ARTICLE

Dimensions of Being and the Limits of Logic

The Myth of Empirical Reasoning

By Kenneth Chestek*

When I went to law school, I had a rather naïve idea of how the legal system worked. I saw "the law" as a black box. A lawyer loaded a set of facts into the intake gate of the black box, something "legal" happened inside the box, and an answer (a verdict, a finding of liability or not) eventually got pushed out through the output gate of the box. I thought that lawyers were inside of that box, doing something magical, and I wanted to learn how the inside of the box worked. Once I had mastered the inner workings of the black box, I could play a role in the creation of justice and the resolution of disputes, surely a worthy life goal.

It didn't take me long, as a first-year law student, to see that I had oversimplified things terribly. On the input side, I quickly discovered that "the law" was not inside the box at all. "The law" was amorphous, fluid, constantly changing. The inside of the box was legal reasoning: logic and other tools for processing the law and the facts. Importantly, both the law and the facts needed to come into the box through the input gate. A lawyer therefore needed to not only load the facts into the box, but the law itself had to be researched, analyzed, processed, interpreted, and fed into the box too. Once the law and the facts had been loaded into the box, the box did its thing (legal reasoning) and spit out an "answer," sometimes in the form of a verdict or finding of liability, but other types of answers as well.

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As I moved through my three years of law school, I began to realize that even this modified version of the process was sometimes unsatisfactory. Sometimes the "answer" that came through the output gate didn't look much like "justice." Two examples (one mundane and one not so mundane):

Example 1:

Rules: (a) An action upon breach of contract must be initiated within four years of the breach. (b) A lawsuit must be served on a defendant within one year after the complaint is filed; if service is completed, the date the suit was filed will relate back to the date of filing the complaint, not the date of service.

Facts: Debtor fails to pay for goods purchased on credit. Creditor files lawsuit within four years of the breach, but the debtor is absent from the jurisdiction and successfully manages to avoid getting served with process by taking active measures to hide his whereabouts.

Answer: Case dismissed with prejudice for failing to achieve service of process within time allowed by the statute of limitations.

So one way of legally stealing from another is to buy goods on credit, fail to pay for them, then duck service of process when the creditor sues you? That seemed like some sort of perverse game, not "justice."

Example 2:

Rule: It is legal for a school district to create separate schools for black children and for white children, so long as the schools are equal.

Facts: Eight-year-old Linda Brown is black. All of her neighbors and playmates go to the school in the neighborhood, which has been designated for white children. There is another school much farther from her house that has been designated for black children, and which is considered "equal" to the whites-only school.

Answer: Linda Brown may not attend the school in her neighborhood that all of her playmates attend.

Example two is, of course, the essential facts of the landmark case *Brown v. Board of Education of Topeka*.[1] When Linda first applied to attend her neighborhood whites-only school in 1951, the law of the land was *Plessy v. Ferguson*,[2] which famously held that separate public accommodations for the races are perfectly okay so long as they are "equal." Given a finding in the *Brown v. Board* case that the two schools (the whites-only neighborhood school and the more distant black school) were "substantially equal," the only logical, empirical outcome was that Linda Brown had to attend the more distant school.

1 347 U.S. 483 (1954).

2 163 U.S. 537 (1896).

How could *that* result be "just?"

It turns out that purely logical, or "empirical," reasoning is not the end of the judicial process.[3] Sometimes, as in the two examples given above, pure empirical reasoning leads to an unsatisfactory result, a result that strikes almost every reader as "unjust" or "unfair." So if the highest goal of the legal system really is to promote "justice," that necessitates, at least sometimes, a process other than logical, empirical reasoning.[4]

It isn't just first-year law students who misapprehend the importance of strict, logical, binary rules to provide "right" or "wrong" answers to legal questions.[5] Approximately one hundred years ago, most legal scholars thought of the law as "a coherent, gapless, autonomous, and comprehensive system of conceptual propositions"[6] which could be scientifically studied and dispassionately applied. This view, which came to be known as "formalism," came under attack by legal academics in the 1920s and 1930s. The academy soon came to embrace a "realist" view of the law, in which the law was viewed as "instrumental, practical, contextual, constructed, and adaptive."[7] While the legal academy today almost universally accepts the realist view of the law,[8] public perception of the legal system still tends to view formalism as the ideal; anything short of that is viewed skeptically, as "political" or "activist" judging.[9] Even some influential judges

3 Or any decisionmaking process, for that matter. Kathryn Janeway, captain of the Federation starship Voyager, once had to reprimand her Vulcan second officer Lieutenant Tuvok for disobeying one of Captain Janeway's orders, telling him, "You can use logic to justify almost anything. That's its power—and its flaw."

To which Lieutenant Tuvok responded, in his calm, Vulcan manner, "My logic was not in error; but I was." *Star Trek: Voyager*, season 1, episode 10 (UPN television broadcast Mar. 20, 1995), quotations reported at https://www.imdb.com/title/tt0708948/quotes/?ref_=tt_trv_qu (last visited Feb. 4, 2022).

4 That is, of course, how my two examples got resolved in satisfactory ways. In the case of the debtor ducking service, the courts worked out exceptions or special rules (allowing constructive service by publication, or by tolling the statute during any period where the defendant is actively avoiding service). In the case of Linda Brown, the court took the extraordinary step of overruling the controlling precedent and creating a new rule that better served justice.

5 For an excellent discussion about how the 1L curriculum misleads students into thinking that the legal system is all about rules and logic, see generally Sherri Lee Keene & Susan A. McMahon, *The Contextual Case Method: Moving Beyond Opinions to Spark Students' Legal Imaginations*, 108 Va. L. Rev. Online 72 (2022).

6 Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 Iowa L. Rev. 195, 199 (2009).

7 *Id.*

8 *Id.* at 207 ("[Realism] has remained, along with the residues of formalism, an enduring tacit understanding of law throughout the twentieth century.").

9 A related problem is the frequent criticism by political actors that any decision they don't like must be made by an "activist judge" who substitutes his or her own judgment for that of Congress or some other legislative body. *See*, *e.g.,* Tal Axelrod, *Meadows, Cotton Introduce Bill to Prevent District Judges from Blocking Federal Policy Changes*, The Hill, Sept. 11, 2019, 4:40 PM ET, https://thehill.com/regulation/court-battles/460975-meadows-cotton-introduce-bill-to-prevent-district-judges-from/; *On Capitol Hill*, Judicial Watch Report, July 1997, 18 No. 7 Jud./Legis. Watch Rep. 3 ("The fight against activist judges is growing on Capitol Hill. In addition to Senate Judiciary Chairman Hatch's barring the ABA from any official role in the confirmation of federal judges, several Senators have signed on to what has become known as the 'Hatch Pledge' which says: 'Those nominees who are or will be judicial activists should not be nominated by the President or confirmed by the Senate, and I personally will do my best to see to it that they are not.'"); Letter to the Editor, *Activist Judges*, 47 Fla. B. News 2 (Apr. 2020) ("Recently, published letters highlight hopefully-rare situations where activist judges issue orders and rulings based on ideology, and not on the law. Judges are not elected to revise laws, or to legislate from the bench. It is not

and theories of jurisprudence still insist on viewing the act of judging as a purely formalist exercise.[10]

My claim in this article is that formalism, which depends heavily on what I call "empirical reasoning," is little more than a myth. While some judges may still claim to be engaging in nothing more than formal application of neutral principles to objectively found facts, such claims must be viewed skeptically. There are many types of legal conflicts, which I describe below, which simply cannot be adequately resolved through empirical, or logical, analysis. In order to decide those types of cases, judges must resort to other forms of reasoning. Good judges engage in "narrative reasoning," even if they don't admit or acknowledge it.

By "empirical reasoning," I mean relying upon legal rules that produce a binary answer (true or false, guilty or innocent, liable or not) through application of formal logic—essentially, syllogistic reasoning. While the rule being applied (whether enacted or judge-made) certainly incorporates values, the values are built into the rule and are not up to the individual judge to determine. "Narrative reasoning," on the other hand, requires a judge or a jury to rely more heavily on values other than pure logic. Frequently these values are defined through stories (narratives). Prof. Linda Edwards writes that "[n]arrative reasoning evaluates a litigant's story against cultural narratives and the moral values and themes these narratives encode."[11] Importantly, that evaluation occurs at the time the fact-finder (judge or jury) is applying the rule, not at the time the rule is created.

Empirical reasoning of the nature I describe is what legal formalists strive for. The late Justice Antonin Scalia and Bryan Garner wrote that "persuasion is possible only because all human beings are born with a

their job to advance a political, social, or even personal, agenda by putting even a finger on the scales of justice. We elect judges to interpret laws, and apply laws to facts without bias, and in accordance with well-established principles."); John E. Jones, *Our Constitution's Intelligent Design*, 33 Litig. 3 (2007) (reflections by the trial judge who presided over *Kitzmiller v. Dover Area School District*, a case challenging a school board's rejection of "intelligent design" as a valid curricular theory in a science class: "The public at large, including many segments of the media, has no real grasp of how judges operate. Worse, I also discovered that many pundits deliberately misrepresent the way that precedent guides judges in their work. This allows them to vilify individual judges for rendering decisions that are legally correct but with which individual commentators may disagree. It also leads to the frequent use of that pejorative sobriquet 'activist judge.' This term lamentably is now an all-purpose designation for any judge who has rendered a holding with which the user of the designation disagrees. It is therefore misused far more than it is properly applied.").

10 The late Supreme Court Justice Antonin Scalia was frequently described as a "legal positivist" (a term virtually synonymous with "legal formalist"). *See, e.g.,* Beau James Brock, *Mr. Justice Antonin Scalia: A Renaissance of Positivism and Predictability in Constitutional Adjudication*, 51 La. L. Rev. 623, 623–25 (1991). The justice himself, however, admitted that in rare cases he might be described as a "faint-hearted" originalist. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 864 (1989). "Originalism" and "textualism" are fonts of legal formalism. *See, e.g.,* Thomas B. Nachbar, *Twenty-first Century Formalism*, 75 U. Miami L. Rev. 113, 117 (2020).

11 Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 Legal Stud. F. 7, 11 (1996).

capacity for logical thought. It is something we all have in common. The most rigorous form of logic, and therefore the most persuasive, is the syllogism."[12] Lawyers might argue about what the major premise (the applicable rule of law) is, or what the minor premise (the facts upon which that rule may act) might be, but once the premises are settled, the syllogism always works to "inevitably" provide the "correct" answer.[13] And it is a binary choice: true or false, guilty or not.[14]

The quote in the previous paragraph is actually a misleading quote, taken out of context. The sentence actually begins, "Leaving aside emotional appeals, persuasion is possible only because . . . ."[15] The authors' backhanded dismissal of emotional appeals is telling. Many judges, whether they are formalists or not, still want to be thought of as logic machines, or umpires who just call balls and strikes.[16] They want logic-based reasoning because it is easy, "objective" and hard to disagree with. But what if a legal rule creates a *standard*, rather than a rule that can be applied through a syllogism? If the legal rule for deciding child custody disputes is to award custody to serve "the best interests of the child," no syllogism will provide a clear answer because the standard requires an individual judge to resort to *post hoc* value judgments about the specific parties to the dispute in order to resolve the question.

My premise is that courts, as human institutions, must often account for the entire range of human emotions and interests.[17] Humans are complex and multi-layered; they have varying interests in various dimensions of their lives, all of which are valid and important to each individual. If courts are to serve the full range of human needs and interests, and render decisions that respect those interests and serve those needs, courts must understand the different ways in which humans engage with the world, and make meaning in their own lives. In short, the judicial

12 Antonin Scalia & Bryan Garner, Making Your Case: The Art of Persuading Judges 41 (2008); *see also* Ruggero Aldisert et al., *Logic for Law Students: How to Think Like a Lawyer*, 69 U. Pitt L. Rev. 1, 1 (2007) ("Logic is the lifeblood of American law. . . . What is thinking like a lawyer? It means employing logic to construct arguments.").

13 *Id.* at 42.

14 Of course, many scholars reject the notion that law is all about the syllogism, instead recognizing that law and legal reasoning frequently require value judgments. *See*, *e.g.*, Susan Tanner, *Rhetorical Use of the Enthymeme in Supreme Court Opinions*, 20 W. Mich. U. Cooley J. Prac. & Clinical L. 169, 169–70 (2019). Others take a middle ground. For example, Prof. Wilson Huhn argues that judicial reasoning is "syllogistic in form, [but] in substance it is evaluative." Wilson Huhn, *The Use and Limits of Syllogistic Reasoning in Briefing Cases*, 42 Santa Clara L. Rev. 813, 813–17 (2002). Still others try to reconcile syllogistic reasoning with narrative reasoning. *See* Timothy R. Zinnecker, *Syllogisms, Enthymemes and Fallacies: Mastering Secured Transactions Through Deductive Reasoning*, 26 Wayne L. Rev. 1581, 1585 (2010) ("[N]arrative analysis can be expressed as deductive syllogisms, and deductive syllogisms can be the foundation for enhanced narrative analysis.").

15 Scalia and Garner, *supra* note 12, at 41.

16 *Excerpts of Chief Justice Roberts Statement*, United States Courts, https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process (last visited Feb. 27, 2022).

17 *Accord* Keene & McMahon, *supra* note 5, at 77.

system needs to understand and honor the ways in which humans experience their world. Without such an understanding, a court's decision runs a high risk of rendering a result unsatisfactory to the litigants, and others similarly situated. More importantly, since a court derives its authority only from rendering decisions that strike most people as "fair" or "just," a court that consistently returns results that are seen as "unfair" or "unjust" will quickly lose its authority. Many cases require forms of reasoning other than pure logic in order to produce results that are based on widely-shared human values rather than personal favor for, animosity toward, or subjective opinions about, the specific litigants before the court.

Understanding about the dimensions of being human in the world (conditions I will refer to sometimes as "dimensions of being") leads to a fundamental shift in the processes inside my "black box." I graduated from law school still thinking that the black box was all about "thinking like a lawyer": applying the rules of logic to predetermined rules of law and the facts of the case. Long live the syllogism! It only took a year or two of actual practice of law to realize that there is so much more going on inside of that black box. And that the "so much more" is essential for the judicial system to reach results that meet the needs of the litigants, and society in general.

The popular notion that the law can be reduced to a series of empirical decisions or binary choices in order to become "objective" or "fair" or "neutral" is a myth (in the technical sense of what a myth is, which this article will explore in section II.E below). Empirical reasoning is not the only legitimate form of legal reasoning. Sometimes, in the pursuit of "justice," narrative reasoning (storytelling) is the only way to resolve a given case. Many, if not most, courts today do engage in such reasoning when doing so is necessary to reach a fair decision; they should not pretend otherwise.

I. The dimensions of being

A. Overview

As Linda Brown's story makes abundantly clear, binary rules and logic sometimes do not lead to "justice." Stated another way, if the goal of the judicial system is really to "seek justice," sometimes tools other than rules and logic are necessary.

That may sound like a radical claim, but in reality the legal system has long taken this necessity into account. There are many well-settled instances where the legal system resorts to narrative reasoning—where the law actually *requires* narrative reasoning—in order to serve justice. I define "justice" as a legal resolution that not only serves the needs of the

litigants, but also produces a result that is generally considered "fair" by disinterested, outside observers.

Justice Oliver Wendell Holmes was on to something like this with his notion of "can't helps":

> As I probably have said many times before, all I mean by truth is what I can't help believing—I don't know why I should assume except for practical purposes of conduct that [my] can't help has more cosmic worth than any others—I can't help preferring port to ditch-water, but I see no ground for supposing that the cosmos shares my weakness . . . . [I] demand . . . of my philosophy simply to show that I am not a fool for putting my heart into my job.[18]

Commenting on this concept, Prof. Albert Alschuler added:

> Holmes observed that "moral and aesthetic preferences" are "more or less arbitrary. . . . Do you like sugar in your coffee or don't you? . . . So as to truth." He said on another occasion, "Our tastes are finalities."[19]

Holmes' allusions to "moral and aesthetic preferences" suggest some new ways of deciding what is important, and therefore what judges must take into consideration in deciding specific cases. Unfortunately, there is no definitive list of Holmes' "can't helps," or how they can inform judicial decisionmaking.

A few decades after Holmes mused about "can't helps," another Supreme Court justice struggled with the same issue. Benjamin Cardozo wrote,

> What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the cauldron of the courts, all these ingredients enter in varying proportions.[20]

18 Albert W. Alschuler, *From Blackstone to Holmes: The Revolt Against Natural Law*, 36 Pepp. L. Rev. 491, 499 (2009) (quoting a Letter from Oliver Wendell Holmes Jr. to John Chipman Gray (Sept. 3, 1905).

19 *Id.* (citations omitted).

20 Benjamin N. Cardozo, The Nature of the Judicial Process 10 (1922).

While Cardozo was well aware of the issue, and of the probability that some of the instincts that would guide him in his work were subconscious, he held "little hope that I shall be able to state the formula which will rationalize this process for myself, much less for others." Instead, he hoped to use a form of "quantitative analysis" to help understand the judicial process.[21]

Since Justices Holmes and Cardozo were both legal formalists, their desire to reduce judicial reasoning to quantifiable, objective rules is understandable.[22] But I suggest it is not entirely possible. The law is—actually needs to be—as complex as are human affairs generally. It is art more than science.[23] Rules, while necessary, are in many cases difficult to clearly articulate, because they must have soft edges in order to be useful.

Deciding when to abandon strict adherence to the rigor of empirical reasoning and engage in other means of deciding is, as Justice Cardozo seems to acknowledge, extremely difficult. I suggest that one way of making this determination is to examine the very human interests that are at stake in the litigation. People are complex; at any given moment, they may have different, even sometimes conflicting, needs and desires. They encounter the world in a variety of roles, with a variety of interests. In short, people have a variety of ways of experiencing the world and determining from time to time what is important to them. Those ways overlap, and even shift from moment to moment. The "dimensions of being" I describe below are created or constructed by each individual through the different cultural or social norms in which the individual grows up. This article is an attempt to categorize the different interests, or "dimensions of being" human, that people may have, and then to examine how those dimensions of being appropriately influence judicial thinking.

Cognitive psychologist Jordan Peterson suggests that there are two separate, independent ways that humans encounter the world: the world can be a place to be objectively described, measured, and explained according to the laws of physics and science, or it can be a place for action. These two ways of encountering the world are not mutually exclusive, but

21 *Id.*

22 Others have attempted similar projects. For example, Prof. Wilson Huhn has attempted to quantify and categorize the various types of legal arguments that are available to an advocate. Wilson Huhn, The Five Types of Legal Argument (2d ed. 2008). The five types of arguments he catalogs (those based on text, intent, precedent, tradition, or policy analysis) are useful tools for the advocate, but they describe something different than what I am proposing here. *Id.* at 13. Prof. Huhn is describing different ways of *arguing*. I am exploring the deeper question about different ways people have of *evaluating* the world, and thereby making judgments about that world.

23 *Id.* at 818–19 ("During the nineteenth century, law was equated with science, and legal reasoning was thought to be a species of deductive logic . . . . Over the last century, however, legal scholars have rejected the identification of law with science . . . . [W]hile science is based upon and must be reconciled with objective observations of nature, law arises from value judgments.").

they are entirely different things. In short, they are two different ways of measuring what is "true."[24]

Native American traditions embrace a similar concept. In some traditions, Native science views the world as including both an "explicate" order (what one can see, measure and document, akin to Jordan's "world as a place to be described") and an "implicate" order. The implicate order is contextual; nothing exists independent of any other thing. "To take rocks, trees, planets, or stars as the primary reality would be like assuming that the vortices in a river exist in their own right and are totally independent of the flowing river itself."[25]

Peterson's dichotomy between understanding the world as a "place of action" versus a "place to be described" seems useful, but incomplete. I would describe his understanding of the world as a "place to be described" objectively as an empirical way of evaluating the world. But his concept of the world as a "place of action" seems to sweep too broadly. Specifically, *what sort of action* is contemplated? I think there are many different types of actions that are important to people, and that it is useful to categorize them. Myth, for example, is a way of experiencing the world that is meaningful for many people but is very different from other dimensions of being that might belong to Peterson's "world as a place of action" concept.

The simplest way to understand this is to attempt to categorize both the various dimensions of being human, and the metrics that individuals use to make decisions about that interest. Consider the following chart:

Fig. 1: Dimensions of being

Dimension of Being Human	Standard for Evaluating[26]
Empirical	True / False
Aesthetic	Beautiful / Ugly
Emotional	Pleasing / Hurtful
Spiritual	Righteous or Sacred / Sinful or Profane
Moral or Ethical	Just or Right / Unjust or Wrong
Mythical	Significant / Insignificant

This list is likely incomplete. Some of the categories overlap; in particular, the last three items on the list may be related to each other.

24 Jordan P. Peterson, Maps of Meaning: The Architecture of Belief 8 (1999) (emphasis in original).

25 David F. Peat, Blackfoot Physics: A Journey into the Native American Universe 140 (1994), *quoted in* Paula Gunn Allen, Pocahontas: Medicine Woman, Spy, Entrepreneur, Diplomat 113 (HarperOne 2004).

26 All of these metrics (other than the empirical "true/false" standard) should be viewed as continua, or spectrums, not as binary choices.

The list is simply my own attempt to categorize the different but very important ways in which people encounter the world.[27] The key insight here is that, for every dimension of being in the world, the individual evaluates that interest (and makes decisions based on their individual tastes) using different metrics. The metrics are keyed to the type of interest being evaluated. And, importantly, only the empirical dimension can be considered "objective;"[28] all of the others must be determined subjectively. What is beautiful or ugly, pleasing or hurtful, just or unjust, will vary from individual to individual.

In this chart, "empirical" interests refer to what might be called "scientific" or "objective" phenomena. It relates to things that can be measured or evaluated upon a set of standards that we all agree to in advance. We have objective, agreed-to standards about what distance comprises an "inch" or a "yard" or a "mile." We have agreed-upon standards for the gravitational force that is exerted by a "pound" or a "ton." We have discovered many of the laws of physics, and can employ them predictably and objectively to build things that work. Empirical knowledge can be tested against those standards and found to be "true" or "false": such-and-such distance is 5.4 inches (true) or not (false).

But empirical principles can be applied to abstractions as well. Mathematics, for example, is an abstract idea that can be evaluated according to neutral, pre-agreed standards. Once we agree to use a base-10 numbering system, we can all agree that two plus two always equals four. If instead we agree to use a base-three system, two plus two would always equal 11.

Less obviously, rules of logic might be considered "empirical," since they result in a finding of "true" or "false." Ideally, a properly constructed syllogism should render a "true" or "false" finding: once the rule (major premise) and the facts (minor premise) are determined, a conclusion that everybody can objectively agree upon should follow. Rhetors may argue about what both premises truly are, but once the premises are determined, only one logical result (true or false) should emerge.

27 Psychologist Milton Rokeach has attempted to categorize different human values in his Rokeach Value Survey. He identifies two broad categories of values, including eighteen "terminal values" (desirable goals that humans may have, such as "true friendship," "mature love," "happiness," "pleasure," and similar goals) and eighteen "instrumental values" (means to achieve those goals, including "cheerfulness," "self-control," "courage," and "logic"). Milton Rokeach, The Nature of Human Values 1–10 (1973). My listing in this chart serves a different function from what Rokeach was attempting, however. I am trying to categorize different types of values that humans embrace and which provide meaning in their lives, each seeking one or more of the "terminal values" that Rokeach identifies. *Id.*

28 Of course, the claim that "logical" or "empirical" decisions are "objective" is contestable. My point here is simply that the empirical dimension of being is the only one that makes a claim to being objective.

B. Dimensions of being and the law

By these standards, much of what courts do appears to fall into the category of "empirical" evaluation. Or, at least, it aspires to. In theory, the law can be identified using empirical, true/false tests. Was the statute properly enacted by a legislative body that had jurisdiction over the conduct in question? Was the applicable precedent decided by a majority of duly appointed or elected judges in the relevant jurisdiction? Is the language of the case law mandatory authority, *obiter dicta*, or merely persuasive authority for some other reason? What do the words of the rule (legislative or court-made) mean? Lawyers in any case may, and frequently do, argue about whether these tests are "true" or "false," but by and large those arguments proceed according to established rules of statutory interpretation, stare decisis, and other decisional rules.[29]

Likewise, a determination of the facts to which the rules will be applied proceeds using purportedly empirical rules, primarily the applicable rules of evidence. Once again, there are nearly always arguments between the lawyers as to whether or how those rules apply, but the answer is always rendered in a binary, true/false form: admissible or not.[30] Even the inferences to be drawn from those facts resemble empirical evaluation: given the proven facts that (a) the defendant brought a gun to the scene, (b) had made previous threats against the life of the victim, and (c) hid in the bushes so as to catch the victim by surprise, it is reasonable to infer (i.e. determine that it is "true") that the defendant's act of shooting the victim was premeditated.

Things get more dicey when it comes time to apply the empirically determined law to the proven facts, especially in the case of jury trials. While we might hope that a law-trained judge sitting as a finder of fact might be more dispassionate in applying the law to the facts, using empirical reasoning, that might not always be the case; judges are human, too. And what do we make of the standard jury instruction that jurors may apply their common sense to their deliberations?[31] If "common sense"

29 I acknowledge that this paragraph presents an idealized view of what judges claim to be doing. In reality, of course, words may mean very different things to different people, and judges and lawyers do frequently argue about the meaning of words, or the applicability of different rules of construction or other interpretive aids. All of those conflicts are ultimately resolved by human beings who are subject to all kinds of biases, implicit or otherwise, rendering even "empirical" reasoning much more subjective than the litigants, or the judges, might prefer.

30 Of course, many of the rules of evidence use subjective standards that cannot be resolved solely through empirical, or logical, reasoning. *See, e.g.,* Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."). What is "unfair," "confusing," "misleading," "undue," or "needless" will always be in the subjective opinion of the trial judge.

31 *See, e.g.,* Pennsylvania Suggested Standard Criminal Jury Instruction 2.03(2) (3d ed. 2019) ("When you judge the credibility and weight of a witness's testimony, you are deciding whether you believe all, part, or none of the witness's testimony and how important that testimony is. *Use your understanding of human nature and your common sense.*

can be construed to include modes of reasoning other than strict logic, it may be hard to classify a jury verdict as having been rendered empirically. But given that the verdict follows a series of empirical processes in determining both of the major inputs to the jury (law and facts), perhaps that is just the price we have to pay to be able to say that justice belongs to the people.

The legal system, quite appropriately, strives to be neutral and objective. We like to claim that we have a "government of laws, not of men."[32] Many legal rules, most importantly the doctrine of stare decisis, are designed to ensure that litigants in similar situations are treated similarly. Thinking of the law in empirical terms, and striving to apply logical thinking, is the principal way we can approach the ideal of the impartial judge applying neutral rules of law in fair and consistent ways.

Isn't that "justice?"

C. Justice or logic?

Is it justice? Not to the Linda Browns of the world. Sometimes the rules, logically determined as *Plessy v. Ferguson* was (or purported to be), are not fair. Sometimes conditions in the world evolve as humans learn new things and as society changes. The rules of logic and empirical analysis have no safety valve, no override switch, for course correction.

More fundamentally, the end result of an empirical process is not "justice." It is "an answer." The trial court's resolution of *Brown v. Board of Education*, i.e. that Linda was not allowed to attend the all-white school that her playmates attended, was an answer, compelled by the then-existing rules of the law. It was not justice.

Insisting that the law focus solely on binary rules and uniformity would require the legal system to ignore major—maybe even the majority of—human needs. Man does not live by logic alone. As the chart in Figure 1, above, shows, there are many ways in which humans engage the world. All of those ways are important to the human existence. If the law does not take account of those different "dimensions of being" human, the law is not serving the complete humans it was created to serve.

Observe each witness as he or she testifies. Be alert for anything in the witness's own testimony or behavior or for anything in the other evidence that might help you judge the truthfulness, accuracy, and weight of his or her testimony.") (emphasis supplied).

32 This phrase is often attributed to John Adams, writing before and during the Revolutionary War. *See* John D. Bessler, *The Italian Enlightenment and the American Revolution: Cesare Beccaria's Forgotten Influence on American Law*, 37 Mitchell Hamline L.J. Pub. Pol'y & Prac. 1, 69–70, 164–65 (2016). The phrase also appears in the Massachusetts Constitution of 1780, written by a special convention to which John Adams was a delegate and the author of the first draft of the constitution. Const. of the Commonwealth of Mass. art. XXX (stating that the state government was "a government of laws and not of men").

II. The non-empirical dimensions of being

A. The aesthetic dimension

A superficial review of the non-empirical dimensions of being identified in Figure 1 might lead one to conclude that the law has no business taking account of those different dimensions. Take the "aesthetic" dimension. It is measured on the scale of "beautiful" or "ugly." It does not yield to empirical, true/false testing. One cannot say that "that dance was true" or "that piece of music was false." One measures beauty by very subjective, individual metrics. What is aesthetically pleasing to one person may be undesirable or unpleasant to another, and the law has no business making judgments about which reaction to a work of art is "right" or "wrong."

The problem is that humans, in all their wonderful diversity, inevitably come in conflict with each other, and it is the job of the courts to resolve those disputes. And when the disputes involve dimensions of being other than empirical ones, the court can (and often is) dragged into conflicts involving other dimensions of being. An example:

Example 3:

A local sculptor believes that human sexuality is not only normal but beautiful. He thinks depictions of graphic violence, murder, gore and mayhem on television should be considered "pornographic," not images of human beings engaged in loving, pleasurable, sexual relationships. He therefore places a statue of a naked adult man and an adult woman copulating on his front lawn, which sits on a prominent street corner. His neighbors object.

Resolving this dispute will force the court to confront several questions that reside in the realm of the aesthetic dimension. What is pornography? Is it "I know it when I see it,"[33] or is there some empirical test that can be deployed to reach a more uniform result? What gives a court the power to enforce "contemporary community standards"[34] and overrule an artist's sincerely held belief as to what beauty is? How does a court empirically determine what those "community standards" even are? Which members of the community have a say in that determination?

Of course, this example might be considered an "easy case." But that does not change the fact that in order to resolve the dispute, the court must evaluate claims based on non-empirical dimensions of being.

33 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Potter, J., concurring).

34 Miller v. California, 413 U.S. 15, 15 (1973).

B. The emotional dimension

Next on my list of dimensions of being is the emotional dimension. While the reaction of some (many?) may be to assert that courts must avoid emotional reasoning and focus entirely on the more dispassionate empirical forms of reasoning, any lawyer practicing in the field of domestic relations will tell you that that is clearly impossible. No judge can resolve a contest in which the guiding legal rule is "the best interest of the child" without diving deep into the emotional content of the case. The family ties that will be directly affected by whatever decision the judge makes are purely emotional; even if the judge successfully keeps his or her own emotional responses out of the decision (a virtual impossibility), the judge must take into account the emotional damage that the decision will inevitably inflict on the family members.

But emotional interests (and emotional reasoning) are not just limited to domestic relations cases. They permeate the law in many ways.

Take any personal injury case, for example. One of the elements of any such case is "injury"; that is, the culpable conduct of the defendant must have injured the plaintiff. In many cases, the injury is either partially or entirely psychic: injury to reputation, to one's sense of self worth or tranquility or safety. Even in cases involving only physical harm, reducing that harm to a monetary value requires reference to non-empirical standards. There is no rational computer, no empirical formula, that can determine the monetary value of any person's "pain and suffering."

Or consider the "reasonable person" standard. This supposedly "objective" standard asks the jury to consider how a fictional reasonable person would react in the situation presented by the evidence. How is a jury to determine what is reasonable? Take a self-defense claim: was the defendant's fear of severe bodily injury or death reasonable so as to justify his use of lethal force? A trier of fact must evaluate their own emotional response of "fear" in order to resolve that question.

Criminal sentencing is another example. As much as we want similar defendants to be treated in similar, unbiased ways, the multiple and sometimes conflicting goals of the criminal justice system render that aspiration a practical impossibility. Courts and scholars have identified at least four possible goals of imposing a sentence: (a) punishment of the offender (a/k/a "retribution"), (b) deterring other individuals from committing the same crime, (c) protecting the public from future crimes that the defendant might be likely to commit, and (d) rehabilitating the defendant so that he does not offend again in the future.[35] How a judge

35 At least this is what I learned in first-year Criminal Law. *See, e.g.,* Aaron Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 Emory L. J. 557, 567 (2003). These four objectives are even

weighs these sometimes contradictory goals is exceedingly difficult, and impossible to achieve without reference to emotional dimensions. Has the defendant expressed remorse at his conduct? Does the judge think that expression is sincere? Is this a high-profile case in which there may be public reaction (approving or not) to the sentence imposed? Will a sentence really "send a message" to others who may be tempted to commit the same or similar crimes? How likely is the defendant in front of the judge to re-offend? Can he or she be rehabilitated?

I don't intend this discussion to be a criticism, in any way, of the criminal justice system or sentencing decisions. I don't think referencing emotional dimensions of being, in either the civil or criminal law contexts, is problematic. I think it is necessary and appropriate. If the courts did not embrace this dimension, they would lose a lot of their credibility with the society they exist to serve, because humans are not purely (or even primarily) logical beings. All of the different dimensions of being are important and valid to human beings in their respective realms; a court system that does not take that fact into account is not serving human needs.

C. The spiritual dimension

Like other dimensions of being, the "spiritual" dimension cannot be measured by deciding which beliefs are true and which are false. There is no logical or empirical way to determine, for example, whether one's soul ascends to heaven after death, or is reincarnated into another body, or does something else. (Or, for that matter, whether any person even has a "soul.") Yet an individual's sincerely held religious beliefs can be of great importance in their lives, and in a perfect world no court should be allowed to dictate to any person what he or she should believe. But this world is anything but perfect, and courts may on occasion find themselves entangled in disputes centered on the spiritual dimension.

Example 4:

A radical religious sect, calling itself the Disciples of Joshua, believe that sex workers have disobeyed God's commands and therefore have fallen into God's disfavor. Therefore, just as God commanded Joshua to remove the Canaanites from the Promised Land by force, even by killing them, the Disciples of Joshua believe it is their holy mission to kill sex workers. When a member of the sect is charged with murder, he raises the Biblical story of Joshua and the conquest of Canaan as a justification defense.

codified in the federal sentencing guidelines statute as factors a federal judge must consider in imposing a sentence. 18 U.S.C. § 3553(a)(2). More recent scholarship, however, suggests that retribution (sometimes also referred to as "retributive justice") has gained an upper hand and has emerged as the dominant justification for imposing criminal sentences. *See, e.g.,* Michael T. Cahill, *Retributive Justice in the Real World*, 85 Wash. U. L. Rev. 815 (2007).

This example, of course, will get the court entangled in the spiritual dimension of being. Assuming the defendant sincerely holds the belief that he is doing God's will by ridding the world of sex workers, why must that belief be subordinated to the needs of the wider community to safety?

Here is a non-hypothetical example:

Example 5:

> The Native American Church uses peyote, a hallucinogenic drug, for sacramental purposes. Two members of that church were employees of a private drug rehabilitation company. When they were fired from their jobs for ingesting peyote during a religious ceremony, they applied for unemployment compensation. The state denied them unemployment compensation on the grounds that they had committed work-related misconduct.

These are the operative facts of *Department of Human Resources of Oregon v. Smith*.[36] The First Amendment guarantees individuals the right to the free exercise of their religion. But in the secular world of employment law, is the use of drugs which are illegal for everybody else "misconduct" for two workers in a drug rehabilitation program? Which interest prevails? No court can resolve that balancing test without attempting to understand the spiritual dimension of being that motivated the Native American plaintiffs.

Another example where the law must take account of the spiritual dimension of being are the abortion rights cases. Deciding when life begins can only be resolved through an analysis of spiritual beliefs. Science and logic can approximate when a fetus is likely to be "viable" outside of the mother's womb, but that does not attempt to address when the fetus attains a "life" that the law must protect, or at least balance against the rights of the mother.

The spiritual dimension of being is related to, but I think distinct from, the last two ways on my list: the "moral/ethical" dimension, and the "mythical" dimension. Religious principles often relate to morals and ethics, but there are moral and ethical questions that exist outside of the realm of religion. The same is true for myth; while religious texts often rely on myths to make their points, there are myths outside the realm of religion too. I shall therefore treat those dimensions of being separately.

36 494 U.S. 872, 872–80 (1990). The Supreme Court ruled that the denial of unemployment compensation was not an infringement of the appellants' First Amendment right to the free exercise of their religion.

D. The moral/ethical dimension

1. Explicit moral standards

Digging deeper into my list of "dimensions of being," we get much closer to dimensions that seem important to the law. Take the "moral/ethical" dimension, for example. While courts are often wary of attempts to "legislate morals,"[37] legislatures and courts often do base laws on notions of moral correctness. To name just a few examples, many jurisdictions expressly include misconduct involving "moral turpitude" as a ground for disbarring lawyers,[38] revoking the licenses of teachers,[39] revoking a physician's license to practice medicine,[40] or suspending a state official who has been charged with a crime involving "moral turpitude."[41] Alabama allows for the impeachment of trial witnesses if the witness has been convicted of a "crime involving moral turpitude."[42] What, exactly, constitutes "moral turpitude" is seldom defined but often litigated.[43] And, of course, many laws exist to require public officials to adhere to certain ethical standards, the violation of which in some cases is a crime[44] and in other cases can result in civil penalties or forfeitures.[45]

In some cases, courts attempt to reduce these decisions back to easily enforced, binary tests. For example, the Fifth Circuit in recent years has been faced with numerous cases trying to determine which immigrants should be allowed to remain residents of the United States in the face of a statute allowing deportation of resident aliens convicted of a "crime involving moral turpitude." Since the statute does not define "moral turpitude," the court has deferred to the Board of Immigration Appeals (the "BIA") as it struggles to enforce that law uniformly:

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37 *See, e.g.,* Jack Daniel Distillery, Inc. v. Hoffman Distilling Co., 190 F. Supp. 841, 843 (W.D. Ky. 1960) ("It is the continuance of these imitating tactics that the plaintiff seeks to enjoin, but regardless of how disapproving the courts may be of such practices, they cannot legislate the morals of the market place."); Lawrence v. Texas, 539 U.S. 558, 560 (2003) (declaring criminalization of homosexual conduct unconstitutional because "this Court's obligation is to define the liberty of all, not to mandate its own moral code").

38 *See, e.g.,* W. Va. Code § 30-2-6 (2022) (requiring the revocation or suspension of an attorney's license to practice law upon conviction of a felony "or any other crime involving moral turpitude"); Cal. Bus. & Prof. Code § 6101 (2022).

39 *See, e.g.,* 24 P.S. § 2070.9b (requiring the state Department of Education to revoke the teaching certificate of any teacher convicted of "a crime involving moral turpitude").

40 Lorenz v. Bd. of Med. Exam'rs, 298 P.2d 537 (Cal. 1956).

41 So. Carolina Const. art. VI, § 8.

42 Ala. Code § 12-21-162 (2022).

43 *See, e.g.,* Esparza-Rodriguez v. Holder, 699 F.3d 821, 826 (5th Cir. 2012) ("Because the INA does not define the term 'moral turpitude' and legislative history does not clarify which crimes Congress intended to characterize as turpitudinous, we have concluded that 'the interpretation of this provision [was left] to the BIA and interpretation of its application to state and federal laws [was left] to the federal courts.' [citation omitted]").

44 *See, e.g.,* 18 U.S.C. § 201 (bribery of public officials and witnesses defined as a crime).

45 *See, e.g.,* 5 U.S.C. § 1505 (violation of the Hatch Act may warrant the removal of a public official from office).

> The BIA has construed "moral turpitude" to refer to conduct that is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." *In re Sejas*, 24 I. & N. Dec. 236, 237 (BIA 2007) (internal quotation marks and citation omitted); *see also Garcia–Maldonado v. Gonzales*, 491 F.3d 284, 288 (5th Cir.2007) ("Moral turpitude refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved. . . . .").[46]

But note that even this attempt to "objectify" the test and return it to a predictable, empirical "true/false" test ultimately fails, because the tests all return to the inherently subjective evaluation of "accepted rules of morality" in the eyes of "society in general," or what might "shock the public conscience as being inherently base, vile or depraved." Reference to the subjective moral dimension is inescapable.

2. The law of equity

Even where "morals" are not specifically invoked in the legal rule, there is a whole world of cases in which "justice" is the goal and can only be decided by referencing the moral or ethical dimension. What, for example, does one make of the entire field of equity jurisprudence?

Think about this for just a moment. When does "equity" kick in? What is its objective?

The first, and arguably most important, element of an appeal to the equity side of the court is that the plaintiff "has no adequate remedy at law."[47] Remedies at law are generally just money damages, while equitable remedies include a wide range of positive relief such as restitution, injunctive relief, and specific performance.

While the law side of the court is very rule-bound and logical, the equity side is less so.[48] A plaintiff can't even open the door to the court of equity unless he can prove that the law door doesn't get him where he needs to be. Who decides where he "needs to be," though? In whose eyes is a legal remedy "adequate" or not? Many definitions of what an "adequate remedy at law" is refer explicitly to the standard of "justice";[49]

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46 Cisneros-Guerrerro v. Holder, 774. F.3d 1056 (5th Cir. 2018).

47 *See, e.g.,* St. Joe Minerals Corp. v. Goddard, 324 A.2d 800, 802 (Pa. Commw. Ct. 1974) ("[T]here can be no adequate remedy at law unless the remedy at law is presently available in terms of both timeliness and in terms of the competency of the tribunal to resolve all of the issues in the case. *In effect, the plaintiff must demonstrate a sense of urgency for his relief before equity will assume jurisdiction where a remedy at law does exist.*").

48 My Remedies professor at the University of Pittsburgh School of Law, Francis Holahan, once told us that "equity was the free agent of the law, until it came down with a bad case of *stare decisis.*"

49 *See, e.g.,* Hancock v. Bradshaw, 350 S.W.2d 955, 957 (Tex. Civ. App. 1961) ("[a]dequate remedy at law preventing relief by injunction means a remedy which is plain and complete, and *as practical and efficient to the end of justice* and its prompt administration as a remedy in equity") (emphasis supplied); Royal Peacock Social Club, Inc., v. City of Atlanta, 177 S.E.2d

that is the metric by which one evaluates a claim sounding in the "moral or ethical" dimension of being. Other definitions refer to vague standards like "complete," "beneficial," "efficient" or similar concepts;[50] some courts employ the rather circular definition that a plaintiff lacks an adequate remedy at law when "[money] damages will not adequately compensate the plaintiff for the injury or threatened injury."[51] All of these concepts, however, are entirely subjective; none of these "rules" can be resolved by a simple binary choice between "true" and "false." They require reference to moral or ethical standards to resolve.

The entire goal of equity jurisprudence is to "do justice."[52] Not logic—"justice." It is as if the courts are saying "first, apply the rules of law and logic to see what the empirical result is. If that doesn't resolve the case in a satisfactory way, then you can apply the standards of equity to get to the real goal of justice."

E. The mythical dimension

The final dimension of being listed in Figure 1 is the "mythical" dimension.

A thorough exploration of this complex topic is beyond the scope of this article. I include it in my list because it is a topic worthy of much greater depth than I can provide here. The basic premise is that many people encounter the world through myths that are significant to them, even though the myths are most likely not grounded in empirical truth. Because myths provide meaning and "significance" to many people, they are important influences on the development of law.

Legal scholars have not yet fully explored the importance of myth in the law. There are some beginnings; Linda Edwards, for example, has

664 (Ga. 1970) (same); Futrell v. Shadoan, 828 S.W.2d 649, 651 (Ky. 1992) (equitable relief is available "only when the situation is so exceptional that there is no other adequate remedy at law to prevent a miscarriage of justice"); Buchanan v. Buchanan, 6 S.E.2d 612, 620 (Va. 1940) ("Equity has jurisdiction in cases of recognized rights, when a plain, adequate and complete remedy cannot be had in the courts of common law. The remedy must be plain; for if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate, for if at law it falls short of what a party is entitled to, that founds a jurisdiction in equity. And it must be complete; that is, *it must attain the full end and justice of the case*. It must reach the whole mischief, and secure the whole right of the party in a perfect manner.") (emphasis supplied).

50 State ex rel. Carter v. Schotten, 637 N.E.2d 306, 308 (Ohio 1994) ("In order for there to be an adequate remedy at law, the remedy must be complete, beneficial, and speedy."); *In re Marriage of Slomka and Lenehan-Slomka*, 922 N.E.2d 36, 42 (Ill. App. 2009) ("An adequate remedy at law must be 'concise, complete, and provide the same practical and efficient resolution as the equitable remedy would provide.'").

51 City of Kansas City v. New York-Kansas Bldg. Assocs., L.P., 96 S.W.3d 846, 855 (Mo. Ct. App. 2002).

52 Bank of Haw. v. Davis Radio Sales & Serv., Inc., 727 P.2d 419, 427 (Haw. Ct. App. 1986) ("[e]quity jurisprudence is not bound by strict rules of law, but can mold its decree 'to do justice'"); Tkachik v. Mandeville, 790 N.W.2d 260, 265 (Mich. 2010) ("[e]quity jurisprudence 'mold[s] its decrees to do justice amid all the vicissitudes and intricacies of life'"); Holmes Reg'l Med. Ctr., Inc. v. Allstate Ins. Co., 225 So.3d 780, 783 (Fla. 2017) ("equity favors justice and fairness over formalistic legal rules"); Manning v. Nev. State Bd. of Acct., 673 P.2d 494, 495 (Nev. 1983) ("the overriding goal of equity [is] to achieve justice").

examined the "myth of redemptive violence" and how it has influenced the law of war, specifically the case of *Hamdi v. Rumsfeld*.[53] Other scholars have approached the subject but have not closely examined how myth works in the human psyche, or how it wiggles its way into the law. Thus, while Robert Cover talks about a "nomos" (a "normative universe"), referring on occasion to myths, his work is only adjacent to the systematic study of myth and the law.[54]

A simple Westlaw or Lexis search for law review articles in which the word "myth" appears in the same sentence as "law" reveals that the word "myth" is almost universally being used as a synonym for "misconception," "misunderstanding," "falsehood" or similar concepts.[55] The Oxford English Dictionary seemed to agree, defining "myth" as "a widespread but untrue or erroneous story or belief; a widely held misconception; a misrepresentation of the truth. Also: something existing only in myth; a fictitious or imaginary person or thing."[56] But such treatment does not recognize that myths are a different "dimension" that many people take meaning from, and which have profound impacts on their lives. And myths do, sometimes, influence the law.

Noted psychologist Rollo May argues that myth is not just an important way in which people make meaning; it is essential to their mental well being. May defines myth as "a way of making sense in a senseless world. Myths are narrative patterns that give significance to our existence." He compares myths to the "beams of a house: not exposed to outside view, they are the structure which holds the house together so people can live in it."[57]

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53 Linda H. Edwards, *Where Do the Prophets Stand? Hamdi, Myth, and the Master's Tools*, 13 Conn. Pub. Int'l. L. J. 43 (2013). In her article, she explores how the Fourth Circuit's decision reflects (perhaps unconscious) application of the Myth of Redemptive Violence, a myth in which the law and legal rules are seen as ineffectual and that only "good" violence, in the nature of a hero acting outside of legal norms, can achieve the "right" result. Hamdi v. Rumsfeld, 316 F.3d. 450, 459–60 (4th Cir. 2003). Ultimately, however, the Supreme Court reversed, being persuaded instead by the story of the American Revolution and freedom. Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004).

54 Robert M. Cover, Nomos *and Narrative*, 97 Harv. L. Rev. 4 (1983).

55 The concept of myth is commonly used in critical race theory analysis. *See, e.g.,* Athornia Steele, *The Myth of a Colorblind Nation: An Affirmation of Professor Derrick Bell's Insight into the Permanence of Racism in Society*, 22 Cap. U. L. Rev. 589 (1993); Cedric Merlin Powell, *Schools, Rhetorical Neutrality, and the Failure of, the Colorblind Equal Protection Clause*, 10 Rutgers Race & L. Rev. 362 (2008); David A. Strauss, *The Myth of Colorblindness*, 1986 Sup. Ct. Rev. 99 (1986); Richard Delgado, *On Taking Back Our Civil Rights Promises: When Equality Doesn't Compute*, 1989 Wis. L. Rev. 579 (1989). But it appears in many other contexts too. *See, e.g.,* John Lande, *Shifting the Focus from the Myth of "The Vanishing Trial" to Complex Conflict Management Systems, or I Learned Almost Everything I Need to Know about Conflict Resolution from Marc Galanter*, 6 Cardozo J. Conflict Resol. 191 (2005); Hannah Brenner et al., *Bars to Justice: the Impact of Rape Myths on Women in Prison*, 17 Geo. J. Gender & L. 521 (2016). Still, most of these articles tend to throw up their hands, say something like "myth is really hard to define," and proceed to treat myth as simple falsehoods or misconceptions.

56 *Myth*, Oxford English Dictionary (3d ed. 2000).

57 Rollo May, The Cry for Myth 15 (1991).

Historian James Oliver Robertson writes that "[m]yths are stories; they are attitudes extracted from stories; they are 'the way things are' as people in a particular society believe them to be; and they are the models people refer to when they try to understand their world and its behavior."[58] He adds that myths help people explain contradictions, conflicts, and "confusing realities" in the world. They are often passed down from generation to generation "by an unconscious, non-rational process" that is resistant to change. And thus, the myths persist.[59]

My own definition of "myth" recognizes that myths are important dimensions of being human, and that they have powerful influences over people. Here is my expanded definition:

> A myth is an often-repeated story that attempts to explain some moral value or to explain something beyond the comprehension of humans. Although the story is not necessarily grounded in historical or scientific fact, it is regarded by a social group as a true statement of the group's moral or other values, or is significant to that group in some important way.[60]

There are different types of myths, too, some of which are more relevant to the legal system than others. For example, religious literature from all faiths is full of myths: origin myths, resurrection myths, etc. These all fit my definition of myth in that while they cannot be empirically proven as "true" or "false," they do present ideas and values that are significant to those who adhere to the myths. Adjudicating the veracity of such myths is far beyond the competence or responsibility of the judicial system; however, courts should be attentive to how such myths may inform or be incorporated into legal rules or decisionmaking processes, even subconsciously.

The legal system has its useful myths too. What are "legal fictions" if not myths? For example, the notion that a corporation is a "person" may not have a well-articulated story behind it, but it is at least a metaphor that attempts to explain something beyond the comprehension of humans. And it has significance in that it allows corporations to accumulate capital, shield investors from personal liability, own property, and do many things useful for our economic lives.[61]

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58 James Oliver Robertson, American Myth, American Reality xv (1980).

59 *Id.*

60 In coming up with this definition, I have borrowed liberally from Chiara Bottici and her book *A Philosophy of Political Myth* (Cambridge U. Press 2007), although I have modified it in some respects based on additional sources, including May's formulation above.

61 *See* Kenneth Chestek, *Of Metaphors and Magic Wands: Are Corporations Really People?*, 89 Miss. L. J. 1 (2019).

Another type of myth is the "political myth." Prof. Chiara Bottici defines a "political myth" as "the work on a common narrative by which the members of a social group (or society) make significance of their political experiences and deeds."[62] A political myth, she writes, is related to, but distinct from an ideology. Ideologies are "systems of ideas that reveal a universal truth."[63] Essentially, myth can be used as a tool to further a larger ideology. Ideologies, sometimes communicated through political myths, can, and often do, influence the law, most obviously in enacted law but also, in less obvious ways, in decisional law.

Let me provide two brief examples. I have identified what I am calling the "Myth of Divine Right": the notion that God favors one society over all others, with the result that the favored society is entitled to, or maybe even required to, spread its values over all other, less-favored societies. That myth, in my view, derives from the Biblical creation story, in which God created the earth, then humans, and then gave "dominion" over all the earth to the humans.[64] But despite its origins as a religious myth, the marriage of church and state in medieval times transformed it into a political myth. Thus, the Myth of Divine Right led 15th and 16th century kings and emperors to feel entitled to travel to North America and conquer the natives they encountered there, seeking religious blessings for their deeds after the fact from the corrupt popes of the era.[65] These papal pronouncements soon formed the basis of what became known as the Doctrine of Discovery, a Euro-centric notion that the first Christian king to "discover" lands not ruled by any other Christian prince gained certain rights over the natives of that land, and perhaps more importantly the right to exclude other European powers from interfering with those rights.[66] The Doctrine of Discovery eventually led to the idea of Manifest Destiny, the obnoxious idea that Europeans were destined by Providence to "overspread" the entire North American continent, dispossessing the

62 Bottici, *supra* note 60, at 178.

63 *Id.* at 186 (citing R. Aron, The Opium of the Intellectuals (2001)).

64 And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.

So God created man in his own image, in the image of God created he him; male and female created he them.

And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.

Genesis 1:26–28 (King James Version).

65 Pope Alexander VI's bull *Inter Caetera*, one of three bulls issued to sanctify Christopher Columbus' conquest of some Caribbean islands, was issued on May 3, 1493, *after* Columbus returned to Spain from his famous 1492 "Voyage of Discovery." Kirkpatrick Sale, Christopher Columbus and the Conquest of Paradise 124–25 (2006).

66 This is a simplification of a very controversial and complex legal theory. For a fuller explanation of how the Doctrine of Discovery works, see Robert J. Miller, Native America, Discovered and Conquered: Thomas Jefferson, Lewis & Clark, and Manifest Destiny 3–5 (Praeger 2006).

indigenous peoples in the process.[67] Manifest Destiny and the conquest of the American West is, perhaps, the most perfect example of the Myth of Divine Right in American history.

But the larger point here is that the Myth of Divine Right, which led to the Doctrine of Discovery, has found its way into American law. It made its first appearance even prior to the articulation of the concept of Manifest Destiny in the famous case *Johnson v. M'Intosh*,[68] which involved a land dispute between two Euro-Americans. Johnson claimed that he had title to the land based on a deed granted to him by an Indian tribe, while M'Intosh claimed title through a patent issued to him by the U.S. government. Since one of the key tenets of the Doctrine of Discovery is that the European power that first "discovered" the land held the exclusive right to negotiate for the purchase of land from the indigenous population, the title of the United States to the land was based upon the Doctrine of Discovery. The Supreme Court therefore had to resolve what the legal impact of that doctrine was. It upheld M'Intosh's claim of title through the United States, specifically invoking the European doctrine of "discovery."

The Doctrine of Discovery, which *Johnson v. M'Intosh* refers to as "the foundation of title, in European nations,"[69] remains the law of the United States. It has been specifically invoked as recently as 2005 in a majority opinion by Ruth Bader Ginsburg, which held that land originally occupied by the Oneida Indian Nation but which had been sold to the United States in 1805, did not become tax-exempt property as part of the Oneida reservation when the Oneidas re-purchased the land in 1997 and 1998.[70]

Another example of a political myth is what I call the Myth of the Free Market. This myth holds that government regulations only "distort" the market which, if left unregulated, would automatically self-correct to insure maximum freedom for all actors. This myth even uses mystical images of "invisible hands" that ensure this freedom for all of us.[71] This

67 The phrase "manifest destiny" is commonly attributed to a publisher named John L. O'Sullivan, who wrote an editorial in his newspaper the *United States Magazine and Democratic Review* in July 1845:

> To state the truth at once in its neglected simplicity, our claim [to Oregon] is by the right of our manifest destiny to overspread and possess the whole of the continent which Providence has given us for the development of the great experiment of liberty and federated self-government entrusted to us.

Will Bagley, So Rugged and Mountainous: Blazing the Trails to Oregon and California, 1812–1848 251 (2010); *see also* Anders Stephanson, Manifest Destiny: American Expansion and the Empire of Right 42 (1995).

68 21 U.S. 543 (1823).

69 *Id.* at 567.

70 City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 203 n.1 (2005) ("'Under the 'doctrine of discovery,' . . . 'fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States.'") (citations omitted).

71 The image of the "invisible hand" is most often attributed to Scottish philosopher Adam Smith:

> The rich only select from the heap what is most precious and agreeable. . . . [I]n spite of their natural selfishness and rapacity, though they mean only their own conveniency, though the sole end which they propose from the labours of all the thousands, whom they employ be the gratification of their own vain and insatiable desires, they

myth ignores the fact that markets need rules in order to function at all, and that therefore whoever creates the rules has the power to control the market. Yet legislatures legislate, and judges rule, as if there is such a thing as a "free market."

The key feature of the mythical dimension is not that a myth is a false story that people mistakenly believe. It is that adherents to the myth find "significance" in the myth.[72] German philosopher Hans Blumenberg devotes an entire chapter to the topic of "significance" in his book *Work on Myth*. He rhetorically asks how myth can compete with other ways of looking at the world and concludes that it is the quality of "significance" that gives myth its power. He says that "significance . . . can be explained but cannot, in the strict sense, be defined." He says that "significance" has the "status of reality," which is different from "empirical demonstrability."[73]

Thus, those who believe in the Myth of Divine Right find significance in the supposition that God favors them. Those who believed in Manifest Destiny believed that "Providence" wanted them to have the land they were "overspreading." Those who believe in the Myth of the Free Market are comforted by the idea that they are somehow "free" because of the lack of government intrusions into their private lives.

Because "significance" is so important and so powerful, adherents to specific myths are loathe to give them up easily; moreover, it is easy to see how such myths are easily incorporated into legal doctrines. Legal scholars would do well to undertake a serious study of how myth works, how it embeds itself in the law, and thereby learn how to counteract its often-ill effects on the law, by asking not whether the identified myth is "true," but why it appears to be "significant" to its adherents.

III. Empirical reasoning vs. narrative reasoning and storytelling

To the partial lists of myths in the previous section, I offer another: the Myth of Empirical Reasoning. This myth seeks to reduce all legal

divide with the poor the produce of all their improvements. *They are led by an invisible hand* to make nearly the same distribution of the necessaries of life which would have been made had the earth been divided into equal portions among all its inhabitants; and thus, without intending it, without knowing it, advance the interest of the society.

Adam Smith, The Theory of Moral Sentiments 304 (1759) (emphasis supplied); *see also* Robin Paul Malloy, *Adam Smith in the Courts of the United States*, 56 Loyola L. Rev. 33 (2010). However, some scholars argue that Smith probably didn't invest much meaning into his metaphor, and that its elevation in the mid-20th century to a high principle of economics is probably unjustified. Gavin Kennedy, *Adam Smith and the Invisible Hand: From Metaphor to Myth*, 6 Econ. J. Watch 239 (2009).

72 Bottici, *supra* note 60, at 123.

73 Hans Blumenberg, Work on Myth 67–68 (1985).

decisionmaking to binary, true/false tests, in an attempt to infuse the law with "certainty" and "objectivity." While most serious legal scholars and lawyers clearly understand that this myth is false, and that few legal decisions can be reduced to binary choices, the myth persists in public discourse. Judges who rely on rules and tests that require *post hoc* application of values (as many legal rules do) are accused of being "activist judges," at least when the accuser disagrees with the result.

My response to such accusations is that, in those cases, the judges are appropriately addressing dimensions of being human that require ways other than empirical reasoning to decide "adequately." Different types of disputes demand different types of reasoning to resolve. While empirical problems might yield to a strict regime of logical analysis and scientific proof, none of the other dimensions of being will. There is no "logical" way a court can decide which parent would make a "better" custodial parent of a minor child, for example. Nor is there a logical way to determine which sentencing goal is more important in a particular case; two defendants convicted of the identical crime might legitimately receive different sentences because of their very different individual attitudes and circumstances.

Empirical reasoning and logic work fine when the case can be confined to the realm of empirical facts—and at least some issues in a surprisingly large number of "easy" cases can be decided on that basis. In every other type of case, the only way to resolve the dispute is through narrative reasoning. Storytelling matters.

A short and incomplete list of the kinds of cases where storytelling is essential to a court's reasoning might include:

1. Equity cases
2. Domestic relations cases (including equitable distribution of property, child custody decisions, and the like)
3. Sentencing decisions in criminal cases
4. Impact litigation, or efforts to change existing law
5. Tort cases seeking relief for psychic injuries
6. Many damage calculations in tort cases (wrongful death damages, pain and suffering calculations, consortium claims, etc.)
7. Any legal rule relying on a balancing test (since the relative weight of one interest over any other is a subjective matter)

Relying on something as subjective and indistinct as "narrative reasoning" will likely feel unsettling to some. It seems to invite bias and judicial hunches and motivated reasoning. It feels unpredictable and unstable, not "neutral" or "unbiased."

It is true that narrative reasoning puts a lot of trust in the judges doing the reasoning. It gives them wide discretion, which leads to power. But is the solution to that problem depriving judges of their discretion and attempting to confine them strictly to cases involving only claims based on empirical disputes? To try to reduce every decision to an objective, true/false binary choice? To do so would lead to great injustice in the many types of cases, described above, that require other forms of reasoning. Elevating hard-edged rules over justice will inevitably lead to injustice at least some of the time.

Narrative reasoning is not wholly untethered from rationality or manageable standards. Trial courts are often said to have wide discretion in many areas, including the types of decisions we have discussed in this article. And their decisions are not unreviewable; the "abuse of discretion" standard of review exists precisely to ensure that large deviations from social norms can be corrected on appeal. And scholars have begun to articulate verbal standards that could be useful in reviewing cases. Chris Rideout, for example, refers to the concept of "narrative fidelity" as a standard that might help a court evaluate a narrative argument. He writes that "narrative fidelity . . . has to do with 'whether or not the stories they experience ring true with the stories they know to be true in their lives.'"[74]

Another way of thinking about "narrative fidelity" is the colloquial expression "does it pass the laugh test?" Take for example a story currently circulating in some social groups that "a group of Satan-worshiping elites who run a child sex ring are trying to control our politics and media."[75] For most Americans, this conspiracy theory does not "pass the laugh test"—it lacks narrative fidelity. It does not ring true with stories we know to be true about our political leaders. But less extreme examples of narrative fidelity come into legal reasoning on a daily basis. Every time a juror evaluates the credibility of a witness, that juror is using (among other things) the metric of narrative fidelity: does the witness's testimony "ring true?"

It is one thing to acknowledge the validity, even the necessity at times, of narrative reasoning in the decisionmaking process. It is quite another to allow space for narrative reasoning to occur in ways that are not perceived by litigants, or the general public, as "biased" judging. There are several ways to accomplish this.

74 J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 Legal Writing 53 (2008).

75 Kevin Roose, *What Is QAnon, the Viral Pro-Trump Conspiracy Theory?*, N.Y. Times, June 15, 2021, https://www.nytimes.com/article/what-is-qanon.html.

A. Selection of judges

The first point to be made is that, rather than constrain the judges in how they operate, we need to select good judges, regardless of whether they are elected or appointed. By "good judges," I mean judges who understand the many "dimensions of being" that are important to the human experience, and therefore understand their roles in the judicial system.[76] Judges with good instincts for narrative fidelity.

In 2005, President George W. Bush nominated Judge John G. Roberts to be Chief Justice of the United States Supreme Court. A young Senator from Illinois named Barack Obama voted against that nomination, saying in part:

> [W]hile adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court, so that both a Scalia and a Ginsburg will arrive at the same place most of the time on those 95 percent of the cases—what matters on the Supreme Court is those 5 percent of cases that are truly difficult. In those cases, adherence to precedent and rules of construction and interpretation will only get you through the 25th mile of the marathon. That last mile can only be determined on the basis of one's deepest values, one's core concerns, one's broader perspectives on how the world works, and the depth and breadth of one's empathy. . . . [I]n those difficult cases, the critical ingredient is supplied by what is in the judge's heart.[77]

In 2009, then-President Obama stirred up a political hornet's nest when he appointed Sonia Sotomayor to the U.S. Supreme Court. Following up on his 2005 remarks upon the confirmation of Chief Justice Roberts, President Obama said that he wanted to appoint a judge who displayed "empathy . . . for people's hopes and struggles."[78] Upon making his nomination, he praised not only Sotomayor's life history of rising from a modest background to getting an Ivy League education and becoming an appellate court judge, but also her "ability to relate to ordinary Americans."[79] Republican Senators immediately objected, complaining

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76 Former Seventh Circuit Judge Richard Posner suggested that good judges need an "elusive" quality he referred to as "good judgment," which he said is "best understood as a compound of empathy, modesty, maturity, a sense of proportion, balance, a recognition of human limitations, sanity, prudence, a sense of reality, and common sense." Richard A. Posner, How Judges Think 117 (2008). His definition is, I think, entirely compatible with my notion of judges being well-versed in the myriad human ways of being that I describe in this article.

77 *Remarks of Senator Barack Obama on Confirmation of Judge John Roberts*, ObamaSpeeches.com, http://obamaspeeches.com/031-Confirmation-of-Judge-John-Roberts-Obama-Speech.htm.

78 Janet Hook & Christi Parsons, *Obama Says Empathy Key to Court Pick*, L.A. Times, May 2, 2009, https://www.latimes.com/archives/la-xpm-2009-may-02-na-court-souter2-story.html.

79 Deborah Tedford, *Obama Chooses Sotomayor for Supreme Court*, Nat'l Pub. Radio, May 26, 2009, https://www.npr.org/templates/story/ story.php?storyId=104530389.

that "empathy" meant she would make decisions based on her personal political preferences and not based on the law.[80] Justice Sotomayor, during her own confirmation hearings, found it necessary to distance herself from President Obama's 2005 remarks.[81]

Former Seventh Circuit Judge Richard Posner might agree with President Obama. He wrote:

> Because the materials of legalist decision making fail to generate acceptable answers to all the legal questions that American judges are required to decide, judges perforce have occasional—indeed rather frequent—recourse to other sources of judgments, including their own political opinions or policy judgments, even their idiosyncrasies . . . . The decision-making freedom that judges have is an *involuntary* freedom. It is the consequence of legalism's inability in many cases to decide the outcome (or decide it tolerably . . .) . . . . That inability . . . create[s] an open area in which judges have decisional discretion—a blank slate on which to inscribe their decisions—rather than being compelled to a particular decision by "the law."[82]

What was Judge Posner referring to when he referred to "acceptable" or "tolerable" answers? He seems to be resisting "legalist decision making" because that constraint can lead to bad decisions. I suggest he is acknowledging that decisions reached through purely empirical processes (his notion of "legalism") may not have narrative fidelity with other dimensions of being that are important to human society—the ultimate "consumers" of the court's decisions.

It seems to me that then-Senator Obama and former Judge Posner both have it exactly right. Formal, rigid legal rules cannot provide answers, acceptable or not, to the many types of questions that require metrics other than a binary true or false decision to even understand, let alone resolve acceptably. And despite Justice Sotomayor's attempt during her confirmation hearing to distance herself from President Obama's views on empathic judging, some scholars have argued that she has actually used that approach since joining the bench—and that her ability to "enlighten

80 Peter Baker & Jeff Zeleny, *Obama Hails Judge as 'Inspiring,'* N.Y. Times, May 26, 2009, https://www.nytimes.com/2009/05/27/us/politics/27court.html.

81 Manu Raju, *Sotomayor breaks with Obama on empathy*, Politico Now Blog, July 14, 2009, https://www.politico.com/blogs/politico-now/2009/07/sotomayor-breaks-with-obama-on-empathy-019822.

To be fair, what judicial candidates say in Senate confirmation hearings must be taken with a large dose of salt. For example, Former Seventh Circuit Judge Richard Posner has excused Chief Justice Roberts' famous remark, during his confirmation hearing, about judges simply being umpires "calling balls and strikes" as Roberts' simply "trying to navigate the treacherous shoals of a Senate confirmation hearing." Posner, *supra* note 76, at 78.

82 Posner, *supra* note 76, at 9 (emphasis in original).

her colleagues to other perspectives" has "allowed her to give a voice to the habitually unheard, which inevitably generates fairer decisions."[83]

B. Diversity on the bench

The second point to be made here is that, even if we are able to select judges who are appropriately attentive to the narrative fidelity of a story, not all judges bring the same understanding of what "narrative fidelity" is to the bench. Nor is it possible to guarantee that the judge's understanding of narrative fidelity will match that of the litigants or other interested observers. What "rings true" for a judge from one background may differ greatly from what "rings true" for another judge.

There are no solutions to this problem, only ways to mitigate it. The principal strategy to mitigate this problem is to have a widely diverse bench, coupled with a strict system of random assignment of cases to judges. On a multi-judge appellate court, this is relatively easy to accomplish, at least in jurisdictions that appoint judges rather than elect them. If the appointing authority commits itself to seek out and appoint judges of varying ethnic backgrounds, races, gender and gender identities, socio-economic backgrounds, partisan affiliations, and other criteria, the appellate bench as a whole would look a lot more like the society it serves.[84] En banc decisions would be informed by all of the diverse worldviews held by the members of the court, hopefully leading to greater understanding of how different possible outcomes would reflect (or not) a shared idea of narrative fidelity. If there is also in place a robust randomized process for assigning cases to appellate panels, panel decisions would also benefit from the diversity of viewpoints likely to be represented on any given panel, as well as reassuring the litigants that any possible bias was the result of a random process. Plus, the prospect of possible en banc review by a fully diverse court would act as a check on possible bias arising from the random selection process (e.g. if the appointment of a panel results randomly in assigning a majority of judges with a particular worldview).

At the trial level, things get a lot trickier, since most cases are decided by single judges. In larger jurisdictions with multiple judges available,

83 Veronica Couzo, *Sotomayor's Empathy Moves the Court a Step Closer to Equitable Adjudication*, 89 Notre Dame L. Rev. 403, 403 (2013). Many scholars rushed to the defense of empathic judging. *See, e.g.,* Andrea McArdle, *Using a Narrative Lens to Understand Empathy and How it Matters in Judging*, 9 Legal Comm. & Rhetoric 173 (2012); Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 Cardozo L. Rev. 133, 136 (2009); Thomas B. Colby, *In Defense of Judicial Empathy*, 96 Minn. L. Rev. 1944 (2012); Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 Calif. L. Rev. 629 (2011); Mitchell F. Crusto, *Empathic Dialog: From Formalism to Value Principles*, 65 SMU. L. Rev. 845 (2012).

84 I am fully aware that I am positing an *ideal* appointment process, not the highly partisan process that has emerged in recent years for federal judges.

the strategy I propose for appellate courts (i.e. seeking diversity among the judges and a strictly randomized case assignment system) could be effective. But in smaller courts (particularly in state court systems where a small county may have only one judge available, elected by the local citizens), the opportunity to have a diverse bench is greatly reduced. The only safeguard available in those cases would appear to be the trial judge's fear of reversal by a more diverse appellate court.

C. Implicit bias training

The third point to be made is that having a diverse bench and a secure, randomized case assignment system still isn't enough. There will inevitably be situations where a case is assigned to a judge or a panel that one or more of the litigants will suspect has a very different base worldview, and therefore will suspect that "narrative reasoning" is just a cover for imposing the judge's or panel's own personal preferences, rather than basing the ruling on neutral legal principles.

The only feasible solution to this problem is to provide judges (most importantly trial judges) with (a) training on how to spot implicit biases that they may not be aware of, and (b) asking judges to specifically address those possible biases in their written opinions. As much as judges may not like to admit it, a written opinion is a work of persuasive writing. Not only the litigants before the court, but also the public at large, needs to be persuaded that the ruling is correct and unbiased.[85] Any opinion resolving the dispute must therefore clearly lay out not just the legal reasoning, but also any narrative reasoning that the court relied upon, so that it can be evaluated by the interested parties. Just like any other piece of good persuasive writing, it also needs to engage in counteranalysis: the opinion should lay out the best case for the losing side, and then explain carefully why that side was not the "best" result in the eyes of the court. Any implicit biases that the court spotted and addressed in its ruling should also be reported and discussed.

In the end, the courts' authority is derived only from their own credibility. Respect for the rule of law can only be earned by transparent judging—including full transparency about any narrative reasoning that the court necessarily relied upon in reaching its decision.

85 By "unbiased," I mean simply free from pre-judgment, or improper favor or animus toward any of the litigants. Any time a judge must resolve a case based on narrative reasoning, the judge's own experiences and worldview will inform the ultimate decision; the best we can hope for is that the judge's personal feelings toward the litigants are set aside to the extent possible.

VI. Conclusion

It is commendable for jurists and lawyers to aspire to create and apply neutral rules, clearly articulated and unambiguous, to resolve cases fairly and impartially. And it is understandable why citizens want such certainty in the legal system. But that objective is unattainable. Judge Posner has written that

> [t]he falsest of false dawns is the belief that our system can be placed on the path to reform by a judicial commitment to legalism—to conceiving the judicial roles as exhausted in applying rules laid down by statutes and constitutions or in using analytic methods that enable judges to confine their attention to orthodox legal materials and have no truck with policy.[86]

The legal system itself needs to account for all of the varied ways in which human beings encounter the world. A legal system whose authority depends on public acceptance of the idea of the "rule of law" must meet the public where it lives: in the complicated, emotional, often irrational but very real and deeply felt ways in which humans experience the world.

86 Posner, *supra* note 76, at 15.