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Kenneth D. Chestek

*University of Wyoming - College of Law*, [kchestek@uwyo.edu](mailto:kchestek@uwyo.edu)

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THE LIFE OF THE LAW HAS NOT BEEN LOGIC: IT HAS BEEN STORY\*

Kenneth D. Chestek<sup>Ω</sup>

WASHINGTON, D.C., (Aug. 15, 2025)—*The Supreme Court announced today that its new supercomputer system, CLEAR, is ready to begin operations with the October 2025 term of the Court.*

*The new system, called the Computerized Legal Evaluation, Analysis, and Resolution system, represents the culmination of efforts by the Court to comply with the 28th Amendment to the Constitution, ratified by the states in 2021. That Amendment, proposed and adopted in the wake of a series of controversial Supreme Court decisions, enshrines the doctrine of stare decisis into the Constitution and requires all court decisions to strictly adhere to prior precedents and the express language of enacted law, such as statutes, regulations, and constitutions, both state and federal. Proponents argued that the Amendment would promote greater uniformity and predictability of judicial decisions, which will effectively remove politics from Supreme Court decisions.*

*CLEAR uses the latest advances in artificial intelligence to create a computer program that analyzes every reported decision of both federal and state supreme courts and all intermediate courts of appeal. In addition, all state and federal statutes, regulations, and court rules are included in the massive law database that CLEAR applies to the facts of each new case to be decided. The program uses sophisticated algorithms to resolve apparent conflicts between the various sources of the law.*

*The system also includes a massive database of economic information, keyed to geographic regions, so as to allow the computer to ren-*

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\* Apologies to Oliver Wendell Holmes. His original writing said “experience,” but to the extent that stories are reflections of experience, I think he would approve of this slight modification. See HOLMES, *infra* note 1, at 1.

<sup>Ω</sup> Assistant Professor of Law and Assistant Director of the Center for the Study of Written Advocacy, University of Wyoming College of Law. The author wishes to thank Savannah Law School and the organizers of the 2013 Southeastern Regional Legal Writing Conference on legal writing as doctrine held at Savannah Law School on April 26, 2013, and Professor Elizabeth Megale for inviting this presentation. The discussion among all of the symposium presenters, including Professors Linda H. Edwards, Lucille A. Jewel, Teri A. McMurtry-Chubb, and J. Christopher Rideout proved to be thought-provoking and inspiring. Early versions of this work were reviewed by Ruth Anne Robbins and Jeffrey Lockwood; their comments were invaluable, as always. Special thanks to the George Hopper Faculty Research Fund and the Goodstein Law Faculty Research Fund, both of which provided generous research funding in support of this Article.

*der location-specific damage awards. Information such as prevailing wages, consumer price indexes, regional medical cost data, and other economic information will be uploaded and periodically updated in an effort to create fairness and uniformity in damage awards. In addition, the system is designed to “learn as it decides” by adding each new decision to its database of prior decisions.*

*Chief Justice William Gates explained that the program was designed by a team of more than one hundred computer scientists, assisted by seventy-five lawyers and law professors, chosen in a completely non-partisan fashion. He said that of the 175 members of the design team, thirty-four identified themselves as Democrats, thirty-two as Republicans, and three as Libertarians. The remaining team members self-identified as either independent or apolitical.*

*The American Bar Association mounted vigorous opposition to the 28th Amendment in all fifty states, claiming that laws cannot be implemented fairly without a human touch. With the implementation of CLEAR, an ABA spokesperson asserts, the roles of both the lawyer and the judge will change dramatically. Since CLEAR will determine the law through a comprehensive analysis of all precedent and enacted law, the sole remaining function of the lawyers, judges, and juries will be to determine the facts of each case. Once the parties agree on the facts, or the facts are found by either a judge or jury based upon the evidence presented, they will be entered into CLEAR using a complex set of coding instructions. Lawyers will now argue about how to code the established facts, and judges will rule on proper coding. Once the facts are coded and entered into the system, CLEAR will analyze the data and decide the case within minutes, including the proper award of damages in the event that the plaintiff wins.*

*On appeal, the only issue permitted will be whether the facts were correctly coded. In rare cases, appeals will be allowed to determine whether the evidence presented in the trial court supports the finding of fact, but the standard of review for such questions will remain very high (as it is with existing law).*

\* \* \*

Does this sound like a world in which you would like to live? Me neither. This Article explores why.

Justice Holmes wrote that “[t]he life of the law has not been logic: it has been experience.”<sup>1</sup> Essentially, Holmes’s claim was that the law is not simply about rules and logic, applied neutrally to proven facts;<sup>2</sup> if it were,

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<sup>1</sup> O.W. HOLMES, JR., *THE COMMON LAW* 1 (1881).

<sup>2</sup> *See id.*

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then a computer program like the fanciful CLEAR system would be much more effective in applying the law than humans. But in reality, the law is a living system<sup>3</sup> continuously adapting to its environment,<sup>4</sup> ultimately changing society and human experience. Therefore, the law must adapt as those experiences change over time. That phenomenon is the heart of the common law system that Holmes describes in his classic work *The Common Law*<sup>5</sup> and is also the subject this Article explores.

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In April 2013, Savannah Law School hosted the Southeastern Regional Legal Writing Conference and invited me to be a panelist at the opening symposium, which considered the question of whether legal writing courses have “doctrine.” To those of us who teach legal writing, the question seems simple, or even insulting. If one thinks of doctrine as “substance,” then of course there is doctrine in legal writing. We have a great body of knowledge we wish to transfer to our students so that they can become effective lawyers, just as any other law professor.<sup>6</sup>

The objection may be raised: legal writing courses just teach practical skills. The rest of the first-year curriculum, and most of the rest of law school generally, focuses on abstract rules and principles that govern human behavior. The naysayers may claim that this is more important, interesting, or intellectually challenging than teaching mere tools of the trade.

The purpose of this Article is twofold. First, it will show that legal writing has doctrine in the sense that it, too, is full of abstract principles that govern human behavior. These principles regulate the behavior of not only the lawyers and the clients who must abide by the law, but also most importantly, the behavior of the judges and legislators who make the laws that other law school courses teach. Second, this Article will show that the other courses in the law school curriculum teach skills in the very same sense that legal writing courses teach a fundamental skill: thinking

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<sup>3</sup> See, e.g., Fred L. Morrison, *Public International Law: An Anchor in Shifting Sands*, 22 LAW & INEQ. 337, 337 (2004) (“International law is not, however, an immutable body of rules. It is a living system. Like all living systems, it reacts to its environment.”). Living systems theory is generally attributed to biologist James Grier Miller. JAMES GRIER MILLER, *LIVING SYSTEMS* (1978).

<sup>4</sup> See Morrison, *supra* note 3, at 337-38.

<sup>5</sup> See HOLMES, *supra* note 1.

<sup>6</sup> See Linda L. Berger *et al.*, *The Past, Presence, and Future of Legal Writing Scholarship: Rhetoric, Voice, and Community*, 16 THE J. OF THE LEGAL WRITING INST. 521 (2010) (providing an excellent summary of how legal writing doctrine has evolved (and continues to develop)).

like a lawyer.<sup>7</sup> But, we do so more explicitly in the legal writing classroom.

The piece of “thinking like a lawyer” that the legal writing classroom is ideally suited to teach is what I allude to in the title of this Article: legal storytelling.<sup>8</sup> And by storytelling I do not mean just telling entertaining stories as a pedagogic tool to maintain student interest or to effectively convey information. Instead, I mean storytelling in the sense of understanding how stories help shape the law itself. Yes, it is true that a lawyer who is an effective storyteller can more easily persuade a judge or a jury to rule in favor of that lawyer’s client, but that is just one sense in which knowledge of storytelling is important to lawyers. It is also true that the law itself reflects the stories that we as a society understand and accept as correct statements of our principles.<sup>9</sup>

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<sup>7</sup> Kenneth D. Chestek, *Judging By the Numbers: An Empirical Study of the Power of Story*, 7 LEGAL COMM. AND RHETORIC: J. ALWD 1, 29 (2010) (“[L]aw schools tend to teach that ‘thinking like a lawyer’ means breaking a fact pattern into small, abstract pieces, applying logical rules to those fragments, and then reasoning your way to a conclusion through syllogisms, analogies, and other logical processes.”) (citing WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 28, 40-41, 50-54 (2007)).

<sup>8</sup> By saying this, I do not mean to diminish the importance of teaching how to identify legal rules and use them in logical reasoning—something that we also do very explicitly and carefully in the legal writing classroom. But in this regard we are not unique in the legal academy; every other course a law student takes teaches that same part of “thinking like a lawyer.” All I am saying is that many other courses in law school do not focus sufficient attention on the pathos of a legal argument.

<sup>9</sup> See Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4-5 (1983) (claiming “[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning”).

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Stories, or more precisely, “narrative reasoning,”<sup>10</sup> can effect substantive changes in the law.<sup>11</sup> Law professors teach this phenomenon in virtually every course in law school, albeit perhaps unconsciously, as demonstrated later in this Article. The more law professors and students understand this process, the better all of us will understand the law itself.

More significantly, all law professors on the faculty are training students to become participants in the living system that is the law.<sup>12</sup> Everything lawyers and judges do—every case decided, every argument made, and even every out-of-court settlement negotiated—adds to the body of the law.<sup>13</sup> Which decisions and arguments live on or which decisions wither and fade away depends on how well they are received by the collective wisdom of society at large. Story is the metric by which these rules are measured.<sup>14</sup>

This Article will explore the ways in which the law, almost unconsciously, incorporates storytelling, or more accurately narrative reasoning. But perhaps the best way to demonstrate the importance of narrative reasoning to the law is through a thought experiment. The opening scene of this Article invites you to imagine a world in which narrative reasoning and story is stripped from the law in the pursuit of more logic-driven rul-

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<sup>10</sup> Scholars currently have varying definitions of the term “narrative reasoning.” See generally LINDA EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION* 7 (5th ed. 2010) (describing narrative reasoning as an “appeal[] to commonly shared notions of justice, mercy, fairness, reasonableness and empathy,” usually through storytelling); Derek Kiernan-Johnson, *A Shift to Narrativity*, 9 *LEGAL COMM. & RHETORIC: JALWD* 81 (2012) (suggesting that the use of the word narrativity instead of story, narrative, or storytelling, draws on both the everyday meaning of the word story and the also broader meaning of narrative, which “encompass[es] abstract entities such as the basis for analogizing factual scenarios in some forms of legal reasoning”) (quoting Ruth Anne Robbins, *An Introduction to Applied Storytelling and to This Symposium*, 14 *THE J. OF THE LEGAL WRITING INST.* 3, 14 (2008)); J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 *THE J. OF THE LEGAL WRITING INST.* 53, 55-57 (2008) (citing WALTER R. FISHER, *HUMAN COMMUNICATION AS NARRATION: TOWARD A PHILOSOPHY OF REASON, VALUE, AND ACTION* 64, 105 (1987)) (Rideout relies on the work of speech communication theorist Walter Fisher in using the term “narrative rationality” and suggests that audiences adhere to stories that match their ideas of narrative coherence, narrative correspondence, and narrative fidelity.); Chestek, *infra* part I, at 7 (I offer my own definition of narrative reasoning.). At this point in the development of the Applied Legal Storytelling scholarship, we are still refining the definition of these terms.

<sup>11</sup> See Cover, *supra* note 9, at 5.

<sup>12</sup> See generally Morrison, *supra* note 3, at 337-38 (suggesting that the law is a living system).

<sup>13</sup> See, e.g., Cover, *supra* note 9, at 8-10 (1983).

<sup>14</sup> As noted psychologist Jerome Bruner put it, “stories are a culture’s coin and currency.” JEROME BRUNER, *MAKING STORIES: LAW, LITERATURE, LIFE* 15 (2002).

ings. We will return to that thought experiment in the pages that follow.

### I. *An Introduction to Narrative Reasoning*

Since one premise of this Article is that narrative reasoning is key to understanding how the law evolves and is applied in real cases, a definition of “narrative reasoning” is needed.

Cognitive psychologists have recently concluded that human beings are hard-wired to respond to stories.<sup>15</sup> We experience the world in story form; as Professor Michael Smith has written, we are all protagonists in the stories of our own lives.<sup>16</sup> Therefore, our fascination with the stories of others is natural because it helps us understand other people.<sup>17</sup> Stories are older than written language itself;<sup>18</sup> they are the mechanism through which we make sense of the world and understand other human beings.<sup>19</sup> I argue this concept is not only true, but that it is a good thing.

Second, storytelling connects well to the three types of appeals identified in classical rhetoric. Good stories require good *logos* and *ethos*, two

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<sup>15</sup> See, e.g., KENDALL HAVEN, *STORY PROOF: THE SCIENCE BEHIND THE STARTLING POWER OF STORY 4* (2007) (detailing numerous cognitive science studies). Jerome Bruner makes a similar point when he writes:

what originally differentiated the human species from other primates was our extended capacity to read each other’s intentions and mental states—our capacity for intersubjectivity or ‘mind reading.’ It is a precondition for our collective life in culture. I doubt such collective life would be possible were it not for our human capacity to organize and communicate experience in narrative form.

BRUNER, *supra* note 14, at 16 (citing MICHAEL TOMASELLO, *THE CULTURAL ORIGINS OF HUMAN COGNITION* (1999)).

<sup>16</sup> MICHAEL R. SMITH, *ADVANCED LEGAL WRITING* 39 (3d ed. 2013).

<sup>17</sup> For example, I gave this presentation in Savannah about one week after the capture of the Boston Marathon bombing suspects. On the Friday of the capture, I (as well as so many others in the audience) was transfixed by the television coverage of the manhunt, even though it had no immediate effect on me. I wanted to know what made those two young men act out so viciously. As dribs and drabs of information trickled in during the day, I found myself trying to figure out the bombers’ stories. I was not alone; many of the commentators who had to fill air-time while the hunt was on were imagining the stories that explained the bombers’ behavior. Others spent time explaining the psychology of the manhunt itself, including the tactics of the police officers engaged in the hunt. The story was being played out on live television with an uncertain ending, and I could not turn away from it.

<sup>18</sup> See HAVEN, *supra* note 15, at 3 (“Humans have told, used, and relied on stories for over 100,000 years. Written communication began only 6,000 to 7,000 years ago.”)

<sup>19</sup> See *id.* at 4-5.

types of persuasion that are well-covered in the law school curriculum.<sup>20</sup> But what required courses other than legal writing give significant attention to the appeal of the *pathos* of persuasion?

I have argued elsewhere that a logical argument (*logos*) intertwined with a sound emotional appeal (*pathos*) is far stronger than an argument that neglects the *pathos*.<sup>21</sup> Essentially, the advocate should try to accomplish two things: (1) show the court that the preferred result is legally permissible (the *logos* argument), and (2) make the judge *want* to reach that result (the *pathos* argument).<sup>22</sup> An effective *logos* argument may be a tough sell if the *pathos* of the case favors the opposing party; thus, every advocate should strive to find a reason that a ruling in the client's favor would be emotionally satisfying to the court—blending the *logos* with the *pathos*.<sup>23</sup>

The process by which the *pathos*-based piece of the argument is made to the court has sometimes been described as narrative reasoning.<sup>24</sup> The key characteristic of narrative reasoning is that it is value-based.<sup>25</sup> Narrative reasoning focuses on what is right or just and engages not only a fact-finder's emotions, but also her moral judgment at a fundamental level.<sup>26</sup> It helps the fact-finder arrive at a decision that is not only legally permissible, but that also feels right emotionally, ethically,<sup>27</sup> and morally.

Professor Robert Burns has suggested that narrative reasoning, at least at the trial level, is essential to prevent purely subjective decisions:

If the case is presented in a manner that flattens out the record and avoids its narrative and dramatic elements, the result will be

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<sup>20</sup> If anything, the legal academy has been criticized in recent years for focusing too intently on logic, and not enough on the human aspects of legal rules. Judge Richard Posner, for example, has talked about the “excessively rhetorical emphasis of legal education.” Richard Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1049 (2006); see also Brian J. Foley, *Applied Legal Storytelling, Politics, and Factual Realism*, 14 THE J. OF THE LEGAL WRITING INST. 17, 41 (2008) (“[C]asebook classes and appellate judges focus on *logos*, whereas clinics—and actual law practice—focus on all three aspects of persuasion[,]” *logos*, *pathos*, and *ethos*.)

<sup>21</sup> Chestek, *supra* note 7.

<sup>22</sup> *Id.* at 5-6, 8.

<sup>23</sup> *See id.*

<sup>24</sup> Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUD. F. 7, 11 (1996); Chestek, *supra* note 7, at 2.

<sup>25</sup> *See* EDWARDS *supra* note 10, at 7 (stating that “[n]arrative appeals to commonly shared notions of justice, mercy, fairness, reasonableness, and empathy”).

<sup>26</sup> *Id.*

<sup>27</sup> *See, e.g.*, Steven J. Johansen, *This is Not the Whole Truth: The Ethics of Telling Stories to Clients*, 38 ARIZ. ST. L.J. 961 (2006).



left to the undisciplined subjectivity of the decisionmaker, and to the “attitudes” which political scientists find best predict appellate decisionmaking . . . [T]here is a kind of deep necessity here: the attempt to eliminate the role of common-sense moral judgment in legal decisionmaking can generate, not a higher level of lawfulness, but a greater arbitrariness in deciding concrete cases.<sup>28</sup>

Trial lawyers are generally comfortable with this process, since they have developed a healthy respect for the common sense of the jury. Accordingly, the pure logic of the CLEAR system hypothesized earlier in this Article might first encounter trouble at the trial level.

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WASHINGTON, D.C., (Feb. 19, 2026)—*The Administrative Office of the United States Courts announced today that, since the implementation of the CLEAR system, new court filings in the district courts have dropped by nearly fifty percent.*

*Robert Roy, spokesperson for the AOUSC, expressed surprise at the dramatic drop. “We had actually anticipated that court filings would remain constant, or increase slightly, because the CLEAR system is designed to produce faster and more consistent results,” he said. “But instead, we have seen the number of diversity cases drop by nearly eighty percent. Even federal question cases have seen a decline in initial filings.”*

*Joyce James, a spokesperson for the American Association for Justice, an organization supporting plaintiffs’ lawyers, said that because CLEAR is only used in the federal court system, many lawyers are choosing to file their cases in state courts whenever possible. This shift is causing a large backlog to develop in some state courts, she said, but many lawyers would prefer to wait for a conventional jury trial rather than take their chances with an untested computer system still viewed with great suspicion. Moreover, James said, the “consistent results” that supporters of CLEAR have promised, “sound to plaintiffs’ lawyers like code for ‘liability caps,’ which is not in their clients’ best interests.”*

*However, despite the decline in initial filings, Roy reported that the trial court caseload has not declined as much, since there has been an increase in notices of removal by defense lawyers whose clients want to*

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<sup>28</sup> Robert P. Burns, *The Rule of Law in the Trial Court*, 56 DEPAUL L. REV. 307, 308 (2007). Burns goes on to note that “the process of adjudication is partly value-defining.” *Id.* at 314 (citing JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 29-30 (1983)).

*get into the CLEAR system.*

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While many accept the role of narrative reasoning at the trial level, some may object that appellate judges do not, or at least should not, engage in narrative reasoning. Chief Justice Roberts, for example, famously claimed during his confirmation hearings that his role as a judge would be to act as an umpire, calling balls and strikes based on pre-determined rules made by others.<sup>29</sup> Other judges claim to be “originalists” or “textualists,” who syllogistically reason their way from fixed principles to decisions.<sup>30</sup> These contentions are naive at best, since they make no allowance for judge-made law. Even in questions of constitutional or statutory interpretation, there is a wide-open area for judges to interpret words that are inherently (and often intentionally) vague; those interpretations can be, and surely often are, grounded in judges’ values and intuitions.<sup>31</sup> In other words, they arise from a form of narrative reasoning.

This Article argues that narrative reasoning is not only a *necessary* feature of law-making, but also a *desirable* feature. But before considering that argument, the examples in Part II will show how the rules created by both statutory and common law often require the fact-finder to engage in narrative reasoning to apply those rules to the facts of the case.

## II. *Many Rules of Law Require Narrative Reasoning to Resolve*

First the easiest case, juries. Jurors unquestionably need broad discretion to resolve the disputes we put before them. Jurors are notoriously emotional when rendering decisions; this propensity is actually a feature

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<sup>29</sup> See *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary, 109th Cong. 55-56* (2005) (statement of John G. Roberts, Jr., Nominee). Some commentators, of course, have pointed out how the roles of both umpires and Supreme Court justices are far more involved than Chief Justice Roberts suggested in this statement. See, e.g., Timothy P. Terrell, *The Art of Legal Reasoning and the Angst of Judging: Of Balls, Strikes, and Moments of Truth*, 8 *Nw. J. L. & Soc. POL’Y* 35, 87 (2012).

<sup>30</sup> ANTONIN SCALIA AND BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 41-43 (2008).

<sup>31</sup> See Linda L. Berger, *A Revised View of the Judicial Hunch*, 10 *LEGAL COMM. & RHETORIC: JALWD* 1, 12-13 (2013); see also RICHARD A. POSNER, *HOW JUDGES THINK* 9 (2008) (positing that there is a category of cases for which the rules of law are insufficient to decide the outcome “tolerably,” or where verification of the correctness of the outcome is difficult or impossible). Those cases create what Posner calls an “open area in which judges have decisional discretion[.]” *Id.* He later suggests that a judge’s intuition is helpful in deciding cases in this “open area.” *Id.* at 107-08.

of the system, not a bug.<sup>32</sup> We want jurors to apply their common sense when deciding what happened in a given controversy. We believe the collective wisdom of the group lends credibility to the result, which suggests another problem with our hypothetical CLEAR supercomputer.

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NEW YORK, (March 4, 2026)—*A group of trial lawyers has filed suit in the United States District Court for the Southern District of New York, seeking the public disclosure of the computer software at the heart of the CLEAR system now in use in federal courts throughout the nation.*

*“One of the most fundamental principles of our court system has always been transparency,” said Joyce James, spokesperson for the American Association for Justice, lead plaintiff in the case. “Another fundamental principle has been citizen involvement and the right to a jury trial. The CLEAR system destroys both principles by allowing a secret computer program to replace one of the most important functions of a jury: to make damages determinations.”*

*“The American taxpayers paid for this system,” she continued. “They have a right to know what values this computer program uses to make damage awards and what facts it deems more important than others in reaching its calculations.”*

*Curtis Schenkel, a professor of law at Princeton University, pointed out the use of CLEAR at trial “does not really replace the jury with a computer program. It replaces the judgment of the jury with the judgment of the unknown computer programmers who designed CLEAR to value certain types of damages over others.” He wrote in his opinion that the use of CLEAR to determine damages is a fundamental, and probably unconstitutional, change in the right to a jury trial.*

*The Administrative Office of the United States Courts declined comment on the suit. However, at the time that the CLEAR system was implemented, the AOUSC said in a press release that the algorithms used to evaluate cases would remain a secret so as to discourage litigants from attempting to game the system by manipulating the evidence they presented at trial.*

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In addition to jurors, we also want trial judges to exercise common

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<sup>32</sup> See generally Burns, *supra* note 28, at 316 (stating that “[i]n the world of jury behavior, fact-finding and value judgments are subtly intertwined”). “[T]he jury’s search for moral sources beyond what can be deduced from the law of rules is legitimate.” *Id.* at 331.

sense. When trial judges sit as fact-finders in non-jury trials, they have the same wide discretion to use their common sense as juries. But even in other situations, we ask trial judges to bring their humanity into the courtroom. Consider just a few examples. First, when sentencing a criminal defendant, the judge must tailor the punishment to each individual case. The judge must balance a human sense of when rehabilitation is possible against when public safety is served by a longer sentence, among many other factors. Next, in a child custody dispute, judges must decide which parent will do a better job raising a child. They might consult a list of factors that have grown out of prior cases and their own experiences, but in the end judges must use narrative reasoning to decide what is best in any given situation. Finally, in a hostile workplace case under Title VII of the Civil Rights Act of 1964,<sup>33</sup> judges are often asked to imagine themselves in the shoes of the plaintiff in order to determine whether a claim can proceed,<sup>34</sup> which is, of course, impossible to do without engaging in narrative reasoning.

This list could go on indefinitely. The law often requires trial judges to take their feelings into account in resolving individual cases. Appellate judges who review such decisions for abuse of discretion typically affirm the trial judge's finding. Abuse of discretion, as a standard of review, by definition gives trial judges a wide-open field to engage in narrative reasoning.

Note that this standard of review is not controversial. Appellate courts created many of the rules that require trial judges to engage in narrative reasoning in the examples given above. Many rules of law are judge-made: torts, Contracts, and many concepts of property law, for example. These rules were made by appellate judges, which raises the question: what values did they apply in creating these rules in the first place? This Article suggests the judges' values derive from narrative reasoning and their own conception of what is good for society.<sup>35</sup>

Moreover, when one looks more closely at what appear to be "rules" of common law that supposedly should be logically and dispassionately applied, it becomes clear these rules require the application of human emotions to resolve. The following examples illustrate this point:

*Negligence Cases (including malpractice).* The basic concept of com-

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<sup>33</sup> 42 U.S.C.A. § 2000e (1964).

<sup>34</sup> Benjamin Bratton, *A Defense of Sotomayor's "Wise Latina" Remark—with No Rewording Required*, FINDLAW (July 17, 2009), [http://writ.news.findlaw.com/commentary/20090717\\_bratman.html](http://writ.news.findlaw.com/commentary/20090717_bratman.html).

<sup>35</sup> I am referring here to when the appellate court is acting in its precedent-setting (or law-making) capacity. Of course, at least at the level of intermediate appellate courts, part of the court's job is error-correcting (making sure that individual justice is done). In practice, it is not always possible for the court to separate its law-making from its error-correcting function, but for the sake of simplicity, I am setting aside the latter function in this discussion.

mon-law negligence is failing to act as a reasonable person would act in a similar circumstance,<sup>36</sup> and if that failure injures another, the person who neglects that standard of care should compensate the other for the resulting injuries. This explanation sounds straightforward and fair. But look at all of the narrative reasoning required before a defendant can be found liable under this so-called objective standard. First, a fact-finder is required to determine what should be the standard of care. That determination is very subjective and depends on one human imagining himself in the shoes of another. Next, in yet another subjective evaluation, the fact-finder must determine how the defendant's conduct actually measured up to the standard of care. And finally, if the conduct fell short of the standard, did that failure "proximately" cause the injury, or was it too remote?<sup>37</sup> Only narrative reasoning can resolve these questions.

*Contract Law.* Contract law enforces some agreements, but not others, based on rules of what seems fair.<sup>38</sup> As such, fact-finders are constantly asked to put themselves in the shoes of other persons. When party A spoke to party B, did party A make an offer of contract, or was that person simply soliciting an offer from party B? Was party B's response intended as an acceptance of party A's offer, or simply as a counteroffer? Are the terms of the supposed contract unenforceable because they are "unconscionable?"<sup>39</sup> What does that even mean? "That provision shocks my conscience!" says a judge. Narrative reasoning is required to resolve many, if not most, contract cases.

*Equity Jurisprudence.* Indeed, the entire body of equity law depends on narrative reasoning. Equity is the "free agent" of the legal world.<sup>40</sup> Where strict adherence to the logical rules of law leaves an innocent person injured and without a remedy, sometimes the law of equity steps in to fashion a remedy. This remedial function often happens when large and powerful entities take advantage of their power to oppress weaker foes

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<sup>36</sup> This concept is often referred to as an "objective standard," which evaluates a person's behavior based on some external comparison rather than the "subjective standard" of what the actor intended. *RESTATEMENT (THIRD) OF TORTS* § 3, cmt. a, d (2010).

<sup>37</sup> *RESTATEMENT (THIRD) OF TORTS* § 28 cmt. a (2010).

<sup>38</sup> See generally DAN B. DOBBS, *LAW OF REMEDIES*, § 12.1(2) (Hornbook Series, 2d ed. 1993) ("Moral analysis of contract, grounded on promise, consent and autonomy of the contracting parties, may yield, at least for some thinkers, a different measure of relief from an economic analysis that is grounded in either efficiency or distributional concerns.").

<sup>39</sup> *RESTATEMENT (SECOND) OF CONTRACTS* § 208 (1981).

<sup>40</sup> See e.g., DAN B. DOBBS, *LAW OF REMEDIES*, § 2.1(1) (Practitioner Treatise Series Vol. 1, 2d ed. 1993) (A "striking characteristic of equity and equitable remedies is a high degree of discretion . . . Equity courts saw their discretion as a reflection of their flexibility and as a means to justice apart from law.").

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in such situations as civil rights violations, employment discrimination claims, and antitrust or unfair competition claims where large companies use market power to suppress competition. Indeed, one of the cornerstone principles of equity jurisprudence is that equitable remedies are only available where the injured party “has no adequate remedy at law.”<sup>41</sup> Stated another way, equity only intervenes when logos arguments do not address the pathos of the injury. The key principle in equity is thus fairness—recognizing when a party has been injured and the traditional remedy of money damages is not sufficient to make the injured party whole. Resolving such cases requires virtually all narrative reasoning.

Once we start to look at the rules that supposedly underpin the logos of the law, it becomes clear that many of them require a large dose of narrative reasoning to resolve. Take any balancing test, for example. How is a judge or jury supposed to determine which side weighs more heavily than the other? In a Fourth Amendment<sup>42</sup> search-and-seizure case, when should a judge determine that an individual’s right to privacy outweighs the government’s need to gather information to maintain social order? What about factors tests? How is a judge to determine whether enough factors, or weighty enough factors, are present or absent in order to resolve the test? Making such decisions requires the judge to make some value judgment, which is the hallmark of narrative reasoning.<sup>43</sup>

### III. *Narrative Reasoning is Essential to a Functional Legal System*

Okay—maybe now you are convinced that the legal system has some aspect of narrative reasoning built into it. But are you convinced yet that this is a good thing? Should we not constantly strive, as did the voters in the hypothetical CLEAR computer example, for more objectivity and predictability, and leave less room for a judge’s emotions to decide cases? There are two problems with that supposed ideal,<sup>44</sup> one practical and one philosophical.

The practical problem is that asking judges to ignore their experiences is like asking a computer to ignore its programming; doing so is unnatural and ultimately impossible. Current research in cognitive psychology suggests emotional thinking is essential to virtually any type of decision-making. For example, cognitive psychologist Dr. Antonio Damasio documented his study of a patient he calls Elliot.<sup>45</sup> Elliot presented to Dr. Damasio with a history of having a benign brain tumor surgically re-

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<sup>41</sup> See generally E. ALLAN FARNSWORTH, *CONTRACTS*, § 12.6 (4th ed. 2004).

<sup>42</sup> U.S. CONST. amend. IV.

<sup>43</sup> Chestek, *supra* Part I.

<sup>44</sup> See Chestek *infra* Part IV (considering whether this is even an “ideal” at all).

<sup>45</sup> ANTONIO DAMASIO, *DESCARTES’ ERROR* 34-37 (1994).

moved from his prefrontal cortex, leaving significant residual damage to the right lobe.<sup>46</sup> While Elliot made a good physical recovery and seemed to be cognitively intact in terms of perception, speech, memory, moral judgment, and other functions, he developed some radical personality changes post-surgery that led him to make many poor (and life-changing) decisions.<sup>47</sup> Elliot became easily distracted at work, leading to his termination.<sup>48</sup> Unable to find suitable employment, he started a series of ill-fated business ventures, sometimes partnering with disreputable individuals, and failing every time.<sup>49</sup> Elliot divorced, remarried, and divorced again.<sup>50</sup> He lost his entire life's savings but was denied social security disability benefits because to outside observers, he was healthy and intelligent.<sup>51</sup> In short, his life completely fell apart.<sup>52</sup>

Dr. Damasio ran a wide series of psychological tests, and Elliot scored in the normal or above average ranges on all of these tests.<sup>53</sup> But Dr. Damasio noticed that Elliot seemed "flat" and detached in his interactions.<sup>54</sup> While he could accurately recount all of the failings in his personal life, he did not seem to care about them; he showed no remorse or regret.<sup>55</sup> In response, Dr. Damasio designed a series of new tests to measure Elliot's emotional functioning.<sup>56</sup> For example, Dr. Damasio showed Elliot a series of emotionally charged images, depicting death, destruction, and mayhem. Elliot was able to accurately describe what each image showed but had no apparent emotional reaction to any of them—he was completely unfazed.<sup>57</sup>

Dr. Damasio concluded that the tumor and subsequent surgery had irreparably damaged the portion of Elliot's brain that controlled emotion.<sup>58</sup> Elliot was unable to feel any emotion at all.<sup>59</sup> The consequence was that Elliot was unable to make decisions effectively, even mundane

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<sup>46</sup> DAMASIO, *supra* note 45, at 35-36.

<sup>47</sup> *Id.* at 37.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> DAMASIO, *supra* note 45, at 37.

<sup>52</sup> *See id.* at 34.

<sup>53</sup> *Id.* at 40-43.

<sup>54</sup> *See id.* at 44.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 43.

<sup>57</sup> DAMASIO, *supra* note 45, at 45.

<sup>58</sup> DAMASIO, *supra* note 45, at 44-45.

<sup>59</sup> *Id.*

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choices that had no emotional content whatsoever.<sup>60</sup> Thus, based on this case and others he describes, Damasio concluded emotional reasoning is not inferior to logical reasoning; it is inextricably woven into the process of reaching every decision humans make.<sup>61</sup> Dr. Damasio's study renders an important point for the purposes of this Article: without a fully functioning emotional brain, judges would be unable to make decisions any way other than by throwing darts at a dartboard.<sup>62</sup>

The philosophical problem is that law is the quintessential human endeavor.<sup>63</sup> Since the law's intent is to order society and control human behavior, it must respond to the needs of human beings. Law derives its legitimacy from our consent. We obey the law because we as a society agree that it has legitimacy, and it is a better way of resolving conflict than through raw power and might. But as soon as laws cease to serve our needs, they will be changed or overthrown.<sup>64</sup> Accordingly, the law needs to be flexible and respond to societal changes if it is to retain its legiti-

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<sup>60</sup> DAMASIO, *supra* note 45, at 45.

<sup>61</sup> *See id.* at 49-51.

<sup>62</sup> *See id.* at 37.

<sup>63</sup> *See* Robert M. Cover, *supra* note 9, at 4-5 (1983) ("Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.").

<sup>64</sup> This is why dictatorships do not last. Dictators are the law unto themselves, unresponsive and repressive to the needs of the people they *Seek* to rule. Throughout history there are a myriad of examples of how popular uprisings have toppled dictatorships and authoritarian governments. The Arab Spring uprisings provide the most recent example. Beginning in Tunisia in December 2010, a series of protests and revolt, in part against oppressive political regimes, spread widely across nations in the Middle East and Northern Africa. These uprisings, dubbed the Arab Spring, ultimately led to government upheavals in Tunisia, Yemen, Egypt, and Libya. The political instability sparked by the Arab Spring continues today in many Arab nations, including Bahrain and Syria (and still in Egypt at this writing). Ayodeji K. Perrin, *Introduction to the Special Issue on the Arab Spring*, 34 U. PA. J. INT'L L. i, i-v; *see also* Rosa Brooks, *Lessons for International Law from the Arab Spring*, 28 AM. U. INT'L L. REV. 713, 714 (2013).

Empires do not last either. When lawmakers are *Seen* as distant and try to enforce their laws through raw power, their subjects rebel. This rebellion to unresponsive hegemonic power is our own history as a society, but the American Revolution is hardly the only example of this phenomenon.



macy and our consent to be governed by law.<sup>65</sup>

Our court system has proven remarkably flexible over the years through the genius of the common law system. As society has changed, courts have crafted new rules or rejected old rules that no longer fit our needs and evolving norms. These changes occur incrementally at every level of state and federal court, but such changes are most obvious in landmark rulings of the Supreme Court, such as *Brown v. Board of Education*,<sup>66</sup> *Loving v. Virginia*,<sup>67</sup> *Griswold v. Connecticut*,<sup>68</sup> *Lawrence v. Texas*,<sup>69</sup> and most recently *United States v. Windsor*.<sup>70</sup> Each of these cases was met with great public controversy when decided, but in each case (with the possible exception of *Brown*), rulings followed public opinion rather than led it. After a period of initial consternation (some of which is ongoing for the more recent cases on the list), most of those who initially objected to the decisions eventually accepted the rulings, and civil society continued to move forward.

But notice something else. There is an important commonality in each of those decisions—the role of narrative reasoning. The Court’s rationale in each case is laden with value judgments. In *Brown*, for example, after saying that the Court “must consider public education in the light of its full development and its present place in American life throughout the Nation,”<sup>71</sup> Chief Justice Warren wrote, “[t]o separate [minority students]

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<sup>65</sup> See, e.g., Simon Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 A.B.A. 425, 425-26 (1951).

Once you complete the circle of specialization by having a specialized court as well as a specialized Bar, then you have set aside a body of wisdom that is the exclusive possession of a very small group of men who take their purposes for granted. Very soon their internal language becomes so highly stylized as to be unintelligible to the uninitiated. That in turn intensifies the reclusiveness of that branch of the law and that further immunizes it against the refreshment of new ideas, suggestions, adjustments and compromises which constitute the very tissue of any living system of law. In time, like a primitive priestcraft, content with its vested privileges, it ceases to proselytize, to win converts to its cause, to persuade laymen of the social values that it defends. Such a development is invariably a cause of decadence and decay.

<sup>66</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding that segregated schools were inherently unequal).

<sup>67</sup> *Loving v. Va.*, 388 U.S. 1 (1967) (holding that state laws banning interracial marriages were unconstitutional).

<sup>68</sup> *Griswold v. Ct.*, 381 U.S. 479 (1965) (holding that state laws barring the sale of contraceptives even to married couples were unconstitutional).

<sup>69</sup> *Lawrence v. Tx.*, 539 U.S. 558 (2003) (holding that state laws barring sodomy between consenting adults were unconstitutional).

<sup>70</sup> *U.S. v. Windsor*, 570 U.S. \_\_\_, 133 S. Ct. 2675 (2013) (holding that the federal Defense of Marriage Act was unconstitutional).

<sup>71</sup> *Brown*, 347 U.S. at 492-93.

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from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>72</sup> This is pure, value-based narrative reasoning.<sup>73</sup>

Philosopher Sir Francis Bacon wrote, “The logic now in use serves rather to fix and give stability to the errors which have their foundation in commonly received notions than to help the search after truth. So it does more harm than good.”<sup>74</sup> A 21st century translation of Bacon’s sentiment might be: one cannot prove anything new solely through logic.<sup>75</sup> In essence, pure logical reasoning begins from fixed premises that are agreed to be true; principles of logic are then used to apply those pre-determined fixed principles to different situations.<sup>76</sup> But if the result of that logical process is emotionally unsatisfactory, one can only reach a different result by rejecting the initial premises. And the most effective way to reject

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<sup>72</sup> *Brown*, 347 U.S. at 494.

<sup>73</sup> Similar examples of narrative reasoning could be pulled from virtually any landmark decision of the Supreme Court. In *Loving v. Virginia*, Chief Justice Warren wrote that:

[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival. [citations omitted] To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

*Loving*, 388 U.S. at 12. And in *Lawrence v. Texas*, Justice Kennedy wrote:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

*Lawrence*, 539 U.S. at 562.

<sup>74</sup> SIR FRANCIS BACON, THE NEW ORGANON OR TRUE DIRECTIONS CONCERNING THE INTERPRETATION OF NATURE (1620), reprinted in 8 THE WORKS OF FRANCIS BACON 68, Aphorism XII (James Spedding, Robert Leslie Ellis, and Douglas Denon Heath eds., trans., Boston, Houghton, Mifflin & Co. 1863); [http://www.constitution.org/bacon/nov\\_org.htm](http://www.constitution.org/bacon/nov_org.htm).

<sup>75</sup> See *id.*

<sup>76</sup> See *id.*

those premises is through narrative reasoning.<sup>77</sup>

A counterexample is instructive: pure logic can lead to decisions that lack common sense. Consider the case of *Citizens United v. FEC*,<sup>78</sup> which invalidated a federal statute that had prohibited corporations from using independent expenditures to advocate for or against political candidates.<sup>79</sup> The majority opinion proceeds from two unexamined, but clearly essential, propositions. First, corporations have the same free speech rights under the Constitution as humans do. Second, money is the equivalent of speech.<sup>80</sup> From that starting point, using reason to reach a logical conclusion is easy—corporations must be allowed to spend unlimited money on political speech. But let us examine how narrative reasoning could have led to a different result.

First, as noted above, to reach a different result, one needs to reject the initial premises. Here, the two major premises are metaphors. Simply selecting different metaphors leads to a completely different logical sequence. Corporations are not people; they are tools.<sup>81</sup> And money is not speech; it is a megaphone. From those new initial premises, here's how narrative reasoning leads to a new result:

Corporations are tools—fictional entities created by humans to accomplish certain purposes related to the acquisition of capital to accomplish important human goals in business and commerce.

Humans are fundamentally different from corporations in that humans have certain physical needs (like clean air and water) and desires (like aesthetically pleasing landscapes) that corporations do not have.

Human goals are often in conflict with corporate goals. For example, humans have an interest in conserving natural resources; corporations have an interest in exploiting them.

Humans are more important than corporations.

Money is a megaphone—it allows those who have a great deal of money to drown out the voices of the multitudes of people who have far less

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<sup>77</sup> See, e.g., *Lawrence*, 539 U.S. 558; *Loving*, 388 U.S. 1; *Griswold*, 381 U.S. 479; *Brown*, 347 U.S. 483. This is exactly what the Supreme Court has done in each of these landmark cases; the fixed principles of prior case precedents, enacted legislation, and the doctrine of stare decisis would have led to a perfectly logical, but emotionally unsatisfying, result. Instead of relying on original principles, the Court used narrative reasoning in order to arrive at results that better align with modern social values.

<sup>78</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>79</sup> *Id.* at 364-65.

<sup>80</sup> See *id.*

<sup>81</sup> Even if corporations are “people,” one could reasonably argue that they are psychopaths, since corporations lack empathy for others. Indeed, the entire free market system incentivizes psychopathic behavior. If a corporation can earn more profit by destroying its competitors, it will attempt to destroy its competitors and not feel the least bit of remorse if it is successful.

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money to make their voices heard, either in the public square or in the offices of policymakers.

Politics are a human device to advance important societal goals such as a clean environment or public safety, among others.

Corporations should therefore refrain from political involvement because politics serve the more important human goals.

Since the primary purpose of corporations is to raise capital, most corporations have far more money than individual humans. It is therefore unfair to allow corporations to use their money to drown out the voices of humans.

Because humans create corporations, they have the right to restrict corporate behavior and exclude corporations from exclusively human endeavors such as politics.

While a certain amount of logic is inherent to this line of reasoning, that reasoning is only effective if the initial premises are challenged and replaced with new, value-based premises: that corporations are different from, and ultimately less important than, humans. Such a challenge operates on a narrative level.

IV. *Problem: Does Narrative Reasoning Make Law Too Subjective and Thus Less Predictable?*

Narrative reasoning is a key feature in law's evolution and growth, a potentially upsetting proposition for those who prefer rigid stability in the law, or for those who prefer legal change to emanate solely from the legislature.<sup>82</sup> But even those who accept this Article's earlier proposition—law must evolve with society—may be uncomfortable with the concept of narrative reasoning. Does accepting a role for narrative reasoning in judicial decision-making mean that judges are free to rule based on their gut? What constraints, if any, are judges under, or should they be under?

This Article contends that storytelling principles are a restraint on judicial decision-making. In this way, storytelling is a valuable legal skill that merits academic study, not only in the legal writing classroom but also in every law school class.

This Article suggests that the concept of narrative fidelity<sup>83</sup> is the principle of storytelling that serves as a proper restraint on judicial de-

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<sup>82</sup> But even those whose preference is for changes in law to be legislatively adopted would have to allow for some role for the courts to interpret the legislation, since it is impossible for any legislation to completely define and predict every situation that may arise in the future that might, or might not, be intended by the legislature to be controlled by the statute. The court's role in statutory interpretation can also be influenced to a great degree by narrative reasoning.

<sup>83</sup> WALTER R. FISHER, HUMAN COMMUNICATION AS NARRATION: TOWARD A PHILOSOPHY OF REASON, VALUE, AND ACTION 64, 105 (1987).

cision-making. That is to say, any decision that lacks narrative fidelity would likely be viewed by society as wrong, and in turn, would likely be overturned either by legislation or subsequent judicial decisions.

Professor Christopher Rideout defines narrative fidelity as a “substantive property”<sup>84</sup> of narrative because it describes how narratives work (as opposed to the formal properties of narrative which simply describe what narratives look like).<sup>85</sup> Rideout cites Walter Fisher for the proposition that “narrative fidelity . . . has to do with ‘whether or not the stories [the audience] experience[s] ring true with the stories [audience members] know to be true in their lives.’”<sup>86</sup> In other words, narrative fidelity assesses “whether the components of a story ‘represent accurate assertions about social reality and thereby constitute good reasons for belief or action.’”<sup>87</sup> Rideout goes on to cite Professor Robert Burns, who writes that jurors apply “practical judgment,” or a “literally indescribable structure of norms, events and possibilities for action.”<sup>88</sup> Burns, in turn, cites Justice Holmes for support: “[M]any honest and sensible judgments . . . express an *intuition of experience* which outruns analysis and sums up many unnamed and tangled impressions—impressions which may lie beneath consciousness without losing their worth.”<sup>89</sup>

Both Fisher and Burns are attempting to explain how stories affect the audience of fact-finders, whose job is to decide the story of the parties (*i.e.*, resolve the immediate dispute between litigants based on the pre-determined rules of law). But there can be other stories in a lawsuit

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<sup>84</sup> Rideout, *supra* note 10, at 55, 69 (drawing from Walter Fisher’s work in describing the concept of “narrative fidelity”); FISHER, *supra* note 83, at 105.

<sup>85</sup> See Rideout, *supra* note 10, at 69-70.

<sup>86</sup> *Id.* (quoting FISHER, *supra* note 83, at 64).

<sup>87</sup> Rideout, *supra* note 10, at 70 (quoting FISHER *supra* note 83, at 105). Stated another way, narrative fidelity deals with the truthfulness of a story as assessed by what the communication theorist Fisher calls, “the logic of good reasons.” FISHER, *supra* note 83, at 108. These involve the following components: (1) Are the purported “facts” reliable? (2) Are relevant facts omitted or distorted? (3) Are the conclusions common sense? (4) Are there other possible conclusions? And, (5) Does the story address the “real” issue of the case? *Id.* Fisher emphasizes that the test for narrative fidelity is not (just) a thinking process but a valuing process, stating “Humans as rhetorical beings are as much valuing as they are reasoning animals.” *Id.* at 105; see also Steven Hartwell, *Classes and Collections: How Clinicians Feel Differently*, 9 CLINICAL L. REV. 463 (2002) (citing FISHER, *supra* note 83).

<sup>88</sup> ROBERT BURNS, A THEORY OF THE TRIAL 199 (1999).

<sup>89</sup> *Id.* at 209-10 (quoting Justice Holmes in *Chicago, Burlington, & Quincy Railway. v. Babcock*, 204 U.S. 585, 598 (1907)) (emphasis supplied).

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also—stories about the law and stories about the process.<sup>90</sup> Can storytelling theory help us understand how judges decide a case where it is a story about the law? More specifically, when the court is involved in law-making (as when it crafts common law rules, resolves ambiguity in a statutory regime, or creates orderly processes for applying or administering the law), does narrative fidelity constrain judges' choices among alternative views of what the law or process is, or should be? I believe it can.

In a story of the parties, the audience to persuade is the fact-finder (judge or jury). The fact-finders compare the stories presented by the parties to see if they ring true with the stories they know to be true in their own lives. The audience thus engages in narrative reasoning. The storyteller in this context is the lawyer.<sup>91</sup> But in a story of the law, the storyteller is the court. The court is trying to persuade the readers of the legitimacy of the rule being created; the audience is society as a whole. The advocates in this situation are merely advisors to the storyteller, attempting to persuade the court as to what story to tell. Society must then evaluate the rules announced by judges to determine whether those rules comport with widely shared values. That is, society will determine whether the rules feel right. Do they comport with what Justice Holmes described as society's "intuition of experience"<sup>92</sup> as to who we are as a community?<sup>93</sup>

Professor Rideout gives an example of how an individual might make such a determination in the last section of his article when he analyzes *Parents Involved v. Seattle School District*,<sup>94</sup> the 2007 case invalidating the race-based desegregation plans in two school districts where Chief Justice Roberts famously said "the way to stop discriminating on the basis of

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<sup>90</sup> RUTH ANNE ROBBINS, STEVE JOHANSEN, & KENNETH CHESTEK, *YOUR CLIENT'S STORY: PERSUASIVE LEGAL WRITING* 104 (2013) (stating that in a story about the law, the central issue is what the law is, or should be). In a story about the process, the central issue is whether the correct procedures have been followed. *Id.* Note, however, a case in which a court is asked to craft or refine a rule of procedure, is a story of the law. In a pure story of the process, the storytellers are the parties who are trying to persuade the audience (the court) that the pre-existing rule of procedure has or has not been correctly applied. Here the court, by changing the rule, is re-telling the story. *Id.*

<sup>91</sup> See Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE L. REV. 767, 775 (2006).

<sup>92</sup> *Chicago*, 204 U.S. 585, 598 (1907).

<sup>93</sup> See Rideout, *supra* note 10, at 77 ("For Supreme Court decisions, the narratives are stories not only about the case at hand, but also about who we are or wish to be as a community."). I would describe the "case at hand" as the "story of the parties," and "who we are or wish to be as a community" as the "story of the law."

<sup>94</sup> *Parents Involved v. Seattle Sch. Dist.*, 551 U.S. 701 (2007).

race is to stop discriminating on the basis of race.”<sup>95</sup> A vigorous dissent by Justice Breyer criticized the plurality opinion on the basis that it “undermines Brown’s promise of integrated primary and secondary education that local communities have sought to make reality.”<sup>96</sup> Professor Rideout looks at this case through the lens of narrative fidelity, comparing the narratives told by Justices Roberts and Breyer with his own “intuition of experience” as to who we are as a community.<sup>97</sup>

Professor Rideout immediately acknowledges the inherent difficulties in using the lens of “intuition of experience” in determining whether an opinion displays narrative fidelity.<sup>98</sup> He acknowledges that while he believes Justice Breyer’s dissent displayed more narrative fidelity than did Chief Justice Robert’s plurality opinion,<sup>99</sup> his own sense of narrative fidelity was not shared by a majority of the court. He noted that,

we [as a society] do not always adhere to the same narrative version of the particulars, to the same version of how we can best arrive at our ideals. Hence the sharp division in the opinions of the Court in *Parents v. Seattle Schools*, reflecting differences in how the story is best told. Those differences, under Fisher’s narrative paradigm, are differences in what best reflects our intuition of experience and in who we want to be as a people. They are differences about the story, felt at the deepest levels of what makes us human. We are still looking for the telling that seems like the right one.<sup>100</sup>

True enough, but what is left unexamined is how society determines “who we want to be as a people.”<sup>101</sup> Indeed, it may even be impossible to formulate a single explanation of who we are as a people; different segments of society are likely to come up with different explanations. This difficulty is because we all bring different experiences, perceptions, attitudes, desires, and moral values to the process of building a community. More importantly, some members of society want different outcomes than other members. In this light, one could reasonably despair as to whether it is even possible to find a single “intuition of experience”

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<sup>95</sup> *Parents Involved v. Seattle Sch. Dist.*, 551 U.S. 701, 748 (2007).

<sup>96</sup> *Id.* at 803-04.

<sup>97</sup> Rideout, *supra* note 10, at 79, 83.

<sup>98</sup> *Id.* at 83-84.

<sup>99</sup> Only four Justices signed Part IV of Chief Justice Roberts’s opinion, where he wrote, “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Parents Involved*, 551 U.S. at 748.

<sup>100</sup> Rideout, *supra* note 10, at 85-86.

<sup>101</sup> *See id.*

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that is widely shared among the highly diverse members of our society.<sup>102</sup>

Perhaps more importantly, to what extent is it acceptable to let the current values of society determine what the law should be? It was not that long ago that society thought it was acceptable to have racially segregated schools, notwithstanding the Fourteenth Amendment to the Constitution. Yet the Supreme Court ruled the practice unconstitutional, reflecting a moral judgment that the rights of the minority should not be trampled by the majority.<sup>103</sup> Arguably, that ruling reflected an “intuition of experience” shared by members of the Court that might not have been reflected in the majority of United States citizens at that time.

Different judges may have different “intuitions of experience,” shaped by the stories of their professional and personal background. But judges cannot escape those stories; they are only human. So it behooves us as a discipline to try and understand how those stories affect judges and why the stories are powerful. Perhaps more importantly, how do we as a society receive those stories and compare them to our own intuitions of experience? Because if those stories lack narrative fidelity—if they are at odds with our intuitions and moral sense of right and wrong—then the rule of law is in trouble.

These inquiries, of course, are not new. Scholars have been debating the role of judicial independence and values for over 100 years.<sup>104</sup> What is new, however, is the more recent work in cognitive science and narrative

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<sup>102</sup> One might be tempted to rely on our democratic institutions as a way of deciding what our “society” wants, but there are obvious and multiple limitations on that principle. First, it is not even clear that our elected officials represent individual constituents well, given the high level of infiltration of money into politics; see *Citizens United*, 558 U.S. at 310. Second, even assuming that our elected representatives do truly attempt to reflect the will of a majority of their constituents, determining what that “will” might be is problematic at best. People vote for their representatives for myriad of complex reasons, some of them contradictory. Finally, there is the problem of the tyranny of the majority, who often would not vote for social change even though, when that change happens, it turns out to be an overall benefit to society in general. The role of moral judgment in determining one’s “intuition of experience” is another puzzle that needs to be explored. Some segments of society decry what they dismissively call “moral relativism,” but isn’t all morality relative? Reasonable people can argue where to draw the line between “right” and “wrong” on many issues. Even the act of drawing that line requires comparison and weighing.

<sup>103</sup> Chestek, *supra* Part IV (discussion of *Brown*, 347 U.S. 483).

<sup>104</sup> The long-running debate between legal positivism and realism is just one iteration of the judicial independence and value debate. See, e.g., WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973).



theory. We are just beginning to explore this area,<sup>105</sup> and the legal writing academy is well-suited to study it since the answers to these questions have significant impact on how lawyers persuade.

#### V. Conclusion

So the final answer is yes, legal writing has doctrine. We stand at the frontier of new research into how the brain processes stories and how those processes influence judicial reasoning and the formation of law; we have a lot more to explore and learn. These are exciting times.

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WASHINGTON, D.C., (June 30, 2026)—*In a stunning rebuke to the controversial CLEAR system, eight of the nine Justices of the United States Supreme Court resigned today, citing their dissatisfaction with the way the supercomputer was deciding cases. Only Chief Justice William Gates remains on the bench.*

*The eight justices said in a prepared statement that a majority of the justices had disagreed with nearly half of the Court's decisions that the CLEAR computer had rendered since its implementation last fall. "With an error rate so substantial, we feel that we could no longer in good conscience serve in the capacity of essentially data input clerks," the statement read.*

*The resignations occurred less than a month after the CLEAR computer rendered a decision in favor of a developer who wished to build a major industrial facility, housing and commercial development in northern Arizona, near the Colorado River. Plaintiffs downstream of the proposed development, including the City of Las Vegas, filed suit to halt the development, claiming that the development would require so much water that downstream farms would lack sufficient water to irrigate their crops and that the water levels in Lake Mead would be seriously threatened. The ruling has sparked large-scale protests*

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<sup>105</sup> See, e.g., Berger, *A Revised View of the Judicial Hunch*, *supra* note 31; Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISCIPLINARY L.J. 259 (2009); Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883 (2010); Michael J. Higdon, *Something Judicious this Way Comes . . . The Use of Foreshadowing as a Persuasive Device in Judicial Narrative*, 44 U. RICHMOND L. REV. 1213 (2010); Andrea McArdle, *Using a Narrative Lens to Understand Empathy and How it Matters in Judging*, 9 LEGAL COMM. & RHETORIC: JALWD 173 (2012); Kathryn Stanchi, *Playing With Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 381 (2010); Kathryn Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89. OR. L. REV. 305 (2010).

*The Life of the Law Has Not Been Logic: It Has Been Story  
in Nevada and California, as well as a petition to repeal the 28th  
Amendment.*