongdoing "); Nakahara v. NS 1991 Am. Trust, 718 A.2d 518, 523 n.35 (Del. Ch. 1998) (citing to *Sheridan's* discussion of unclean hands); Breisch v. Rafanello, 2014 N.J. Super. Unpub. LEXIS 600, at *8 (N. J. Sup. Ct. App. Div. Mar. 20, 2014) (relying on *Sheridan* to find that "the judge did not abuse his discretion in failing to find that plaintiff came to court with unclean hands when no reimbursement was due ").

254. *See, e.g.*, Richardson v. Bristol Land & Improv. Co., 1 Tenn. App. 671, 684 (Tenn. Ct. App. 1926) ("A court of conscience cannot be compelled by any rules of law to outrage its conscience in the exercise of any supposed jurisdiction, otherwise it would cease to be a court of conscience."); *see also* DENNIS R. KLINCK, CONSCIENCE, EQUITY, AND THE COURT OF CHANCERY IN EARLY MODERN ENGLAND (2010).

255. Indeed, reliance on equity and its conscience characterizes nineteenth century remedies cases. *See* Duane Rudolph, *How Equity and Custom Transformed American Waste Law*, 2 PROP. L. J. 1, 6 (2015).

256. Pion v. Bean, No. S348-00 Fc, slip op. at 11 (Vt. Sup. Ct. Mar. 11, 2002).

257. *Id.* at 9 (Vt. Sup. Ct. Mar. 11, 2002); *see also* Brief for Appellants at 25–27, Pion v. Bean, 833 A.2d 1248, 1251 (Vt. 2003) (No. 2002-179) (acknowledging that "[a]ll of the behavior which Mrs. Pion is accused of took place when the appellees were out of doors, within view of the public; she never entered their home or confronted them anywhere but outside").

258. *Pion*, No. S348-00 Fc, slip op. at 5.

and Daddy were going to hurt them."[259] Mrs. Pion had repeatedly called the police to lodge false complaints about another neighbor whom she had called a "hag," a "witch," and a "fucking bitch."[260]

As a result of Mrs. Pion's conduct, the next round of neighbors tried to sell their home for half a year.[261] So they would not purchase the property, Mrs. Pion shouted at prospective buyers, which forced her neighbors to abandon their home to a state agency.[262] As they moved out, "Mrs. Pion stood outside their home and smiled."[263] Mrs. Pion was not done. She moved boundary markers on the defendants' land, put up chain link fences on their property, filled in their neighbor's stream bed resulting in a flooded basement, felled their trees and hurled obscenities at them, too.[264] She called the defendant's sister-in-law "a 'slut' and a 'whore.'"[265] Because the actual malice element had been met in the case, punitive damages were issued, but neither the trial, appellate, nor the Supreme Court of Vermont in the *Pion* case expressed any palpable outrage—certainly none of the *Sheridan* kind.[266]

By relying on remedial morality of the *Sheridan* kind when faced with facts more egregious and shocking than those in *Sheridan*, the *Pion* courts could have expressed moral outrage.[267] The *Pion* courts could have expressed such outrage, for example, when upholding an equitable injunction against the Pions for their misconduct.[268] Similarly, *Kansas*—an opinion about the correct remedy when faced with continued willful misconduct in a water rights case—could also have expressed moral outrage, especially since it was a decision, much like *Sheridan* (non-payment of taxes), about offenses against a governmental entity in matters involving money.[269] The Supreme Court of Vermont, which decided *Pion* in 2003, could have founded its expression of moral outrage against the Pions on a remedial conscience since the court had already referred to a remedial conscience in the years before *Pion* and it continues repeatedly to do so afterward.[270] *Kansas* could also have done the same thing since justices

259. *Id.* at 6.
260. *Id.* at 7.
261. *Id.*
262. *Id.*
263. *Pion*, No. S348-00 Fc, slip op. at 7.
264. *Id.* at 9.
265. *Id.*
266. Pion v. Bean, 833 A.2d 1248, 1252 (Vt. 2003).
267. Sheridan v. Sheridan, 589 A.2d 1067, 1069 (Sup. Ct. N.J. Ch. Div. 1990).
268. *Id.*
269. *Kansas*, 135 S. Ct. at 1057.
270. *See, e.g.*, State v. Putnam, 130 A.3d 836, 852–53 (Vt. 2015); Darling v. Crow, 2015 Vt. Unpub. LEXIS 92, *7 (2015); Lasek v. Vermont Vapor, Inc., 95 A.3d 447, 454 (Vt. 2014); Bandler v. Majestic Car Rental Group, Inc., 2013 Vt. Unpub. LEXIS 256, at *7 (2013); Kellogg v. Shushereba, 82 A.3d 1121, 1138 (Vt. 2013); Shattuck v. Peck, 70 A.3d 922, 934–35 (Vt. 2013); Marsh v. McGillvray, 67 A.3d 943, 956–57 (Vt. 2012); Mueller v.

of the Supreme Court of the United States had also referred to equity's conscience before *Kansas* and have done so in more recent opinions.[271] Neither of them did, however.

While the Supreme Court of Vermont qualified the Pions' acts as "egregious" and affirmed the trial court's finding of a "vicious disregard and disrespect for the defendants' personal and property rights," it did not pay any attention to what Todd Rakoff has called the "social meanings" of the alleged objectionable conduct.[272] Judicial responsiveness to the social meanings of phrases in *Pion* such as "fucking crazy bitch", "slut", "whore", "hag," "witch," and "fucking bitch" would see such damaging language as part of a continuum of the centuries-old subordination of women, even where other women were involved in the demeaning of women. Attention to social meanings would explicitly condemn such misconduct as part of the award for punitive damages, for example, or it might elicit written disapproval of such misconduct from the bench as part of the opinion. True, *Pion* is, more than anything else, a property rights case about obnoxious neighbors.[273] However, what makes the neighbors obnoxious also makes them outrageous in legally significant ways, which is sanctionable under current law and should be subject to an outrage remedy.[274]

In some sense then, the fusion of a particular court's horizon and a particular case's horizon can foment or suppress an expression of moral outrage in that case. Different courts have different understandings of facts and different responses regarding the necessity of moral outrage. Although *Sheridan* and *Pion* were decided by very different courts, the cases are similar in that both cases involved what Henry Smith would refer to as opportunistic litigants trying to use the courts to sanitize their egregious misconduct.[275] The Sheridans

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Mueller, 54 A.3d 168, 176–77 (Vt. 2012); Savage v. Walker, 969 A.2d 121, 121 (Vt. 2009); Montgomery v. Cheshire Handling, 2009 Vt. Unpub. LEXIS 158, at * 13 (2009); Weed v. Weed, 968 A.2d 310, 315 (Vt. 2009); Johnson v. Harwood, 945 A.2d 875, 881–82 (Vt. 2008); Clark v. Witte, 182 Vt. 650, 650 (Vt. 2007); Korda v. Chi. Ins. Co., 908 A.2d 1018, 1028 (Vt. 2006); Gallipo v. City of Rutland, 489 A.2d 942, 954–55 (Vt. 2005); Monahan v. GMAC Mortg. Corp., 893 A.2d 298, 217 (Vt. 2005); Mann v. Levin, 861 A.2d 1138, 1147 (Vt. 2004); Nationwide Mut. Fire Ins. Co. v. Gamelin, 786 A.2d 1078, 1088 (Vt. 2001).

271. *See, e.g.*, Florida v. Georgia, 138 S. Ct. 2502, 2536, 2548 (2018) (Thomas, J., dissenting); Nelson v. Colorado, 137 S. Ct. 1249, 1260 (2017) (Alito, J., concurring); Holland v. Florida, 560 U.S. 631, 670 (2010) (Scalia, J., dissenting); Phillipines v. Pimentel, 553 U.S. 851, 862 (2008).

272. Pion v. Bean, 833 A.2d 1248, 1259 (Vt. 2003); *see* Rakoff, *supra* note 86, at 83–94. To be sure, Rakoff focuses on official actions subject to constitutional review, but his point is a hermeneutic one. That is, context matters, and actions—including speech acts—are embedded within an expansive context that defines their contours and bearing. As Rakoff notes, "making social meaning the direct subject of legal inquiry will indeed make officials more careful to avoid creating invidious meanings." *Id.* at 92.

273. *Pion*, 833 A.2d at 1251.

274. Klass, *supra* note 96, at 90.

275. On opportunism, *see supra* note 139 and accompanying text.

sued to divide illegal money and the Pions sued to destroy their neighbors.[276] Yet, only *Sheridan* expressed moral outrage—and for failure to pay taxes while requesting a judicial remedy.[277] The horizons that individual judges bring to each case and the horizons that they confront at given points in time thus matter and they have some bearing on expressions of moral outrage.

What kind of horizon might an individual judge bring to a case? *Sheridan*'s indignation at failure to pay taxes while requesting a remedy may have something to do with the litigants' implicit attack on the institution of marriage, whose upholding may be central to the judge's own particular horizon, traditions and prejudices.[278] *Sheridan* notes, for example, that "marriage in terms both human and material is afforded great deference and many societal protections."[279] It is "a social relationship subject in all respects to the state's police power."[280] Marriage "creat[es] the most important relation in life."[281] Concerns about marriage may motivate the displacement of moral outrage from the dissolution of marriage (which is legally acceptable) to the failure to pay taxes while requesting a remedy (which is legally unacceptable).[282] Outrage can thus be a response to a perceived attack on particular traditions and prejudices to which a particular judge is attentive.

Pion, in particular, presented courts with numerous opportunities to express moral outrage, which were eschewed.[283] Almost eight months before the Supreme Court of Vermont handed down *Pion*, a lower Vermont court had found the Pions in contempt and had fined them:

> [T]he state court found that the Pions had violated Judgment 1 (entered March 11, 2002), held the Pions in contempt, and ordered them to pay a $1,000 sanction to the Beans for violating that order. As a specific rationale for finding contempt, Judgment 2 cited a paragraph from Judgment 1 that ordered the Pions to cease their harassment of the Beans, and forbade the Pions from surveilling the Beans' property by way of taking photographs or using binoculars.[284]

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276. Sheridan v. Sheridan, 589 A.2d 1067, 1068 (N.J. Super. Ct. Ch. Div. 1990); *Pion*, 833 A.2d at 1251.

277. *Sheridan*, 589 A.2d at 1068.

278. *Id.* at 1069–70.

279. *Id.* at 1070.

280. *Id.*

281. *Id.* (quoting Maynard v. Hill, 125 U.S. 190 (1888)).

282. *Sheridan*, 589 A.2d at 1068.

283. Pion v. Bean, 833 A.2d 1248, 1260 (Vt. 2003).

284. Bean v. Pion (*In re* Pion), No. 06-10538, 2007 Bankr. LEXIS 3578, at *32 (Bankr. D. Vt. Oct. 22, 2007).

Even after the Supreme Court of Vermont opinion, the *Pion* case proved interminable. The Pions disputed (and lost) their appeal of an award of construction costs for replacement of the defendants' stone wall.[285] The Pions ignored court orders.[286] They unsuccessfully sought to discharge the contempt, punitive, and compensatory damages against them in a bankruptcy proceeding.[287] Again, this fact validates Gadamer's insight that particular traditions, prejudices, and fore-understandings are at play, even in judicial interpretation, and failure to account for them does not stop them from driving the outcome of a given case.

C. Outrage as Dignity

From a dignitarian perspective, moral outrage identifies conduct that is difficult to understand and accept because it violates the inherent human dignity of the individual being targeted.[288] Inherent human dignity, as David Luban has powerfully argued, applies to everyone, no matter who they are and no matter our personal misgivings about them:

> Once we accept that human dignity requires litigants to be heard, the justification of the advocate becomes clear. People may be poor public speakers. They may be inarticulate, unlettered, mentally disorganized, or just plain stupid. They may know nothing of the law, and so be unable to argue its interpretation. Knowing no law, they may omit the very facts that make their case, or focus on pieces of the story that are irrelevant or prejudicial. They may be unable to utilize basic procedural rights such as objecting to their adversary's leading questions. Their voices may be nails on a chalkboard or too mumbled to understand. They may speak a dialect, or for that matter know no English. None of this should matter. Human dignity does not depend on whether one is stupid or smooth. Hence the need for the advocate. Just as a non-English speaker must be provided an interpreter, the legally mute should have—in the very finest sense of the term—a mouthpiece.[289]

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285. Pion v. Bean, No. 2005-054, 2005 WL 6152658, at *2 (Vt. Sup. Ct. 2005) (affirming award of construction costs); Pion v. Bean, No. S348-00 Fc, 2004 WL 5459782, at *3 (Vt. Super. Ct. 2004) (awarding construction costs for replacement of stone wall to defendants).

286. *Pion*, 2005 WL 6152658, at *1 (Vt. Sup. Ct. 2005) ("The trial court's final judgment included several specific orders to address the property damage plaintiffs caused. The court issued the specific orders because plaintiffs had not followed its previous orders to make repairs during the pendency of the case.").

287. Bean v. Pion (*In re* Pion), No. 06-10538, 2007 Bankr. LEXIS 3578, at *20–36 (Bankr. D. Vt. Oct. 22, 2007).

288. Luban, *Human Rights Pragmatism*, *supra* note 17, at 211.

289. Luban, *Lawyers as Upholders*, *supra* note 17, at 819.

As Luban's insight implies (and *applies* within the context of moral outrage), dignity does two things for moral outrage.[290] First, it implies that certain actions are inimical to inherent human dignity because those actions humiliate a given individual, usually on the basis of the individual's perceived belonging to a class or community that is deemed inferior and worthy of debasement.[291] Second, Luban's insight implies that outrage, which is something fundamentally vocal, vocal*ized*, voc*iferous*, can be aligned with the necessity to be heard in a given situation and that the court in such a case acts, to use Luban's word, as the targeted community or class's "mouthpiece."[292] Outrage speaks and it also purports to speak *on behalf of*.[293] Outrage underscores the failure of conversation, the breakdown of dialogic openness to the other, and it heightens the necessity of unusually vocal speech so that the other's plight might be heard and the parties might come to some understanding of the truth of the situation.[294]

But isn't outrage always late? Doesn't it always arise after the objectionable act has happened? And if outrage is effective, then why does its mere expression not foment the desired change once and for all? Even if late, outrage still holds the perpetrator accountable and it orders her participation at the dialogic exchange that she has long rejected by raising the tone of the discussion, which appears to be the only way she will bring herself to understand at this moment in time. In this sense, outrage involves a measure of "resentment," which is about "the unremitting denunciation of injustice."[295] Resentment—

> stands for a refusal to 'normalise' the crime, to make it part of the ordinary/explicable/accountable flow of things, to integrate it into a consistent and meaningful life-narrative; after all possible explanations, it returns with its question: 'Yes, I got all this, but nevertheless, how could you have done it? Your story about it doesn't make sense!'[296]

Outrage thus speaks to a failure of understanding, and it recalls the horror of the occurrence of *those* facts in *this* moment and why they

290. Luban, *Human Rights Pragmatism*, *supra* note 17, at 211.
291. Luban, *Lawyers as Upholders*, *supra* note 17, at 822.
292. *Id.* at 830.
293. Bandes, *supra* note 79, at 368.
294. *Id.*
295. SLAVOJ ŽIŽEK, VIOLENCE 189 (2008). I adapt for my purposes Žižek's discussion of "resentment" in his work on violence. While Žižek does briefly discuss moral outrage in his treatment of "left-liberal humanitarian discourse on violence," his work is not explicitly about moral outrage, but about systemic and other forms of violence. *Id.* at 6.
296. *Id.*

are inimical to the dignitarian society to which we aspire at this point in time.[297] Finally, outrage can and does bring about change. Some discriminatory acts, however, are so ingrained and embedded in our judicial and social structures that they take longer to dislodge than others—hence, more outrage is necessary to do so.

Outrage, nevertheless, can be unhelpful in some cases. Outrage can function as a smokescreen. That is, outrage can churn up a cloud of smoke that prevents people from seeing what the outraged person is doing behind the veil of smoke.[298] Take, for example, *Sheridan's* indignation over a request for a remedy following a failure to pay taxes.[299] The real outrage in that case might be the court's displaced displeasure over the dissolution of a marriage, which it hides behind failure to pay taxes. Or, let's assume, *arguendo*, that in the water rights case Kansas sued Nebraska not because Kansas was outraged over Nebraska's willful breach of its water rights (resulting in a $3.7 million loss) but because Kansas realized that Nebraska had long enjoyed the enviable position of having 49% of the Basin's water rights (nine percent more than Kansas) and the only way to get Nebraska back to the negotiation table was to sue Nebraska promptly and often in the Supreme Court of the United States. Outrage is thus not self-justifying and is not always proof that the target of the outrage has done something outrageous.

Outrage can also displace attention. It can effortlessly redirect its audiences to a tangential or non-issue (a sideshow) that it would like others to believe is now the most significant issue of all. Indeed, outrage can terminate the dialogic exchange that is at the heart of Gadamer's meaningful communication because it is so vocal that it can overwhelm the other's ability to speak openly and in the spirit of a truthful exchange.[300] In other words, outrage can exhaust so that those exposed to it are no longer in any position to engage meaningfully in a conversation.[301]

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297. By "violence" I understand an expansive definition that includes both verbal acts as well as physical acts. *See* Duane Rudolph, *How Violence Killed an American Labor Union*, 67 RUTGERS U. L. REV. 1407, 1411 (2015).

298. David Remnick, *The Cruelty and Cynicism of Trump's Transgender Ban*, NEW YORKER (July 26, 2017), https://www.newyorker.com/news/news-desk/the-cruelty-and-cynicism-of-trumps-transgender-military-ban [http://perma.cc/KTE6-39UW]. On outrage as a smokescreen, *see* Courtney Weaver, *Donald Trump's tweets are weapons of mass distraction*, FINANCIAL TIMES (Sept. 26, 2017), https://www.ft.com/content/3dc733fa-a1fb-11e7-b797-b61809486fe2 [http://perma.cc/3Q8J-7YVS].

299. Sheridan v. Sheridan, 589 A.2d 1067, 1068 (N.J. Super. Ct. Ch. Div. 1990).

300. *See* JEFFREY M. BERRY & SARAH SOBIERAJ, THE OUTRAGE INDUSTRY 6 (2014) (finding "that outrage tactics such as ideological selectivity, vilification of opponents, and fear mongering make talking politics beyond our most intimate circles extraordinarily difficult, complicating our ability to have meaningful discussions about politics in our communities").

301. *See* Lee Drutman, *How to Combat Trump Fatigue Syndrome*, VOX (May 17, 2017), https://www.vox.com/polyarchy/2017/3/7/14844120/how-to-fight-trump-fatigue-syndrome;

Given these dangers, the issue arises regarding when it is appropriate to deploy moral outrage in our legal system.[302] Under the paradigm I propose, judicial outrage of the kind I envisage must be reserved for specific circumstances in which individuals from identifiable and vulnerable communities are under attack or risk being under attack. Such communities include women and those who face religious intolerance. Under my reading, outrage will not be a smokescreen because it will protect identified dignitary interests. It will not divert attention because it will focus on specific vulnerability at law and in society and will attempt to remedy it. Finally, outrage will only end discussion to the extent that any judicial opinion can (in other words, it cannot).

The goal, thus, of moral outrage in a judicial opinion will not be to exhaust any litigant or reader of a particular judicial opinion but to commit judges to the upholding of the inherent dignity of vulnerable litigants by strengthening the range of remedies available to the disenfranchised. In this context, expressions of moral outrage will reinvigorate in the process the conversation that has closed or become blocked.

IV. THIS MOMENT IN MORAL OUTRAGE

Gadamer reminds us that interpretation involves a dialogic exchange whose goal it is to transcend the barriers that would thwart meaningful conversation.[303] Outrage can thus be considered to speak to the other loudly so as to pierce the other's inability to hear in this moment and make such a dialogic exchange possible because this moment presents a number of dangerous issues (raised, for example, by the *Sheridan*, *Abercrombie*, and *Pion* facts) that affect and damage so many lives in the United States, as they have done for a long time.[304] Sexism/misogyny is such a pressing issue. Sexism/misogyny is present in the domestic violence that Susan Sheridan suffered, in the background of Abercrombie's treatment of Samantha Elauf, and it is also present in the *Pion* case.[305] Religious intolerance is another. In the *Abercrombie* case, Islamophobia specifically and religious intolerance more generally are on display.[306] Outrage requires the court to talk to the litigant and to the party who are in violation of

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Jessi Hempel, *The Problem with #MeToo and Viral Outrage*, WIRED (Oct. 10, 2017), https://www.wired.com/story/the-problem-with-me-too-and-viral-outrage/ [http://perma.cc/LA6H-SVHS].

302. BERRY & SOBIERAJ, *supra* note 300, at 6.

303. *See supra* Part II.

304. BERRY & SOBIERAJ, *supra* note 300, at 6.

305. *See* EEOC v. Abercrombie & Fitch Stores, Inc., 798 F. Supp. 2d 1275, 1275 (N.D. Okla. 2011); Pion v. Bean, 833 A.2d 1248, 1259 (Vt. 2003); Sheridan v. Sheridan, 589 A.2d 1067, 1068 (N.J. Super. Ct. Ch. Div. 1990).

306. *See Abercrombie*, 789 F. Supp. 2d at 1277.

the other's inherent dignity. Here, I begin by recognizing that outrage is a fixture of this particular moment in the United States before I look specifically at the sexism/misogyny and Islamophobia (religious intolerance) that are also omnipresent in this moment's horizon and that are deserving of expressions of moral outrage.

A. This Moment in Moral Outrage

The present political and cultural moment is one of perpetual outrage. The president is constantly outraged, so much so that he communicates his displeasure to the world at all hours and, in the process, outrages others.[307] Members of Congress and their constituents are outraged by this president and this moment in time.[308] Members of both parties are outraged at each other, so much so that they are shocked, *shocked,* that the other party and its supporters are doing what they are doing, which is an incomprehensible way of doing things, after all.[309] Newspapers are appalled, *appalled,* at what things have come to under these leaders in this moment in time.[310] Americans are disgusted, *disgusted*, at how bad things are in Washington [D.C.].[311] To live in the United States in this moment is to be angry, appalled, disgusted, indignant, shocked—that is, outraged—about something, some things, or about everything. Indeed, to not be

307. Stephen Castle, *Trump's Tweets Manage a Rare Feat: Uniting Britain, in Outrage*, N.Y. TIMES (Dec. 1, 2017), https://www.nytimes.com/2017/11/30/world/europe/trump-tweets-uk-visit.html [http://perma.cc/G82H-NDC8]*; see* Ben Jacobs, *Trump Uses Twitter to Bash New York Times Coverage and Letter to Subscribers*, GUARDIAN (Nov. 13, 2016), https://www.theguardian.com/us-news/2016/nov/13/trump-twitter-new-york-times [http://perma.cc/7AH2-DWD7].

308. *See* Burgess Everett & Rachel Bade, *Conservatives Floored by Trump's Gun Control Lovefest*, POLITICO (March 1, 2018), https://www.politico.com/story/2018/03/01/trump-gun-control-conservatives-gop-nra-432783 [http://perma.cc/B68U-2TTG]; Tom Howell, Jr., *Conservatives outraged at Trump's Funding to Subsidize Obamacare Insurers*, WASH. TIMES (Feb. 18, 2018), https://www.washingtontimes.com/news/2018/feb/18/donald-trumps-obamacare-funds-anger-conservatives/ [http://perma.cc/35XM-EGYR].

309. *See* Nicholas Kristof, *You're Wrong! I'm Right!*, N.Y. TIMES (Feb. 18, 2018), https://www.nytimes.com/2018/02/17/opinion/sunday/liberal-conservative-divide.html [http://perma.cc/82A6-3ZRN]; Sean Sullivan, *Sen. Orrin Hatch Apologizes for Calling Obamacare Supporters 'Dumbass' People*, WASH. POST (March 2, 2018), https://www.washingtonpost.com/news/powerpost/wp/2018/03/02/sen-orrin-hatch-apologizes-for-calling-obamacare-supporters-dumbass-people/?utm_term=.8c46ceb5d817 [http://perma.cc/3VYH-F2CT].

310. Paul Krugman, *The Uses of Outrage*, N.Y. TIMES (Feb. 27, 2017), https://www.nytimes.com/2017/02/27/opinion/the-uses-of-outrage.html [http://perma.cc/CN4A-B3A3]; *see Trump's 'Best People' and Their Dubious Ethics*, N.Y. TIMES (Feb. 19, 2018), https://www.nytimes.com/2018/02/18/opinion/trump-best-people-ethics.html [http://perma.cc/8ZYP-64MU].

311. *See* Alan Greenblatt, *Voters Angry at Washington Gridlock May Want to Look in the Mirror*, NPR (Oct. 1, 2012), https://www.npr.org/sections/itsallpolitics/2012/10/01/162084449/voters-angry-at-washington-gridlock-may-want-to-look-in-the-mirror [http://perma.cc/C4J5-BAG8].

outraged about something—even at the amount of outrage in public discourse—might be considered somewhat anomalous at this moment in time.

B. This Moment in Sexism/Misogyny

Sexism/misogyny stubbornly persists with often violent results for women and those identified as women. Sexism/misogyny goes to the heart of the traditions that shape us as interpreters and the prejudices that we bring to bear in reading legal texts. Sexism/misogyny also goes to the definitions of inherent dignity that we support as worthy of the world in which we want to live, a world in which women and those likened to women should not be demeaned. Legislators have sometimes responded to the discriminatory treatment of women.[312] Courts and commentators have documented its nefarious effects in the American workplace.[313] American newspapers continue to document its effects in this moment of American life.[314] I look at each of these briefly in turn since they, too, characterize the present horizon under a Gadamerian reading.

Various laws in recent years have identified some of the issues that women in American life continue to face.[315] At the federal level, the Violence Against Women Reauthorization Act of 2013 provides support for women who are victims of rape, domestic violence, dating violence, stalking, as well as support for Native Americans, immigrant women, lesbians, and women with disabilities.[316] The Affordable Care Act requires health insurance companies to pay for birth control without copays or deductibles.[317] The Lilly Ledbetter Fair Pay Act of 2009 targets compensation discrimination to which women are still widely subjected.[318] Similarly, a number of states

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312. *See, e.g.*, Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013) (codified in scattered portions of 42 U.S.C.).

313. *See, e.g.*, Stoll v. Runyon, 165 F.3d 1238, 1243 (9th Cir. 1999); EEOC v. Willamette Tree Wholesale, Inc., No. CV 09-690-PK, 2011 U.S. Dist. LEXIS 25464, at *14–17 (D. Or. Mar. 14, 2011).

314. Kahan, *supra* note 11, at 607 (observing that reliance on newspapers is useful when discussing public morality, values, and social meaning):

> I thus draw liberally on media reports, op-ed pieces, and letters to the editor, as well as legislative histories and judicial opinions, not because I believe (necessarily) that the arguments made in them are persuasive, but because the sentiments they express provide evidence of how the public perceives alternative sanctions.

315. Indeed, the argument here is not that these laws are sufficient to address the problems that women face, but that the existence of these laws displays some of the issues that women face in American life.

316. Violence Against Women Reauthorization Act of 2013.

317. Affordable Care Act of 2010, 42 U.S.C. § 300gg-13 (2019).

318. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, 123 Stat. 5 (2009) (codified in scattered portions of 42 U.S.C.).

have also moved against compensation discrimination.[319] Legislators have thus identified these acts as prejudicial to women, and such acts are part of the horizon that both judges and litigants bring to judicial proceedings.

Courts and commentators have similarly acknowledged that the prejudicial treatment of women is ongoing. They have discussed sexism/misogyny in employment discrimination cases, which includes various forms of discrimination against women in the American workplace.[320] Women are sexually assaulted, harassed, insulted, passed over for promotion, and paid less than men, among other workplace problems.[321] Women are denied employment, lose their jobs when pregnant, are not paid when on maternity leave in most states, and they are deemed less diligent and less intelligent solely on the basis of their status as women.[322] These are some of the recalcitrant issues that are deeply rooted in this moment's horizon.

American newspapers document many of the same issues. They report that the presidency itself has taints of sexism/misogyny.[323]

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319. *See State Equal Pay Laws*, NAT'L CONF. OF STATE LEG., http://www.ncsl.org/research/labor-and-employment/equal-pay-laws.aspx [http://perma.cc/EB2W-WH69] (last visited Nov. 24, 2019).

320. *See, e.g.*, CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 1 (1979); Meredith Render, *Misogyny, Androgyny, and Sexual Harassment: Sex Discrimination in a Gender-Deconstructed World*, 29 HARV. J.L. & GENDER 99, 99–100 (2006); Abigail C. Saguy, *Employment Discrimination or Sexual Violence: Defining Sexual Harassment in American and French Law,* 34 LAW & SOC'Y REV. 1091, 1091 (2000); Abigail C. Saguy, *Employment Discrimination or Sexual Violence: Defining Sexual Harassment in American and French Law,* 34 LAW & SOC'Y REV. 1091, 1091 (2000).

321. For sexual assault, harassment, insults, see, for example, EEOC v. Willamette Tree Wholesale, Inc., No. CV 09-690-PK, 2011 U.S. Dist. LEXIS 25464 at *14; Stoll v. Runyon, 165 F.3d 1238, 1243 (9th Cir. 1999). For denial of promotion, see Ángel González, *Costco Settles Promotion Lawsuit for $8M, Vows Reforms*, SEATTLE TIMES (Dec. 7, 2013), https://www.seattletimes.com/business/costco-settles-promotion-lawsuit-for-8m-vows-reforms/ [https://perma.cc/PRV8-QXCY]. On pay inequity, see *Pay Equity & Discrimination*, INST. FOR WOMEN'S POLICY RESEARCH, https://iwpr.org/issue/employment-education-economic-change/pay-equity-discrimination [http://perma.cc/JJU5-GVFN] (last visited Nov. 24, 2019).

322. On denial of employment, see *Walmart to Pay More than $11.7 Million To Settle EEOC Sex Discrimination Suit*, U. S. EQUAL EMP'T OPPORTUNITY COMM'N (March 1, 2010), https://www.eeoc.gov/eeoc/newsroom/release/3-1-10.cfm [http://perma.cc/8NGC-EVXM]. On pregnancy discrimination, see Young v. UPS, 135 S. Ct. 1338, 1344 (2015). On unpaid maternity leave, see *State Family and Medical Leave Laws*, NAT'L CONF. OF STATE LEG., http://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx [http://perma.cc/CQJ9-ET3Y] (last visited Nov. 24, 2019). On stereotypes regarding pregnant women, see Charlotte N. Sweeney & Rachel E. Ellis, *Family Responsibility Discrimination: Enforcing the Rights of Caregivers in the Workplace*, 41 COLO. LAWYER 39, 40 (Oct. 2012). On derogatory comments regarding women's intelligence, see, for example, Collins v. Clark County Fire Dist. No. 5, 231 P.3d at 1217 (female employees described as "'stupid wom[e]n,' 'stupid bitch[es],' and 'lying bitch[es]'").

323. *See* Jill Filipovic, *Donald Trump and His Work Wives*, N.Y. TIMES (Jan. 22, 2018), https://www.nytimes.com/2018/01/20/opinion/donald-trump-and-his-work-wives.html [http://perma.cc/K98D-WCLS]; Michael Tackett, *Trump's Combative Denials Again Draw*

Congress and the judiciary similarly struggle with these issues.[324] Newspapers also tell us that men who have sexually assaulted women have received lenient sentences.[325] Newspapers recount the story of a doctor entrusted with the medical care of hundreds of young female athletes that represent our country whom the doctor sexually assaults over several years.[326] A number of prominent men are also said to have sexually assaulted and discriminated against women.[327] These are some of the pressing issues in this moment, in this horizon, facing cases like *Sheridan, Abercrombie,* and *Pion* and the courts understanding, interpreting and applying the law to them.

C. This Moment in Religious Intolerance

Islamophobia and religious intolerance of the type evoked in *Abercrombie* are similarly deeply embedded in this moment.[328] Muslims are assumed to be un-American, terrorists, and they are widely discriminated against.[329] Muslims abroad are also presumed to be terror threats and the executive may now enforce bans against their entry to the United States.[330] Religious intolerance in this moment

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Him into the Sexual Harassment Debate, N.Y. TIMES (Dec. 13, 2018), https://www.nytimes.com/2017/12/12/us/politics/trump-blames-democrats-for-false-accusations-from-women.html [http://perma.cc/FZ72-5KKZ].

324. *See* Grace Guarnieri, *Federal Courts to Track Sexual Harassment in Wake of Misconduct Allegations*, NEWSWEEK (Feb. 21, 2018), http://www.newsweek.com/us-courts-track-sexual-harassment-814668 [http://perma.cc/5DYR-G2QL]; Martha Nussbaum, *The Roots of Male Rage, on Show at the Kavanaugh Hearing*, WASH. POST (Sept. 29, 2018), https://www.washingtonpost.com/news/democracy-post/wp/2018/09/29/the-roots-of-male-rage-on-show-at-the-kavanaugh-hearing/?noredirect=on&utm_term=.2f90cd000e69 [http://perma.cc/2MUC-BZUE]; Evan Osnos, *Deliberating Bodies: Sexism and Congress*, THE NEW YORKER (Aug. 29, 2014), https://www.newyorker.com/news/daily-comment/deliberating-bodies-sexism-congress [http://perma.cc/8HYQ-EMFK].

325. *See* Christine Hauser, *Judge's Sentencing in Massachusetts Sexual Assault Case Reignites Debate on Privilege*, N.Y. TIMES (Aug. 24, 2016), https://www.nytimes.com/2016/08/25/us/david-becker-massachusetts-sexual-assault.html [http://perma.cc/R235-9C HV]; Danielle Paquette, *What Makes the Stanford Sex Offender's Six Month Jail Sentence so Unusual*, WASH. POST (June 6, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/06/06/what-makes-the-stanford-sex-offenders-six-month-jail-sentence-so-unusual/?utm_term=.16732852bb7b [http://perma.cc/K6RA-WWPR].

326. Rebecca Davis O'Brien & Louise Radnofsky, *Former USA Gymnastics Doctor Larry Nassar Sentenced to Up to 175 Years for Sexual Abuse*, WALL ST. J. (Jan. 24, 2018), https://www.wsj.com/articles/former-u-s-gymnastics-doctor-larry-nassar-sentenced-to-up-to-175-years-for-sexual-abuse-1516815868 [http://perma.cc/L8VA-W5XM].

327. Sarah Almukhtar et al., *After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall from Power*, N.Y. TIMES (Feb. 8, 2018), https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html [http://perma.cc/XM23-AKT6].

328. *See, e.g.*, Khaled A. Beydoun, *Islamaphobia Has a Long History in the US*, BBC NEWS MAG. (Sept. 29, 2015), http:www.bbc.com/news/magazine-34385051 [http://perma.cc/KY4Y-6MQA].

329. Khaled A. Beydoun, *"Muslim Bans" and the (Re)Making of Political Islamophobia*, 2017 U. ILL. L. REV. 1733, 1738 (2017).

330. *See generally* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

has also deeply affected the Jewish community as anti-Semitism surges, and religious intolerance also damages and makes life difficult for members of other minority communities.[331]

Commentators remind us that Islamophobia has long been a phenomenon in America.[332] Muslims are attacked, as are their sacred spaces, and their allegiance to the country of their birth, or to their adopted home (as the case may be), the United States, is often questioned.[333] Muslims are forced to overcome suspicion regarding their belonging, their commitment to democratic values, failing which they are considered un-American and terrorists.[334] Islamophobia is damaging because it renders members of a religious group suspect and suspicious.[335] Islamophobia also identifies all Muslims as potential threats to American values with real consequences for how Muslims in America must order their lives.[336]

The Jewish community similarly faces intolerance. Courts and commentators have documented the pernicious continuing effects of anti-Semitism.[337] Jewish sacred grounds have been desecrated and the Jewish community is subject to hate speech and other forms of violence.[338] Anti-Semitism is damaging and Jews are made to fear for their safety in their own country, their own home, or in their adopted

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331. On rising anti-Semitism, see Maggie Astor, *Anti-Semitic Incidents Surged 57 Percent in 2017, Report Finds*, N.Y. TIMES (Feb. 27, 2018), https://www.nytimes.com/2018/02/27/us/anti-semitism-adl-report.html [http://perma.cc/JHQ2-U8L6]. On religious intolerance, see Peter Holley, *How the United States Became a 'Second-Tier' Country*, WASH. POST (June 22, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/06/22/rising-intolerance-makes-the-united-states-a-second-tier-country-new-study-finds/?utm_term=.8ced59658ef1 [http://perma.cc/MJR3-2Z9E].

332. Beydoun, *supra* note 328.

333. *See* Khaled A. Beydoun, *Islamophobia: Toward a Legal Definition and Framework*, 116 COLUM. L. REV. ONLINE 108, 112–13, 116–17 (2016).

334. *See generally* Beydoun, *supra* note 329.

335. *Id.* at 1737, 1747, 1773.

336. *Id.* at 1739, 1757.

337. *See, e.g.*, Slade *ex rel.* G.D.S. v. Northport–East Northport Union Free Sch. Dist., 915 F. Supp. 2d 268, 271 (E.D.N.Y. 2012) (Jewish high school student subjected to a variety of anti-Semitic slurs, including: "Jew", "Hey, Jew", and being told "'Jews are disgusting,' 'You dumb Jew,' 'Being Jewish must suck,' 'Hitler was a good person,' 'My love for you burns like a thousand Jews in an oven' . . . 'What's the difference between a Jew and a pizza? A pizza doesn't scream when it goes into the oven.'"); Kenneth L. Marcus, *Jurisprudence of the New Anti-Semitism*, 44 WAKE FOREST L. REV. 371 (2009).

338. Kayla Epstein, *The Disturbing History of Vandalizing Jewish Cemeteries*, WASH. POST (Feb. 21, 2017), https://www.washingtonpost.com/news/acts-of-faith/wp/2017/02/21/the-disturbing-history-of-vandalizing-jewish-cemeteries/?utm_term=.088e7db95f52 [http://perma.cc/U387-UE2P]; Meghan E. Irons, *Hate Group and Anti-Semitic Incidents Rose During Trump's first year, reports find*, BOS. GLOBE (Feb. 27, 2018), https://www.bostonglobe.com/metro/2018/02/27/anti-semitic-incidents-spiked-last-year-mass-adl-says/oTDjIZCimm4XE63UXNCPAJ/story.html [http://perma.cc/8RB9-7C6Z]; Ian Simpson, *Philadelphia Jewish cemetery desecrated by vandals*, REUTERS (Feb. 27, 2017), https://www.reuters.com/article/us-usa-security-cemetery/philadelphia-jewish-cemetery-desecrated-by-vandals-idUSKBN1650Y8 [http://perma.cc/7B53-UHCP].

home, as the case may be. These forms of vicious intolerance, and others, are deeply embedded in our current horizon and they must be acknowledged and resisted as prejudices and even traditions that exist in this current moment.

V. APPLICATION OF MORAL OUTRAGE

It is one thing to recognize that women and minority religious communities are at risk but another to state how moral outrage should apply in judicial opinions in cases involving women and minority religious communities. Should all outraged opinions include *Sheridan*-type exclamation points?[339] Might [outraged] silence be an expression of outrage, as in *Kansas*?[340] Would it be preferable instead to award the requested remedy (like in *Pion*) and simply characterize the facts as "egregious"?[341] Maybe *Abercrombie*'s approach is best because not even the word "egregious" appears in the opinion yet the aggrieved party gets a damages award and wins the case?[342]

Whatever approach a judge deploys as her own horizon fuses with those of the case before her, it should be apparent from her judicial opinion that the court is expressing public outrage on behalf of a community or class to which a particular litigant belongs and is making certain traditions and prejudices explicit in an effort to combat and overcome them. Given outrage's distinctive vociferation, expression of moral outrage is right where a community or class has been at risk, is currently is at risk, or is likely to be at risk of being muted or silenced. That is, I propose a model for the expression of moral outrage that would reserve its expression for cases involving communities or classes at risk, like women or religious minorities.

A. Community or Class

Central to my analysis is the emphasis on a community or class that has historically been threatened or at risk, is currently threatened or at risk, or that is likely to be threatened or at risk. Such a focus addresses both ingrained traditions or prejudices as well as nascent prejudices against a given group or community. The focus on the community or class and not on the particular litigant is meant to emphasize that the harm in a given case (in which moral outrage must be expressed) is a dignitary harm against a class of individuals of which *this individual* is a part, and the community of which she

339. *See* Sheridan v. Sheridan, 589 A.2d 1067, 1071 (N.J. Super. Ct. Ch. Div. 1990).
340. Kansas v. Nebraska, 135 S. Ct. 1042 (U.S. 2015).
341. *See generally* Pion v. Bean, 833 A.2d 1248 (Vt. 2003).
342. EEOC v. Abercrombie, 731 F.3d 1106 (10th Cir. 2013). *But see id.* at 1248.

is a part needs heightened judicial protection at *this moment in time*. The harm done by the aggressor in such a case is, more importantly, an attack on public morality, which privileges open communication. To provide as much interpretive flexibility as possible to judges and juries under the circumstances, I use both "community or class" in my test.

Courts and commentators have already identified a number of communities or classes at risk. Immigrants and immigrant workers are vulnerable communities.[343] Women can constitute an "especially vulnerable group."[344] Racial minorities are part of vulnerable communities.[345] Gays and lesbians are part of a community at risk.[346] The transgender community is particularly at risk.[347] Prisoners can be part of a community at risk.[348] The disabled, the elderly, and the poor have also been identified as "traditionally vulnerable."[349] That is, these are the kinds of communities, constituencies, or groups that have been historically threatened and that are still at risk.[350] Immigrants, women, racial minorities, sexual minorities, the disabled,

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343. *See* Mendoza v. Ruesga, 86 Cal. Rptr. 3d 610, 613–14 (Cal. Ct. App. 4th 2008) (identifying "immigrants seeking legal residency in the United States" as a "particularly vulnerable population"); Jayesh M. Rathod, *Immigrant Labor and the Occupational Safety and Health Regime*, 33 N.Y.U. REV. L. & SOC. CHANGE 479, 483 (2009).

344. Robert R. M. Verchik, *Katrina, Feminism, and Environmental Justice*, 13 CARDOZO J. L. & GENDER 791, 797 (2008).

345. *See, e.g.*, United States v. Bakenhus, 1997 U.S. App. LEXIS 15320, at *10 (6th Cir. 1997) ("In this case, the minority status of the victims in Clarksville, a predominantly white community, and [defendant's] purposeful attack against them because of their minority status, justifies the district court's determination that these victims were uncommonly vulnerable to the defendant's acts."); Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159 (2016).

346. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2604 ("Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.").

347. Irina D. Manta, *Choosing Privacy*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 649, 687–88 (2017) ("In many ways, the transgender community is the most vulnerable group in the LGBT movement"); *see also* Sarah McBride, *HRC & Trans People of Color Coalition Release Report on Violence Against the Transgender Community*, HUM. RTS. CAMPAIGN (Nov. 17, 2017), https://www.hrc.org/blog/hrc-trans-people-of-color-coalition-release-report-on-violence-against-the [http://perma.cc/XPY2-JYZP].

348. On prisoners, see, for example, Benning v. Georgia, 391 F.3d 1299, 1312 (11th Cir. 2004) noting that:

> If a requested exemption from health or safety rules is so serious as to place members of the prison community at risk, [federal law] allows [the state] to deny the exemption so long as the challenged rule serves a compelling interest, such as prison safety, and the challenged rule is the least restrictive means of serving that interest.

349. Max Stul Oppenheimer, *Return of the Poll Tax: Does Technological Progress Threaten 200 Years of Advances Toward Electoral Equality?*, 58 CATH. U. L. REV. 1027, 1063 (2009).

350. Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 102–08 (2017).

the elderly and the poor have faced long histories of discrimination—often hundreds of years deep—and the attacks on them continue.[351]

Does my analysis foreclose the possibility of new vulnerable communities, classes, or groups arising over time? No. Disadvantaged classes tend to change over time, meaning that today's vulnerable could very well be tomorrow's victimizers. Outrage also has a way of creating new communities of its own. It is adept at bringing people together, often across boundaries of all sorts, and it effortlessly coalesces them into a hive of actors who demand action on behalf of a particular cause. Recall, for example, the discovery of a drowned Syrian toddler on a Turkish beach whose family had fled war or the case of the Zimbabwean lion that was killed by an American dentist both of which cases elicited global uproar.[352] The outrage in both cases—one a human rights case and the other an animal rights case—brought together people across the globe who demanded action.[353] Outrage thus creates communities, however transitory, that come together in the service of a cause. If those communities were imperiled in some way by the actions of an aggressor, my analysis would embrace the expression of outrage on their behalf, even if the only thing that held them together was their moral outrage for a sliver of time.

Applying this insight about communities and classes to *Sheridan* and *Kansas*, it becomes even more evident that *Sheridan* misdirected its moral outrage and that *Kansas* was right not to express any outrage. *Sheridan* identified the state and federal governments as "potential innocent entities" in the case.[354]It expressed moral outrage because it held that "[i]n this state, courts will not allow wrongdoers to enrich themselves as a result of their own criminal acts at the expense of an innocent party."[355] That is, the innocent victims in *Sheridan* were the state and federal governments—neither of which is a community, class, or group that faced a long history of discriminatory animus as a matter of law, public policy, or societal bias either at the moment *Sheridan* was decided or at the present moment.[356] *Kansas* similarly does not present a community

351. *See, e.g.*, *id.*

352. On Syria, see *If These Images Don't Change Europe, What Will?*, AL JAZEERA (Sept. 3, 2015), https://www.aljazeera.com/news/2015/09/images-don-change-europe-150902220504564.html [http://perma.cc/V78V-KZDE]. On Zimbabwe, see *Walter J Palmer, DDS*, YELP, http://www.yelp.com/biz/walter-j-palmer-dds-minneapolis [http://perma.cc/V9A7-AE95] (last visited Nov. 24, 2019); *see also* Kevin Drum, *For a Week, Walter Palmer is the Worst Human Being Ever in History*, MOTHER JONES (July 30, 2015), http://www.motherjones.com/kevin-drum/2015/07/week-walter-palmer-worst-human-being-ever-history.

353. *If These Images Don't Change Europe, What Will?*, *supra* note 352.

354. Sheridan v. Sheridan, 589 A.2d 1067, 1074 (N.J. Super. Ct. Ch. Div. 1990).

355. *Id.*

356. *But see* Phillips Chemical Co. v. Dumas Indep. Sch. Dist., 361 U.S. 376, 387 (1960)

or constituency historically at threat or under sustained attack, even if does present Kansas as a victim of Nebraska's willful "misbehavior" for the second time in roughly a decade.[357]

Similarly, *Abercrombie* was wrong not to express moral outrage on Ms. Elauf's behalf. Ms. Elauf was a young Muslim woman who sought employment in a potentially hostile state, her home state, Oklahoma, from an employer indisposed to her.[358] Bringing into relief this aspect of Ms. Elauf's particular horizon and horizon facing her, the trial court observed that "Elauf has, since age 13, worn the head scarf consistently and continuously when in public or in the presence of men who are strangers—*this despite the fact that she resides in Tulsa, Oklahoma.*"[359] Given, therefore, the particular traditions and prejudices to which women and Muslims are still subject in the United States, and especially in Oklahoma, Ms. Elauf would meet the proposed test's requirement for the expression of moral outrage on her behalf. That is, as a Muslim and a woman, Ms. Elauf is part of a community or class that was historically threatened or at risk, is currently threatened or at risk, and, in her particular case, that is likely to be continuously threatened or at risk.

Indeed, relying on similar reasoning, *Sheridan* should have expressed moral outrage for Suzanne E. Sheridan. Mrs. Sheridan was a battered woman who lived with an abusive spouse who refused to work.[360] Given the existence of sexism and possible misogyny in the case, and the physical nature of the humiliation that Mrs. Sheridan suffered at home, Suzanne E. Sheridan would qualify as being from a community or class historically threatened or at risk, is currently threatened or at risk, and, in her particular case, from her a community or class that is likely to be continuously threatened or at risk.[361] Moral outrage should have issued for Suzanne E. Sheridan and women like her, which the *Sheridan* court failed to do.[362]

B. Muted or Silenced

Given the fact that outrage speaks loudly (and some might add *stridently*) in the service of a given cause, an additional requirement for the expression of moral outrage would be that the community or class in question must either have been historically muted or silenced, is currently muted or silenced, or is likely at risk of being muted or

(holding that state property taxes levied against a private lessee of federal property unconstitutionally discriminated against the United States).

357. Kansas v. Nebraska, 135 S. Ct. 1042, 1055 (U.S. 2015).

358. EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1112 (10th Cir. 2013).

359. *Id.* at 1278 (emphasis added).

360. *Sheridan*, 589 A.2d at 1075.

361. *See id.*

362. *See id.*

silenced, which explains the need for the court to state a position emphatically on that community's behalf at this point in time.

Women and religious minorities have faced long histories of silencing. Historically, women have been systematically silenced and there are indications that they continue to be silenced.[363] Similarly, the religiously intolerant have historically silenced religious minorities, often in horrendous ways.[364] Attacks on Jewish and Muslim sacred spaces, to name a few, continue this tradition of attempted silencing, indicating that both communities are in continuous peril of being muted or silenced, given the attacks on both communities in the United States.[365] Outrage thus speaks out against such attempts at muting a class of marginalized individuals.

C. Emphatic Remedy

Outrage, under my reading, will thus arise as its own remedy, applicable both at law and at equity. While some remedies are classified as monetary (damages, for example) and others as coercive (injunctions, for example), outrage might be classified as its own kind of remedy, an emphatic remedy that both emboldens the grant of all other remedies and that reinforces them as well. Outrage would thus be the remedy *behind* the remedy (a hermeneutic remedy, as it were), which would enhance the monetary value of a damages award, expand the scope of an injunction, and still leave to the judge's discretion written expression moral outrage in the *Sheridan* fashion, as well. Take, for example, the award of punitive damages—an outrage remedy—in the *Pion* case.[366] The Supreme Court of Vermont upheld the award of $5,000 against Mr. Pion and $25,000 against Mrs. Pion.[367] The court held that actual malice had been found in the case to support such an award and that actual malice required

363. *See* Susan Faludi, *The Patriarchs are Falling. The Patriarchy is Stronger than Ever.*, N.Y. TIMES (Dec. 28, 2017), https://www.nytimes.com/2017/12/28/opinion/sunday/patriarchy-feminism-metoo.htm [http://perma.cc/N6G8-MJPA]; Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League School*, 143 U. PA. L. REV. 1, 65 (1994); Margaret E. Montoya, *Silence* and *Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 5 MICH. J. RACE & L. 847, 849–50 (2000); Amy B. Wang, *"Nevertheless, she persisted" becomes new battle cry after McConnell silences Elizabeth Warren*, WASH. POST (Feb. 8, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/08/nevertheless-she-persisted-becomes-new-battle-cry-after-mcconnell-silences-elizabeth-warren/?utm_term=.373d1780332e [http://perma.cc/R9LC-H9QE].

364. *See, e.g.*, Hatem Bazian, *Countering Islamophobia Means Ending the Structural Silencing of Muslim Voices—Including Their Critique of Israel*, MONDOWEISS (Mar. 22, 2017), https://mondoweiss.net/2017/03/countering-islamophobia-structural [http://perma.cc/968G-2S2P].

365. *Id.*

366. Pion v. Bean, 833 A.2d 1248 (Vt. 2003).

367. *Id.*

"[a] showing of conduct manifesting personal ill will or carried out under circumstances evidencing insult or oppression, or even by conduct showing a reckless or wanton disregard of one's rights' will suffice.'"[368] Under my analysis, the Pions' sexist/misogynist comments targeting of women in that case would satisfy my "community or class" and the "muted or silenced" requirements. The victims in the *Pion* case would thus be the kinds of litigants for whom the model proposed here would reinforce the case for an outrage remedy.

Because my test identifies who gets the presumption that an outrage remedy should apply (without establishing that they do merit that remedy under a given set of facts), the litigants claiming an outrage remedy would still have to meet the test for the remedy they seek. In the *Pion* case, for example, for punitive damages to be issued the plaintiffs would still have to show actual malice to the satisfaction of the trier of fact.[369] Nevertheless, having met actual malice the test for an outrage remedy, the victims in the *Pion* case could see their punitive and other damages awards enhanced and an expression of moral outrage issue on their behalf.[370]

Such enhancement of a remedy already exists for civil rights violations and hate crimes in American law.[371] The jury could be instructed that once they have found that actual malice has been met (as required under Vermont law for an award of punitive damages, for example) they may (to adapt current language applicable in Vermont) "in determining the amount of punitive damages, consider the defendant's actions against this particular individual from a community or class at risk in our society. [They] may also consider the fact that by targeting this individual in this manner the defendant has sought to silence the community or class at risk to which this individual belongs, and [they] may increase the size of [their] penalty to a level that [they] deem appropriate under these circumstances."[372]

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368. *Id.*

369. *Id.* at 1248–49.

370. *Pion*, 833 A.2d at 1249.

371. *See, e.g.*, Civil Rights Act of 1968; 18 U.S.C. § 242 (1968); Violent Crime and Law Enforcement Act of 1994, 28 U.S.C. § 994 (1994(; United States v. Pagán-Ferrer, 736 F.3d 573, 590–91 (1st Cir. 2013) (upholding enhanced sentence under 18 U.S.C. § 242 in case involving civil rights violation that resulted in death of the victim); *see also State-by-State Hate Crime Laws*, NAACP (2017), https://www.naacp.org/wp-content/uploads/2017/09/Hate-Crimes-laws-by-state.pdf; *Anti-Defamation League State Hate Crime Statutory Provisions*, ANTI-DEFAMATION LEAGUE, https://www.adl.org/sites/default/files/documents/assets/pdf/combating-hate/2014-adl-updated-state-hate-crime-statutes.pdf.

372. Adapted from VERMONT CIVIL JURY INSTRUCTION COMMITTEE, *Plain English Jury Instructions*, § 11 Damages, VT. BAR ASSOC., http://www.vtbar.org/UserFiles/Files/WebPages/Attorney%20Resources/juryinstructions/civiljuryinstructions/damages.htm#11.19 [http://perma.cc/8XAJ-727G] ("In determining the amount of punitive damages, you should consider the character and standing of [Name of Defendant], [his/her/its] financial status, and the degree of malice or wantonness in [his/her/its] acts.").

Such an instruction would take the focus off the defendant, as appears to be currently the case under Vermont law, and would place it where it should be: on the plaintiff's and her community's suffering. Given constitutional preferences for punitive damage awards that are not excessive, the jury's punitive damages award could be reviewed for conformity with constitutional precedent.[373] A dignitarian turn in our jurisprudence requires of us the upholding of the inherent dignity of vulnerable groups because such groups are pivotal to the kinds of public discourse, conversation, and dialog we would like to thrive in our society and legal system.

CONCLUSION

Far from a request that a court "yell" at a litigant at a given point in time, moral outrage would instead require a court to speak audibly on behalf of a class or community at risk because all other attempts at conversation have failed up to this moment in time. Gadamer's hermeneutic insights situate all parties to a judicial proceeding in time, and they invite such parties to face and transcend the nefarious effects of their particular traditions and prejudices. Because it pierces the other's inability to hear or appreciate the suffering of its interlocutor, which suffering she has been trying to bring to the surface of her communicative ability, outrage helps the vulnerable speak beyond the barriers imposed by antagonistic traditions and prejudices. The effect of the outrage remedy would be to make evident the dignity of the vulnerable in both our legal and public discourse by assuring the vulnerable that even at their weakest, their most susceptible—when they might not be able to speak on their own behalf—their judicial system can and will act as their mouthpiece.

The outrage model presented in this Article builds on the existence of moral outrage in our legal system and the Article assumes that moral outrage need not be—and is not—an unruly element of our legal system if conscripted and channeled appropriately. The idea, therefore, is not only to empower vulnerable litigants as they appear before their judicial system after being exposed to long and difficult and painful histories of discrimination, but also to empower judges to do what they already do, but, openly, transparently, and within a remedial framework that serves the ends of social justice. After all, what is a remedy if not the ability to hear someone, to listen to her as she speaks, and in response to agree to the truth that she presents about her community's continued marginalization whose suffering we are committed to ending?

373. Shahi v. Madden, 5 A.3d 869 (Vt. 2010).