
IT'S ABOUT TIME: KAIROS AS A DYNAMIC FRAME FOR CRAFTING LEGAL ARGUMENTS AND ANALYZING RHETORICAL PERFORMANCES IN THE LAW

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ABSTRACT

Why was the prosecution of Derek Chauvin for the murder of George Floyd successful when past acts of police brutality did not even lead to an indictment? Why are some advocates and social activists iconic, known for their ability to enact real change, while others seem to fade into oblivion, leaders of failed movements? Though there is no one characteristic that defines the successful advocate, this article argues that the Greek concept of kairos plays a critical role in the success – or failure – of advocacy. The ancient Greeks had two words for time: chronos and kairos. Chronos means time in its chronological or sequential sense, a quantitative measure. In contrast, kairos addresses time as a more nuanced, qualitative concept, meaning the “right” or “opportune” moment for an advocate to make an argument. This article posits that the richness of kairos provides a powerful ex ante lens through which scholars and practitioners can strategize the best arguments to make (and when to make them) and for scholars and historians to perform post hoc analyses of key decisions or changes in the law. Specifically, the article identifies two prospective functions of kairos and one retrospective function. Prospectively, an advocate can (1) create a kairotic moment or prime the audience to be receptive to such a moment; or (2) identify and exploit existing kairotic moments based on the topic, the speaker, the audience, and potentially, the surrounding political or social circumstances. Retrospectively, scholars, historians, and advocates can look to surrounding historical circumstances in conjunction with the rhetorical strategies of judges and advocates to better understand why particular arguments succeeded or failed in a given case or line of cases. This article provides two case studies to illustrate and apply the rhetorical frame for kairos: (1) selected speeches of Martin Luther King Jr. and Malcolm X; and (2) Clarence Darrow’s defense of Nathan Leopold and Richard Loeb for the

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murder of Bobby Franks. It also briefly addresses the role of kairos in the prosecution and conviction of Derek Chauvin.

"It is remarkable that we persevere with such a meager aesthetic vocabulary to help us think about time and our actions within it."¹

- Gregory Mason

"I think there is an answer to that myth, and it is that time is neutral. It can be used either constructively or destructively. And I'm absolutely convinced that the forces of ill will in our nation, the extreme rightists in our nation, have often used time much more effectively than the forces of goodwill. And it may well be that we will have to repent in this generation, not merely for the vitriolic words of the bad people and the violent actions of the bad people, but for the appalling silence and indifference of the good people who sit around and say, wait on time. Somewhere we must come to see that social progress never rolls in on the wheels of inevitability. It comes through the tireless efforts and the persistent work of dedicated individuals, and without this hard work, time itself becomes an ally of the primitive forces of social stagnation. And so we must help time, and we must realize that the time is always right to do right."²

- Martin Luther King Jr.

INTRODUCTION

On December 3, 2014, a Staten Island grand jury declined to indict New York City police officer Daniel Pantaleo for the death of Eric Garner. Pantaleo had put Garner in a chokehold³ when he purportedly resisted arrest for selling untaxed cigarettes. Chokeholds had been banned by the New York Police Department more than two decades prior to Garner's death.⁴ While Pantaleo had him in a chokehold, Garner uttered the phrase "I can't breathe" eleven times before dying.⁵ And a recent report in *The New York Times* identified no fewer than seventy instances of people uttering the phrase "I can't breathe" prior to dying in police custody.⁶

However, only after the murder of George Floyd did the phrase "I can't breathe" lead to real, lasting consequences for a perpetrator when, in April

¹ Gregory Mason, *In Praise of Kairos in the Arts*, in RHETORIC AND KAIROS: ESSAYS IN HIST., THEORY & PRAXIS 199, 199 (Phillip Sipiora & James S. Baumlin eds., 2002).

² Reverend Dr. Martin Luther King, Jr., *The Other America*, Speech at Stanford University (Apr. 14, 1967).

³ Andrew Siff, Jonathan Dienst & Jennifer Millman, *Grand Jury Declines to Indict NYPD Officer in Eric Garner Chokehold Death*, NBC N.Y. (Dec. 3, 2014), <https://www.nbcnewyork.com/news/local/grand-jury-decision-eric-garner-staten-island-chokehold-death-nypd/1427980/>.

⁴ Katie Benner, *Eric Garner's Death Will Not Lead to Federal Charges for N.Y.P.D. Officer*, N.Y. TIMES (Jul. 16, 2019), <https://www.nytimes.com/2019/07/16/nyregion/eric-garner-daniel-pantaleo.html> [<https://perma.cc/3UFB-4NET>].

⁵ Ashley Southall, *'I Can't Breathe': Five Years After Eric Garner's Death, an Officer Faces Trial*, N.Y. TIMES (May 12, 2019), <https://www.nytimes.com/2019/05/12/nyregion/eric-garner-death-daniel-pantaleo-chokehold.html> [<https://perma.cc/98FV-2X4G>].

⁶ Mike Baker, Jennifer Valentino-DeVries, Manny Fernandez & Michael LaForgia, *Three Words. 70 Cases. The Tragic History of 'I Can't Breathe'*, N.Y. TIMES (June 29, 2020), <https://www.nytimes.com/interactive/2020/06/28/us/i-cant-breathe-police-arrest.html> [<https://perma.cc/454W-7VW4>].

2021, a jury convicted Derek Chauvin in state court for second degree unintentional murder, third degree murder, and second degree manslaughter.⁷ Subsequently, the Department of Justice indicted Chauvin and three other former officers—Tou Thao, J. Alexander Kueng, and Thomas Lane—on federal civil rights charges related to Floyd's murder.⁸ Chauvin reached a plea agreement in his federal case in December 2021,⁹ and Kueng, Lane, and Thao were convicted in February 2022 of willfully violating Floyd's civil rights.¹⁰

Why was the outcome in the Floyd case so different than that in similar cases that came before: cases in which prosecutors failed to get convictions (or had not even tried)? Floyd was not the first prominent case where an unarmed Black man died uttering those words at the hands of police. What had changed in the legal landscape that made this an opportune moment for police accountability for brutality against unarmed Black victims?

The ancient Greeks had two words for time: *chronos* and *kairos*.¹¹ The former addresses a traditional concept of chronological or sequential time, the order of events.¹² Chronos, then, focuses on the quantitative aspects of time.¹³ Kairos is a more nuanced, three-dimensional concept, meaning the "right" or "opportune" moment given the topic, the speaker, the audience, and, perhaps, the argument's placement in history.¹⁴ Unlike *chronos*, *kairos* addresses primarily the qualitative aspects of time:

[T]he term *kairos* points to a qualitative character of time, to the special position an event or action occupies in a series, to a season when something appropriately happens that cannot happen just at "any time," but only at that time, to a time that marks an opportunity which may not recur . . . [K]airos, or the "right time," as the term is often translated, involves ordinality or the conception of a special temporal

⁷ Eric Levenson & Aaron Cooper, *Derek Chauvin Found Guilty of All Three Charges for Killing George Floyd*, CNN (Apr. 21, 2021), <https://www.cnn.com/2021/04/20/us/derek-chauvin-trial-george-floyd-deliberations/index.html> [<https://perma.cc/GNX9-9G45>].

⁸ Press Release, U.S. Dep't of Just., Four Former Minneapolis Police Officers Indicted on Federal Civil Rights Charges for Death of George Floyd; Derek Chauvin also Charged in Separate Indictment for Violating Civil Rights of a Juvenile (May 7, 2021), <https://www.justice.gov/opa/pr/four-former-minneapolis-police-officers-indicted-federal-civil-rights-charges-death-george> [<https://perma.cc/78N6-33SF>].

⁹ Nicholas Bogel-Burroughs, *Derek Chauvin Pleads Guilty to Violating George Floyd's Rights*, N.Y. TIMES (Dec. 15, 2021), <https://www.nytimes.com/2021/12/15/us/derek-chauvin-civil-rights-guilty-plea.html> [<https://perma.cc/SH34-CMX3>].

¹⁰ Patrick J. Lyons, *Civil Rights Trial Over George Floyd's Death: Ex-Officers Guilty in Federal Trial Over George Floyd's Death*, N.Y. TIMES (Feb. 24, 2022), <https://www.nytimes.com/live/2022/02/24/us/george-floyd-trial-verdict?action> [<https://perma.cc/ENA5-RSKN>].

¹¹ John E. Smith, *Time and Qualitative Time*, 40 REV. METAPHYSICS 3, 4 (1986) [hereinafter *Qualitative Time*]; John E. Smith, *Time, Times, and the 'Right Time': 'Chronos' and 'Kairos,'* in 53 THE MONIST, 1 (Oxford Univ. Press 1969) [hereinafter *Right Time*].

¹² *Qualitative Time*, *supra* note 11, at 4; *Right Time*, *supra* note 11, at 1.

¹³ *Qualitative Time*, *supra* note 11, at 4. According to Smith, *chronos* means the uniform time of the cosmic system, the time which, in Newton's phrase, *aequaliter fluit*. In *chronos* we have the fundamental conception of time as measure, the *quantity* of duration, the length of periodicity, the age of an object or artifact and the rate of acceleration of bodies whether on the surface of the earth or in the firmament beyond. The questions relevant to this aspect of time are: "How fast?," "How frequent?," "How old?," and the answers to these questions can be given in cardinal numbers or, as it may be, in terms of limits that approach these numbers.

Id. See also *Right Time*, *supra* note 11, at 1.

¹⁴ See *infra* Part II for a discussion about these elements as critical components of the rhetorical situation.

position such that what happens or might happen at “that time” and its significance are wholly dependent on an ordinal place in the sequences and intersections of events.¹⁵

Arguably, the state trial of Derek Chauvin for murder and the subsequent federal indictment for civil rights violations presents a modern example of attorneys effectively identifying and exploiting an opportune, or “kairotic,” moment to advance an argument that, in another time and rhetorical situation, would not work. First, Eric Garner’s case transformed “I can’t breathe” into a rallying cry for racial injustice and the fight against police brutality when the grand jury declined to indict Daniel Pantaleo.¹⁶ The Garner case captured the nation’s attention again when, in 2019, Attorney General William P. Barr ended “[a] contentious, years long debate inside the Justice Department” by ordering that the case be dropped and no federal civil rights charges filed against Pantaleo.¹⁷ So the phrase “I can’t breathe” had more salience in 2020. It was charged with meaning. Second, at least in the federal landscape, 2020 represented a sea-change after the Justice Department, under the new Biden administration, “pledged to be more aggressive in prosecuting civil rights violations.”¹⁸

Third, arguably another critical aspect of the case’s moment in history that lent salience to the case and allowed the prosecutors in Derek Chauvin’s state trial to exploit an opportune moment was the fact that the world was in the early and most horrifying days of an unprecedented health event. George Floyd was murdered on May 25, 2020,¹⁹ while the U.S. was locked down from the growing COVID-19 pandemic. Americans were watching friends and loved ones get sick from a new and frightening illness.²⁰ People were catching Covid, getting rapidly sick—with one symptom being an inability to breathe²¹—and dying.²² The world had stopped moving, so people were also fixated on the news. Collectively, as a nation, people were holding their breath. Racial protests were growing across the country.²³ The trial itself

¹⁵ *Right Time*, *supra* note 11, at 1 (internal footnote omitted). *But see* John R. Wilson, *Kairos as “Due Measure”*, 58 *GLOTTA* No. 3/4, at 177–204 (1980) (discussing the non-temporal uses of the term kairos).

¹⁶ Benner, *supra* note 4.

¹⁷ *Id.*

¹⁸ Lyons, *supra* note 10.

¹⁹ Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [<https://perma.cc/9KBG-6SS8>].

²⁰ Press Release, Ctrs. for Disease Control & Prevention, United States Coronavirus (COVID-19) Death Toll Surpasses 100,000 (May 28, 2020), <https://www.cdc.gov/media/releases/2020/s0528-coronavirus-death-toll.html> [<https://perma.cc/L7WA-8255>] (noting the U.S. death toll had “surpassed 100,000” and describing it as “a sobering development and a heartbreaking reminder of the horrible toll of this unprecedented pandemic”).

²¹ *Symptoms of COVID-19*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> [<https://perma.cc/RTZ4-LVWZ>] (last visited June 18, 2023).

²² *See, e.g., The True Death Toll of Covid-19*, WHO, <https://www.who.int/data/stories/the-true-death-toll-of-covid-19-estimating-global-excess-mortality> [<https://perma.cc/69ZH-4J94>] (last visited June 18, 2023).

²³ Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [<https://perma.cc/FAS7-Z4PB>] (noting that after Floyd’s murder, protests “erupted in at least 140 cities” in the United States, with the National Guard “activated in at least 21 states”).

occurred while we were still very much embroiled in the pandemic. Chauvin was sentenced in the state trial on June 25, 2021.²⁴

The law had not changed in significant ways. But the “times” had, both in a literal and a figurative sense. Floyd’s murder occurred at the razor’s edge of change, with the political landscape shifting and a pandemic reminding the public of the fragility of life and how easily and unfairly it could be snuffed out. It was a kairotic moment that had not come before and might not last. But savvy advocates were able to exploit it to advance racial justice.

Although the intersection between law and rhetoric is not new, legal scholars have only recently addressed the critical concept of kairos and its role in legal rhetoric.²⁵ Professors Linda Berger and Kathryn Stanchi have written about the judicial creation of kairotic moments,²⁶ and at least three scholars have directly addressed how learning about kairos can make students better advocates.²⁷ In a recent symposium, Clarke Rountree, a communications scholar, identified a potential framework for the role of stage setting in creating or developing future kairotic moments in the law, focusing primarily on large movements like the #MeToo movement and the “efforts to create a pro-life majority on the U.S. Supreme Court.”²⁸ But beyond that small body of work, little appears in legal scholarship about kairos.

This Article seeks to build upon the limited literature on kairos in the law by identifying an expansive role for kairos as a critical rhetorical tool for scholars and advocates crafting arguments and for legal scholars and historians seeking to perform post hoc analyses of key decisions or changes in the law. Specifically, the Article identifies two prospective functions for kairos as a rhetorical lens and one retrospective function. Prospectively, an advocate can (1) create a kairotic moment or prime the audience to be

²⁴ Bill Chappell, *Derek Chauvin is Sentenced to 22 ½ Years for George Floyd’s Murder*, NPR (June 25, 2021), <https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/06/25/1009524284/derek-chauvin-sentencing-george-floyd-murder> [https://perma.cc/MGX3-XVCQ].

²⁵ See, e.g., LINDA L. BERGER & KATHRYN M. STANCHI, LEGAL PERSUASION: A RHETORICAL APPROACH TO THE SCIENCE 33–37 (2018) [hereinafter LEGAL PERSUASION]; Linda L. Berger, *Creating Kairos at the Sup. Ct.: Shelby Cnty., Citizens United, Hobby Lobby, and the Jud. Constr. of Right Moments*, 26 J. APP. PRAC. & PROCESS 147 (2015) [hereinafter *Creating Kairos*]; Ruth Anne Robbins, *Three 3Ls, Kairos, and the Civil Right to Counsel in Domestic Violence Cases*, 2015 MICH. ST. L. REV. 1359, 1361 (2015); Susie Salmon & Mark Hannah, *Against the Grain: The Secret Role of Dissents in Integrating Rhetoric Across the Curriculum*, 20 NEV. L.J. 935 (2002). Carolyn Miller has also described the concept of kairos as “central” to numerous other disciplines. Carolyn Miller, *Foreward*, in RHETORIC AND KAIROS: ESSAYS IN HIST., THEORY, AND PRACTICE, *supra* note 1, at xi (noting the key role of kairos in “Hippocratic medicine,” “Pythagorean philosophy,” “psychoanalysis and psychological ethics,” and “Western literature”) (internal citations omitted).

²⁶ See, e.g., LEGAL PERSUASION, *supra* note 25, at 33–37 (observing that “[j]udges themselves often seem to be employing kairos to create both opportune and essential moments”); Berger, *Creating Kairos*, *supra* note 25, at 147. Although Berger and Stanchi use the term “kairic” rather than “kairotic,” this article uses the term “kairotic,” as it is the more common term used in other disciplines, including contemporary rhetoric. Both terms are correct.

²⁷ Robbins, *supra* note 25, at 1361 (discussing an amicus brief three 3L students wrote arguing for a civil right to counsel for both parties in domestic violence proceedings); Salmon & Hannah, *supra* note 25, at 935 (addressing using the study and drafting of dissents as a way to integrate rhetorical concepts across the curriculum, with kairos being one of those concepts).

²⁸ Clarke Rountree, *Classical Rhetoric as a Lens for Contemporary Legal Praxis: Kairos and American Legal Praxis*, 20 NEV. L.J. 855, 870 (2020). Rountree counseled identifying the elements of the rhetorical situation, including speaker, audience, message, and occasion, and “consider[ing] the extent to which they are amenable to strategic development.” *Id.* at 873. Rountree also briefly addressed the kairotic aspects of appellate judges working to “push the law in one direction or another.” *Id.* at 871.

receptive to such a moment; or (2) identify and exploit existing kairotic moments based on the topic, the speaker, the audience, and potentially, the surrounding political or social circumstances. Retrospectively, scholars and historians can look to surrounding historical circumstances in conjunction with the rhetorical strategies of judges and advocates to understand why particular arguments succeeded or failed in a given case or line of cases.

This Article proceeds in five parts. Part I provides a baseline understanding of what this Article means when it refers to “rhetoric” and situates kairos among other rhetorical concepts critical for use by legal advocates. Part II surveys the wide range of definitions of kairos as a foundation for understanding the role kairos might play in legal rhetoric. It also provides a summary of the existing framework for and scholarship about kairos in the law. Part III proposes a more detailed, nuanced rhetorical frame for legal advocates, scholars, historians, and activists to harness the power of kairos in their normative arguments and post hoc analyses of historical shifts in the law or failed movements. Because this framework anticipates such a broad role for kairos in the law and in legal advocacy, examples of every possible use of kairos would be impossible in one article. However, Part IV provides two case studies for understanding the role of kairos in legal rhetoric under the framework. The first example provides an analysis of the kairotic aspects of various speeches of Martin Luther King Jr. and Malcolm X. The second addresses the rhetoric of Clarence Darrow in his defense of Richard Leopold and Nathan Loeb for the murder of Bobby Franks, a case in which Darrow’s strategic decision-making and rhetorical choices put the death penalty itself on trial. Finally, the Article concludes with key takeaways for scholars, historians, advocates, and activists regarding the role of kairos in their work.

I. DEFINING RHETORIC AND SITUATING KAIROS AMONG ARISTOTLE’S ETHOS, PATHOS, AND LOGOS

Before transitioning to a more nuanced exploration of the concept of kairos and its potential role as a theoretical and practical frame for scholars, activists, and advocates, this Part positions kairos alongside other related rhetorical concepts. First, if kairos is to be a tool for legal rhetoric, it is helpful to provide a brief explanation of what “rhetoric” might mean to legal advocates and scholars. Second, though the focus of this article is kairos, it is important to place kairos in context with other more well-understood rhetorical elements. Thus, this Part begins with a working definition of rhetoric; continues with a brief summary of ethos, pathos, and logos; and concludes by noting the critical tool for advocacy that kairos can be, particularly when harnessed alongside other rhetorical techniques.

Kairos is both a tool for developing more persuasive rhetoric and a device for analyzing past rhetorical performances in the law. But what, then, is rhetoric? It is not an easy question to answer,²⁹ and a full exploration of the topic is beyond the scope of this Article. However, a working definition

²⁹ Eileen Scallen, *Evidence Law as Pragmatic Legal Rhetoric: Reconnecting Legal Scholarship, Teaching, and Ethics*, 21 QUINNIAC L. REV. 814, 829 (2003) (noting that “[d]efinitions of rhetoric are plentiful and often not particularly helpful”).

of legal rhetoric can be useful. Rhetoric has often been viewed negatively, as speech designed to fool or mislead the audience.³⁰ Or it is seen as merely stylistic, focused only on how one uses language and emotion to sway the listener.³¹ Although rhetoric *can*—though it should not—fool or mislead, and good rhetoric *should* sway the listener, a better definition of rhetoric—at least in the law—understands it as an active and pragmatic technique to bring about change. Thus, Aristotle described rhetoric generally as “the faculty of observing in any given case the available means of persuasion,”³² a “utilitarian” view focused on language as a tool of persuasion, “to seek agreement, cooperation, or action.”³³ And as Lloyd Bitzer noted in his seminal article on the rhetorical situation,

[R]hetoric is pragmatic; it comes into existence for the sake of something beyond itself; it functions ultimately to produce action or change in the world [It] is . . . the creation of discourse which changes reality through the mediation of thought and action. The rhetor alters reality by bringing into existence a discourse of such a character that the audience, in thought and action, is so engaged that it becomes mediator of change.³⁴

This comes closer, I think, to a more appropriate understanding of rhetoric in the law. Perhaps even more important for understanding the role of rhetoric in law is James Boyd White’s notion of “constitutive rhetoric,” which imports an ethical component into the concept of rhetoric. White defines constitutive rhetoric “not as a failed science nor as an ignoble art of persuasion . . . but as the central art by which culture and community are established, maintained, and transformed. This kind of rhetoric . . . has justice as its ultimate subject.”³⁵ A legal rhetor who places justice at the center of any use of rhetoric, and then creates discourse that invites the audience to be a “mediator of change,” harnesses the power of rhetoric in a way that moves rhetoric well beyond “empty bombast” or mere stylistic flair.³⁶

Aristotle’s three major elements of rhetoric or persuasion³⁷ have long been foundational principles of effective legal advocacy.³⁸ Ethos, of course,

³⁰ *Id.* (citing SONJA K. FOSS ET AL., CONTEMPORARY PERSPECTIVES ON RHETORIC 1 (2d ed. 1991)).

³¹ See, e.g., James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 687–88 (1985).

³² ARISTOTLE, THE ART OF RHETORIC BOOK I at 7 (W. Rhys Roberts, trans., 1956).

³³ Scallen, *supra* note 29, at 829.

³⁴ Lloyd F. Bitzer, *The Rhetorical Situation*, 1 PHIL. & RHETORIC. 1, 3–4 (1968).

³⁵ JAMES BOYD WHITE, HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 28 (1985).

³⁶ Scallen, *supra* note 29, at 829.

³⁷ ARISTOTLE, *supra* note 32, at 9. According to Aristotle:

There are, then, these three means of effecting persuasion. The man who is to be in command of them must, it is clear, be able (1) to reason logically, (2) to understand human character and goodness in their various forms, and (3) to understand the emotions—that is, to name them and describe them, to know their causes and the way in which they are excited.

³⁸ See generally Linda Levine & Kurt M. Saunders, *Thinking Like a Rhetor*, 43 J. LEGAL EDUC. 108, 111 (1993) (discussing ethos, pathos, and logos and noting that “[a]lthough the advent of the case method marked the disappearance of rhetoric from the law school curriculum, legal argument and analysis still exhibit a number of techniques that are rooted in classical rhetoric”). In *Thinking Like a Rhetor*, Levine and Saunders argued that law schools should reincorporate classical and contemporary rhetoric into at least the legal writing curriculum with a preference for integrating it across the curriculum. *Id.* at 121 (“Traditionally, clinics and skills-based courses emphasize behavior and practice, while doctrinal courses stress rule memorization. Both neglect the cognitive and cultural dimensions of thinking like a lawyer.

addresses rhetorical devices and decisions in argumentation that help establish the speaker's character and credentials. By establishing oneself as trustworthy and believable, the speaker or writer ensures that the argument itself becomes more persuasive and believable.³⁹ In addition to relating to the character of the speaker, ethos may appear through the character of one of the other players in the argument or from the sources the rhetor uses to build the argument.⁴⁰

Pathos, on the other hand, when viewed in the context of legal argumentation, is an appeal to the decisionmaker's emotions.⁴¹ Arguments invoking pathos attempt to identify and exploit "common ground" or shared ideals between the rhetor and the listener or the listener and some third party.⁴² This common ground may manifest in a number of ways, including through "shared emotions, values, beliefs, ideologies, or anything else of substance."⁴³ In practical terms, pathos will often appear in the form of

The curricular revision we propose makes strategic knowledge explicit because rhetoric unites the theory and practice of the law." Many law school texts on persuasive advocacy touch on the concepts of ethos, pathos, and logos.

³⁹ LEGAL PERSUASION, *supra* note 25, at 5 (observing that ethos involves considerations of "the knowledge, experience, credibility, integrity, or trustworthiness of the speaker"). Though beyond the scope of this article, ethos itself is a term worth exploring in much more depth. For a recent discussion of classical and contemporary notions of ethos, see Melissa H. Weresh, *Ethos at the Intersection: Classical Insights for Contemporary Application*, 20 NEV. L. J. 877, 877 (2020) (addressing (1) whether an advocate must "possess ethos or good character" or whether an "appearance of ethos" is sufficient; and (2) whether ethos "dwell[s] in the speaker/writer . . . [i]n the speech/text . . . [o]r in the exchange that takes place between speaker/writer and the audience"). On the question of whether ethos must be an innate characteristic or whether an "appearance of ethos" was sufficient, Weresh observed that for Isocrates, ethos was "prediscursive," meaning it existed in the character of the speaker prior to the speech. *Id.* at 881–82 (citing Ruth Amossy, *Ethos at the Crossroads of Disciplines: Rhetoric, Pragmatics, Sociology*, 22 POETICS TODAY 1, 7 (2001)). In contrast, Aristotle's concept of ethos was discursive, such that projecting good character would lead to trust on the part of the audience; thus, ethos was created in the speech itself, not in the "prior reputation of the speaker." *Id.* at 883. In Book I of the *Rhetoric*, Aristotle thus states:

The orator persuades by moral character when his speech is delivered in such a manner as to render him worthy of confidence; for we feel confidence in a greater degree and more readily in persons of worth in regard to everything in general, but where there is no certainty and there is room for doubt, our confidence is absolute. But this confidence must be due to the speech itself, not to any preconceived idea of the speaker's character . . . [P]ersuasion is produced by the speech itself, when we establish the true or apparently true from the means of persuasion applicable to each individual subject.

ARISTOTLE, *supra* note 32, at 10. Finally, Cicero's view of ethos focused both on the prior character and reputation of the speaker and on the art of the speech itself. Weresh at 885–86.

As for the second question, whether ethos "dwell[s] in the speaker/writer . . . [i]n the speech/text . . . [o]r in the exchange that takes place between speaker/writer and the audience," the answer is arguably all of the above. *Id.* at 877. For a further discussion of classical and modern notions of ethos, see generally *Id.* at 880–903 (classical view) & 904–14 (modern view).

⁴⁰ LEGAL PERSUASION, *supra* note 25, at 5.

⁴¹ Pathos as defined in basic dictionary terms is "an element in experience or in artistic representation evoking pity or compassion." *Pathos*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/pathos> [<https://perma.cc/2WSR-W5G7>] (last accessed June 9, 2023) (noting, among other things, that the term is borrowed from the "Greek [term] *páthos*," meaning "experience, misfortune, emotion, [or] condition"); see also Phillip Sipiora, *Kairos: The Rhetoric of Time and Timing in the New Testament*, in RHETORIC AND KAIROS: ESSAYS IN HIST., THEORY, AND PRACTICE, *supra* note 1, at 114, 118 [hereinafter *Time and Timing in the New Testament*] (noting that "effective pathetic appeal[s] must evoke certain emotional responses in the audience"). Sipiora specifically highlighted the critical role of kairos in determining the "right" moment to make pathetic appeals, observing that "[a] rhetor who fails to consider the kairos" of a pathetic appeal, who does not accurately assess "the emotional predispositions" of the audience, will be unable to choose the correct or "right" arguments based on emotion. *Id.*

⁴² LEGAL PERSUASION, *supra* note 25, at 5.

⁴³ LEGAL PERSUASION, *supra* note 25.

policy arguments to the court grounded in fairness and equity or in arguments to a jury regarding what is “fair” or “right” to do in a given circumstance.⁴⁴

Logos addresses logic and reason.⁴⁵ This is often what one thinks of as the heart of legal analysis, involving the actual application of the law to facts to make a prediction.⁴⁶ But logic alone will not persuade. The best legal arguments will involve some balance of ethos, pathos, and logos.⁴⁷

The three concepts make up what many refer to as the “rhetorical triangle,” with each of the three concepts appearing in the corners of the triangle.⁴⁸ Remarkably absent from the discussion of the three concepts making up the rhetorical triangle, however, is any nuanced analysis of kairos as an additional mode for identifying and advancing effective persuasive or normative legal arguments.⁴⁹

James Kinneavy, a scholar of rhetoric and composition, and Catherine Eskin, a scholar of English literature and rhetoric, have specifically analyzed this absence of kairos in scholarly works regarding Aristotle’s *Rhetoric*. Their observations support the idea that kairos is a critical concept and

⁴⁴ See, e.g., Lisa A. Mazzie, *Logos, Ethos, and Pathos in Persuasive Writing*, MARQ. U. L. SCH. FAC. BLOG (Jan. 27, 2014), <https://law.marquette.edu/facultyblog/2014/01/logos-ethos-and-pathos-in-persuasive-writing> [<https://perma.cc/J5NX-CQUJ>] (citing RUTH ANNE ROBBINS, STEVE JOHANSEN, AND KEN CHESTEK, *YOUR CLIENT’S STORY: PERSUASIVE LEGAL WRITING* 21 (2013)). An appeal to pathos in legal writing or oral advocacy is, in large part, an attempt to get the audience to empathize with the client or the client’s position. *Id.*

⁴⁵ James S. Baumlin, *Ciceronian Decorum and the Temporalities of Renaissance Rhetoric*, in *RHETORIC AND KAIROS: ESSAYS IN HIST., THEORY, AND PRAXIS*, *supra* note 1, at 138, 157–58 [hereinafter *Ciceronian Decorum*] (explaining that a translation of the Greek word *logos* reveals a range of meanings, including “‘word,’ ‘speech,’ ‘discourse,’ ‘reckoning,’ ‘argument,’ ‘oracle,’ ‘proof,’ ‘proposition,’ ‘explanation,’ ‘measure,’ ‘reason,’ ‘ratio,’ ‘logic,’ and ‘rational principle.’”).

⁴⁶ LEGAL PERSUASION, *supra* note 25, at 5 (“Logos suggests arguments based on the syllogism or the syllogistic form, including arguments based on enthymemes and analogous cases.”). A syllogism is “a deductive scheme of a formal argument consisting of a major and a minor premise” or assumption “and a conclusion” that necessarily or arguably follows from the major and minor premise. *Syllogism*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/syllogism> [<https://perma.cc/AB2W-M9V2>] (last accessed June 9, 2023). The rhetor making an argument based on syllogisms thus applies deductive reasoning to arrive at a desired conclusion or outcome by arguing that two other propositions are true. An enthymeme is also a form of deductive argument or syllogism, but one of the underlying premises is implied and not explicitly stated. *Enthymeme*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/enthymeme> [<https://perma.cc/L3XJ-RJXY>] (last accessed June 23, 2023).

⁴⁷ See, e.g., Mazzie, *supra* note 44 (noting that “using all three techniques in concert” is more effective in persuading an audience).

⁴⁸ See, e.g., JONATHAN SHAPIRO, *LAWYERS, LIARS, AND THE ART OF STORYTELLING: USING STORIES TO ADVOCATE, INFLUENCE, AND PERSUADE* 53 (2014); Michael D. Murray, *The Great Recession and the Rhetorical Canons of Law and Economics*, 58 *LOY. L. REV.* 615, 631 (2012); Jaclyn Lutzke and Mary F. Henggeler, *The Rhetorical Triangle: Understanding and Using Logos, Ethos, and Pathos*, IND. UNIV. SCHOOL OF LIBERAL ARTS (2009), https://www.lsu.edu/hss/english/files/university_writing_files/item35402.pdf [<https://perma.cc/A22Z-5DVE>] (noting that “Aristotle taught that a speaker’s ability to persuade an audience is based on how well the speaker appeals to that audience in logos, ethos, and pathos” and that “these appeals form what later rhetoricians have called the rhetorical triangle”); WILLIAM M. KEITH & CHRISTIAN O. LUNDBERG, *THE ESSENTIAL GUIDE TO RHETORIC* 3 (2008); see also JAMES L. KINNEAVY, *A THEORY OF DISCOURSE* 19 (1980). Other authors have referred to the three pillars of the rhetorical triangle as being audience, purpose, and persona. See, e.g., ALEXA Z. CHEW & KATIE ROSE GUEST PRYAL, *THE COMPLETE LEGAL WRITER* (2d ed. 2020).

⁴⁹ This is not to say that kairos is on the same plane as these modes of proof. Kairos is better viewed as a complex rhetorical frame existing outside the rhetorical triangle and informing the rhetor/advocate when and how to employ ethos, pathos, or logos in written or oral advocacy. See, e.g., Salmon & Hannah, *supra* note 25, at 936 (identifying kairos as being one of the “more complex concepts that demonstrate rhetoric’s constitutive capacity and how it creates and shapes conditions for action”).

belongs in any discussion of Aristotelian rhetorical techniques.⁵⁰ In fact, though, the term “kairos” does not appear in Aristotle’s definition of rhetoric, Aristotle’s discussion of political and legal rhetoric focuses on the individual nature of specific rhetorical situations.⁵¹ Kinneavy and Eskin have also observed that there are kairotic aspects to the other kinds of Aristotelian rhetorical proof.⁵² Thus, for example, the legal advocate must determine when it is appropriate or timely to make an appeal to emotion.⁵³

More recently, moreover, some legal scholars have recognized the importance of kairos, describing the key modes of persuasion as including Aristotle’s ethos, logos, pathos, *and* the concept of kairos.⁵⁴ Therefore, a nuanced understanding and use of kairos as a rhetorical technique is critical to legal persuasion. Just as a purely logical argument would not persuade without some trust of the advocate (ethos) and recognition of the equities involved in the legal analysis (pathos), an argument advanced in the wrong moment or lacking a true understanding of the rhetorical situation⁵⁵ will likely fail. Thus, Part II addresses the concept of kairos and examines its relationship to (and distinction from) the rhetorical situation.

II. KAIROS AS A MULTIDIMENSIONAL AND SHIFTING RHETORICAL CONCEPT

Kairos is a slippery concept, but it is not beyond comprehension. This Part lays the groundwork for Part III, which provides a new analytical framework for the use of kairos in the law. First, this Part explores the interrelation between kairos and chronos. Next, it provides a survey of competing scholarly views of kairos in both classical and contemporary rhetoric: from Cicero, who viewed kairos as bounded by and related to propriety and decorum; to Gorgias and the post-modern Sophists, who saw kairos as representing the distinctly spontaneous and unpredictable; to Isocrates, who explored the ethical and practical components of kairos, grounding kairos in the specific discourse in which it would be employed. To bring the concept of kairos into sharper focus, this Part also briefly introduces some artistic and literary depictions of *Kairos* as a Greek god and kairos as explored through metaphor. Finally, this Part works to harmonize competing views of kairos to set the stage for the comprehensive framework in Part III.

⁵⁰ James L. Kinneavy & Catherine R. Eskin, *Kairos in Aristotle’s Rhetoric*, 11 J. WRITTEN COMMUN. 131–42 (1994). One reason for the absence of scholarly work on kairos in Aristotle’s *Rhetoric* is that scholars did not look beyond the “literal appearance[]” of the word kairos to Aristotle’s use of related terms, such as “virtue, equity, fitness, and occasion.” *Id.* at 132.

⁵¹ *Id.* at 133.

⁵² *Id.* at 136.

⁵³ *Id.* at 137 (“Clearly, Aristotle intended to give a situational grounding to the notion of an emotional argument.”).

⁵⁴ See, e.g., LEGAL PERSUASION, *supra* note 25, at 5 (citing E.P.J. CORBETT, E.P.J. & R.J. CONNORS, CLASSICAL RHETORIC FOR THE MODERN STUDENT (4th ed. 1998)).

⁵⁵ Bitzer, *supra* note 34, at 2. For a longer discussion of the rhetorical situation, see *infra* Part II.

A. KAIROS AND CHRONOS: TWO DISTINCT AND YET INTERRELATED CONCEPTS OF TIME

Earlier, this Article discussed the two distinct words the Greeks used for time, *kairos* and *chronos*. However, these terms are not completely unrelated. While it is true that *chronos* focuses on the *quantitative* nature of time and *kairos* focuses more on the *qualitative* nature of time, philosopher John E. Smith rightly observed that the two concepts are interwoven.⁵⁶ All arguments occur within a specific, identifiable setting (including the speaker, the audience, and the events surrounding a discrete chronological time and space). Therefore, the advocate must seek to identify both “critical points” in the chronology “at which a qualitative character begins to emerge,” and when there is a “juncture of opportunity calling for human ingenuity” to determine that a *kairotic* moment is at hand and can be exploited.⁵⁷ *Chronos* time, of course, permits a sequencing of events: an order of important moments in a lawsuit, in a social movement, in a historical account. This sequencing is critical to a *kairotic* notion of timing as well, but it is *kairos* that helps us understand (either in hindsight or perhaps even in the moment) the relative importance of events, of moments in the chronology:

[*Chronos* time] permits . . . a chronical of events which forms the initial material for the writing of history. But considering no more than the facts of process, of measuring time elapsed and the “before” and “after” of events, leaves us without the purpose, the significance and the evaluating interest which are the necessary ingredients both of historical action and of historical interpretation. The historical consciousness presupposes a framework of *chronos* time . . . but by itself it is insufficient because the relations it involves are too abstract to express the significance of events.⁵⁸

This is not to say that *kairotic* moments can only be determined in hindsight, though there are those who would argue as much.⁵⁹ The chronology of current events or of a given case can provide a foundation for an advocate who is able to “grasp the dominant problem . . . the ‘crisis’ . . . and the possibilities for response inherent in their situation. Thus confronted, they must envisage the ‘opportunities’ of that time, what ‘must’ be done and what ‘can’ be done.”⁶⁰ Indeed, though the best legal advocates are most certainly effectively harnessing *kairos* in their advocacy, as demonstrated through examples in Part IV of this Article, they typically are not doing so explicitly. This Article provides a more transparent introduction

⁵⁶ *Qualitative Time*, *supra* note 20, at 6.

⁵⁷ *Id.* at 5–6; *Right Time*, *supra* note 11, at 1–2, 4.

⁵⁸ *Right Time*, *supra* note 11, at 4. *But see* Wilson, *supra* note 24, at 180. John Wilson has argued further that any true understanding of the concept of *kairos* must move beyond “confin[ing it] to a temporal straightjacket.” According to Wilson, *kairos* had a distinctly non-temporal meaning, particularly in the work of early Greek poets like Hesiod, Theognis, and Pindar. *Id.* at 178–87. This concept of *kairos* as “due measure” was related to *kairos* as what is “fitting” or “appropriate,” but it had a more quantitative meaning: the right amount “between too much and too little,” *Id.* at 179, like Goldilocks looking for what was “just right” in between two extremes.

⁵⁹ *See, e.g.*, Miller, *supra* note 25, at xiii (referencing the view of Gorgias and the latter-day postmodern Sophists that *kairos* represented “the uniquely timely, the spontaneous, the radically particular,” and noting that such an “impoverished” view of *kairos* would render rhetoric “unteachable”).

⁶⁰ *Right Time*, *supra* note 11, at 11.

to the critical rhetorical concept of kairos to guide scholars and advocates alike.

B. COMPETING VIEWS OF KAIROS IN CLASSICAL AND CONTEMPORARY RHETORIC

Although all who have written or discussed the concept of kairos generally agree that it is a concept of time that moves beyond chronology and into the realm of “right” or “opportune” moments, there are differences in the way scholars and rhetors have understood the term.⁶¹

Cicero (106-43 B.C.E) and the Stoics (third century B.C.E.) had a vision of kairos that was closely related to and represented “propriety” or “decorum.”⁶² To many who hold this view, kairos is “a principle of adaptation and accommodation to convention, expectation, and predictability.”⁶³ But to be proper or fitting, the rhetor must necessarily adapt to the discrete occasion or person; thus, “its specific expression continually changes.”⁶⁴ Cicero’s role as a Roman statesman, philosopher, and lawyer makes this focus on convention and expectation unsurprising.

This focus on decorum, however, did not deny the existence of kairotic moments. Rather, it recognized that kairotic moments, which are “crucial or otherwise novel situation[s]” that call for a “quick, appropriate, and effective response,” could only be addressed within the bounds of both social decorum (or the Greek notion of *prepon*) and stylistic decorum.⁶⁵ Thus, though discerning and exploiting a kairotic moment requires the advocate to “assess and address his audience’s expectations,” kairos should be subordinate to external audience expectations in the form of social rules and expectations.⁶⁶

Applying this understanding to *legal* advocacy, kairos represents the rhetor or advocate attempting to discern what argument is “right” or “fitting” given the particular time and space in which the advocate is advancing that

⁶¹ See, e.g., *Ciceronian Decorum*, *supra* note 45, at 157. Baublum notes:

Thoroughly overdetermined in meaning, kairos comprehends a range of rhetorical effects that include “due measure,” “harmony,” fitness,” “appropriateness,” and “proportionality,” as well as “timing” and “timeliness.” The difficulty in translating such a term is that any English equivalent captures only a fraction of its full range of meanings, whereas any given usage is likely to suggest several senses simultaneously. Specific uses of kairos may best be translated as a combination of qualities, such as “that harmony which is proportionate,” or “that timing which harmonizes,” or “that proportionate measure,” or “that measure which is fit and timely.”

Ciceronian Decorum. See also Kairos, *Eulexis-web, Lemmatizer of Ancient Greek*, BIBLISSIMA, <https://outils.bibliissima.fr/fr/eulexis-web/?lemma=%CE%BA%CE%B1%CE%B9%CF%81%CE%BF%CF%82&dict=LSJ> [https://perma.cc/J6UQ-86VN] (last accessed June 11, 2023). Consulting a lemmatizer for ancient Greek texts further illustrates the wide range of possible definitions of kairos, though most are interrelated rather than contradictory. See *id.*

⁶² Miller, *supra* note 25, at xii; see also Joseph J. Hughes, *Kairos and Decorum: Crassus Orator’s Speech de lege Servilia*, in *RHETORIC AND KAIROS: ESSAYS IN HIST., THEORY, AND PRAXIS*, *supra* note 1, at 128; James L. Kinneavy, *Kairos: A Neglected Concept*, in *RHETORIC AND PRAXIS, THE CONTRIBUTION OF CLASSICAL RHETORIC TO PRAC. REASONING* 82 (Jean Dietz Moss ed., 1986) [hereinafter *A Neglected Concept*] (noting that “in Stoicism . . . the concept of kairos merged with that of *prepon* (propriety or fitness) . . . [and that] kairos, with its related concept of *prepon*, was a major influence in much of classical rhetoric in antiquity, particularly with the Pythagoreans, the Sophists, Plato, and Cicero”).

⁶³ Miller, *supra* note 25, at xii.

⁶⁴ *Ciceronian Decorum*, *supra* note 45, at 142 (citing Cicero, *DE ORATORE* 22.74).

⁶⁵ Hughes, *supra* note 62, at 128.

⁶⁶ *Id.* at 130.

argument.⁶⁷ In doing so, the legal advocate must consider numerous external constraints, some of which directly involve an understanding of what is permissible or “appropriate.” For example, a legal advocate is constrained in many ways by what the client has asked the lawyer to do, what the Rules of Civil Procedure allow, what the ethical rules dictate, what role the lawyer plays in the particular legal dispute and within the larger legal system, what level of court the lawyer is advancing the argument in, and the like.⁶⁸

Of course, any view of *kairos* that focuses too heavily on decorum and what is “fitting” may cause an advocate to miss critical opportunities to effect change or to advance a persuasive argument at the “right” or “essential” moment. Indeed, Cicero’s own dual identity as both a rhetorical theorist and as a practical orator demonstrates the tension between decorum and *kairos*. As a rhetorical theorist, Cicero prioritized decorum:

[T]he orator must observe *decorum* not only in his thoughts but in his language . . . [He] must not use the same language and thoughts for portraying individuals of every condition, status, position, or age, nor in every place, or at every time, or before every audience. In every part of an oration as in life, decorum must be taken into account.⁶⁹

Nevertheless, as classics professor and scholar Joseph Hughes has observed, Cicero as an orator (rather than as a rhetorical theorist) “was quite willing to cross this boundary when the *kairos* demanded.”⁷⁰ In fact, though perhaps overstated, English literature, rhetoric, and composition scholar James Baumlin has described the Ciceronian-Humanist “rhetoric of decorum” as an “ultimate failure.”⁷¹ Baumlin argued that it is almost impossible to fully “know when an occasion is ‘timely’ or an argument or style is ‘fitting.’”⁷² Baumlin’s greatest critique of a *kairos* concept that is based on decorum, however, is a more practical one: theorists have failed to provide clear rules to govern the effective use of decorum.⁷³

Here, the law may provide better guidance regarding what is appropriate decorum. There are very clear expectations in the law regarding how one conducts oneself in various situations. For example, when appearing before

⁶⁷ *Creating Kairos*, *supra* note 25, at 153.

⁶⁸ See, e.g., Salmon & Hannah, *supra* note 25, at 954–55.

⁶⁹ Hughes, *supra* note 62, at 129–30 (internal quotations omitted).

⁷⁰ *Id.* at 135. By way of example, Hughes recounts a speech Cicero gave in 56 B.C. to defend M. Caelius Rufus, a speech which occurred during the Megalensian Games, a festival with dramatic performances. *Id.* Despite Cicero the rhetorical theorist’s condemnation of inappropriate use of humor in oratory, Cicero the orator used his speech in defense of M. Caelius Rufus as an opportunity to entertain the jurors by “impersonating a wide range of characters, old and young, male and female, dead and alive, thus turning the speech into somewhat of a comic farce.” *Id.* (internal citations omitted). This would seem to be a clear example of subordinating decorum to the need to exploit a *kairotic* moment.

⁷¹ *Ciceronian Decorum*, *supra* note 45, at 157.

⁷² *Id.*

⁷³ *Id.* (“[C]learly, [the concept of decorum] cannot be reduced to a set of precepts.”) On the other hand, Baumlin’s earlier writing on *kairos* and decorum may indicate more that he advocated for a broader understanding of what *kairotic* decorum meant rather than a judgment that decorum was not an important consideration. Thus, in arguing for a marriage of modern and classical rhetoric in contemporary writing instruction, Baumlin noted that “[t]hrough *kairos* . . . the writer or speaker recognizes the mutability of the world and the power that the word . . . plays in constituting reality; and decorum, united with *kairos*, becomes the principle of adapting all elements of discourse to a world of change.” James S. Baumlin, *Decorum, Kairos, and the “New Rhetoric,”* PRE/TEXT 5, 177 (1987). He further noted that “decorum” is not simply a matter of determining what is correct or proper. Rather, decorum requires a “sensitivity toward time, opportunity, and audience, and toward the effect of one’s words on audience.” *Id.* at 179.

a federal district court judge or jury and arguing a case, the attorney would be subject to at least the following rules: the Federal Rules of Civil Procedure, the Federal Rules of Evidence, relevant local rules, the relevant judge's rules, and the ethical rules in the given jurisdiction. On the other hand, even in the law, there may be unstated expectations and assumptions depending on the particular audience. Thus, Baumlin is ultimately correct, at least to the extent that he recognizes that decorum or appropriateness cannot be the *sole* motivating concept for the rhetor, legal or otherwise.

Earlier philosophers and rhetoricians had a much different conception of kairos. Rather than a notion of kairos as either related to or subordinate to decorum, Gorgias and the postmodern Sophists instead viewed kairos as represented not by the expected or predictable but by the "uniquely timely, the spontaneous, the radically particular."⁷⁴ This view of kairos would arguably mean that kairotic moments could only be identified in retrospect, in the context of "unfolding and unprecedented circumstances."⁷⁵ Because the surrounding circumstances could shift at any moment, kairos is a "principle of invention . . . a prescription concerning the way thought should encounter reality Such an activity of invention would renew itself and be transformed from moment to moment as it evolves and adapts itself to newly emergent contexts."⁷⁶

However, scholars like Carolyn Miller, a professor emerita of rhetoric and technical communication, have noted that the best definition of kairos keeps varying views of kairos in "productive tension."⁷⁷ Thus, some focus on propriety, decorum, and what is "fitting" counsels the rhetor to be accommodative and to look to the past in formulating current arguments and rhetorical strategies. But the advocate should also remain flexible and creative in adapting to circumstances as they happen.⁷⁸ Indeed, it is the richness of the concept of kairos that makes it particularly useful as a tool for effective legal advocacy.

Kairos also has an ethical⁷⁹ and practical component. Whereas Gorgias was one of the earliest teachers of rhetoric to address the concept of kairos, Isocrates,⁸⁰ as an opponent of the Sophists, was the first to fully address both

⁷⁴ Miller, *supra* note 25, at xiii; see also John Poulakos, *Kairos in Gorgias' Rhetorical Compositions, in RHETORIC AND KAIROS: ESSAYS IN HIST., THEORY, AND PRAXIS, supra* note 1, at 89.

⁷⁵ Miller, *supra* note 25, at xiii. Interestingly, Baumlin critiques a view of kairos based on decorum for similar reasons. Particularly relevant to the legal advocate, he notes that "decorous (or indecorous) speech and behavior is necessarily judged after the fact, based on an audience's immediate, concrete response." *Ciceronian Decorum, supra* note 45, at 157. Thus, even though the rhetor may attempt to predict how a given audience will receive the rhetoric, "one can never guarantee that any behavior will yield its desired effects." *Id.* The fact that there are no guarantees, however, does not mean that the advocate should be absolved of a duty to hone his or her craft.

⁷⁶ ERIC CHARLES WHITE, *KAIRONOMIA: ON THE WILL TO INVENT* 13 (1987). According to White, under a Gorgian view of kairos, "the irrational novelty" of each new situation would render kairos as a rhetorical technique impossible to teach: "If every occasion presents a unique challenge to the situational, context-oriented consciousness of the sophist, then the sophist's interpretive ingenuity will nowhere find itself resumed in a definitive statement." *Id.* at 20. This would seem overstated, though, as the effective advocate can also draw from past experience in approaching new situations.

⁷⁷ Miller, *supra* note 25, at xiii.

⁷⁸ *Id.* at xii-xiii (citing Cicero, *DE ORATORE* 22.74) ("Cicero's dictum that decorum is both a universal requirement and at the same time an ever-changing contingency gets it right.").

⁷⁹ Kinneavy & Eskin, *supra* note 50, at 135 (noting that "kairos has a clear relation to the legal concept of equity" and further observing that "[i]t is only in a particular case toward a particular individual at a particular time that true legal justice can be found—when kairos can truly occur").

⁸⁰ Isocrates was an ancient Athenian orator who lived from 436–338 B.C.E. Phillip Sipiora, *Introduction, in RHETORIC AND KAIROS: ESSAYS IN HIST., THEORY, AND PRAXIS, supra* note 1, at 1, 7.

the “theoretical and pragmatic importance of kairos to rhetoric and social responsibility.”⁸¹ According to rhetoric scholar Phillip Sipiora, though earlier rhetorical schools focused merely on the *art* of rhetoric, Isocrates was concerned with *phronesis* (practical wisdom and sound judgment) and social justice.⁸² While these earlier schools arguably divorced speech from the rhetorical situation and lacked a grounding in actual experience rather than theory,⁸³ the goal of Isocrates’ rhetorical *paideia* was to prepare students to serve the public good, to train leaders who would be “*pragmatic* thinkers and speakers capable of understanding the principle of *phronesis*, with a special emphasis on what is practical and expedient under any given set of circumstance—the principle of kairos.”⁸⁴ Such a focus on the practical application of rhetorical theory is particularly relevant to legal advocates, who necessarily advocate within particular rhetorical situations. The law, of course, involves real people and real situations, not abstract theories and ideas.⁸⁵

Isocrates specifically criticized the Sophists for failing to identify the “kairotic exigencies” presented by specific discourse. To be an effective advocate, Isocrates counseled the rhetor to be flexible enough to “consider the right time” and “make the appropriate adjustments in any given rhetorical situation.”⁸⁶ Thus, in *Against the Sophists*, Isocrates discussed oratory (which, of course, has obvious parallels to modern oral advocacy) as only effective when it understood these kairotic exigencies: “[O]ratory is good only if it has the qualities of fitness for the occasion, propriety of style, and originality of treatment.”⁸⁷

The concept of kairos also appears in Plato’s⁸⁸ *Phaedrus* in the form of Socrates expounding on what makes for ideal rhetoric.⁸⁹ Socrates, in

⁸¹ Sipiora, *supra* note 80, at 85; see also *A Neglected Concept*, *supra* note 62, at 81 (noting that Pythagoras added nuance to the concept of kairos, closely relating it to “the basis of all virtue, particularly justice, and consequently with civic education”).

⁸² Sipiora, *supra* note 80, at 8.

⁸³ *Id.* at 8–9. According to Isocrates, kairos was a key aspect of effective discourse, and kairos was situated in the joining of “*phronesis* or ‘practical wisdom’ and pragmatic ethics within the ‘situation’ and ‘time’ of discourse.”

⁸⁴ *Id.*

⁸⁵ This is an important reminder for those advocates tempted to focus too heavily on logos divorced from other rhetorical concepts. In examining the distinction between logos and kairos, James Kinneavy referenced the work of German philosopher Paul Tillich, noting that “logos thinking [is] characterized by an emphasis on timelessness, on form, on law, on stasis, on method,” whereas “kairos thinking [is] characterized by an emphasis on time, on change, on creation, on conflict, on fate, and on individuality.” *A Neglected Concept*, *supra* note 62, at 89–90 (internal citations omitted). Critically, kairos is important “because it brings theory into practice, it asserts the continuing necessity of free decision, it insists on the value and norm aspects of ideas, [and] it champions a vital and concerned interest in knowledge because knowledge always is relevant to the situational context.” *Id.*

⁸⁶ Sipiora, *supra* note 80, at 9.

⁸⁷ ISOCRATES, AGAINST THE SOPHISTS 13 (George Norlin trans., 1980), <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0144%3Aspeech%3D13%3Asection%3D13> [https://perma.cc/LYJ8-FZE4] (last visited June 12, 2023).

⁸⁸ Plato was a Greek philosopher who lived in Ancient Greece from approximately 429 B.C.E.–347 B.C.E. Richard Kraut, *Plato*, in STAN. ENCYC. PHILOSOPHY (Edward N. Zalta ed., Spring 2022), <https://plato.stanford.edu/archives/spr2022/entries/plato> [https://perma.cc/9VWB-MABW].

⁸⁹ *Qualitative Time*, *supra* note 11, at 11–12 (citing PLATO, PHAEDRUS, 271d–272b); *Time and Timing in the New Testament*, *supra* note 41, at 117 (noting that Plato treated kairos as a “central element” of “effective rhetoric”). Plato was critical, however, of any concept of rhetoric as a form of persuasion to “adjudicate situational truths.” Roger Thompson, *Ralph Waldo Emerson and the American Kairos*, in RHETORIC AND KAIROS: ESSAYS IN HIST., THEORY, AND PRAXIS, *supra* note 1, at 187, 197 n.4. Rather, for Plato, rhetoric was a means of communicating “universal and transcendental truth.” *Id.*

speaking to Phaedrus, explains “how one must write if one intends to be . . . artful”:

Since the capacity of speech is to guide the soul, someone intending to become a rhetorician must know what forms the soul possesses. The number of forms is so and so; their quality such and such; hence some people are of this sort and others of that sort. When these divisions are made, [the rhetor] needs again to know that the forms of speeches are so and so and the quality of each such and such. Therefore, people of this sort can be easily persuaded by such and such for this or that reason to do one thing or another, while people of a different sort are hard to persuade for these reasons . . . Only when he is able to explain sufficiently what type of person is persuaded by what type of speech and he has the ability to perceive and to determine for himself in the case of an individual he meets that he is this type of person and his nature is the very type that he heard about in school, and now that he finds himself in front of this man, he must apply these particular words in that particular way to persuade him of these things. After the young rhetorician has mastered all this and understood *the appropriate times—both opportune and inopportune—for speaking and for holding back, for concise speech, for speech which stirs pity, for exaggeration, and for each of the other forms of speech he has learnt, only then, and not before, has the art been beautifully and perfectly mastered.*⁹⁰

It is almost impossible to miss the kairotic aspects of Plato’s discussion of ideal rhetoric, as this passage focuses on the rhetor mastering the “appropriate” or “opportune” times to make particular arguments in light of the audience and the circumstances. But it is equally interesting to see how this focus on kairos also helps the rhetor determine when to use other rhetorical devices, like pathos, when the “appropriate” moment might be to “stir[] pity.”⁹¹

C. KAIROS IN ART AND LITERATURE

As the previous discussion indicates, the concept of kairos is both critical to advocacy and quite elusive to define. Where language has failed to convey the “rich dimensions” of kairos,⁹² art and literature have stepped in to provide additional nuance and vivid imagery.⁹³

The earliest sculptural depiction of the god, Kairos, is believed to be a bronze statue by the Greek sculptor, Lysippos of Sicyon. Although the statue itself has not been found, references to the statue “repeatedly” appear in

⁹⁰ PLATO, PHAEDRUS, 271d–272b (Stephen Scully trans., 2003) (emphasis added); *see also Qualitative Time*, *supra* note 11, at 11–12 (quoting Plato’s *Phaedrus* and discussing kairotic aspects of Socrates’ comments).

⁹¹ PLATO, *supra* note 90, at 272b.

⁹² James L. Kinneavy, *Kairos in Classical and Modern Rhetorical Theory*, in RHETORIC AND KAIROS: ESSAYS IN HIST., THEORY, AND PRACTICE, *supra* note 1, at 58, 61.

⁹³ *See, e.g.*, DIETRICH BOSCHUNG, KAIROS AS A FIGURATION OF TIME: A CASE STUDY 9 (Wilhelm Fink ed., 2013) (analyzing and referencing literary and figural references to kairos, with a focus on analyzing Lysippos’s sculpture of Kairos, the God of Opportunity). Boschung specifically acknowledged the “ability of the artist to endow abstract concepts . . . with a concrete form that can be apprehended by the senses and thus assure them a permanent presence.” *Id.*

various ancient texts.⁹⁴ It is believed to have stood at the front of the artist's home, in the Agora of Hellenistic Sicyon, and the original dates to the fourth century B.C.E.⁹⁵ Although Lysippos's statue is lost to history, it is believed to be the model for a kairos bas-relief that dates to the beginning of the third century B.C.E. Figure 1 is a bas-relief housed as part of the Kairos Collection at the Benedictine nunnery at the Church of St. Nicolas in Trogir, Croatia.⁹⁶

Figure 1: Bas Relief of Kairos
Trogir, Croatia



Figure 2 is a Roman work also believed to be crafted in the image of Lysippos's original work.⁹⁷ It is a fragment of an Attic Sarcophagus housed in Turin, Italy at the Museum of Antiquities.⁹⁸ It dates to 160-180 C.E.⁹⁹

⁹⁴ *Id.* at 15.

⁹⁵ A.F. Stewart, *Lysippan Studies: 1. The Only Creator of Beauty*, 82 *AM. J. ARCHEOLOGY* 163, 163 (1978).

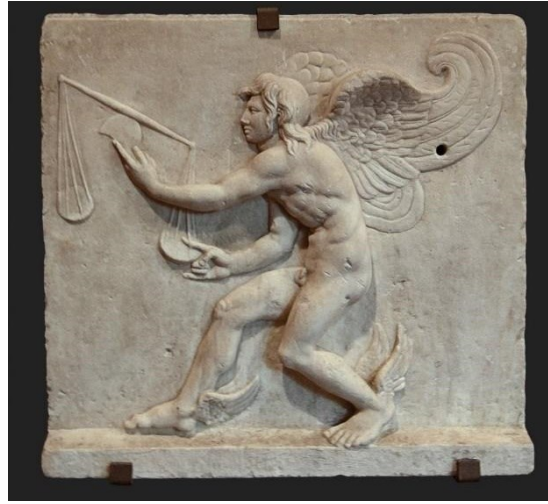
⁹⁶ Photograph of Greek bas-relief depicting Kairos, in *Trogir; Carved out of History and Stone, MYSTERIOUS CROATIA*, <https://mysteriouscroatia.wordpress.com/2013/01/07/trogir-carved-out-of-history-and-stone> [<https://perma.cc/G5DA-QDLJ>] (last visited June 23, 2023); see also *The Monastery Collection – Benedicta, MONASTERY OF ST. NICHOLAS*, <https://benedicta.hr/en/the-monastery-collection> [<https://perma.cc/LVU5-MJ4U>] (last visited June 23, 2023) (noting that the collection at the monastery “takes its name from the relief of Kairos from the third century BC, that is, of the Greek god of the fortunate moment, a copy of an original by Lysippos”).

⁹⁷ *Relief with Kairos* (photograph), in *Online Catalog – Royal Museums Turin, MUSEI REALI TORINO*, https://museireali.beniculturali.it/catalogo-on-line/#/dettaglio/838433_Rilievo%20con%20Kairos [<https://perma.cc/Q79B-BXCU>] (last accessed June 13, 2023); Mary Harrsch, *Attic Sarcophagus Fragment Depicting Kairos the God of Opportunity at the Museum of Antiquities in Turin, Italy, ANTIQUITIES EXHIBITS* (Dec. 31, 2019), <http://antiquitiesexhibits.blogspot.com/2019/12/attic-sarcophagus-fragment-depicting.html> [<https://perma.cc/VCN3-747J>] (last visited June 12, 2023).

⁹⁸ See Harrsch, *supra* note 97.

⁹⁹ *Id.*

Figure 2: Roman Attic Sarcophagus
Turin, Italy¹⁰⁰



In Greek mythology, Kairos is the youngest son of Zeus.¹⁰¹ He is the god of the “fleeting moment,” the god of “opportunity.” He is usually pictured with wings and winged feet to demonstrate the concept of the fleeting or passing moment. He is also often pictured on his toes to indicate running. According to mythology, this “favorable moment must be grasped . . . otherwise the moment flies away without return and cannot be caught anymore.”¹⁰² Kairos is typically shown with a bald head and a lock of hair in the front. The idea was that “Kairos could easily be seized by the hair hanging over his face (“creeping down over the eyebrows”) when he is arriving, but once he has passed by, no one can grasp him.”¹⁰³

Some depictions show him with a razor and others with scales as in Figure 2. One scholar has argued that the pair of scales is a reminder “that Kairos does not only signif[y] the right moment, but also the appropriate measure.”¹⁰⁴

An epigram attributed to Posidippus¹⁰⁵ described Lysippos’s statue of Kairos and was “structured as a dialogue between the Lysippan statue and a fictionalized viewer whose primary concern” was not to describe the sculpture but to comprehend the physical details’ “embodied meanings and

¹⁰⁰ This work is licensed under a Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License (<https://creativecommons.org/licenses/by-nc-nd/4.0/>).

¹⁰¹ Harold Kelman, *Kairos: The Auspicious Moment*, AM. J. PSYCHOANALYSIS 29, 59 (Jan. 1, 1969).

¹⁰² *Trogir Stories & Legends: The Kairos Story*, TROGIR ONLINE, http://www.trogironline.com/history_culture/kairos.html [<https://perma.cc/CV49-W85P>] (last visited June 12, 2023).

¹⁰³ Harrsch, *supra* note 97.

¹⁰⁴ BOSCHUNG, *supra* note 93, at 30.

¹⁰⁵ Although there is some debate as to its authorship, more recent scholars have accepted the attribution. See, e.g., Lucia Prauscello, *Sculpted Meanings, Talking Statues: Some Observations on Posidippus 142.12 A-B (=XIX G-P) ΚΑΙ ΕΝ ΠΡΟΘΥΡΟΙΣ ΘΗΚΕ ΔΙΑΚΚΑΛΙΗΝ*, AM. J. PHILOLOGY 511, 512 n.6 (Winter 2006). The definitive authorship of the epigram is beyond the scope of this article.

thus correctly interpret them.”¹⁰⁶ The epigram provides a deeper understanding of the artistic imagery of *kairos*:

Who and from where is the sculptor?—From Sicyon.—And his name?—Lysippus.—And who are you?—Right Occasion, the all-subduer.—Why do you stand on tip-toe?—I am always running.—Why do you have a pair of wings on your feet?—I fly with the wind.—Why do you hold a razor in your right hand?—As a sign to men that I am sharper than any sharp edge.—And why is your hair over your face?—For the one who meets me to grasp at, by Zeus.—And why is the back of your head bald?—Because none whom I have once raced by on my winged feet will now, though he wishes it, take hold of me from behind. The artist fashioned me in such a shape for your sake, stranger, and he set me up in the portico as a lesson.¹⁰⁷

This interaction between artistic and literary meanings of *kairos* gives the statue “voice,” allowing Posidippus to “make[] fully possible, through language, the visual representation of time in motion.”¹⁰⁸

Kairos also appears in literary metaphor. Metaphors for *kairos* have included the weaver finding an opening in the yarn to pass the needle, and an archer finding the space through which an arrow must pass to find its mark.¹⁰⁹

Kairos is an ancient Greek word that means ‘the right moment’ or ‘the opportune.’ The two meanings of the word apparently come from two different sources. In archery, it refers to an opening or ‘opportunity’ or, more precisely, a long tunnel-like aperture through which the archer’s arrow has to pass. Successful passage of a *kairos* requires, therefore, that the archer’s arrow be fired not only accurately but with enough power for it to penetrate. The second meaning of *kairos* traces to the art of weaving. There it is the ‘critical time’ when the weaver must draw the yarn through a gap that momentarily opens in the warp of the cloth being woven. Putting the two meanings together, one might understand *kairos* to refer to a passing instant when an opening appears which must be driven through with force if success is to be achieved.¹¹⁰

D. HARMONIZING COMPETING DEFINITIONS: OPPORTUNE MOMENTS, ESSENTIAL MOMENTS, AND THE RHETORICAL SITUATION

This Article began with a foundational working definition for the purpose of analyzing the role of *kairos* in legal advocacy: *kairos* represents the “opportune” or “right” moment to advance an argument or take a position. In addition to “right timing,” *kairos* also addresses a principle of

¹⁰⁶ *Id.* at 513.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 514 n. 12 (internal quotations omitted). According to Prauscello, the epigram appeared alongside the statue. *Id.* at 513. *But see* BOSCHUNG, *supra* note 93, at 33 (noting that the epigram was written “[s]ome decades . . . after Lysippos”).

¹⁰⁹ *Creating Kairos*, *supra* note 25, at 157.

¹¹⁰ WHITE, *supra* note 76, at 13.

proper or “due measure,” proportional to the rhetorical situation at hand.¹¹¹ A “right moment” may be either discerned, created, or both.¹¹² To discern or create a kairotic moment, the advocate needs to truly understand the rhetorical situation. Thus, the advocate must account for the audience, the argument’s purpose, and the current circumstances.¹¹³ In doing so, the advocate must consider timing in a much more nuanced sense, looking both to the argument’s moment in history (to the extent that the advocate can predict it), the moment in the lawsuit, and perhaps even the moment in a particular document. Berger and Stanchi articulate this more nuanced understanding of timing as having two parts:

First, the lawyer must recognize *the most opportune moment* in chronological time. The advocate uses the most opportune moment to construct an opening for telling the client’s story. Second, the advocate must isolate *the most essential moment*, the optimum place in time within the problem setting itself. The advocate uses the essential moment to construct an iconic image that lies at the heart of a client’s story. The opportune moment lies within the larger societal setting for making a particular argument, while the essential moment lies within the particular rhetorical setting of the argument.¹¹⁴

Table 1: Berger & Stanchi: Essential vs. Opportune Moments¹¹⁵

Type of Kairotic Moment	Meaning/Timing
Opportune Moment	The most opportune moment in the chronos to tell a particular story or advance a particular argument ¹¹⁶ (contextualized via history or current events)
Essential Moment	The best place internal to the client’s story to create a turning point or advance an argument; the moment that “captur[es] or creat[es] the essence of an argument” ¹¹⁷

¹¹¹ *A Neglected Concept*, *supra* note 62, at 85–87.

¹¹² *See, e.g.*, LEGAL PERSUASION, *supra* note 25, at 21 (noting that (1) “advocates should be aware of [the concept of] kairos as a means of identifying potential tipping points” or “essential moment[s] in time that capture[] the heart of the problem,” and (2) advocates should “recognize that [such] turning points can be created through the lawyer’s efforts”); Rountree, *supra* note 28, at 856 (noting that “rhetors do not always bide their time until ‘opportune moments’ or ‘kairotic situations’” appear, but instead “they sometimes work to create them”).

¹¹³ *See, e.g.*, LEGAL PERSUASION, *supra* note 25, at 5 (noting that identifying the right moment for an argument requires an advocate to identify the appropriateness of both the timing and the setting).

¹¹⁴ *Id.* at 32.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ E-mail from Linda Berger, Emerita Prof. of L., William S. Boyd Sch. Of L., to author (Nov. 6, 2022, 10:38 PST) (on file with author) (agreeing that creating an essential moment that favors the advocate’s argument could occur by “changing the storyline to create a turning point or conjuring up an image to serve as an extended focal point”).

According to Berger and Stanchi, research in persuasion science reinforces the conclusion that the best legal advocates will be those who are able to identify and exploit the *kairoi*—the most opportune moments and the most essential moments—in a given situation.¹¹⁸ Pointing to the concept of “priming” and “step-by-step argument chains,” Berger and Stanchi note that identifying the “right” moment to advance a particular argument may require the advocate to seek out “emerging trends” or “small changes in the law or society that will provide the ‘prime’” to persuade the audience to tip in favor of supporting the advocate’s position.¹¹⁹ Furthermore, legal arguments do not exist in a vacuum. Rather, they necessarily appear within the context of a rhetorical situation, each of which “presents a kairotic moment” for the speaker to identify and exploit.¹²⁰

But what is the rhetorical situation? The “rhetorical situation” is “a complex of persons, events, objects, and relations presenting an actual or potential exigence which can be completely or partially removed if discourse, introduced into the situation, can so constrain human decision or action as to bring about the significant modification of the exigence.”¹²¹

Thus, one key aspect of the rhetorical situation is the exigence. According to Bitzer, an “exigence is an imperfection marked by urgency . . . a defect, an obstacle, something waiting to be done.”¹²² However, a rhetorical exigence is only present if the exigence is “capable of positive modification” through discourse.¹²³

A rhetorical situation may certainly have more than one exigence, but the “controlling exigence” will “specif[y] the audience to be addressed and the change to be effected.”¹²⁴ Thus, the second key aspect of the rhetorical situation is the audience.¹²⁵ A rhetorical audience, according to Bitzer, must be “capable of being influenced by discourse and of being mediators of change.”¹²⁶ Of course, lawyers, as advocates, are almost always speaking to a rhetorical audience. Except when speaking with one’s own client in a counseling or predictive role, advocates are typically arguing to potential change agents, such as policymakers, judges, juries, mediators, and arbitrators.

¹¹⁸ LEGAL PERSUASION, *supra* note 25, at 32.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 32–33 (citing Bitzer, *supra* note 34, at 1). See generally Richard E. Vatz, *The Myth of the Rhetorical Situation*, 6 PHIL. & RHETORIC 154–61 (1973).

¹²¹ Bitzer, *supra* note 34, at 6 (noting the three key parts of the rhetorical situation include “first . . . the exigence,” second “the audience to be constrained in decision and action,” and third, “the constraints which influence the rhetor and can be brought to bear upon the audience”).

¹²² *Id.*

¹²³ *Id.* at 7. Bitzer, though not a lawyer, provides two law and/or policy-related examples of rhetorical exigences. In the first example, he describes environmental pollution as a rhetorical exigence. It is a rhetorical exigence because the “positive modification,” improvement of the environment, “strongly invites the assistance of discourse producing public awareness, indignation, and action of the right kind.” *Id.* He offers a second example where the rhetorical nature of the exigence is less certain—that of the appeal of a wrongful conviction. Because it is possible that the attorney’s discourse *could* effect a positive modification—overturning the conviction—the exigence *might* be rhetorical, and the attorney decides to appeal. *Id.* According to Bitzer, the decision to speak on the part of the rhetor/advocate depends “mainly upon the urgency of the exigence and the probability that the exigence is rhetorical.” *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 7–8.

¹²⁶ *Id.*

The final aspect of the rhetorical situation is “a set of constraints made up of persons, events, objects, and relations” having “the power to constrain decision and action needed to modify the exigence.”¹²⁷ These constraints fall into two categories: “(1) those originated or managed by the rhetor and [the rhetor’s] method . . . and (2) those other constraints, in the situation, which may be operative.”¹²⁸ Relevant constraints may “include beliefs, attitudes, documents, facts, traditions, images, interests, motives,” and the orator’s own “personal character . . . logical proofs, and . . . style.”¹²⁹ In the law, these constraints could include the standard of review, the burden of proof, court rules, the judge, the jury, and the like. The relation of the rhetorical situation to law is not merely hypothetical; Bitzer explicitly offers a typical jury trial as an example of a rhetorical situation both “complex and highly structured”:¹³⁰

The jury is not a random and scattered audience but a selected and concentrated one; it knows its relation to judge, law, defendant, counsels; it is instructed in what to observe and what to disregard. The judge is located and prepared; he knows exactly his relation to jury, law, counsels, defendant. The counsels know the ultimate object of their case; they know what they must prove; they know the audience and can easily reach it. This situation will be even more highly structured if the issue of the case is sharp, the evidence decisive, and the law clear.¹³¹

In addition to identifying the three key aspects of exigence, audience, and constraints, Bitzer offers general characteristics of a rhetorical situation. First, rhetorical discourse is “strongly invited—often required” by the situation. Thus, although the rhetorical situation has similarities to any concept of *kairos* that treats *kairotic* moments as something one can *identify* and *exploit*, it is distinct from any concept of *kairos* that contemplates the rhetor being able to *create* or *bring about* the *kairotic* moment.¹³² Second, rhetorical situations invite not just a response, but a “fitting response,” one that appropriately “fits the situation.”¹³³ The third characteristic of the rhetorical situation is that, to the extent that the rhetorical situation invites a fitting response, the situation itself will dictate the “purpose, theme, matter, and style” of the response.¹³⁴ The most effective rhetors will read the rhetorical situation to devise the most fitting response. Fourth, the exigence and the constraints presented by the rhetorical situation are “located in

¹²⁷ *Id.*

¹²⁸ *Id.* (comparing to Aristotle’s “artistic” and “inartistic” proofs, respectively).

¹²⁹ *Id.*

¹³⁰ *Id.* at 12 (explaining that in a highly structured rhetorical situation, “everything is ordered to the task to be performed”).

¹³¹ *Id.*

¹³² *Creating Kairos*, *supra* note 25, at 155 (noting first that the “rhetorical situation exist[s] objectively outside the speaker” and is “discovered by the speaker (rather than being constructed by the speaker)” and then contrasting that with the concept of *kairos*, which contemplates the ability of the rhetor to either find or create right moments for rhetoric).

¹³³ Bitzer, *supra* note 34, at 10. This characteristic of the rhetorical situation calls to mind definitions of *kairos* that focus on decorum and “right” or “proper” timing.

¹³⁴ *Id.* at 10–11.

reality, are objective and publicly observable historic facts in the world we experience.”¹³⁵

Berger notes that “adherents of the rhetorical-situation view would say that kairos occurs when . . . an exigence . . . has punctured the chronos, [while] a critic of that definition would say that every moment has its kairos that can be seized and developed in strategic ways.”¹³⁶ A middle ground might be the view that the “‘tool’ of kairos (the most opportune moment) and its ‘setting’ (the essence of the problem) must act together.”¹³⁷ While Berger is certainly correct that the rhetorical situation is narrower than a broad all-encompassing view of kairotic moments as both identifiable, observable, and creatable, there remains a need for the advocate to understand the rhetorical situation when analyzing the tool of kairos. An advocate who develops a strong ability to assess and understand the rhetorical situation will develop a better ability to identify and exploit kairotic moments. And while Bitzer’s rhetorical situation analysis does not leave room for the possibility of *creating* kairotic moments, it does provide a critical way for the advocate to think about how to set the stage for *future* kairotic moments where the current rhetorical situation does not readily support the creation of a kairotic moment.

The distinction between the kairotic notion of the opportune moment and the essential moment highlights the fact that various kairoi can be identified and exploited in several ways by an effective legal advocate. First, the kairoi may be identified in the chronology: either by the astute advocate who senses an opening in evolving law or by the legal historian viewing arguments in hindsight with a full understanding of the historical events as they unfolded around a given set of arguments, whether those arguments were ultimately persuasive when made in a particular moment in history. But an effective advocate may also create kairotic moments by looking “within the problem itself” to create or draw the audience’s attention to specific turning points.¹³⁸

The best advocates will be able to harness the power of kairotic moments in both senses: by identifying the most opportune moment to make an argument given the external setting, including the surrounding legal and historical framework, and by “isolat[ing] the essential moments that convey the heart of a problem.”¹³⁹

The limited legal scholarship on kairos has focused almost exclusively on the creation or identification of large, externally-focused kairotic moments, such as critical turning points in the law or in political or legal history.¹⁴⁰ Berger addressed the judicial creation of kairotic moments at the

¹³⁵ *Id.* at 11. Being able to read the “real” rhetorical situation would seem indispensable to an advocate trying to find the right or most opportune moment to advance a particular argument.

¹³⁶ *Creating Kairos*, *supra* note 25, at 155.

¹³⁷ *Id.* at 155 (internal citations omitted).

¹³⁸ LEGAL PERSUASION, *supra* note 25, at 32–33.

¹³⁹ *Id.* at 37.

¹⁴⁰ Berger and Stanchi are an exception:

[T]he persuasive lawyer may decide to begin [a] client’s story with one event rather than another, and thus to create a different crisis or turning point. And rather than being stuck in a rigidly linear timeline, the persuasive lawyer may choose to open up the focus on critical moments of time rather than abide by chronological sequence. By seizing the moment that provides an opening for telling the story, the advocate may find a more receptive reader. By isolating the moment or

Supreme Court.¹⁴¹ Ruth Anne Robbins addressed whether there were wrong moments in history and within the political landscape to advance a right argument.¹⁴² Susie Salmon and Mark Hannah briefly addressed whether judicial dissents could pave the way for later kairotic moments for major legal reform.¹⁴³ However, the rhetorical concept of kairos provides the advocate with a powerful tool for advocacy, even on a smaller level in more mundane cases. In addressing non-legal discourse in the form of poetic argument, James Baumlin noted that “the most telling rhetorical application of kairos may be charted in the internal temporalities of discourse itself; for arguments necessarily unfold in time, subtly changing as one line of reasoning extends, completes, or overthrows another, continually adjusting in accordance with an audience’s complex response.”¹⁴⁴ Thus, “occasions,” or right moments, may appear “not just within time but within texts.”¹⁴⁵ This focus on the “internal temporalities of discourse” opens up new ways of thinking about why argument, or even word placement within a document or within an oral argument, might exploit or create a kairotic moment. Thus, though this Article does focus primarily on major turning points and kairotic moments in historical and current social movements and in cases, it also offers examples of these smaller, internal opportunities to create “essential moments” in an argument or analysis.¹⁴⁶

III. AN EXPANSIVE FRAMEWORK FOR UNDERSTANDING AND HARNESSING THE POWER OF KAIROS FOR LEGAL ADVOCATES, SCHOLARS, ACTIVISTS, AND HISTORIANS

This Article attempts to both incorporate and build upon the Berger and Stanchi framework of essential and opportune moments and to provide a framework for understanding (1) how kairos can help advocates *and* scholars strategize to advance more effective legal or normative arguments; and (2) how retrospectively analyzing social movements or legal advocacy through the lens of kairos can help scholars, historians, *and* advocates better understand why movements or arguments succeeded or failed. This is not to say that an understanding of kairos will guarantee success to the advocate or will perfectly illuminate the causes of success or failure of movements. Nevertheless, it is a critical and under-explored aspect of advocacy; advocates, scholars, and activists alike would do well to incorporate a nuanced understanding of kairos as a critical tool for crafting legal arguments and analyzing rhetorical performances in law and politics.

Kairos can be viewed through both prospective and retrospective lenses. A prospective frame is likely most helpful for practitioners creating a narrative or advancing an argument; scholars making a normative claim or

moments that crystallize the essence of the situation, the advocate may help the reader make crucial persuasive connections.

Id. at 33.

¹⁴¹ See Berger and Stanchi, *supra* note 25.

¹⁴² See Robbins, *supra* note 25, at 1391.

¹⁴³ See Salmon and Hannah, *supra* note 25, at 955–56. See also Rountree, *supra* note 28, at 870 (discussing the role of stage-setting for creating later kairotic moments).

¹⁴⁴ *Ciceronian Decorum*, *supra* note 45, at 156.

¹⁴⁵ *Id.*

¹⁴⁶ A deeper analysis of this use of kairos is the subject of future work.

argument; or political/social advocates advancing an argument or proposing legal or social reform. The scholar, practitioner, or advocate can harness kairos by either (1) *creating* new kairotic moments; or (2) *identifying* and *exploiting* existing kairotic moments, though there may be overlap between the two.

For an advocate, creating an essential kairotic moment may mean reading the room in the moment and determining whether a pivot in strategy is required or if an opening has appeared to advance a particular argument or paint a narrative picture. Or it might involve creating a moment in a document upon realizing that current events have changed the way in which the document's various audiences might receive particular arguments or characterizations of the facts or evidence. As Berger and Stanchi have observed, sometimes creating a kairotic moment requires more than one action.¹⁴⁷ Rather, a practitioner may recognize that creating a right moment in litigation will involve a series of discrete priming events, actions, or arguments within a document or argument, or throughout the course of a lawsuit. For political advocates, social advocates, and movement lawyers, this may involve a long game: identifying where the law is, where the advocate wants it to go, and what series of priming events over the course of years can move the law forward. For example, an anti-death penalty advocate might recognize that the time is not right to convince the legislature to abolish the death penalty. However, the advocate may well be able to examine the rhetorical situation and determine whether small steps towards that goal can help eventually move the law in the direction the advocate hopes to take it.

To use the second prospective lens – identifying or exploiting existing kairotic moments – a scholar, activist, or advocate may recognize an opportune moment in the development of the law or in the current state of law or politics. Then, they may exploit that opportune moment in the chronos (external to the advocacy) by choosing the essential moment within the advocacy or scholarship to advance an argument or shift the narrative.

For those advocates adding kairos to the rhetorical toolbox using the prospective frame, a word of warning: in the law, persuasive arguments often appear in the form of opposing arguments (in classical Greek rhetoric, referred to as the *Dissoi logoi*)¹⁴⁸ based on the same set of facts and law. In other words, “[a]ny given problem involves choice or compromise” between two or more opposing positions, and “consideration of kairos, that is of time, place, and circumstance . . . alone can solve the dilemma and lead to the choice of relative truth and to action.”¹⁴⁹ Considerations of kairos are critical in the law, but such considerations also permit the legal advocate “to choose one *logos* over another, making one and the same thing seem great or small, beautiful or ugly, new or old.”¹⁵⁰ The ethical advocate will not seek only to find the “right timing” for an argument. Rather, the advocate’s use of kairos should involve an attempt to work “toward an even larger ideal for ethical

¹⁴⁷ *Legal Persuasion*, *supra* note 25, at 32.

¹⁴⁸ GEORGE KENNEDY, *THE ART OF PERSUASION IN GREECE* 66 (1963).

¹⁴⁹ *Id.* at 66–67.

¹⁵⁰ *Introduction*, *supra* note 80, at 4.

action: the right person doing the right thing at the right time *and for the right reasons.*"¹⁵¹

Kairos is also a particularly useful retrospective framework for scholars and legal historians seeking to add richness to their understanding of past advocacy or social movements. Used retrospectively, kairos is a lens for observing opportune moments in historical legal or political movements to understand why and how advocates succeeded or failed in advancing particular arguments or causes. A retrospective frame permits scholars and legal historians to interrogate history and unpack opportune moments (whether created, primed, identified, and/or exploited) for social or political change. This frame may also help the advocate in researching earlier cases and arguments and in adapting the narrative and arguments in light of new rhetorical situations. Narrowing the focus to discrete pieces of written or oral advocacy, the scholar or historian may also review historical speeches, judicial opinions, and legal arguments to explore how effective legal rhetors were in creating essential moments within the advocacy itself. This understanding of kairos may then help scholars and historians begin the cycle anew by applying it to the identification, exploitation, and creation of new kairotic moments in future work.

The following chart summarizes the major prospective and retrospective frames for kairos. It also (1) identifies the necessary action the practitioner, scholar, or activist must take to harness that particular use of kairos in advocacy; and (2) notes the moment in the chronos when that action is most likely to be effective. Finally, the chart identifies who benefits from including kairos as a tool in a given case.

Table 2: Kairos—An Analytical Framework for Practitioners, Legal Scholars/Historians, and Political/Social Activists

Rhetorical Lens	Action	Timing (Chronos)	Who Benefits from Frame?
Prospective	Create / Prime	Create essential moments in real-time within the framework of an argument in a lawsuit	Legal advocates advancing an argument or narrative
		<i>or</i>	Scholars making a normative claim
		Create opportune moments through a series of discrete priming events within or external to the argument	Political or social activists advancing an argument or proposing legal reform

¹⁵¹ Amélie Frost Benedikt, *On Doing the Right Thing at the Right Time: Toward an Ethics of Kairos*, in *RHETORIC AND KAIROS: ESSAYS IN HIST., THEORY, AND PRAXIS*, *supra* note 1, at 226, 233.

	Identify / Exploit	Identify an opportune moment in the development of the law or in the current state of law or politics <i>and</i> Exploit that moment within the advocacy or scholarship (essential moments)	Legal advocates advancing an argument or narrative Scholars making a normative claim Political or social activists advancing an argument or proposing legal reform
Retrospective	Observe / Understand	Retroactively understand opportune moments (both created/primed and identified/exploited) and essential moments in historical speeches, judicial opinions, and legal arguments	Legal advocates researching past advocacy viewed through the lens of current experience to adapt and reframe arguments Scholars and legal historians ¹⁵² seeking to interrogate history and understand past advocacy or social movements

IV. CASE STUDIES EXAMINING KAIROTIC MOMENTS USING THE FRAMEWORK

Although it would be impossible to examine every potential role for kairos in the span of one article, some illustrations are helpful for showing the light kairos can shed on political and social advocacy and litigation. Part IV explores two examples. The first is an exploration of kairotic timing in advocacy through selected speeches of the Reverend Dr. Martin Luther King,

¹⁵² This lens is also a particularly powerful tool for training new advocates, though that is the subject of a later article.

Jr. and Malcolm X. The second example explores the role of kairos in Clarence Darrow's larger (failed) social goal of abolishing the death penalty and the immediate (successful) advocacy in representing Nathan Leopold and Richard Loeb in 1924 for the murder of Bobby Franks.

A. AN ILLUSTRATION OF KAIROS IN HISTORICAL POLITICAL AND SOCIAL ADVOCACY: REV. DR. MARTIN LUTHER KING, JR. AND MALCOLM X

One lens through which to better understand kairos (and other key rhetorical concepts) is by viewing and analyzing historical speeches of activists and change agents. One arc of speeches that is particularly useful in analyzing various aspects of kairotic timing in advocacy is a series of speeches from Martin Luther King Jr. and Malcolm X. Retrospectively analyzing the speeches of these civil rights leaders in the context of the audience for those speeches and the political and social environment of the day allows scholars and historians to determine whether and how the speakers were able to effectively choose and amplify "right moments" for advancing particular civil rights narratives. This, in turn, may help equip current and future movement lawyers with the knowledge to similarly identify, exploit, or even create kairotic moments in future advocacy. This Article addresses the following arc:

- (1) Excerpts from Martin Luther King Jr.'s "I Have a Dream" speech from August 28, 1963;¹⁵³
- (2) An excerpt from Malcolm X's "Ballot or the Bullet" speech from 1964; and¹⁵⁴
- (3) An excerpt from Martin Luther King Jr.'s "The Other America" speech at Stanford in 1967.¹⁵⁵

Many of the most famous lines of Dr. King's "I Have a Dream" speech look to the future, focusing on the hope for a *future* kairotic moment for social change:

I have a dream that one day this nation will rise up and live out the true meaning of its creed: We hold these truths to be self-evident, that all men are created equal . . .

I have a dream that one day on the red hills of Georgia, the sons of former slaves and the sons of former slave owners will be able to sit down together at the table of brotherhood.

I have a dream that one day even the state of Mississippi, a state sweltering with the heat of injustice, sweltering with the heat of oppression will be transformed into an oasis of freedom and justice.

¹⁵³ Ilya Gokadze, *Martin Luther King, Jr. I Have a Dream Speech*, YOUTUBE (Aug. 28, 1963), <https://www.youtube.com/watch?v=3vDWWy4CMhE> [<https://perma.cc/YZD3-JNRM>].

¹⁵⁴ Malcolm X delivered one version of the speech in Cleveland, Ohio on April 3, 1964, and another in Detroit, Michigan on April 12, 1964. Malcolm X, *The Ballot or the Bullet* (Apr. 3, 1964) (transcript available at <https://www.rev.com/blog/transcripts/the-ballot-or-the-bullet-speech-transcript-malcolm-x> [<https://perma.cc/5Q6S-82V2>]) (last accessed June 22, 2022); Malcolm X, *The Ballot or the Bullet* (Apr. 12, 1964) (transcript available at <https://americanradioworks.publicradio.org/features/blackspeech/mx.html> [<https://perma.cc/DA9E-BCTP>]) (last accessed July 29, 2023).

¹⁵⁵ Stanford Univ., *An Excerpt from Martin Luther King, Jr.'s 1967 Stanford Visit*, YOUTUBE (April 14, 1967), https://www.youtube.com/watch?v=sctENM_d77g [<https://perma.cc/BBU9-X8AE>].

I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character. I have a dream today.

I have a dream that one day down in Alabama with its vicious racists, with its governor having his lips dripping with the words of interposition and nullification, one day right down in Alabama little Black boys and Black girls will be able to join hands with little white boys and white girls as sisters and brothers. I have a dream today . . .

This is our hope. This is the faith that I go back to the South with With this faith we will be able to work together, to pray together, to struggle together, to go to jail together, to stand up for freedom together, knowing that we will be free one day.¹⁵⁶

In fact, most excerpts of the “I Have a Dream” speech conveniently begin in the middle of the speech, focusing heavily on later language regarding “dreaming,” “freedom,” and “togetherness,” and glossing over urgent calls for immediate change.¹⁵⁷ However, other parts of the speech provide evidence that Dr. King understood the need to take some action to *create* a kairotic moment rather than simply waiting for needed change to come. For example, the following passage precedes the more famous sparts of the speech:

We have also come to this hallowed spot to remind America of the fierce urgency of Now. This is no time to engage in the luxury of cooling off or to take the tranquilizing drug of gradualism. Now is the time to make real the promises of democracy . . .

It would be fatal for the nation to overlook the urgency of the moment. This sweltering summer of the Negro's legitimate discontent will not pass until there is an invigorating autumn of freedom and equality. Nineteen sixty-three is not an end, but a beginning. And those who hope that the Negro needed to blow off steam and will now be content will have a rude awakening if the nation returns to business as usual. And there will be neither rest nor tranquility in America until the Negro is granted his citizenship rights. The whirlwinds of revolt will continue to shake the foundations of our nation until the bright day of justice emerges.¹⁵⁸

This language stands in stark contrast to later parts of the speech that are more forward focused, imagining a world without racism and the dream of racial equality. It is in equal parts a recognition of the need for immediate change and the possibility that the time might not yet have been upon them for a full realization of that change. In fact, the most famous parts of the “I Have a Dream” speech may not even have been originally part of his planned

¹⁵⁶ Martin Luther King, Jr., I Have a Dream Speech at the Lincoln Memorial in Washington, D.C. (Aug. 28, 1963) (transcript available at <https://www.npr.org/2010/01/18/122701268> [<https://perma.cc/4DA3-VLCW>]) (last visited July 29, 2023).

¹⁵⁷ *Id.*

¹⁵⁸ This language is a clear nod to Martin Luther King's apparent view that the time for incrementalism, or continued small priming moments, had passed. Rather history had landed squarely in a kairotic moment for critical, long-awaited, immediate change. *Id.* Failure to recognize the importance of that kairotic moment for social change “would be fatal.” *Id.*

remarks;¹⁵⁹ “Dr. King was about halfway through his prepared speech when Mahalia Jackson . . . shouted out to him from the speakers’ stand: ‘Tell ‘em about the ‘Dream,’ Martin, tell ‘em about the ‘Dream!’”¹⁶⁰ At that point, Dr. King “pushed the text of his remarks to the side” and began: “I have a dream . . .”¹⁶¹ The very fact that Dr. King adapted in real time to the exigencies of the moment and the particular audience to which he was speaking demonstrates that he inherently understood that (1) he was standing in a kairotic opportune moment in history; and that (2) a kairotic essential moment within the speech was upon him. He exploited that essential moment by pivoting mid-speech to focus on his “dream.” Dr. King was expert in balancing demands for immediate change and painting a picture of what a future steeped in that change could look like.

However, to fully analyze whether or how Dr. King or Malcolm X identified or, in contrast, created kairotic moments with their speeches, it is critical to place the speeches in their historical context—in the chronos. Dr. King gave the “I Have a Dream” speech at the March on Washington for Jobs and Freedom on August 28, 1963.¹⁶² He spoke in front of the Lincoln Memorial¹⁶³ to a crowd of 250,000.¹⁶⁴ Scholars and journalists have credited the March on Washington, along with Dr. King’s speech, as helping to provide the necessary momentum to pass the Civil Rights Act of 1964.¹⁶⁵ Thus, one could argue that Dr. King was seizing an “opportune” or “right” moment in history when he had an audience made up of thousands (and, via television and newspapers, the entire country) to move towards a more just and free society, and to create momentum and pressure for necessary legislation. His language cast both the march and surrounding sociopolitical events as a critical kairotic moment, a turning point in the civil rights movement.

Excerpts from Malcolm X’s “Ballot or the Bullet” speech provide another opportunity to analyze the kairotic aspects of historical civil rights advocacy.¹⁶⁶ In the speech, Malcolm X directly engaged with those who might have hoped that the March on Washington would lead to greater change. Though he certainly did not use the word *kairos* in explaining what

¹⁵⁹ Michiko Kakutani, *The Lasting Power of Dr. King’s Dream Speech*, N.Y. TIMES (Aug. 27, 2013), <https://www.nytimes.com/2013/08/28/us/the-lasting-power-of-dr-kings-dream-speech.html> [<https://perma.cc/UH7R-S3HH>].

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ This imagery was important, and something to which Dr. King directly referred in the speech:

Five score years ago, a great American, in whose symbolic shadow we stand today, signed the Emancipation Proclamation. This momentous decree came as a great beacon light of hope to millions of Negro slaves who had been seared in the flames of withering injustice. It came as a joyous daybreak to end the long night of their captivity. But 100 years later, the Negro still is not free.

King, *supra* note 156.

¹⁶⁴ Michiko Kakutani, *The Lasting Power of Dr. King’s Dream Speech*, N.Y. TIMES (Aug. 27, 2009), <https://www.nytimes.com/2013/08/28/us/the-lasting-power-of-dr-kings-dream-speech.html> [<https://perma.cc/PN4K-TLRC>].

¹⁶⁵ *Id.*; Jessica Pearce Rotondi, *8 Steps That Paved the Way to the Civil Rights Act of 1964*, HISTORY (June 15, 2023), <https://www.history.com/news/civil-rights-act-1964-steps> [<https://perma.cc/EV5F-QV79>].

¹⁶⁶ See *Malcolm X – Don’t Sit-In, Stand Up; On Black Nationalism*, YOUTUBE <https://www.youtube.com/watch?v=ZzSgUDrZ60s> [<https://perma.cc/5VUB-2ZGH>] (last accessed July 29, 2023) (containing excerpts from Malcolm X’s *Ballot or the Bullet* speech).

he was doing, the subtext was that it was time to *create* a pivotal moment for change. He also recognized that this was an *opportune* moment in the chronos to call for this particular action, a critical skill for advocates seeking to harness the power of *kairos* in their advocacy.¹⁶⁷

And in 1964, this seems to be the year. Because what can the white man use, now, to fool us? After he put down that March on Washington—and you see all through that now, he tricked you, had you marching down to Washington. Yes, had you marching back and forth between the feet of a dead man named Lincoln and another dead man named George Washington, singing, “We Shall Overcome.”

He made a chump out of you. He made a fool out of you. He made you think you were going somewhere, and you end up going nowhere but between Lincoln and Washington

So today our people are disillusioned. They’ve become disenchanting. They’ve become dissatisfied. And in their frustrations, they want action. And in 1964 you’ll see this young black man, this new generation, asking for the ballot or the bullet.¹⁶⁸

Malcolm X, having *identified* a kairotic moment, a time for change, then called for his audience to use the mechanism of the ballot to actively *create* a kairotic moment and change the balance of power and the trajectory of history:

Why is . . . Why does this loom to be such an explosive political year? Because this is the year of politics. This is the year when all of the white politicians are going to come into the Negro community. You never see them until election time. You can’t find them until election time. They’re going to come in with false promises[, a]nd as they make these false promises[,] they’re going to feed our frustrations, and this will only serve to make matters worse¹⁶⁹

Twenty-two million black victims of Americanism are waking up and they are gaining a new political consciousness, becoming politically mature. And as they become . . . Develop this political maturity, they’re able to see the recent trends in these political elections. They see that the whites are so evenly divided that every time they vote, the race is so close they have to go back and count the votes all over again. Which means that any block, any minority that has a block of votes that stick together is in a strategic position. Either way you go, that’s who gets it. You’re in a position to determine who’ll go to the White House and who’ll stay in the doghouse. You’re the one who has that power. You can keep Johnson in Washington D.C., or you can send him back to his Texas cotton patch. You’re the one who sent Kennedy

¹⁶⁷ See LEGAL PERSUASION, *supra* note 25, at 32 (drawing a distinction between opportune and essential moments).

¹⁶⁸ Malcolm X, *The Ballot or the Bullet*, at 20:05 (transcript available at <https://www.rev.com/transcript-editor/shared/vhzEA1ZAhfKTh5VFTDrS7qX8BBjnzFDkCPkyAmp9zWnjt1EpKRC3vLVyuTxUpyVCLxbyCc2zCHwEvxytIqmhNanpeY?loadFrom=PastedDeeplink&ts=2.51> [<https://perma.cc/4BDS-G9V5>]) (last accessed July 29, 2023).

¹⁶⁹ *Id.* at 24:01.

to Washington. You're the one who put the present Democratic Administration in Washington, D.C. The whites were evenly divided. It was the fact that you threw 80 percent of your votes behind the Democrats that put the Democrats in the White House.

When you see this, you can see that the Negro vote is the key factor. And despite the fact that you are in a position to be the determining factor, what do you get out of it? The Democrats have been in Washington, D.C. only because of the Negro vote. They've been down there four years. And they're . . . All other legislation they wanted to bring up they've brought it up and gotten it out of the way, and now they bring up you. And now they bring up you! You put them first, and they put you last. Because you're a chump! A political chump.¹⁷⁰

He then returned to the opportune moment in the chronos. He also spoke directly to aspects of the relevant rhetorical situation, noting the unique opportunity the United States had to have a revolution *without* violence (while raising the specter of such violence):

This is why I say it's the ballot or the bullet. It's liberty or it's death. It's freedom for everybody or freedom for nobody. America today finds herself in a unique situation. Historically, revolutions are bloody, oh, yes, they are. They have never had a bloodless revolution. Or a non-violent revolution. That don't happen even in Hollywood. You don't have a revolution in which you love your enemy. And you don't have a revolution in which you are begging the system of exploitation to integrate you into it. Revolutions overturn systems. Revolutions destroy systems.

A revolution is bloody, but America is in a unique position. She's the only country in history, in the position actually to become involved in a bloodless revolution. The Russian Revolution was bloody, Chinese Revolution was bloody, French Revolution was bloody, Cuban Revolution was bloody. And there was nothing more bloody than the American Revolution. But today, this country can become involved in a revolution that won't take bloodshed. All she's got to do is give the black man in this country everything that's due him, everything.¹⁷¹

A brief survey of just some key historical events in the year following Malcolm X's speech unearths what is arguably a series of smaller kairotic moments providing the prime for the eventual passage of the Voting Rights Act. The summer of 1964 was known as "Freedom Summer."¹⁷² June marked the assassination of three key voting rights activists: James Chaney, Andrew Goodman, and Michael Schwerner.¹⁷³ On July 2, 1964, President Johnson

¹⁷⁰ *Id.* at 26:44.

¹⁷¹ *Id.* at 37:29.

¹⁷² *Summer 1964: Freedom Summer*, SNCC DIGITAL GATEWAY, <https://snccdigital.org/events/freedom-summer/> (last accessed Nov. 18, 2023).

¹⁷³ *Freedom Summer*, NATIONAL ARCHIVES AFRICAN AMERICAN HERITAGE, <https://www.archives.gov/research/african-americans/vote/freedom-summer> [https://perma.cc/R72C-BTPA] (last visited Nov. 11, 2023).

signed the Civil Rights Act of 1964 into law.¹⁷⁴ Though this was a critical move forward in the fight for civil rights, it was only one kairotic prime in a series of primes. On February 21, 1965, Malcolm X was assassinated.¹⁷⁵ At least on the part of those who fought against civil rights, there would be no “bloodless revolution.”

That was further demonstrated on March 7, 1965, a day that became known as Bloody Sunday.¹⁷⁶ Civil rights advocates and activists had organized a protest for voting rights, which would begin in Selma, Alabama, and end in Montgomery, the state capital.¹⁷⁷ They began at a local church in Selma and started with a prayer.¹⁷⁸ The march was orderly. Two activists lead the demonstration: Hosea Williams, who was with the Southern Christian Leadership Conference (“SCLC”), and John Lewis, who was then the Chairman of the Student Nonviolent Coordinating Committee (“SNCC”).¹⁷⁹ They lead six hundred protesters in rows of two, walking silently through the streets and then across the Edmund Pettus Bridge in Selma, where they were met by roughly one hundred and fifty Alabama state troopers, sheriff’s deputies, and others, who ordered the protesters to go away.¹⁸⁰

Over a “bullhorn or megaphone,” a state trooper gave the marchers a two-minute warning to disperse, but law enforcement began attacking the protesters after only one minute and five seconds.¹⁸¹ Troops attacked with tear gas, whips, and clubs, fracturing Lewis’s skull and injuring at least fifty-seven others.¹⁸² Only a week later, while still injured, Lewis spoke at a federal hearing to request protection for a large-scale march to Montgomery before Judge Frank Johnson, Jr., who concluded that the protestors had a constitutional right to march.¹⁸³ And on March 21, 1965, a federalized national guard protected 3,200 protestors who marched from Selma to Montgomery in what came to be seen as a turning point, a kairotic moment in the civil rights movement in the United States.¹⁸⁴ This cascade of events ultimately lead to President Johnson signing the Voting Rights Act into law on August 6, 1965.

Comparing the most famous parts of Dr. King’s “I Have a Dream” speech and Malcolm X’s “Ballot or the Bullet” speech, it would be tempting to identify the early tension between the positions of Dr. King and Malcolm X as explained in part by the fact that Dr. King’s earlier speeches seem to impliedly recognize that the “right” or “opportune” moment is one that can

¹⁷⁴ *Civil Rights Act of 1964*, NATIONAL ARCHIVES CATALOG, <https://catalog.archives.gov/id/299891> [<https://perma.cc/C8HZ-46CM>] (last visited Nov. 11, 2023).

¹⁷⁵ *Malcolm X Assassinated During Speech in Manhattan*, EQUAL JUSTICE INITIATIVE CALENDAR, <https://calendar.eji.org/racial-injustice/feb/21> [<https://perma.cc/9EWH-P39G>] (last visited Nov. 11, 2023.)

¹⁷⁶ *Confrontations for Justice: John Lewis – March from Selma to Montgomery, “Bloody Sunday,” 1965*, EYEWITNESS: AM. ORIGINALS FROM THE NAT’L ARCHIVES, <https://www.archives.gov/exhibits/eyewitness/html.php?section=2> [<https://perma.cc/B3XV-MNMT>] (last visited July 29, 2023).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

be discerned and identified but perhaps not created, whereas Malcolm X had a vision that the “right” moment is now, something that we must exert force upon to create. But a fuller exploration of the entirety of Dr. King’s famous speech indicates that he and Malcolm X may have been closer in thinking on this critical point.

Dr. King’s later speeches even more explicitly referenced the need to create kairotic moments in history. In a speech at Stanford University in 1967, he expressly addressed the role of time in its kairotic sense:

I think there is an answer to that myth, And it is that time is neutral. It can be used either constructively or destructively. And I’m absolutely convinced that the forces of ill-will in our nation, the extreme rightists in our nation, have often used time much more effectively than the forces of goodwill. And it may well be that we will have to repent in this generation, not merely for the vitriolic words of the bad people and the violent actions of the bad people, but for the appalling silence and indifference of the good people who sit around and say, wait on time. Somewhere we must come to see that social progress never rolls in on the wheels of inevitability. It comes through the tireless efforts and the persistent work of dedicated Individuals. And without this hard work time itself becomes an ally of the primitive forces of social stagnation. And so we must help time, and we must realize that the time is always right to do right.¹⁸⁵

Dr. King’s assertion that “the time is always right to do right” is an implicit recognition of the ethical component of kairos and a movement towards the idea that “right” or “opportune” moments may require action to create. That recognition is critical to effective advocacy both for an individual client and for movement lawyers.

V. AN EXAMPLE OF KAIROS IN HISTORICAL TRIAL ADVOCACY: DARROW’S TRIAL STRATEGY AND SUMMATION IN THE STATE V. LEOPOLD AND LOEB

Another fascinating example of an attorney identifying and exploiting kairotic moments in history and within a lawsuit is Clarence Darrow’s defense of Nathan (“Babe”) Leopold and Richard (“Dickie”) Loeb for the brutal and senseless murder of an acquaintance and neighbor, fourteen-year-old Bobby Franks. The Leopold and Loeb trial occurred in 1924, just a year before Darrow’s performance in the Scopes trial.¹⁸⁶

Leopold and Loeb were, by all accounts, bright young men from wealthy Chicago families. Leopold’s grandfather had emigrated to the United States from Germany in the mid-1800s.¹⁸⁷ He built a shipping business that became

¹⁸⁵ King, *supra* note 2.

¹⁸⁶ The Scopes Trial, or Scopes Monkey Trial, occurred in July 1925. *Scopes v. State*, 278 S.W. 57 (Tenn. 1925). Clarence Darrow defended a Tennessee high school teacher, John T. Scopes, who had taught Charles Darwin’s theory of evolution to his students in violation of a Tennessee state law, the Butler Act, which prohibited public school teachers from “teach[ing] any theory that denie[d] the Story of the Divine Creation of man as taught in the Bible, and to teach instead that man . . . descended from a lower order of animals.” 49 TENN. CODE ANN. § 1922 (repealed 1967).

¹⁸⁷ SIMON BAATZ, FOR THE THRILL OF IT: LEOPOLD, LOEB, AND THE MURDER THAT SHOCKED JAZZ AGE CHICAGO 29 (2008).

the largest in the Great Lakes region, and his son inherited that fortune and then built his own fortune in manufacturing and by marrying the daughter of a prominent financier in Chicago. The Leopolds were among the most affluent families in Chicago in the early 1900s.¹⁸⁸ Though bright, Nathan Leopold had suffered bullying by classmates at a public school as a younger child,¹⁸⁹ had been sexually abused by his governess when he was only twelve,¹⁹⁰ and has been described as an “awkward, self-conscious, [and] diffident” loner.¹⁹¹ His family moved to a three-story mansion in Kenwood near the Harvard School for Boys in 1915. The Harvard School was a small private school in a very wealthy, prestigious area of Chicago that sent nearly all of its students to elite colleges after graduation.¹⁹² Leopold excelled academically while at the Harvard School, so well that he accumulated enough credits to skip his senior year, and he was to begin his freshman year at the University of Chicago in the fall of 1920.¹⁹³ He had even made a few friends through his interest in ornithology—he had over two thousand bird specimens he had collected.¹⁹⁴

Leopold met Loeb the summer before he matriculated at the University of Chicago. Loeb’s family was also affluent and well-established in Chicago society. Loeb’s father was vice president of Sears, Roebuck, and Co., and his mother was a highly regarded member of the Chicago Woman’s Club.¹⁹⁵ Loeb was younger than Leopold by six months and had already attended one year at the University of Chicago.¹⁹⁶ Though regarded as “the intellectual of the family,”¹⁹⁷ Loeb had not done well during his first year at the University of Chicago.¹⁹⁸ His governess, Emily Struthers, had educated him and pushed him to graduate high school after only two years; though he was able to do so, he was “ill-prepared for college” upon beginning classes at fourteen.¹⁹⁹ However, unlike Leopold, Loeb was “likable, engaging, and popular.”²⁰⁰

In addition to his studies, Loeb had one obsession that he kept from all but his friend Leopold: crime stories—the more “complex and dangerous,”

¹⁸⁸ *Id.* at 30.

¹⁸⁹ *Id.* at 30–31.

¹⁹⁰ *Id.* at 31. Despite the fact that it was “common knowledge” among the household employees that the governess, Mathilda (“Sweetie”) Wantz had become “sexually intimate” with Nathan beginning when he was twelve, Nathan described himself as “thoroughly devoted to” Mathilda because his mother had been sick and unavailable during his childhood. *Id.* at 31–32 (quoting Karl M. Bowman & Harold S. Hulbert, Report of Preliminary Neuro-Psychiatric Examination (Nathan Leopold, Jr.), Box 2, Folder 18, Harold S. Hulbert Papers, Series 55/23, Univ. Archives, Northwestern Univ.) [hereinafter *the Bowman-Hulbert Report*]. The Bowman-Hulbert Report details both Nathan and Richard’s “childhood, education, upbringing, and adolescence,” and it also includes each defendant’s “version of the murder and its immediate aftermath.” *Id.* at 461.

¹⁹¹ *Id.* at 41.

¹⁹² *Id.* at 32–33.

¹⁹³ *Id.* at 28, 33.

¹⁹⁴ *Id.* at 33. Nevertheless, “his classmates regarded him as an eccentric loner.” *Id.* His birding became relevant to the murders, as Nathan and Richard eventually selected an area Nathan frequented for his birding for the location to dump Bobby Franks’ body.

¹⁹⁵ *Id.* at 34.

¹⁹⁶ *Id.* at 33–34.

¹⁹⁷ *Id.* at 34.

¹⁹⁸ *Id.* at 41.

¹⁹⁹ *Id.* at 34, 38–40.

²⁰⁰ *Id.* at 37. In fact, Richard was so outwardly friendly that Nathan’s father appreciated the good influence he believed Richard to be on his son.

the better.²⁰¹ Beginning in 1923, he began brainstorming how he and Leopold could “commit the perfect crime.”²⁰²

Leopold and Loeb orchestrated the kidnapping for ransom and murder of Bobby Franks simply to show that they could get away with a well-orchestrated plan “for the thrill of it.”²⁰³ Leopold and Loeb planned well in advance.²⁰⁴ They rented a car so they would not be recognized,²⁰⁵ and they did a trial run of the complex multistep ransom process.²⁰⁶ They crafted the ransom note the night before the murder, addressing it “Dear Sir” because they had not yet selected their victim from a number of potential victims on a list they had crafted.²⁰⁷ They planned to choose one of several boys they had identified as possible victims.²⁰⁸ All they cared about was that the boy would come from a wealthy enough home to pay the ransom, so the boys were those who had attended the Harvard School, just like Leopold and Loeb.²⁰⁹

On the day of the murder, they trailed a different boy first and, upon losing him, went looking for others.²¹⁰ As it got later in the day, they almost gave up, but they saw Bobby Franks walking home.²¹¹ Franks, who was actually Loeb’s second cousin, agreed to get in the car with them.²¹² Leopold was driving the rental car.²¹³ Although they had initially planned to strangle the boy to death with each of them holding one end of the rope (to share culpability equally and reduce the likelihood that either would give up the other), Loeb ended up covering Franks’ mouth with a chloroform cloth and striking him multiple times in the head with a chisel until the boy finally collapsed.²¹⁴ It was a gruesome death; he did not die immediately, and the car was soaked in blood.²¹⁵

While waiting for nightfall so they could dispose of the body, Leopold and Loeb drove to a roadside café at the Dew Drop Inn for hot dogs and root beer.²¹⁶ Leopold and Loeb then drove to a pre-determined place to stash the body (one where Leopold regularly engaged in birdwatching) and shoved Franks’ lifeless body into a drainage ditch in a culvert.²¹⁷ Before doing so, they stripped Franks naked and poured hydrochloric acid on the boy’s face and genitals to prevent identification of the body.²¹⁸ They then drove back

²⁰¹ *Id.* at 35.

²⁰² *Id.* at 53. Nathan and Richard had a long and complex relationship, many of the details of which are not relevant to this article.

²⁰³ *See id.* at 148, 156–57. When asked about his motive, Richard Loeb noted that “the main thing was the adventure of the thing.” *Id.* at 156. He further stated that he and Nathan had concocted and carried out their plan out of “a sort of pure love of excitement, or the imaginary love of thrills . . .” *Id.* at 157. For his part, Nathan Leopold described his motive as related to “a thirst for knowledge,” comparing his “participation in the killing [as] . . . akin to the desire of the scientist to experiment.” *Id.* at 148.

²⁰⁴ *Id.* at 60, 62.

²⁰⁵ *Id.* at 65–68, 76.

²⁰⁶ *Id.* at 63–64.

²⁰⁷ *Id.* at 70–71, 78.

²⁰⁸ *Id.* at 78.

²⁰⁹ *Id.* at 61.

²¹⁰ *Id.* at 79–80.

²¹¹ *Id.* at 81.

²¹² *Id.* at 81, 83.

²¹³ *Id.* at 83.

²¹⁴ *Id.* at 84.

²¹⁵ *Id.*

²¹⁶ *Id.* at 132, 133.

²¹⁷ *Id.* at 132.

²¹⁸ *Id.* at 86.

into town, dropped the ransom note in a mailbox,²¹⁹ and burned much of the evidence in a furnace.²²⁰ Shortly thereafter, they used the pay phone at a Walgreen's drugstore to phone the Franks household to notify them of the kidnapping and then disposed of the chisel by throwing it out the window of the car.²²¹

Despite believing themselves so clever and so prepared that no one would ever catch them, their plan unraveled almost immediately, with Leopold leaving his tortoiseshell glasses on the ground near the scene.²²² Numerous other pieces of evidence eventually led police to tie both Leopold and Loeb to the crime.²²³ The boys were their own worst enemies. After thirty-six hours of questioning,²²⁴ they each confessed and provided a thorough account of the planning and murder.²²⁵

Leopold and Loeb were plainly guilty of the most heinous of crimes. They were the most unlikable of defendants: wealthy, smug, and unremorseful. Their parents recognized there was no way their children would be found innocent. Their only wish was to save their children's lives by securing a sentence of life in prison rather than the death penalty. They hired Clarence Darrow for the job.²²⁶

It was a perfect role for Darrow. He was vehemently against capital punishment.²²⁷ In his defense of Leopold and Loeb, he both (1) identified and exploited a kairotic moment outside the lawsuit in his overall trial strategy; and (2) created a kairotic moment within the lawsuit in the crafting of his closing argument in the case.

First, Darrow recognized and exploited an opportune moment in history to put the death penalty on trial. Leopold and Loeb had originally pled not guilty to murder and kidnapping for ransom.²²⁸ The judge set a hearing for July 21, 1924 to address any motions, with trial to begin on August 4.²²⁹ Because the evidence of guilt was overwhelming, the prosecution anticipated and prepared for a defense based on insanity, and Darrow hinted as much in public statements.²³⁰ But privately, Darrow had other plans; he relied on the element of surprise to effectively create the moment he hoped.²³¹ On July 21, Darrow stood in court, withdrew the defendants' pleas of not guilty, and requested to enter guilty pleas, shocking the prosecutor, Robert Crowe, and

²¹⁹ *Id.* at 87–88.

²²⁰ *Id.* at 88. They did not burn the blanket the body was wrapped in, as it was too blood-soaked to burn without creating a noticeable odor. *Id.*

²²¹ *Id.* at 88–89.

²²² *Id.* at 25.

²²³ *See, e.g., id.* at 90 (noting that a security guard saw Leopold and Loeb throw the chisel from the car), 122–26 (discussing evidence linking typewriter used for typing ransom note to Nathan Leopold), 127–288 (describing events that lead to Leopold family chauffeur refuting the defendants' alibis), 234 (describing additional evidence linking Leopold and Loeb to the crime).

²²⁴ *Id.* at 126. Despite their wealth and privilege, neither defendant had an attorney during the many early hours of interrogation, largely because their parents were so certain of their innocence that they did not see a need. *Id.* at 119–20, 129.

²²⁵ *Id.* at 135–37. In fact, the only significant difference between the two boys' confessions was that each initially tried to pin the blame for the actual murder on the other. *Id.*

²²⁶ *Id.* at 196.

²²⁷ *Id.* at 173.

²²⁸ *Id.* at 242.

²²⁹ *Id.* at 243.

²³⁰ *Id.* at 269.

²³¹ *Id.* at 278.

reporters alike.²³² This one strategic move created a kairotic moment: a turning point that set the stage for Darrow to save his clients from death and to put the death penalty itself on trial. By changing the pleas, Darrow took the case away from a jury.²³³ He feared that a jury trial would most assuredly have resulted in Leopold and Loeb's death by hanging.²³⁴ Rather, the defendants' fate would be decided by the judge alone:

After long reflection and thorough discussion . . . we have determined to make a motion in this court for each of the defendants in each of the cases to withdraw our plea of not guilty and enter a plea of guilty.

. . .

The statute provides that evidence may be offered in mitigation of the punishment, and we shall ask at such time as the court may direct that we may be permitted to offer evidence as to the mental condition of these young men, to show the degree of responsibility they had and also to offer evidence as to the youth of these defendants and the fact of a plea of guilty as further mitigation of the penalties in this case.

With that we throw ourselves upon the mercy of this court and this court alone.²³⁵

But why choose this moment in history to begin a concerted effort to abolish the death penalty? Darrow sensed the competing forces at play and used them to his clients' advantage, making their trial emblematic of larger societal forces—the clash between the enlightenment of the progressive era and the fear of a return to barbarism. Although some states outlawed capital punishment in the nineteenth century, it was the beginning of the twentieth century when progressive reform took hold.²³⁶ Between 1907 and 1917, six states outlawed capital punishment entirely and three limited it to treason and first degree murder of a law enforcement official.²³⁷ But moving into the 1920s, the abolitionist movement seemed to be losing steam, and the pendulum began to swing back in favor of capital punishment.²³⁸

Against this historical backdrop, the public cried out for a hanging: even “Chicagoans who had previously opposed capital punishment wrote to the newspapers demanding that [Leopold and Loeb] be sent to the gallows.”²³⁹

²³² *Id.* at 286.

²³³ *Id.* at 284.

²³⁴ *Id.* at 278–79, 283.

²³⁵ Douglas O. Linder, *Darrow's Plea of Guilty*, FAMOUS TRIALS, <https://famous-trials.com/leopoldandloeb/1742-pleaofguilty> [<https://perma.cc/5B9Y-TZU2>] (last accessed on July 29, 2023).

²³⁶ John F. Galliher, Gregory Ray, & Brent Cook, *Abolition and Reinstatement of Capital Punishment During the Progressive Era and the Early 20th Century*, 83 J. OF CRIM. L. & CRIMINOLOGY, 538, 538–39 (1992).

²³⁷ *History of the Death Penalty: The Abolitionist Movement*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/the-abolitionist-movement> [<https://perma.cc/7QN8-SY2L>] (last accessed July 29, 2023). In fact, ten states abolished the death penalty between 1897 and 1917: “Colorado (1897), Kansas (1907), Minnesota (1911), Washington (1913), Oregon (1914), South Dakota (1915), North Dakota (1915), Tennessee (1915), Arizona (1916) and Missouri (1917).” Galliher, Ray, & Cook, *supra* note 236, at 541.

²³⁸ DEATH PENALTY INFO. CTR., *supra* note 237; Galliher, Ray, & Cook, *supra* note 236, at 538 (noting that reinstatement occurred during economic recession and depression and arguing that it “was triggered by the threat of lynchings and political radicals, since abolition gave those outside of government a monopoly on lethal violence”).

²³⁹ BAATZ, *supra* note 187, at 238.

Politicians argued in favor of hanging, and even some church pastors preached to their congregations that the death penalty was the correct punishment for “notorious criminals” who were guilty of “atrocious crimes.”²⁴⁰ Furthermore, the broader public seemed to fear that American society in the 1920s was sliding into hedonism and self-absorption: “The traditional morality, centered on work, discipline, and self-denial, had evaporated.”²⁴¹ The senseless kidnapping and murder of Bobby Franks seemed to some emblematic of the decline of morality in the United States, something that had to be stopped.²⁴² The Ku Klux Klan, experiencing a revival in the 1920s and growing at a “remarkable” rate in Chicago, attended all court sessions and sent threats and demands to Judge Caverly to sentence Leopold and Loeb to hang.²⁴³

Thus, one explanation for why Darrow was able to capitalize on this opportune moment to put the death penalty on trial (while simultaneously defending his clients) was that, as John Smith observed in one of his foundational articles on kairos, Darrow had the unique ability to “grasp the dominant problem . . . the ‘crisis’ . . . and the possibilities for response inherent in their situation.”²⁴⁴

Clarence Darrow’s summation offers another example of how a skilled advocate can isolate the controlling exigence presented by a rhetorical situation and then identify or create a kairotic moment within the advocacy itself. For Darrow, the rhetorical exigence, the “imperfection marked by urgency,”²⁴⁵ was the state’s desire to kill Leopold and Loeb for the murder of Bobby Franks. Despite having spent much of the trial presenting his own psychiatrists and challenging the state’s experts on the topic of the defendants’ mental condition, Darrow’s closing argument focused almost exclusively on the death penalty and on Leopold and Loeb’s ages. Recognizing that his clients were nearly children themselves, he used that aspect of the rhetorical situation to garner sympathy – not for the murderers themselves, but for others’ children, who might one day sit where Leopold and Loeb did.

Darrow’s speech took over twelve hours to deliver. Though many have lauded the speech as a masterpiece,²⁴⁶ its full content only appears in transcripts provided by the *Chicago Herald* and the *Examiner*.²⁴⁷ The crisp, clear summation that most cite is actually Darrow’s reworking of the summation.²⁴⁸ Apparently, Darrow was aware that portions of his otherwise brilliant closing argument were rambling and off-topic, so he “borrowed” the

²⁴⁰ *Id.* at 319 (quoting Arthur Kaub, pastor of Winslow Park Evangelical Lutheran Church).

²⁴¹ *Id.* at 321.

²⁴² *See id.* at 321.

²⁴³ *Id.* at 322 (“The Klan, never reluctant to blame marginal groups as the cause of all social problems, portrayed itself as the guardian of public morals and, in that role, was eager to see two Jewish homosexuals sent to the scaffold for the murder of a child.”).

²⁴⁴ *Right Time*, *supra* note 11, at 11.

²⁴⁵ Bitzer, *supra* note 34, at 6.

²⁴⁶ *See, e.g.*, Alison Martin, *This Week in History: Clarence Darrow’s Most Famous Speech*, CHI. SUN-TIMES (Apr. 22, 2022), <https://chicago.suntimes.com/2022/4/22/23032424/clarence-darrow-leopold-loeb-speech-closing-arguments> [<https://perma.cc/SF5Y-4S93>] (describing Darrow’s closing as “one of the most influential trial speeches ever delivered in a court of law”).

²⁴⁷ BAATZ, *supra* note 187, at 458.

²⁴⁸ *Id.*

section of the court transcript containing his closing.²⁴⁹ He edited his speech by “cutting out long passages, correcting his syntax, and streamlining his argument.”²⁵⁰ He then published his revision in a pamphlet and failed to return the borrowed portion of the official trial transcript.²⁵¹

Despite Darrow’s rambling, overly long closing, the argument was effective. He (1) saw the exigence to be modified (saving his clients’ lives and casting doubt on the use of the death penalty for young defendants); (2) strategically altered his audience to ensure that the decisionmaker (Judge Caverly) was the one most likely to be “influenced by [Darrow’s] discourse”²⁵² given the public’s feelings about the death penalty; and (3) understood and managed the constellation of “persons, events, objects, and relations” necessary to save his clients from hanging.²⁵³

Having identified the exigence as the threat of death for his clients (and those like them) and strategically chosen a judicial audience, Darrow used the language of his closing argument to both literally and figuratively turn the judge himself into the fulcrum on the scales of justice—the tipping point between the barbarism of the past and the enlightenment of the future:

Your Honor, it may be hardly fair to the court, I am aware that I have helped to place a serious burden upon your shoulders. And at that, I have always meant to be your friend. But this was not an act of friendship.

I know perfectly well that where responsibility is divided by twelve, it is easy to say,

“Away with him.”²⁵⁴

. . .

But, your [H]onor, if these boys hang, you must do it. There can be no division of responsibility. You must do it. You can never explain that the rest overpowered you. It must be by your deliberate, cool, premeditated act, without a chance to shift responsibility. . . .

The easy thing and the popular thing to do is to hang my clients. I know it. Men and women who do not think will applaud. The cruel and the thoughtless will approve. It will be easy today, but in Chicago and reaching out over the length and breadth of the land more and more are the fathers and mothers, the humane, the kind and the hopeful, who are gaining an understanding, are asking questions not only about these boys, but about their own. These will join in no acclaim at the death of these boys. These would ask that the shedding of blood be stopped, and that the normal feelings of man resume their sway

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² Bitzer, *supra* note 34, at 8.

²⁵³ *Id.*

²⁵⁴ Douglas O. Linder, *If These Boys Are to Hang, You Must Do It*, FAMOUS TRIALS, <https://famous-trials.com/leopoldandloeb/1700-boystohang> [<https://perma.cc/VNR5-CGCE>] (last accessed July 29, 2023) (excerpting from Darrow Summation).

I know your honor stands between the future and the past. I know the future is with me, and what I stand for here; not merely for the lives of these two unfortunate lads, but for all boys and all girls; all of the young, and as far as possible, for all of the old. I am pleading for life, understanding, charity and kindness, and the infinite mercy that forgives all. I am pleading that we overcome cruelty with kindness and hatred with love. I know the future is on my side. *Your honor stands between the past and the future.* You may hang these boys; you may hang them by the neck till they are dead. But in doing it you will turn your face toward the past. In doing it you are making it harder for every other boy. In doing it you are making it harder for unborn children. You may save them and it makes it easier for every child that some time may sit where these boys sit. It makes it easier for every human being with an aspiration and a vision and a hope and a fate.²⁵⁵

Judge Caverly understood the gravity of the moment that Darrow had created in history and in the lawsuit. Prior to rendering his verdict, he spoke to a reporter at the *Chicago American*, stating, “I wish this case had gone to a jury. If it had gone to a jury, I would be the thirteenth man and not the one and only one to render the decision.”²⁵⁶ And when he rendered the verdict, he again noted his discomfort with being the sole decisionmaker in such a pivotal moment in a case involving capital punishment:

Under the pleas of guilty, the duty of determining the punishment devolves upon the court . . . In reaching his decision the court would have welcomed the counsel and support of others. In some states the legislature, in its wisdom, has provided for a bench of three judges to determine the penalty in cases such as this. Nevertheless, the court is willing to meet his responsibilities.²⁵⁷

He also recognized that this was the “right time” to curtail the use of capital punishment, at least for young offenders, noting that his “determination appear[ed] to be in accordance with the progress of criminal law all over the world and with the dictates of enlightened humanity.”²⁵⁸

These two examples illustrate the value that a nuanced understanding of *kairos* can add to the work of an activist, advocate, scholar, or historian. Whether discerned or created, *kairotic* moments are powerful and effective. The best advocates and activists understood that power, even if they lacked the vocabulary to describe it.

²⁵⁵ Clarence Darrow, Plea for Leopold & Loeb (Aug. 22, 1924) (transcript available at <https://voicesofdemocracy.umd.edu/clarence-darrow-plea-for-leopold-and-loeb-22-23-and-25-august-1924-speech-text>) [<https://perma.cc/UQR8-VLTR>] (emphasis added) (last accessed July 29, 2023). In fact, despite the entire trial having been about mitigating factors, including significant testimony from various alienists (psychiatrists) regarding the mental state of the defendants, Darrow did not rely on the testimony of the alienists in his closing. Rather, he focused heavily on the depravity of the death penalty, particularly for those under the age of maturity. *Id.*

²⁵⁶ BAATZ, *supra* note 187, at 393 (quoting Edward L. Corey, *Mind Not Made Up—Caverly*, *Chicago American*, September 5, 1924).

²⁵⁷ Douglas O. Linder, *Judge Caverly's Decision and Sentence*, FAMOUS TRIALS, <https://famous-trials.com/leopoldandloeb/1747-judgedecision> [<https://perma.cc/7QZN-ZC5P>] (last accessed July 29, 2023).

²⁵⁸ *Id.*

CONCLUSION

In sum, *kairos*—qualitative time—provides a rich, nuanced frame for crafting and situating arguments and for interrogating historical legal decisions and movements. Though its complexity makes the concept of *kairos* difficult to grasp (much like the opportune moment itself), it is a critical lens that permits scholars, historians, and advocates to fully understand history and to be effective advocates. Underexplored in the law, scholars have only recently begun to recognize the role *kairos* might play in persuasive legal rhetoric. The framework discussed in this Article should provide scholars, historians, and advocates alike with the ability to harness the power of *kairos* both prospectively and retrospectively. One prospective frame involves creating *kairotic* moments, like Clarence Darrow did in changing Leopold and Loeb’s pleas from not guilty to guilty and taking the case away from the jury, or priming the audience to later be receptive to *kairotic* moments that might not otherwise have arisen. Other prospective uses involve the ability to identify and exploit existing *kairotic* moments based on the topic, the speaker, the audience, and potentially, the surrounding political or social circumstances, a tool effectively employed in the prosecution of Derek Chauvin. Retrospectively, scholars, historians, and advocates can look to surrounding historical circumstances in conjunction with the rhetorical strategies of judges and advocates to better understand why particular arguments succeeded or failed, something apparent in any analysis of the speeches of Malcolm X and Martin Luther King, Jr. in their historical context. *Kairos* is not the only tool necessary in persuasive rhetoric, but it is a vastly underexplored tool. This Article aims to place *kairos* at the forefront of rhetorical techniques critical to advocacy and to provide a frame for understanding and employing it.