THE POWER OF THE DISSENT AND WRITING THE FUTURE OF JUSTICE: *MAAT*, ARISTOTLE'S RHETORIC, AND JUSTICE GINSBURG'S DISSENT IN *KENTUCKY V. KING*

LIVAN DAVIDSON*

Dissents speak to a future age. –Ruth Bader Ginsburg

I. Introduction

Given the recent activism and demonstrations against policing in America—ignited by the murders of Breonna Taylor,[1] George Floyd,[2]

* Juris Doctor Candidate, May 2021, St. Thomas University College of Law, St. Thomas Law Review, Executive Editor; Moot Court, Competing Member; B.A. English Literature and International Relations, Florida State University, 2018. *Agradezco eternamente el apoyo inconmensurable de mis padres, hermana y familia*. My most sincere thanks to Professor Lenora Ledwon for her guidance, insight, and feedback during the writing process. To the *St. Thomas Law Review* family, thank you for giving me a space to grow as a person, leader, and writer.

[1] *See* Rachel Treisman et al., *Kentucky Grand Jury Indicts 1 of 3 Officers in Breonna Taylor Case*, NPR (Sept. 23, 2020, 12:15 PM), https://www.npr.org/sections/live-updates-protests-for-racialjustice/2020/09/23/914250463/breonna-taylor-charging-decision-to-be-announced-this-afternoon-lawyer-says ("[F]ollowing months of outrage, activism and anticipation, a Kentucky grand jury has decided to indict one of the three Louisville Metro Police Department officers involved in the fatal shooting of Breonna Taylor in March."); Bill Chappell, *Court Releases Grand Jury Recording in Breonna Taylor Case*, NPR (Oct. 2, 2020, 4:45 PM) https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/10/02/ 919245689/court-releases-grand-jury-recording-in-breonna-taylor-case ("The audio gives a rare level of public access to more than two days of grand jury proceedings in a case that has fueled widespread protests over racial injustice and police use of deadly force against Black people and other minorities."); *see also* Kimberlé Crenshaw, Speech at the TEDWomen Conference: The urgency of intersectionality, (Oct. 27, 2016) (transcript available at https://www.ted.com/talks/kimberle_crenshaw_the_urgency_of_intersectionality) (discussing the many names of Black individuals who experienced police violence).

[2] *See* Brakkton Brooker, *Body Camera Video of George Floyd and Police Offers New Details of Deadly Encounter*, NPR (Aug. 14, 2020, 3:22 PM),

and many others—it is timely to examine the dissent and majority opinions in *Kentucky v. King*.[3] In *King*, the majority opinion "arm[ed]" police officers with yet another tool to circumvent the Fourth Amendment's warrant requirement.[4] The U.S. Supreme Court's (the Court) decision in *King* expanded police officers' discretion to break and enter into homes without having to first secure a warrant whenever officers suspect that evidence is being destroyed, so long as police officers do not create an exigency by way of engaging (or threatening to engage) in conduct that violates the Fourth Amendment.[5]

The late Court Justice, Ruth Bader Ginsburg (Ginsburg), voiced that "[t]he dissenter's hope [is] that they are writing not for today, but for tomorrow."[6] Before Ginsburg's passing, the hopes of a balanced court remained. Now, the future of the Court seems bleak.[7] For many

---

https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/08/14/902539820/body-camera-video-of-george-floyd-and-police-offers-new-details-of-deadly-encoun ("Floyd can be heard pleading with officers for air, including telling them, 'I can't breathe'—the complaint that's been repeated by thousands of protesters as they call for an end to systemic racism and police brutality across the U.S. and internationally."); *see also* Linda C. McClain, *Why Talk About Bad Actors Versus Good People Misses the Problem of Systemic Racism*, OXFORD U. PRESS BLOG (June 19, 2020), https://blog.oup.com/2020/06/why-talk-about-bad-actors-versus-good-people-misses-the-problem-of-systemic-racism/.

[3] Justice Alito, writing for the eight-justice majority, rejected Kentucky's Supreme Court ruling and held that "a warrantless entry to prevent the destruction of evidence is allowed where police do not create the exigency through actual or threatened Fourth Amendment violation"; thus abrogating U.S. Supreme Court precedent. *Kentucky v. King*, 563 U.S. 452, 452 (2011).

[4] *King*, 563 U.S. at 472. (Ginsburg, J., dissenting) (stating that "[t]he Court today arms the police with a way routinely to dishonor the Fourth Amendment's warrant requirement. …").

[5] *See generally id.* at 452.

[6] Jay Croft, *10 Quotes that Help Define the 'Notorious RBG' Legacy of Ruth Bader Ginsburg*, CNN POLITICS (Sept. 20, 2020, 4:47 PM), https://www.cnn.com/2020/09/19/politics/best-ruth-bader-ginsburg-quotes-trnd ("'Dissents speak to a future age. It's not simply to say,' 'My colleagues are wrong and I would do it this way.'").

[7] *See* Linda Greenhouse, *The ever-evolving US Supreme Court*, OXFORD U. PRESS BLOG (Aug. 10, 2018), https://blog.oup.com/2018/08/evolving-supreme-court/ ("Each departure and each new arrival up-ends established patterns and presents a

people, it is unsettling to imagine what the future of the Court will look like because of the profound impact that its decisions have on lawyers, judges, and society at large.[8]

This article explains why Ginsburg's dissent in *King* is rhetorically superior to the majority opinion. It evaluates, by way of comparing and contrasting, the persuasiveness of the dissent and majority opinions in *King*. This article examines the opinion through the lens of Aristotle's rhetorical model and the ancient tenet of *Maat*. It analyzes Ginsburg and Justice Alito's (Alito) use of rhetorical devices that appeal to persuasion, including logos (appeal to logic), ethos (appeal to credibility), pathos (appeal to emotions), and *Maat* (rightness in the world). This article concludes that Ginsburg's use of rhetoric has a superior appeal to fairness and justice because it is informed by Western rhetoric and the ancient tenet of *Maat*.

---

shock to the system."); Jonathan Turley, *The Nine Greatest Supreme Court Justices*, HISTORYNET (July 2019), https://www.historynet.com/the-nine-greatest-supreme-court-justices.htm ("We face a similar guessing game as a nation every time a new Supreme Court justice is chosen."); Barbara Sprunt, *Amy Coney Barrett Confirmed To Supreme Court, Takes Constitutional Oath*, NPR: POLITICS (Oct. 26, 2020, 8:07 PM), https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court ("The Senate has voted 52-48 to confirm Judge Amy Coney Barrett to the Supreme Court, just about a week before Election Day and 30 days after she was nominated by President Trump to fill the seat of the late Justice Ruth Bader Ginsburg.").

[8] *See About the Supreme Court*, U.S. COURTS https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about (last visited Nov. 23, 2020); *see also* Jay M. Feinman, *How Does the Supreme Court Decide What the Constitution Means?*, OXFORD U. PRESS BLOG (Dec. 12, 2018), https://blog.oup.com/2018/12/us-supreme-court-constitution-decisions/ (discussing how the U.S. Supreme Court justices interpret the Constitution); "The judge must interpret those constitutional and other legal texts which speak to the question of the proper or permissible occasions for imposition of a capital sentence. She must understand the texts in the context of an application that prescribes the killing of another person. And she must act to set in motion the acts of others which will in the normal course of events end with someone else killing the convicted defendant. Our judges do not ever kill the defendants themselves. They do not witness the execution. Yet, they are intensely aware of the deed their words authorize." Robert Cover, *Violence and the Word*, 95 YALE L. J. 1601, 1622 (1986).

This article introduces the current social climate to highlight why it is an important time to discuss the dissent and majority opinions in *King*. Part II defines Aristotle's classical rhetoric and the ancient tenet of *Maat.*[9] Part III discusses the role of the appellate judge and opinion writing.[10] Part IV overviews the Fourth Amendment and defines the exigent circumstance exception.[11] Part V both analyzes the dissent and majority opinions through the frame of Aristotle's rhetorical model and applies the Afrocentric comparative rhetorical tool of *Maat* (balance and justice in the world).[12] Part VI then concludes that Ginsburg's use of rhetorical devices in the dissent was rhetorically superior to the majority opinion because it has a greater appeal to justice.[13]

II. Defining Rhetoric

Rhetoric is the art of oral and written[14] persuasion.[15] It is also a tool utilized to educate, encourage, dissuade, reinforce, and plant ideas.[16] Rhetoric predates the ancient Greeks and Romans.[17] The oldest recognized writing on the subject was written in Egypt over 4,000

---

[9] *See infra* Part II.
[10] *See infra* Part III.
[11] *See infra* Part IV.
[12] *See infra* Part V.
[13] *See infra* Part VI.
[14] This article focuses on written persuasion by analyzing Justice Ginsburg and Alito's written opinions in *King*. The terms "speaker" and "writer" are used interchangeably. The terms "speech" and "writing" are used interchangeably. *See, e.g.*, *infra* Part II; Part III.
[15] *See generally* ARISTOTLE, RHETORIC 6–7 (Dover Thrifts ed. 2004); *see* Scott Fraley, *A Primer on Essential Classical Rhetoric for Practicing Attorneys*, 14 LEGAL COMM. & RHETORIC 99, 99 (2017) ("Rhetoric is the art of persuasion whether orally or in writing."); Steven D. Jamar, *Aristotle Teaches Persuasion: The Psychic Connection*, 8 SCRIBES J. LEG. WRITING 61, 62 (2002).
[16] *See* Fraley, *supra* note 15, at 101.
[17] *See, e.g.*, Joshua J. Mark, *Balance & the Law in Ancient Egypt*, ANCIENT HIST. ENCYC. (Oct. 3, 2019), https://www.ancient.eu/article/1126/balance--the-law-in-ancient-egypt/ ("Finally, after Khun-Anup has made nine petitions – all of which have

years ago by Pharaoh Huni, who instructed his son on effective speaking.[18] Other Ancient Egyptian rhetorical practices are found in the Book of Khunanup, a book that ponders on the rhetor's use of *Maat* to argue for justice.[19]

Ancient Greeks, like the rhetorician, scientist, and philosopher Aristotle, credited the origins of formal rhetoric to Corax and Tisidias, both teachers of logos–"logical argument"–from around 467 B.C.E.[20] The most popular scholars in the discipline of rhetoric from the ancient world were Aristotle, Cicero, and Quintilian because they formalized its theory and practice.[21] Plato became the first formally recognized practitioner and teacher of what is known today as rhetoric.[22]

---

been recorded by Rensi's scribes—he is rewarded with justice: all the lands belonging to Nemthnakht are given to him and, further, he is honored by the king who considers him a master of rhetoric."); Nicolaas J. Van Blerk, *The Emergence of Law in Ancient Egypt: The Role of Maat*, 24 FUNDAMINA 69, 69 (2018) ("Because of the ancient Egyptians' keen interest in—and love for—rhetorical speech, this could facilitate a robust legal process, enhancing the capacity for the Egyptian courts to reach just verdicts.").

[18] *See* MARK SANDLER, THE ART OF PERSUASION: ESSAYS ON RHETORIC IN THE COURT ROOM 2, https://www.shapirosher.com/img/headers/The-Art-of-Persuasion-Sandler.pdf (citing JAMES C. MCCROSKEY, AN INTRODUCTION TO RHETORICAL COMMUNICATION 261–62 (5th ed. 1986)).

[19] Teri A. McMurtry-Chubb, *Still Writing at the Master's Table: Decolonizing Rhetoric in Legal Writing for a Woke Legal Academy*, 21 THE SCHOLAR 255, 279–80 (2019) ("Instructions for the practice of African rhetoric are found in the Book of Khunanup, which considers the rhetor's use of Maat to argue for justice."). The Book of Khunanup translates to "The Eloquent Peasant" and "Knun-Anup's speeches were maxims on not only how one should live but also the responsibility of judges to be fair no matter the social class of plaintiff." *See* Joshua Mark, *The Eloquent Peasant & Egyptian Justice*, ANCIENT HIST. ENCYC. (Oct. 6, 2017), https://www.ancient.eu/article/1127/the-eloquent-peasant--egyptian-justice/.

[20] Philosopher Aristotle had an enormous influence on the development of the art of rhetoric. Authors who wrote in different traditions and the famous Roman teachers of rhetoric, such as Cicero and Quintilian, frequently relied on elements stemming from the Aristotelian teachings. *See generally Aristotle's Rhetoric*, STANFORD ENCYC. OF PHILOSOPHY (Feb. 1, 2010), https://plato.stanford.edu/entries/aristotle-rhetoric/; *see* Fraley, *supra* note 15, at 100.

[21] *See* Fraley, *supra* note 15, at 100.

[22] *See id.*

Rhetoric is the "the power of observing the means of persuasion on almost any subject presented to us . . . ."[23] Aristotle highlighted three modes of persuasion furnished by words.[24] The first mode focuses on "the personal character of the speaker; the second on putting the audience in a certain frame of mind; and the third on the proof, or apparent proof, provided by the words of the speech itself."[25] Thus, classical rhetoricians focused on three persuasive appeals: logos, ethos, and pathos.[26]

The practice of law relies on rhetorical principles. It consists of convincing an audience of a desired results.[27] In a way, the law is a rhetorical art.[28] Jurists and lawyers alike use rhetorical tools as a method for persuading another to change his or her actions, decisions, or beliefs.[29] This is achieved by "all aspects of methodologies of argument including grammar, invention, narrative, syllogism, analogy, metaphor, arrangement, and style, among others."[30] Moreover, figures of speech enrich the writing and the effectiveness of the argument.[31] Written rhetoric relies on several common figures of speech. The most effective figures of speech include metaphors, allusions, alliteration,

---

[23] ARISTOTLE, *supra* note 15, at 7.

[24] *Id.* ("Of modes of persuasion furnished by the spoken word there are three kinds.").

[25] To have a command of rhetoric one must be able to "(1) reason logically, (2) to understand human character and goodness in their various forms, and (3) to understand the emotions." *Id.* at 7–8.

[26] *See id.* at 6–7; *see also* Fraley, *supra* note 15, at 102–06; Michael Frost, *Ethos, Pathos & (and) Legal Audience*, 99 DICK. L. REV. 85, 99 (1994).

[27] *See* Fraley, *supra* note 15, at 99 ("The practice of law, whether transaction or litigation, consists of efforts to convince an audience to accept [a] position.").

[28] *Justice Ruth Bader Ginsburg*, 13 SCRIBES J. LEG. WRITING 133 (2010) ("[L]aw should be a literary profession, and the best legal practitioners do regard law as an art as well as a craft.").

[29] *See* Fraley, *supra* note 15, at 101 ("[R]hetoric includes the art of persuasion, a method of convincing another to change his or her actions . . . .").

[30] *See id.* at 99.

[31] *Id.* at 112–14; Frost, *supra* note 26, at 99.

hyperbole, irony, understatement, metonymy, repetition, and rhetorical questions.[32]

A. Maat

Maat is an Ancient Egyptian tenet that means "rightness in the world."[33] *Maat* incorporates seven key principles: "truth, justice, propriety, harmony, balance, reciprocity, and order," truth being the most important.[34] *Maat* also affirms the value of all people, irrespective of race, class, or gender, and stresses the partnership between rhetor and audience in community building.[35] The tenet of *Maat* has a loose par-

---

[32] Fraley, *supra* note 15, at 112–14; Frost, *supra* note 26, at 99.

[33] *See* McMurtry-Chubb, *supra* note 19, at 279. Although *Maat* has loose parallels to Western rhetoric, *Maat* is more concerned with justice and the relationship between the rhetor and the community. "Maat (truth and justice personified as the daughter of Re, equivalent with the Greek Themis, daughter of Zeus… [t]he 'logic' behind this operation involves four rules: (1) inversion: when a concept is introduced, its opposite is also invoked (the two scale of the balance); (2) asymmetry: flow is the outcome of inequality (the feather-scale of the balance is a priori correct); (3) reciprocity: the two sides of everything interact and are interdependent (the beam of the balance); (4) multiplicity-in-oneness: the possibilities between every pair are measured by one standard (the plummet)." *See generally* Wim Van Den Dungen, *Hermes the Egyptian*, SOFIATOPIA (2002), http://www.sofiatopia.org/maat/hermes1.htm#3.1a.

[34] McMurtry-Chubb, *supra* note 19*,* at 279; Blerk, *supra* note 17, at 70 ("Egyptian law was essentially based on the concept of maat, which was about morality, ethics and the entire order of society. The goal of maat was to keep the chaotic forces at bay, with the idea of order . . . .").

[35] *"*Egyptian texts and autobiographies…introduce classical Egyptian foundations of rhetoric, which accent ethics as the means through which we acquire a fundamental understanding of the power of the spoken word. Alkebulan continues the conversation on ethics as one of seven virtues of Maat, which means truth, balance, justice, and right thinking." *See* Ronald L. Jackson II, *Afrocentricity as Metatheory: A Dialogic Exploration of Its Principals,* in UNDERSTANDING AFRICAN AMERICAN RHETORIC: CLASSICAL ORIGINS TO CONTEMPORARY INNOVATIONS 124 (Ronald L. Jackson II & Elaine B. Richardson eds., 2003); *see also* McMurtry-Chubb, *supra* note 19, at 279 (defining *Maat* and the seven principles).

allel to Aristotle's Western persuasive appeals of logos, ethos, and pathos.[36] *Maat* differs from Western rhetoric in that it takes into account a community-oriented approach. It is important to analyze persuasion not only through logic, emotion and ethics, but also through world view justice; and it is especially appropriate to incorporate not only classic Western rhetoric in analyzing law, but also comparative and Afrocentric rhetoric, given the protests about social justice and racial inequality.

B. Logos

Logos is persuasion through logic or reason.[37] As the name "logos" implies, it relies on logic and assumes a logical mind on the reader. Logical appeal "is effected through speech itself when we have proved a truth or an apparent truth by means of persuasive arguments suitable to the case in question."[38] Aristotle explained that "[a] statement is persuasive and credible either because it is directly self-evidence or because it appears to be proved from other statements that are so."[39] Thus, logic relies on syllogisms.[40]

A syllogism is a type of deductive reasoning that takes two premises assumed to be correct to arrive at a result or conclusion based off of these premises.[41] The goal of a syllogism is to argue "from accepted

---

[36] McMurtry-Chubb, *supra* note 19, at 279 ("Maat's loose parallels in the Western world are Aristotle's persuasive appeals . …").
[37] *See* ARISTOTLE, *supra* note 15, at 7; *see also* Fraley, *supra* note 15, at 102.
[38] *See* ARISTOTLE, *supra* note 15, at 7.
[39] *Id.* at 8–9.
[40] *See id.* ("Everyone who effects persuasion through proof does in fact use either enthymeme or example: there is no other way. And since everyone who proves anything at all is bound to use either syllogism or inductions… it must follow that enthymemes are syllogism and examples are inductions."); *see also* Fraley, *supra* note 15, at 102 ("The most basic logos argument is called a syllogism.").
[41] *See* Fraley, *supra* note 15, at 102 ("Deductive reasoning assumes the conclusion must be true, based on the validity of the premises.").

premise to factual evidence to conclusion."[42] Logic through syllogisms extend to the structures frequently used in legal writing, for example "IRAC."[43] Narrative theory is closely related to logos because when legal scholars write they use legal rules and facts to arrive at a conclusion.[44] Those facts must be presented in a logical way, for this reason, logos has often been associated with narrative theory.[45] In fact, Aristotle acknowledged that narrative "is an imitation of an action that is complete and whole…; [a] whole is that which has a beginning, a middle, and an end."[46]

Lawyers and jurists[47] use a variety of logical arguments to arrive at a conclusion that persuades his or her audience. There are five common types of logical reasonings used by legal scholars: (1) rule-based reasoning, (2) reasoning by analogy, (3) distinguishing cases, (4) reasoning by policy, and (5) inductive reasoning.[48] Rule-based reasoning takes a rule and applies it to a set of facts.[49] Reasoning by analogy finds similarities between things, for example when comparing the facts of the case at hand to the facts in precedent cases.[50] Another type of logical reasoning is distinguishing cases by using the opposite of reasoning by analogy.[51] Reasoning by policy takes a precedent case and says that it should also apply in the present case because it creates

---

[42] *See id.* ("Thus a syllogism simply argues from accepted premise to factual evidence to conclusion.").
[43] *See id.* at 103 ("A common logos-style form frequently incorporated in CREXAC, IRAC, CREAC, or TREAT—is an extended form of syllogism.").
[44] *See id.* at 104.
[45] *See id.* ("Narrative theory is closely related to logos.").
[46] *See id.* (quoting Aristotle, The Poetics of Aristotle 30–31 (S.H. Butcher ed., and trans., 3d ed. 1902).
[47] This article focuses on appellate judges and opinion writing.
[48] *See The Five Types of Legal Reasoning and Argument*, LEGAL SKILLS PROFESSOR BLOGS NETWORK (Aug. 18, 2020), https://lawprofessors.typepad.com/legal_skills/2020/08/the-five-types-of-legal-reasoning-and-argument.html.
[49] *See id.*
[50] *See id*.
[51] *See id*.

a good result for society.[52] Then, inductive reasoning synthesizes different rules and holdings from precedent cases to come up with a general rule.[53]

C. Ethos

Ethos is an appeal to the speaker's credibility and reputation.[54] Ethos "depends upon the moral character of the speaker."[55] "Persuasion is achieved by the speaker's personal character when the speech is so spoken as to make us think him [or her] credible."[56] This mode of persuasion, like logos and pathos, should be accomplished "by what the speaker says, not by what people think of his [or her] character before he [or she] begins to speak."[57]

Persuasion is accomplished by the writer's personal character when the writing is written in such a way that it makes her credible.[58] This happens when the writer proves herself to be a reliable source and that her assertions are believable.[59] This is achieved through consistent honesty, integrity, and ethical behavior.[60] Moreover, ethos is made up of the credibility of the speaker and her truthfulness. Ethos must also convey a sense of justice, wisdom, and temperance.[61] In turn, a strong ethos can help support the writer's logos and pathos argument.[62]

---

[52] *See id.*
[53] *See id.*
[54] *See* Fraley, *supra* note 15, at 106.
[55] ARISTOTLE, *supra* note 15, at 7.
[56] *Id.* at 8.
[57] *Id.*
[58] *See id.*
[59] *See* Fraley, *supra* note 15, at 106.
[60] *See id.*
[61] *See id.* ("Credibility involves matters not only of trustworthiness, but of caring, a sense of justice, temperance, wisdom, demeanor or comportment.").
[62] *See id.*

D. Pathos

Pathos relies on an emotional appeal to the audience.[63] Pathos puts the "hearer into a certain frame of mind . . . ."[64] It attempts to evoke a familiar feeling of empathy or sympathy.[65] There are two types of pathos. First, there is pathos with emotional substance. Emotional substance is "persuasion [that] may come through the hearers, when the speech stirs their emotions."[66] Emotional substance focuses on the facts and the story. Second, there is pathos with emotional style. Emotional style is how the writer creates mood by using diction and tone. Emotional style is based on our judgments because when we are pleased and friendly it is not the same to when we feel pained and hostile.[67]

Pathos takes into consideration human nature and emotions like love, hate, fear, hope, pity, and sympathy.[68] The writer uses these emotions to promote a sense of justice.[69] To achieve pathos, the writer must "tie [her] argument to the values and beliefs of the various audiences, the [writer] must understand their concerns and work to meet or at least address their disparate interests. Creating that 'psychic connection' between the speaker and the audience is the central, unifying theme of the *Rhetoric.*"[70]

---

[63] *See id.* at 104–05.
[64] ARISTOTLE, *supra* note 15, at 7.
[65] *See* Fraley, *supra* note 15, at 104–05.
[66] ARISTOTLE, *supra* note 15, at 7.
[67] *Id.*
[68] *See* Fraley, *supra* note 15, at 105; *see also* Frost, *supra* note 26, at 89.
[69] *See* Fraley, *supra* note 15, at 105.
[70] Jamar, *supra* note 15, at 62.

III. The Role of Appellate Opinion-Writing

The judge's spirit rests in determining the result of a particular case, the grounds for reaching that result, and drawing out—from her superior wisdom and life experiences—its implications on future cases.[71] In a common law system, like the legal system in the United States, good judicial opinion writing is vital because courts rely on *stare decisis*.[72] Thus, producing well-written reasoned judgments is the goal of all members of the bench.[73]

Judges write judicial opinions where they decree results in individual cases to announce a broader commandment about what the law requires.[74] Modern judges write judicial opinions for two primary reasons.[75] First, judges write to "reinforce" the often "challenged and arguably shaky authority to tell others what to do."[76] To justify these

---

[71] Patricia M. Wald, *The Rhetoric of Results and Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1384 (1995); "This means regarding people and circumstances without one's interest as a reference point, adhering strictly to a standard of what has been determined as right, true, or lawful, and being impartial towards both parties. It means communicating your humanity by feeling compassion for and understanding of the concerns of the litigants as persons. It also means that to achieve justice for the litigants, you must do more than slavishly adhere to the dictates of mechanical jurisprudence." Ruggero J. Aldisert, *In Memoriam Max Rosenn: An Ideal Appellate Judge*, 154 U. PA. L. REV. 1025, 1028 (2006).

[72] The principle of *stare decisis* asserts that courts "must follow earlier judicial decisions when the same points arise again in litigation." *Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[73] *See* S. I. Strong, *Writing Reasoned Decisions and Opinions: A Guide for Novice, Experienced, and Foreign Judges*, 2015 J. DISP. RESOL. 93, 94 (2015). "The winning and losing attorneys read the well-reasoned majority opinion clarifying the current state of the law. They finish reading the majority's conclusion but realize the decision does not end there. One judge dissented, with an opinion even longer than the majority's opinion. The appellate attorneys read the dissent, and suddenly, each does not feel as firm in his or her conviction that the law as decided by the majority is now settled." Iman Zekri, *Respectfully Dissenting: How Dissenting Opinions Shape the Law and Impact Collegiality Among Judges*, 94 FLA. BAR J. 8 (2020).

[74] Wald, *supra* note 71, at 1371.

[75] *Id.* at 1372.

[76] *Id.*

decisions, judges must explain why they decide as they do.[77] Second, judges write to demonstrate that "under a government of laws, ordinary people have a right to expect that the law will apply to all citizens alike."[78] To achieve some level of consistency litigants, lawyers, reviewing judges, the press, and ordinary citizens need to know why judges came to a conclusion under a particular set of circumstances. This allows litigants, lawyers, jurists, and others to decide "if the law is really a seamless web or irreparably snagged by a bunch of clumsy knitters who can't take directions."[79]

Much bargaining goes on among judges when deciding the grounds for a decision.[80] Generally, the author of the majority opinion writes for the court.[81] Sometimes, a judge will pen a separate concurring opinion providing an alternative reason that explains why the majority reached the correct result. Other times, an appellate judge will dissent when she cannot reconcile the majority's application of the law to the factual circumstances before the court.[82]

When judges agree on a proposed result, after reading briefs and hearing arguments, the writing judge(s) reasons it out on paper or on a word processor. That deliberate process, more than the vote at the conference or the courtroom arguments, puts the writer on the line.[83] Because it reminds her that with the typing of each word, she will be held responsible for the logic and persuasiveness of the reasoning and its implication for not just the litigants but for a larger audience.[84] Thus, most judges feel a heavy responsibility when they author judicial opinions.[85]

---

[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] Wald, *supra* note 71, at 1377.
[81] *Id.*
[82] *Id.* at 1412 ("Judges write in a different voice when they concur or dissent.").
[83] *See id.* at 1376 (highlighting the gap between the number of published and unpublished opinions).
[84] *See id.*
[85] *Id.* at 1375 ("Most judges feel the responsibility keenly; they literally agonize over their published opinions."); *see, e.g.*, *Justice Samuel A. Alito*, 13 SCRIBES J. LEG.

A. Main Parts of an Appellate Opinion

Appellate judges use rhetoric to maneuver the process of writing judicial opinions.[86] Judicial opinions, especially appellate opinions, frame the facts.[87] The conventional wisdom was that appellate opinions merely recited neutral facts. Quite the contrary, when a judge authors an opinion, she knows how the case will come out and she consciously relates a narrative that will convince the audience the result is correct.[88] Oftentimes, the desired result frames the way the factual story is told. Thus, contemporary opinion writing often relies on one set of facts arranged by the majority's author; unless a dissenter pens a second set of facts.[89]

In addition to interpreting the facts from a voluminous record, the appellate courts have reviewing jurisdiction.[90] This means that appellate judicial opinions generally explain the standard of review. The standard of review establishes how the appellate court is to review the facts and the law.[91] Most importantly, through the standard of review, appellate courts establish upfront who has the burden of proving which facts and what it will take to overturn a decision appealed before the court.[92]

WRITING 169, 177 (2010) ("When you have to write it, and if you aim for a tightly reasoned, well-expressed argument, very often that will expose the problems in the kind of argument that you had anticipated you were going to make.").

[86] Wald, *supra* note 71, at 1419 ("[J]udges still use rhetoric to maneuver…[t]he way they present the facts, the way they describe rules and standards of review, the way they 'handle' precedent, their decisions to write separately or stay with the pack, all provide wide avenues in which to drive the law forward.").

[87] *Id.* at 1386 ("Construing the facts is a wholly legitimate element of the appellate judge's job. After all, one cannot simply reprint the record of the trial below, and the task of interpreting and condensing the record requires that the judge frequently dip his pen into the well of rhetoric.").

[88] *Id.* at 1386. ("In old nineteenth century opinions each side's claims were set out in detail.")

[89] *See id.*

[90] *See Court,* BLACK'S LAW DICTIONARY (11th ed. 2019).

[91] Wald, *supra* note 71, at 1391.

[92] *See id.*

After arranging the factual story and establishing the standard of review, the author of the majority discusses the legal principles.[93] This includes parsing through precedent and sometimes defending dicta.[94] Discussion of legal principles appear in the majority, concurring, and dissenting parts of the opinion.[95]

B. The Role of Dissents

The dissenter is a separate voice. Dissents are liberating—requiring no consultation or approval from the other judges.[96] They are a reminder that where significant and meaningful disagreements exist, judges have a duty to use their individual intellects to scrutinize and assess the issues that come before their court.[97]

Dissents serve several functions.[98] At the core of a dissenting opinion is the desire to persuade a future court to adopt the dissent's reasoning and conclusion as the correct interpretation of the law.[99] Dissents improve the majority by highlighting mistakes in the facts, law, or reasoning.[100] Dissents hold the majority accountable by forcing the majority to acknowledge unfavorable facts.[101] Dissents remind the losing party that their position was acknowledged.[102] When a dissent accomplishes these functions, it helps the law evolve.[103]

---

[93] *See id.* at 1394–1407 (discussing different parts of an appellate judicial opinion, for example the discussions of controlling legal principles, precedent, and dicta).
[94] *See id.* at 1408.
[95] *See id*.
[96] *Id.* at 1413; *see also* Zekri, *supra* note 74 (noting that unlike authoring a dissent, authoring a majority opinion may require a judge to compromise or soften the opinion's rhetorical force in order to persuade other judges to join it).
[97] Zekri, *supra* note 73.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] Zekri, *supra* note 73.

The dissenter writes under the belief that "because the law is a quest for truth and encompasses sound reasoning, the view articulated in the dissent will sooner or later prevail."[104] The dissenter separates the reasoning in the dissent from the majority's analysis by appealing to the sense of what is right and what is wrong; thus, pointing out the majority's failure to consider the human condition when they "mercilessly" apply legal principles to real-world circumstances.[105]

Typically, a dissent's tone is "troubled, outraged, sorrowful, puzzled"[106] because it aspires to go beyond the technicalities in the majority's holding by voicing higher aspirations and values ignored by the majority.[107] Sometimes, dissents are chastised for splitting the court; they are characterized as being too "strong," "scathing," "powerful," "biting," or "acerbic."[108] Although a dissent can be written in a moderate and restrained style, the question becomes, if the difference between the majority and the dissenting is so slight then why write a dissent? The logic follows that a dissent's function is to highlight the better alternatives to the majority's reasoning or signal the dangers of developing the law. Dissents warn us of the horrible possibilities that stem from the majority's holding. Ultimately, the essential condition of dissents is to kindle changes in judicial thinking by voicing urgency in an attempt to forestall doom.[109]

---

[104] *Id.*
[105] Wald, *supra* note 71, at 1413 ("The strategy of personalization in dissent is to separate the dissenter from the cold, impersonal, authoritarian judges of the majority, who impliedly do not take the human condition into account when they mercilessly impose 'the law.'").
[106] *Id.* at 1412.
[107] *Id.*
[108] *Id.* at 1413.
[109] *Id.*

C. Justice Ginsburg on Law and Writing

Ginsburg penned that the Constitution belongs to the twenty-first century.[110] She respected the framers' intent; she noted that their superseding intent was to draft a flexible document and not a static one.[111] Thus, she viewed the Constitution as a "dynamic document" rather than a "frozen text."[112]

Ginsburg viewed the law as a literary profession and noted that the best legal practitioners approach the "law as an art as well as a craft."[113] She ascribed her care for writing to two professors. One of them was the famous author Vladimir Nabokov.[114] Nabokov taught her the importance of "choosing the right word and presenting it in the right order."[115] Nabokov changed the way she read and wrote.[116] The other influence was a constitutional law professor, Robert E. Cushman, who taught her the importance of concise writing.[117]

Ginsburg noted the importance of strong oral arguments, but highlighted that brief-writing is crucial.[118] She was known for her

---

[110] Christopher Slobogin, *Justice Ginsburg's Gradualism in Criminal Procedure*, 70 OHIO STATE L. REV. 867, 868–69 (2009) ("None of this means, of course, that Justice Ginsburg ignores Framers' 'intent' when that elusive mental state can be discerned; rather she believes the overriding intent of the Framers was to draft a document that is flexible rather than static.").

[111] *Id.*

[112] *Id.*

[113] *Justice Ruth Bader Ginsburg*, *supra* note 28, at 133.

[114] Justice Ginsburg was a student in Nabokov's literature class at Cornell. *See Justice Ruth Bader Ginsburg*, *supra* note 28, at 135. Nabokov was a famous novelist, poet, translator, entomologist, and professor. *See also* Melissa Albert & Andrew Field, *Vladimir Nabokov*, BRITANNICA (June 28, 2020), https://www.britannica.com/biography/Vladimir-Nabokov.

[115] *Justice Ruth Bader Ginsburg*, *supra* note 28, at 135.

[116] *Id.* ("His name was Vladimir Nabokov. He was a man in love with the sound of words. He taught me the importance of choosing the right word and presenting it in the right word order. He changed the way I read, the way I write.").

[117] *Id.*

[118] *Id.* at 136 ("Of the two components of the presentation of a case, the brief is ever so much more important.").

opening paragraphs where she took a few short sentences to lay out the case.[119] Good legal writing should be "concise," she said.[120] In a few sentences, Ginsburg would "crystalize" the issue before the court.[121] When asked, "[m]any observers … consider you the best writer on the Court today. Do you work hard at it?"[122] She responded: "I try hard, first of all, to write an opinion so that no one will have to read a sentence twice to get what it means."[123] Ginsburg's "eye [was] on the reader" and those readers usually include judges or other courts that must apply this decision as precedent and lawyers who must account for them in their briefs.[124]

IV. Fourth Amendment Jurisprudence

The Fourth Amendment expressly forbids unreasonable searches and seizures.[125] In a Fourth Amendment analysis, reviewing courts must first determine whether a "search" or "seizure" occurred within the meaning of the Constitution. If a court finds a search or a seizure, then the question becomes whether it was unreasonable. Thus, the Fourth Amendment imposes two requirements: first, all searches and seizures must be reasonable and second, that a warrant is issued upon a finding of probable cause.[126]

---

[119] *Id.* at 134.
[120] *Id.*
[121] *Justice Ruth Bader Ginsburg*, *supra* note 28, at 134.
[122] *Id.* (noting that Linda Greenhouse, a distinguished legal journalist and writer for the New York Times, considered Ginsburg as one of the best writers in the court).
[123] *Id.* ("Very hard. I go through innumerable drafts . . . I generally open an opinion with a kind of a press-release account of what the case is about, what legal issue the case presents, how the Court decides it, and the main reason why.").
[124] *Id.*
[125] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.
[126] *King*, 563 U.S. at 459 (noting that the Fourth Amendment imposes two main requirements when addressing searches and seizures); *see also Payton v. New York*,

Warrantless searches are presumed unreasonable and the home has the highest level of protection.[127] Exceptions to the Fourth Amendment follow a similar narrative, they are motivated by exigent circumstances.[128] The exigent circumstance exception is used when there is a situation that is "so compelling" that a warrantless search is found to be objectively reasonable under the Fourth Amendment.[129] Police officers who rely on the exigent circumstance exception, as an excuse to break down the door of a home, must articulate to the court an objective and reasonable belief that there was destruction of evidence or provide another exigent circumstance that requires such action.[130]

V. *Rhetorical Analysis of* Kentucky v. King

This article examines the majority and dissenting opinions in *King*. Primarily, this part presents a rhetorical analysis of the justices' use of Aristotle's rhetoric. The analysis concludes that Alito's majority opinion, although grounded in logos and ethos, has a weak appeal

---

445 U.S. 573, 584 (1980) (explaining that warrantless arrests and searches went to the core of the Fourth Amendment's protection of privacy in a citizen's dwelling and the protection is too important to be violated on the basis of a police officer's on-the-spot decision regarding probable cause).

[127] *See generally Florida v. Jardines*, 569 U.S. 1, 6 (2013) ("But when it comes to the Fourth Amendment, the home is first among equals."); *Brigham City v. Stuart*, 547 U.S. 398, 403 (noting that searches and seizures within a home are presumptively unreasonable).

[128] *See generally King*, 563 U.S. at 452 (exigencies may include the need to provide emergency medical aid, the "hot pursuit" of a fleeing suspect, and the prevention of imminent destruction of evidence); CYNTHIA LEE, L. SONG RICHARDSON & TAMARA LAWSON, CRIMINAL PROCEDURE, CASES AND MATERIALS 361 (2d. ed. 2018) ("Many of the exceptions to the warrant requirement that we have studied . . . are motivated by exigency concerns.").

[129] *See King*, 563 U.S. at 460; *see also Mincey v. Arizona*, 437 U.S. 385, 394 (1978).

[130] *See generally King*, 563 U.S. at 452 (listing a number of common exigencies, for example the destruction of evidence, hot pursuit of a fleeting suspect, or need to render medical help); Elizabeth Sargeant, *Kentucky v. King: The One Where the Supreme Court Dishonors the Warrant Requirement*, 47 WAKE FOREST L. REV. 1269, 1269 (2012).

to justice. On the other hand, Ginsburg's dissenting opinion has a greater appeal to justice due to her strong use of logos, ethos, pathos, and *Maat*. Thus, Ginsburg's dissent has a superior appeal to the ancient tenet of "rightness in the world."[131]

A. Majority Opinion by Justice Alito

Throughout the opinion, Alito's writing follows a logical structure. The opinion reads like a law student who wrote a well-structured IRAC type answer to a law school essay exam question. Alito opens with the "well established" principles of law that govern this issue. In the first sentence, he establishes ethos when he shows the reader that he is well aware of the legal rule that is implicated in this case; that is, the exigent circumstance exception. In the first paragraph, he lays out the governing rule, how the rule applies to the factual circumstance in this case, the Kentucky Supreme Court's finding, and the reason why the lower court erred.

Alito follows a syllogism like structure when he provides a set of premises that when added up, lead to a logical conclusion. He writes, "[t]he Kentucky Supreme Court held that the exigent circumstances rule does not apply in the case at hand because the police should have foreseen that their conduct would prompt the occupants to attempt to destroy evidence."[132] Then, he provides the holding: the U.S. Supreme Court "reject[s] this interpretation of the exigent circumstances rule."[133] Alito's word choice is clear. The word "reject" denotes that the lower court got it wrong. In the first paragraph, Alito uses ethos to establish a well-respected rule of law and then uses logos to "reject" the lower court's finding that their interpretation of the law was erroneous.

Alito writes the facts, as interpreted by the majority, in favor of the police officers. He attempts to paint a picture, beginning with the

---

[131] *See* McMurtry-Chubb, *supra* note 19, at 279.
[132] *King*, 563 U.S. at 455.
[133] *Id.*

setting. He describes that "[p]olice officers set up a controlled buy of crack cocaine outside an apartment complex."[134] Alito's use of setting is an example of pathos. Alito also relies on emotional style and emotional substance to convey the facts.

The emotional style is exemplified through Alito's use of setting to begin the factual background. Here, he begins with a drug-deal scene in an apartment complex.[135] He could have used a different way to begin the story. However, he carefully places the reader in the middle of a "drug deal" scene to recreate the situation the officers encountered.[136]

Alito uses emotional substance when he appeals to the reader's fear. He compels the reader to imagine the circumstance under which the police officers were working and creates sympathy for the officers. Furthermore, Alito explains that the police officers were acting under a mistake.[137] Alito appeals to pathos and logos when he paints a story of police officers acting under a mistake.[138] Alito appeals to pathos when he relates police officers' conduct to a mistake. This puts the reader in the frame of mind that police officers, like all human beings, make mistakes while working under the difficulties of the job. This is also logical reasoning because Alito explains why the officers acted in this manner; he logically justifies their conduct by pointing out that they were acting under a mistake.

Alito provides the procedural history from the trial court to the Kentucky Supreme Court. He acknowledges the circuit court's finding that the officers had probable cause to investigate the marijuana odor and the officers properly conducted the investigation by knocking and

---

[134] *Id.* at 456.
[135] *See id.* at 455.
[136] *See id*. at 457.
[137] *Id.* at 456 (Alito noted that officer Gibbons "radioed that the suspect was running to the apartment on the right but the officers did not hear this because they had already left their vehicles.").
[138] *See King*, 563 U.S. at 456 (Alito highlighted that at the end of the breezeway "officers saw two apartments, one on the left and one on the right, and they did not know which apartment the suspect had entered.").

waiting for a response before entry.[139] He acknowledges that respondent was sentenced to eleven years of prison.[140] However, Alito did not acknowledge the policy implication attached to sentencing a person to eleven years of imprisonment—as a result of a police mistake.

Alito focuses on a strict rule-based analysis to explain why the Kentucky Supreme Court erred: "the police did not impermissibly create the exigency, the court explained, because they did not deliberately evade the warrant requirement."[141] Here, Alito's strict focus on logos debunks his ethos and pathos; he argues the officers did not deliberately evade the warrant requirement, yet Ginsburg's dissent reminds the reader that the officers had sufficient time to secure the warrant as required by the Constitution.[142] Moreover, Alito fails to note that a person's liberty was in jeopardy as a result of a police mistake. Most importantly, Alito shows that he is not faithful to the "well established" constitutional principle of the warrant requirement.[143]

Alito discusses the "police created exigency" doctrine and how the doctrine is problematic as a matter of policy.[144] Alito exhibits ethos when he acknowledges that "over ten years courts have developed an exigent circumstances rule, the so called 'police created exigency' doctrine."[145] But then, he notes that the eight circuit recognized, "in some sense the police always create the exigent circumstance."[146] Through this logic, Alito debunks the lower court's finding that police created exigency cannot be used as an excuse to circumvent the warrant requirement. Alito notes that the police always create some degree

---

[139] *Id.* at 457.
[140] *Id.*
[141] *Id.* at 458.
[142] *Id.* at 473.
[143] *Id.* at 455 ("It is well established that "exigent circumstances," including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant.").
[144] *King*, 563 U.S. at 461.
[145] *Id.* at 461 ("[C]ourts require something more than mere proof that fear of detection by the police caused the destruction of evidence . . . .").
[146] *Id.* (citing *United States v. Duchi*, 906 F.2d 1278, 1278 (1990)).

of exigency; thus, the police conduct in this case fell within the Fourth Amendment "reasonableness" requirement.[147]

The majority's analysis is governed by rule-based reasoning, analogies, and policy arguments. Alito points to "[t]he text of the Fourth Amendment thus expressly imposed …." as the guiding principle for the opinion.[148] He explains the logical parts of the rule when he writes that "the Amendment expressly imposes two requirements."[149] Then, he admits to the basic principle that "searches and seizures" at the home are "presumptively unreasonable."[150] The following sentence explains how to "overcome" this presumption; Alito reminds the reader that "the ultimate touchstone of the Fourth Amendment is reasonableness."[151] Then, Alito fits the exigent circumstance exception as an exception that satisfied the "reasonableness" requirement.[152] He explains, by way of analogy, that "[t]his Court has identified several exigencies that may justify a warrantless search of a home.[153]

The majority opinion restates the holding throughout the opinion. Repetition is a logical device used to reinforce an idea. Alito states in plain words—like a good law student would in a final exam essay—that "the answer to the question before us is that the exigent circumstances rule justifies a warrantless search when the conduct by police preceding the exigency is reasonable …."[154] Alito explains the reasoning, by way of analogy, when he writes that this court has "taken a similar approach in other cases involving warrantless searches …. [f]or example, we have held that law enforcement officers may seize evidence in plain view, provided that they have not violated the Fourth

---

[147] *Id.*
[148] *See id.* at 459.
[149] *Id.*
[150] *King*, 563 U.S. at 459.
[151] *Id.*
[152] *Id.*
[153] *Id.* (Alito cited to cases where this Court acknowledged various circumstances that overcome the reasonableness requirement, for example emergency aid, hot pursuit, and destruction of evidence).
[154] *Id.* at 462.

Amendment in arriving at the spot from which the observation is made."[155] He adds, "similarly officers may seek consent-based encounters if they are lawfully present in the place where the consensual encounter occurs."[156] Moreover, he notes that "[s]ome lower courts have adopted a rule that is similar to the one that we recognized today."[157]

Furthermore, Alito provides policy-based reasoning when he writes, "[c]onsequently, a rule that precludes the police from making a warrantless entry to prevent the destruction of evidence whenever their conduct causes the exigency would unreasonably shrink the reach of this well-established exception to the warrant requirement."[158] Alito focuses on the burden that is placed on the government and police officers, yet he overlooks the invasion of privacy that is implicated when the U.S. Supreme Court permits police officers to unreasonably intrude inside a person's home. This violates the most basic principle of *Maat*, as far as rightness in the world, because meeting burdens of persuasion is essential to a fair legal system.

The majority opinion discusses the factors considered by the Kentucky Supreme Court. Alito states that the Kentucky Supreme Court erred when it considered the "bad faith" factor in its analysis because it is "fundamentally inconsistent with our Fourth Amendment jurisprudence."[159] He posits, "[t]he reasons for looking to objective factors, rather than subjective intent, are clear."[160] He relies on the general principles established by Supreme Court precedent to support that "[l]egal tests based on reasonableness are generally objective."[161]

---

[155] *Id.* at 462–63 (citing *Horton v. California*, 496 U.S. 128, 136–40 (1990)).
[156] *King*, 563 U.S. at 463.
[157] *Id.*
[158] *Id.* at 461–62.
[159] *Id.* at 464 ("Our cases have repeatedly rejected a subjective approach.") (citation omitted).
[160] *Id.*
[161] *Id.* ("[T]his Court has long taken the view that 'even-handed law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.'").

Next, the majority rejects the lower court's consideration of the foreseeability factor. Alito articulates that "[c]ontrary to this reason, however, we have rejected the notion that police may seize evidence without a warrant only when they come across [it] by happenstance."[162] He supports this reasoning with a case cited earlier in the opinion, where the U.S. Supreme Court "held that the police may seize evidence in plain view even though the officers may be 'interested in an item of evidence and fully expec[t] to find it in the course of a search.'"[163]

Alito supports this position, by way of policy-based reasoning, when he asserts that "[a]doption of a reasonable foreseeability test would also introduce an unacceptable degree of unpredictability."[164] He adds "[a] simple example [that] illustrates the difficulties that such an approach would produce."[165] Then, he provides a rule-based and policy based argument, and mixes in pathos, when he highlights that this Court has noted that "'[t]he calculus of reasonableness must embody allowance of the fact that police officers are often forced to make split-second judgements—in circumstances that are tense, uncertain, and rapidly evolving.'"[166] Additionally, he provides another policy argument when he asserts that "[t]he reasonable foreseeability test

---

[162] *King,* 563 U.S. at 465.
[163] *Id.* (quoting *Horton*, 496 U.S. at 138).
[164] *Id.* at 465.
[165] "Suppose that the officers in the present case did not smell marijuana smoke and thus knew only that there was a 50% chance that the fleeing suspect had entered the apartment on the left rather than the apartment on the right. Under those circumstances, would it have been reasonably foreseeable that the occupants of the apartment on the left would seek to destroy evidence upon learning that the police were at the door? Or suppose that the officers knew only that the suspect had disappeared into one of the apartments on a floor with 3, 5, 10, or even 20 units? If the police chose a door at random and knocked for the purpose of asking the occupants if they knew a person who fit the description of the suspect, would it have been reasonably foreseeable that the occupants would seek to destroy evidence?" *Id.* at 465–66.
[166] *Id.* at 466 (quoting *Graham v. Connor*, 490 U.S. 386, 396-97 (1989)).

would create unacceptable and unwarranted difficulties for law enforcement officers who must make quick decisions in the field."[167] Further, it would require judges "to determine after the fact whether the destruction of evidence in response to a knock on the door was reasonably foreseeable based on what the officers knew at the time."[168]

Moreover, the majority opinion questions the lower court's analysis of the "[p]robable cause and time to secure a warrant" factor.[169] Alito rejects the lower court's analysis, by way of policy-based reasoning, when he expresses that "[t]his approach unjustifiably interferes with legitimate law enforcement strategies."[170] Moreover, Alito communicates that this Court has expressed "[l]aw enforcement officers are under no constitutional duty to call a halt to criminal investigation the moment they have the minimum evidence to establish probable cause."[171] Additionally, the majority establishes that "[f]aulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a duty that is nowhere found in the Constitution."[172] Here, Alito uses both rule-based reasoning and policy-based reasoning to highlight that the lower court's finding imposes an undue burden on the police. Then, Alito discusses the last factor considered by the lower court, the "standard or good investigative tactics."[173] Alito points out that this approach "fails to provide clear guidance to law enforcement officers and authorizes courts to make judgements on matters that are the province of those who are responsible for federal and state law enforcement agencies."[174]

---

[167] *Id.*
[168] *King,* 563 U.S. at 466.
[169] *Id.*
[170] *Id.*
[171] *Id.* at 467 (quoting *Hoffa v. United States*, 385 U.S. 293, 310 (1966).
[172] *Id.*
[173] *Id.* at 467 ("[S]ome lower court cases suggest law enforcement officers may be found to have created or manufactured an exigency if the court concludes that the course of the investigation was 'contrary to standard or good law enforcement practices . ...'").
[174] *King,* 563 U.S. at 467–68.

Then, the majority rejects the Respondent's proposed rule. Alito points out that "[r]espondent argues for a rule that differs from those discussed above, but his rule is also flawed."[175] Respondent argues that police officers "impermissibly create an exigency when they 'engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable.'"[176] However, Alito explains the majority's rejection of this argument, by way of police-centered reasoning, when he notes that "the ability of law enforcement to respond to an exigency cannot turn on such subtleties" like the way police knock or announce themselves.[177] Alito's reasoning is one-sided because his policy is based on the police's perspective. The majority considers the burden on police officers and not the intrusion prohibited by the Fourth Amendment; thus, the majority is blind to a holistic approach to balance in society and violates *Maat*.

Alito adds that "police officers may have a very good reason to announce their presence loudly and to knock on the door with force."[178] He provides a number of reasons why officers would find it necessary to announce their presence in such a way. One important reason is that "officers identify themselves loudly enough" because sometimes occupants do not know someone is at their doorstep.[179] Lastly, he provides more policy-based reasoning explaining why the respondent's rule is flawed and cannot apply in this case: "[i]f respondent's test were adopted, it would be extremely difficult for police officers to know how loudly they may announce their presence or how forcefully they may knock on a door without running afoul of the police-created exigency rule . . . ."[180]

---

[175] *Id.* at 468.
[176] *Id.* ("In respondent's view, relevant factors includes the officers' tone of voice in announcing their presence and the forcefulness of their knocks.").
[177] *Id.*
[178] *Id.*
[179] *Id.* ("A forceful entry knock may be necessary to alert occupants someone is at the door.").
[180] *King,* 563 U.S. at 468–69.

Alito concludes the majority opinion with a logical reference to the facts in this case: "we see no evidence that the officers either violated the Fourth Amendment or threatened to do prior to the point when they entered the Apartment."[181] He concludes that the established principles of law and evidence do not lead the Court to find that the respondent's constitutional rights were violated.[182] In essence, Alito reinforces the logic found throughout the majority's opinion. Alito restates the holding and concludes that "[t]he judgement of the Kentucky Supreme Court is reversed, and the case is remanded for further proceeding not inconsistent with this opinion."[183]

The majority opinion breaks *Maat* because it implicitly decides on the side of governmental intrusion into private spaces as some kind of overwhelming societal good. Alito masks the rule as utilitarian; however, it is not a rule that encourages balance and harmony in society.

B. Dissenting Opinion by Justice Ginsburg

In the first paragraph, Ginsburg provides a concise overview of the dissent's position. Similar to Alito, she invokes the governing principle of law.[184] However, Ginsburg's emotional style is best displayed in her poignant diction and indignant tone, a style that is absent from Alito's opinion.

In this case, she focuses on the Fourth Amendment and what the majority opinion has done to this core Constitutional principle. Ginsburg writes:

---

[181] *Id. at 454.*
[182] *See id.* at 469.
[183] *Id.* at 472.
[184] *Id.* at 473 (Ginsburg, J., dissenting) ("The Fourth Amendment guarantees to the people '[t]he right ... to be secure in their ... houses ... against unreasonable searches and seizures.' Warrants to search, the Amendment further instructs, shall issue only upon a showing of "probable cause" to believe criminal activity is afoot.").

> The Court today arms the police with a way routinely to dishonor the Fourth Amendment's warrant requirement in drug cases. In lieu of presenting their evidence to a neutral magistrate, police officers may now knock, listen, then break the door down, never mind that they had ample time to obtain a warrant. I dissent from the Court's reduction of the Fourth Amendment's force.[185]

The first line appeals to pathos, ethos, and logos. First, Ginsburg sets up the reader in a logical time and space by using the word "today." This means that before "today," the law was different, and the majority, by way of its opinion, is chipping away from established Constitutional principles. The word "arms" has emotional substance because it creates an image of a weapon. Here, the Court has manufactured a weapon for police officers to legally intrude inside the most sacred of spaces, a person's home. The word "arms" denotes and connotes a variety of meanings that create a vivid image of the majority's opinion. The literal meaning of the word "arms" frequently refers to a "collective force" and "weapons of war or combat."[186] The word also has a figurative meaning, as in "something abstract or immaterial used in a manner comparable to a physical weapon."[187] It also means, in a figurative and obsolete way, "arms" as in "a suit or a piece of armour" that shields a soldier or warrior.[188]

The word "arms" appeals to the reader's sense of fear and injustice because it makes the reader aware of the fact that the majority opinion has taken away protections from the people and gives heightened protection to police officers. Ginsburg sends a clear message that establishes that what the majority has done is to tear away from the

---

[185] *Id.* at 473.
[186] *Arms*, OXFORD ENGLISH DICTIONARY (3rd. ed. 2016), https://www.oed.com/view/Entry/10809 (last visited Nov. 23, 2020).
[187] *Id.*
[188] *Id.*

fabrics of the Fourth Amendment.[189] In this instance, Ginsburg appeals to ethos when she displays her knowledge of the law and respect for the Constitution. Then, she tells the reader that the majority now permits police officers to circumvent the well-established principle of obtaining a warrant to enter a person's home. Thus, the majority forged a weapon for police and against the people.

In her introductory paragraph, Ginsburg ties in the key facts of the case with core Fourth Amendment principles.[190] She logically observes how the majority opinion does away with the requirement that compels police officers to obtain a warrant by a "neutral magistrate," before they can "knock, listen, then break the door down, never mind that [the officers] had ample time to obtain a warrant."[191] Ginsburg uses the rule of threes, an example of logos, when she writes the officers "knock, listen, then break."[192] This fact is useful to establish the officers had enough time to secure a warrant and the logical sequence of events. Most notably, through the rule of threes Ginsburg paints a clear picture. The image of breaking down the door is an image of violence, disruption, and lack of balance—that action should only happen when justice requires.

Moreover, Ginsburg takes the key facts of this cases and presents them in a more general context. This is a valuable observation on Ginsburg's part because U.S. Supreme Court decisions implicate not just the case before the court, it will apply to future cases. Ginsburg notes this point because, unlike Alito, she considers not just the implications of the holding in this particular case; Ginsburg is thinking of the larger implications that arise out of the majority's decision in allowing police

---

[189] "Legal interpretation takes place in a field of pain and death. This is true in several senses. Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur." *See* Cover, *supra* note 8, at 1601.

[190] *See King*, 563 U.S. at 473.

[191] *Id.*

[192] *Id.*

officers to break down a person's door without a warrant.[193] Ginsburg speaks on behalf of the Constitution and for all people who may sit in their homes in fear that police can just break down their door without a warrant provided by a neutral magistrate as it has always been required by the Fourth Amendment.

In the next paragraph, Ginsburg expresses that the Fourth Amendment "guarantees to the people '[t]he right … to be secure in their … houses … against unreasonable searches and seizures.'"[194] Ginsburg reassures the reader that the Constitution protects our life, liberty, and property from unreasonable government intrusion. Then, she explains that "warrants to search, the Amendment further instructs, shall issue only upon a showing of 'probable cause' to believe criminal activity is afoot."[195] Here, Ginsburg purely relies on rule-based reasoning because she is referring to the Constitution and its requirements.[196] This is also a reflection of Ginsburg's ethos because she displays her knowledge of constitutional law by way of a logical close reading of the Fourth Amendment's language. She focuses on the strict requirement imposed by the constitution against unreasonable searches. In a sense, Ginsburg is doing a similar task to Alito in the majority, however, Ginsburg is reading the Constitutional amendment more faithfully than Alito. This faithful reading of the Constitution buttresses her ethos, but also her use of pathos because it appeals to her sense of justice. Because the Fourth Amendment is a crucial principle of law, Ginsburg's close reading of its language sustains that the Amendment intends to protect persons from unreasonable governmental intrusion. Thus, when the majority "dishonors" the Constitution, the reader feels that the majority has just committed an injustice against the Constitution and the people it intends to protect.[197]

---

[193] *See id.* at 476.
[194] *Id.* at 473; U.S. CONST. amend. IV.
[195] *King*, 563 U.S. at 473.
[196] The U.S. Constitution is the highest and most binding legal authority. The Constitution establishes that "[t]he judicial Power of the United States, shall be vested in one supreme Court." *See generally* U.S. CONST. art 3, § 1.
[197] *See King*, 563 U.S. at 473.

The Fourth Amendment was not created to protect police officers that intrude into the most sacred of spaces. Quite the contrary, it was penned to shield persons from "unreasonable" governmental intrusion; not to protect police officers from creating exigent circumstances.[198] Ginsburg notes that "[c]omplementary provisions" like the warrant requirement are "designed to ensure that police will seek the authorization of a neutral magistrate before undertaking a search or seizure."[199] She emphasizes, in response to the majority opinion, that "[e]xceptions to the warrant requirement, this Court has explained, must be 'few in number and carefully delineated' if the main rule is to remain hardy."[200] This is an example of Ginsburg's ethos. Here, she displays her ethos by showing that she is aware of the majority's position and the dangers that come with it. This shows her wisdom because she is considering the broader implications of the majority's reasoning; it also shows her truthfulness because she paid attention to the reasoning offered by the majority. In large part, Alito discusses how the Court has other exceptions and how those exceptions are similar to the exigency circumstance exception.[201] Yet, Alito does not acknowledge the expansion of this rule in the context of the most sacred space—the sanctuary one calls home. Ginsburg rebuts the majority's view with policy-based reasoning that highlights the dangerous implication of chipping away from the core principles established by the Fourth Amendment; she points out that expanding the rule shakes the foundation of a long-established and hard-fast rule, that is the warrant requirement.[202]

In the dissent's next paragraph, Ginsburg reminds readers about the issue before the Court: "this case involves a principal exception to

---

[198] *Id.* at 475 (citing *Silverman v. United States*, 365 U.S. 505 (1961) ("At [the Fourth Amendment's] very core stands the right of a man to retreat to his own home and there be free from unreasonable governmental intrusion.").
[199] *Id.* at 473.
[200] *Id.*
[201] *See id.* at 459.
[202] *Id.* at 473.

the warrant requirement, the exception applicable in 'exigent circumstance.'"[203] Ginsburg logically reasons that to have an effective "delineated" rule, the exception should apply "only in genuine emergency situations."[204] She cites to U.S. Supreme Court precedent, as an example of rule-based reasoning, to define exigency.[205] A circumstance is exigent when "there is an imminent risk of death or serious injury, or danger that evidence will be destroyed, or that a suspect will escape."[206]

Ginsburg writes the question presented before the Court, "[m]ay police, who could pause to obtain gain approval of neutral magistrate, dispense with the need to get a warrant themselves creating exigent circumstance?"[207] Ginsburg answers the question in the negative: "I would answer no, as did the Kentucky Supreme Court."[208] She reasons that "the urgency must exist . . . when the police come on the scene, not subsequent to their arrival, prompted by their own conduct."[209] Here, she frames the issue by using the facts of the present case, the core principles established by the U.S. Constitution, and the Kentucky Supreme Court's finding. Then, she arrives at a logical conclusion, which is to find that the majority opinion erred when it disagreed with the Kentucky Supreme Court.

In the next paragraph, Ginsburg analyses the "pillars" of the Fourth Amendment.[210] The word pillars create an image of the Fourth Amendment as a fortress that stands on two pillars. She voices that "two pillars of our Fourth Amendment jurisprudence should have controlled the Court's ruling."[211] The first pillar is that "police must obtain

---

[203] *See King*, 563 U.S. at 473.
[204] *Id.*
[205] *Id.* ("Circumstances qualify as exigent when there is an imminent risk of death or serious injury, or danger that evidence will be destroyed, or that a suspect will escape.").
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *King*, 563 U.S. at 473.
[210] *Id.* at 474.
[211] *Id.*

judicial approval" of searches and seizures.[212] The second is that "unwarranted 'searches and seizures inside a home' bear heightened scrutiny."[213] Ginsburg supports both pillars, by way of rule-based reasoning, with well-established case law including the famous precedents of *Terry v. Ohio* and *Payton v. New York*.[214] Furthermore, she quotes Justice Jackson who ranked the Fourth Amendment among the "fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."[215]

Ginsburg also highlights, by way of rule-based reasoning, that "[t]he police bear a heavy burden . . . when attempting to demonstrate an urgent need that might justify warrantless searches."[216] Justice Alito, on the other hand, did not mention this burden throughout the majority's analysis of the legal principles. This is a testament to Ginsburg's ethos. It shows her awareness and knowledge of Fourth Amendment jurisprudence. She acknowledges the exception but points out that it is not without bounds and that officers have a burden of showing exigency.[217] She establishes that this "heavy burden has not been carried here" because there was little risk that drug related evidence would have been destroyed had the police delayed the search pending a magistrate's authorization."[218] She emphasizes that "nothing in the record shows that, prior to the knock at the apartment door, the occupants were apprehensive about police proximity."[219] Here, she provides a logical argument by using the facts in the case, applying the rule to the facts, and then she arrives at the conclusion—the exception does not apply to the officers' actions.

Ginsburg reminds her audience that "[i]n no quarter does the Fourth Amendment apply with greater force than in our homes, our

---

[212] *Id. (*citing *Terry v. Ohio,* 392 U.S. 1 (1968)).
[213] *Id.* (citing *Payton*, 445 U.S. at 586).
[214] *See Terry* 392 U.S. at 1; *Payton* 445 U.S. at 573.
[215] *King*, 563 U.S. at 474.
[216] *Id.* (citing *Johnson v. United States*, 333 U.S. 10, 17 (1948)).
[217] *See id.* at 473.
[218] *Id.* at 474.
[219] *Id.*

most private space which, for centuries, has long been regarded as 'entitled to special protection.'"[220] Here, Ginsburg uses logos by creating a spectrum of protection—the home logically has the highest level of protection. She cites to case law, an example of rule-based reasoning, to support this position. Ginsburg appeals to our sense of fear, an example of pathos, when she highlights home intrusions as a "[c]hief evil against which . . . [t]he Fourth Amendment is directed."[221]

Ginsburg ends the paragraph with a rhetorical question, "[h]ow secure do our homes remain if police, armed with no warrant, can pound on doors at will and, on hearing sounds indicate of things moving, forcibly enter and search for evidence of unlawful activity?"[222] Rhetorical questions are powerful because they force readers to stop and think. Here, after explaining the legal issue, the legal principle, and the facts, Ginsburg leaves us with a question to ponder on the dangerous implications professed by the majority opinion. Most importantly, Ginsburg embraces the tenet of *Maat* because she focuses the reader's attention, in the form of a question, to think about what is fair and just. The question begs one to consider the injustices that will arise when the Court allows officers to break down the doors of a home without first securing a warrant.

Moreover, Ginsburg highlights that "the existence of a genuine emergency depends not only on the state of necessity at the time of the warrantless search; it depends, first and foremost, on 'actions taken by the police preceding the warrantless search.'"[223] Here, she explains a rule that was not explored by the majority opinion—the Court must consider the police's action before the warrantless search. Ginsburg displays her ethos, showing that she is familiar with the law and understands the applicable standards. Ginsburg points out that "under an

---

[220] *Id.*
[221] *King*, 563 U.S. at 475.
[222] *Id.*
[223] *Id.*

appropriately reined-in 'emergency' or 'exigent circumstances' exception, the result in this case should not be in doubt."[224]

Towards the conclusion, Ginsburg provides an example of a case where the Court "confronted this scenario: standing outside a hotel room, the police smelled burning opium and heard 'some shuffling or noise' coming from the room."[225] When asked, "could the police enter the room without a warrant?" the Court responded in the negative.[226] She quotes language from *Johnson v. United States*, to explain by way of rule-based reasoning, that "if officers in this case were excused from constitutional duty of presenting their evidence to a magistrate, it is difficult to think of [any] case in which [a warrant] should be required."[227] Ginsburg, logically reasons through Alito's point that there is always a police created exigency, by way of analogizing the case in *Johnson* to the factual circumstance in this case; she notes that the exigency created in this case is similar to *Johnson*. She says, "I would not allow an expedient knock to override the warrant requirement."[228] This phrase is followed by her proposed rule, "instead I would accord that core requirement of the Fourth Amendment full respect . . ." thus, when possible, ''a warrant must generally be secured . . . .''[229]

At last, Ginsburg concludes the way she began and that is by "honoring" the fundamental principles established by the Fourth

---

[224] *Id.* at 475–76. *See generally* Slobogin, *supra* note 110, at 879 ("Most of Justice Ginsburg's gradualism, however, has been of the 'negative' variety, in which she has attempted to constrain a Supreme Court whose membership is predominantly prosecution-oriented through concurring or dissenting.").

[225] *King*, 563 U.S. at 476 (internal quotation marks omitted) (citing *Johnson*, 333 U.S. at 12).

[226] *Id.* "The right of officers to thrust themselves into a home is … a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman . . . ." *Id.* (quoting *Johnson*, 333 U.S. at 12).

[227] *Id.* (internal quotation marks omitted) (quoting *Johnson*, 333 U.S. at 14–15).

[228] *Id.*

[229] *Id.*

Amendment.[230] Principles that should not be ignored by the reasoning in the majority opinion. Ginsburg voices that "[t]here is every reason to conclude that securing a warrant was entirely feasible in this case, and no reason to contract the Fourth Amendment's dominion."[231]

The dissenting and the majority opinions come from different perspectives. Alito is focused on logic and hard-fast rules. He writes like a law student who simply seeks to apply the laws to the facts without the need to think about the deeper implications of his conclusion because at end, only a letter grade is at stake. A student who does not view the possibility that police can be a disrupting force, disrupting the peace rather than maintaining the peace, and thus in violation of *Maat*. A student who does not understand that police cannot create the urgency because it goes against the intent of the Fourth Amendment. However, Ginsburg writes like the law professor who wants to teach the students to think about the law and its effect on real people. Ginsburg's dissent is a voice of reason. She strongly honors the Constitution and the protections it affords people from unreasonable governmental intrusions. Thus, the dissent—unlike the majority—has a superior appeal to justice and "rightness in the world."

---

[230] *See King*, 563 U.S. at 476-7.
[231] *Id.* at 476.

VI. Conclusion

There is power in the pen. Honorable Justice Ginsburg, through her strong dissents, reminded her readers of the power of change through the written word. Martin Luther King Jr. once pondered that "[t]he arc of the moral universe is long, but it bends towards justice."[232] Ginsburg's dissent in *King* is rhetorically superior because, through her use of logos, pathos, ethos, and *Maat* she creates a greater appeal to justice than does the majority opinion. The rhetoric in Ginsburg's dissent bends the long arc of the moral universe towards a more just future for all people in the United States. Ginsburg's dissent looks ahead to a future where the United States Supreme Court will protect the individual rights of the people[233] from unreasonable governmental intrusions.

---

[232] "We shall overcome because the arc of the moral universe is long, but it bends toward justice." Martin Luther King Jr., *Remaining Awake Through a Great Revolution*, Delivered at the National Cathedral, Washington, D.C. (Mar. 31, 1968), https://kinginstitute.stanford.edu/king-papers/publications/knock-midnight-inspiration-great-sermons-reverend-martin-luther-king-jr-10. The speech was added to the Congressional Record on April 9, 1969. *See* Deborah Ellis, *The Arc of the Moral Universe is Long, but it Bends Toward Justice*, WHITE HOUSE PRESIDENT BARACK OBAMA (Oct. 21, 2011, 8:31 PM), https://obamawhitehouse.archives.gov/blog/2011/10/21/arc-moral-universe-long-it-bends-toward-justice.

[233] *See* U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union, establish Justice ….").