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Toni M. Massaro  
*University of Florida*

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# EMPATHY, LEGAL STORYTELLING, AND THE RULE OF LAW: NEW WORDS, OLD WOUNDS?†

Toni M. Massaro\*

“[T]he object of a law is always general . . . [A] law always considers the subjects collectively and actions abstractly, never an individual person or a particular action. Thus the law can declare that there will be privileges, but it cannot give them to anyone by name . . . .”<sup>1</sup>

## I. THE TREND

### A. *Introduction: The Problem and the Contemporary Terminology Outlined*

The legal storytelling theme that is the focus of this symposium is part of a larger, ongoing intellectual movement. American legal scholarship of the past several decades has revealed deep dissatisfaction with the abstract and collective focus of law and legal discourse. The rebellion against abstraction has, of late, been characterized by a “call to context.”<sup>2</sup> One strand of this complex body of thought argues that law should concern itself more with the concrete lives of persons affected by it. One key word in the dialogue is the term “empathy,” which appears frequently in the work of critical legal studies, feminist, and “law and literature” writers.<sup>3</sup>

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\* Professor of Law, University of Florida. B.S. 1977, Northwestern; J.D. 1980, William and Mary. — Ed. I thank Francis Allen, Stuart Cohn, Jeffrey Harrison, Fred Schauer, Ted Schneyer, and Joan Shaughnessy for valuable critiques of earlier versions of this essay. I also thank Raymond Van Dyke, University of North Carolina-Chapel Hill, for excellent research assistance.

1. J. ROUSSEAU, *The Social Contract*, in *THE ESSENTIAL ROUSSEAU* 34 (L. Blair trans. 1983).

2. The phrase “call to context” is Professor Schauer’s.

3. See, e.g., J.B. WHITE, *HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* (1985); Henderson, *Legality and Empathy*, 85 *MICH. L. REV.* 1574 (1987); West, *Economic Man and Literary Woman: One Contrast*, 39 *MERCER L. REV.* 867 (1987); West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud’s Theory of the Rule of Law*, 134 *U. PA. L. REV.* 817 (1986); Yudof, “*Tea at the Palace of Hoon*”: *The Human Voice in Legal Rules*, 66 *TEXAS L. REV.* 589 (1988). More recently, a symposium that addresses these issues chose “passion” as its key word to represent (roughly) the same concept. *Reason, Passion, and Justice Brennan: A Symposium*, 10 *CARDOZO L. REV.* 1 *passim* (1988).

Legal writers who appeal to empathy likely are drawing from work in “interpretive sociology,” which appeals to the concepts of empathy and interpretation and to subjective meaning as vehicles for understanding social life. This approach to social life rejects positivist models of

These scholars applaud Noonan's well-known caution about rules. He wrote: "Rules are formalized repetition. They enforce a conformity which may be merciless and inhuman. They embody power."<sup>4</sup> Legal discourse may exaggerate this tendency in two ways. First, traditional legal discourse equates logic with "reason" and "understanding." Feminist jurisprudence in particular challenges this equation, and argues that feeling and imagination also are important aspects of reason and understanding.<sup>5</sup> Second, legal discourse and legal analysis typically emphasize the use of general, acontextual principles to solve concrete legal problems. Arguments against this approach come from many quarters.<sup>6</sup>

Closely related to the empathy theme are arguments in favor of more individualized justice. Lawyers are encouraged to personalize their clients — to "tell their story."<sup>7</sup> Legal scholars are invited to use stories to provoke changes in law teaching, in law scholarship, and in society beyond academia. Judges and other legal decisionmakers in particular are admonished to consider context, and to recognize the unique life story that each litigant represents. The rule-of-law model, or "law for law's sake," should not block judges' experiential understanding of the world — their "practical reason" — or be invoked to deny or devalue the actual human concerns at stake in a given legal setting.<sup>8</sup>

Cases like *Brown v. Board of Education*,<sup>9</sup> it is argued, should be seen as a simple truth about the harm in segregation that any ten-year old black child understands.<sup>10</sup> Lawyers should argue this simple truth. Judges should respect it. Law should enforce it. That is, legal cases should be approached as concrete human stories that take into account our different human voices. These two terms — "story" and "voice" — are important new words in this area of legal writing.<sup>11</sup>

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knowledge and rationality. See R. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* 25-27 (1983).

4. J. NOONAN, *PERSONS AND MASKS OF THE LAW* 19 (1976).

5. See, e.g., Henderson, *supra* note 3, at 1577.

6. See *infra* text accompanying notes 52-53. Many, but not all, of these arguments draw upon Richard Rorty's work in philosophy. See R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979).

7. See, e.g., Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1983).

8. See Henderson, *supra* note 3, at 1587; see also J.B. WHITE, *supra* note 3, at 133-36, 168-91.

9. 347 U.S. 483 (1954).

10. Yudof, *supra* note 3, at 589-90; see also Getman, *Voices*, 66 TEXAS L. REV. 577, 584-85 (1988).

11. It likely stems from Carol Gilligan's rather astonishingly popular work, *IN A DIFFERENT VOICE* (1982). See also J.B. WHITE, *supra* note 3, at 34, 41-42, 47-48; Getman, *supra* note 10, at 577, *passim*; Karst, *Woman's Constitution*, 1984 DUKE L.J. 447; Minow, *The Supreme Court*,

One problem underscored in this scholarship is that individual, concrete human voices and abstract, general legal rules often conflict. Written laws are impersonal. Moreover, the rule-of-law model trains us — that is, legal personnel — to “treat like cases alike,” and to define relevant similarities generally. The purposes of the written law according to this model are thought to go beyond individuals. This focus, say some legal scholars, can be destructive. It may lead to a disregard for individuals, and may exalt logical consistency and predictability over compassion and substantive justice. Therefore, the writers urge, lawyers, judges, and scholars should not suppress emotion and experiential understanding. Empathy, human stories, and different voices should be woven into the tapestry of legal scholarship, legal training, law formulation, legal counseling and advocacy, and law application and enforcement.

### B. “Empathy,” “Rule of Law,” and “Legal Storytelling” Defined

At this point, the terms “empathy,” “rule of law,” and “legal storytelling” require closer scrutiny. Defining these terms is not easy, because many writers use the terms without clarifying their intended meaning, or define the terms differently from other writers. Moreover, the words often are used less as precise descriptions than as symbols of much broader concepts.

#### 1. Empathy

In a recent article, Professor Lynne Henderson notes the prevalent use of the term “empathy” in legal works, and offers a much needed clarification of the term.<sup>12</sup> She identifies three aspects of empathy or empathic capacity:

1. The capacity to perceive others as having one’s own goals, interests and affects;
2. imaginative experience of the situation of another; and
3. the distress response that accompanies this experiencing — which may (but not must) lead to action to ease the pain of another.<sup>13</sup>

In discussing the relevant psychological literature and the current speculations about what determines the empathic capacity of a human being, Henderson notes that the environment of an individual seems to

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1986 Term — Foreword: *Justice Engendered*, 101 HARV. L. REV. 10 (1987); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986). See generally Shaughnessy, *Gilligan’s Travels*, 7 J. L. & INEQUALITY 1 (1988); Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

12. Henderson, *supra* note 3; see also Henderson, *The Dialogue of Heart and Head*, 10 CARDOZO L. REV. 123 (1988).

13. Henderson, *supra* note 3, at 1579-82.

play a major role. That is, our socialization and learning and early childhood experiences — particularly experiences with separation and attachment — principally determine our ability to “empathize” in later life.<sup>14</sup> Thus, for example, someone who has suffered pain is more likely to personalize the suffering of others and be affected more strongly by it.<sup>15</sup> Gender per se does not appear to affect empathic capacity.

External conditions also may influence our empathic capacity, and may cause us to ignore our empathic distress response. In particular, some writers argue, legal training can encourage us to block or inhibit empathic responses because it deems certain factors, including our emotions, to be “irrelevant.”<sup>16</sup> As Henderson puts it, “the ideological structures of legal discourse and cognition block affective and phenomenological argument.”<sup>17</sup> The result, she says, is that a mode of understanding that is best described as “empathy” is “foreclosed” or sent “underground.”<sup>18</sup> The loss she perceives in this approach to legal discourse is that our legal decisions and their justification fail to consider the full range of human experience and to appreciate situations of others.

## 2. Rule-of-Law

The term rule-of-law model is generally defined as a model that requires those who exercise government authority to conform strictly to the rules. “For our purposes, . . . its most relevant meaning is conveyed by . . . ‘a government of laws and not of men.’ . . . [G]overnment by rules takes precedence over government by will of those holding official power.”<sup>19</sup> The underlying concept is that “formal rationality,”

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14. *Id.* at 1583; cf. Goleman, *Researchers Trace Empathy's Roots to Infancy*, N.Y. Times, Mar. 28, 1989, at C1, col. 1 (reporting on recent research that suggests there may be a neural basis for empathy).

15. Henderson, *supra* note 3, at 1583 (citing A. BANDURA, SOCIAL FOUNDATIONS OF THOUGHT AND ACTION: A SOCIAL COGNITIVE THEORY 316 (1986)).

16. *See id.* at 1588.

17. *Id.* at 1575.

18. *Id.* at 1576.

19. M. KADISH & S. KADISH, DISCRETION TO DISOBEY 41 (1973); *see also* Michelman, *Justification (and Justifiability) of Law in a Contradictory World*, in JUSTIFICATION 71, 72-73 (Nomos XXVIII, J. Pennock & J. Chapman eds. 1986) (“The notion of decision *according to* law implies *comparison* of the case with some external standard that in some degree constrains or points to one or another decision, if it does not fully determine the outcome. The external norm must have *some* prescriptive force.”) (emphasis in original) (footnote omitted); Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 180-81 (1986) (describing the multiple ways in which the terms “legal formalism” and “legal realism” have been used over the years); Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) (“At the heart of the word ‘formalism,’ in many of its numerous uses, lies the concept of decisionmaking according to *rule*.”) (emphasis in original)).

which means consistent application of prior stated rules, should prevail.

The argument against formal rationality as a method of legal decisionmaking is that it may prevail to the detriment of substantive rationality. A judge can invoke a legal principle — for example, that black men are property — and ignore the impact of that principle on people. The judge's feelings and the feelings of black men are irrelevant to the dispute. Substantive justice, which means a fair or good result, is sacrificed in favor of consistent application of the legal principle.<sup>20</sup> Moreover, the judge can claim that a result is good simply because it upholds prior-stated law.

The popular image of lawyers is that we are committed to formal rationality. We are trained to cabin "empathic" responses and remain steadfast in our commitment to legal principles despite emotional dissonance. An anecdote, perhaps apocryphal,<sup>21</sup> about Justice O'Connor confirms this image. The story goes that, while a state court judge, Justice O'Connor was compelled by law to impose a strict sentence on a criminal defendant. After she dispassionately announced her verdict in open court, she retired to her chambers and wept. That is, Justice O'Connor maintained her professional discipline and curbed any personal or emotional desire to deviate from the prior-stated, popular legal standards. This was proper and commendable judicial conduct, according to conventional wisdom.<sup>22</sup>

Increasing numbers of legal scholars decry this assumed tendency of legal professionals to invoke and apply the rule-of-law, yet shield themselves from the emotional and moral consequences of their actions.<sup>23</sup> Justice O'Connor's private anguish, according to some people,

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What I mean by formalism . . . is a commitment to, and therefore also a belief in the possibility of, a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary. . . . The formalism I have in mind characteristically invokes impersonal purposes, policies, and principles as an indispensable component of legal reasoning.

Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 564 (1983).

20. The law controls the factors that are "relevant," or, to put it another way, that fall within the lines. And, as Unger has observed, "[e]verything will depend on where one draws the line." R. UNGER, *LAW IN MODERN SOCIETY* 204 (1976). Yudof has observed that "[a]ny particular legal ordering spun from the human imagination may be just or unjust. But the ordering itself determines what facts are necessary to adjudication and thus the relevance of particular human voices." Yudof, *supra* note 3, at 590.

21. I do not recall the source of this anecdote, and cannot vouch for its accuracy. I acknowledge the worrisome possibility, suggested to me by Professor Fred Schauer, that such stories may be more likely to be told about women judges than about men.

22. Cf. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 78 (1980) ("[T]he standard conception [of the lawyer's role] calls for a sharp separation of private and professional morality . . . [which] requires a public endorsement, as well as private adoption, of the extreme strategy of detachment.").

23. Cover made this point in *Justice Accused*. He wrote:

should not have been confined to her chambers, but should have figured in her public deliberations and in the legal result. If application of the penal code made Justice O'Connor weep, then her pain should have alerted her to the possibility that the code should not, in that case, have been so applied. Legal decisionmaking should not discount feelings, whether of the litigants or of other relevant actors in our legal dramas. Our emotions and affect should be as much a part of normal legal discourse as the "objective" legal rules.

### 3. *Legal Storytelling*

Richard Delgado is correct when he notices that "[e]veryone has been writing stories these days."<sup>24</sup> Moreover, they are telling stories to many different audiences, to promote a broad range of different ends. The participants in this symposium, for example, describe or use multiple sorts of stories: stories that bridge,<sup>25</sup> providing connections between people of different experience, stories that explode (like grenades) certain ways of thinking,<sup>26</sup> stories that mask, devalue, or suppress other stories,<sup>27</sup> stories that consolidate, validate, heal, and fortify (like therapy),<sup>28</sup> and even stories that maim or "spirit murder"<sup>29</sup> and so should not be told at all.<sup>30</sup>

The participants likewise describe different sorts of audiences for their stories. Some are stories told by legal scholars, which are directed at other members of the academic community.<sup>31</sup> Other stories are told by lawyers to judges or juries.<sup>32</sup> Other writers discuss "stock

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The judicial conscience is an artful dodger and rightfully so. Before it will concede that a case is one that presents a moral dilemma, it will hide in the nooks and crannies of the professional ethics, run to the cave of role limits, seek the shelter of separation of powers. R. COVER, *JUSTICE ACCUSED* 201 (1975) (describing judges' reactions to slavery).

24. Delgado, *Legal Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2411 (1989).

25. See, e.g., Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989); Matsuda, *Public Sanction of Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989).

26. See, e.g., Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382 (1989); Delgado, *supra* note 24.

27. See, e.g., Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280 (1989); Bell, *supra* note 26; Delgado, *supra* note 24; Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152 (1989); Williams, *supra* note 25.

28. See, e.g., Delgado *supra* note 24, at 2437.

29. The phrase is Patricia Williams'. See Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127 (1987).

30. See, e.g., Matsuda, *supra* note 25 (arguing for criminalizing racist hate speech).

31. See, e.g., Bell, *supra* note 26; Delgado, *supra* note 24.

32. See Cunningham, *supra* note 25; Williams, *supra* note 25.

stories”<sup>33</sup> told by judges to the community<sup>34</sup> and told by the community about itself,<sup>35</sup> and offer competing “counterstories,” that are told by outgroups to themselves, or that can be directed at “ingroups” in an effort to convert, or even deconstruct the stock story.<sup>36</sup>

This storytelling theme ties in to the empathy theme in several ways. Stories tend to work directly from “experiential understanding,” which the empathy writers encourage us to use. Consequently, narrative may be a particularly powerful means of facilitating empathic understanding: a concrete story comes closest to actual experience and so may evoke our empathic distress response more readily than abstract theory. Telling stories can move us to care, and hence pave the way to action. To the extent that lawyers and judges are engaged in acts of persuasion — which they clearly are — legal scholarship reasonably should be interested both in how narratives, in general, tend to “work” (persuade), and in which ones, in particular, succeed.<sup>37</sup>

There is, however, more to the legal storytelling theme than the exploration of effective advocacy techniques. Like the writing on empathy, storytelling is part of an overall “call to context,” which is directed at jurisprudential and normative ends. Those who encourage legal storytelling and those who favor empathic decisionmaking seem to share at least two concerns. One concern is that legal theory and legal discourse often are too removed from individual experience. Academics, judges, and lawyers often juggle concepts and spar with abstractions, without consulting the human concerns actually at issue in their deliberations. Stories can shock them back into sensation, into life as it *is* versus how we talk about it. Stories are one way to bring law down to life, to the people, “to the ground.” This reflects, I believe, a broader suspicion of traditional jurisprudence’s emphasis on acontextual rules and about the way that Western epistemology tends to describe or interpret experience and understanding.

The second shared concern of at least some of the legal storytelling advocates is normative. To favor bringing things down to *context*, to individual storytellers and their unique experience, is to favor the “protestant” view of interpretive authority that Professor David

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33. This phrase is Gerald López’s. See López, *The Internal Structure of Lawyering: Lay Lawyering*, 32 UCLA L. REV. 1 (1984).

34. See, e.g., Luban, *supra* note 27.

35. See, e.g., Ball, *supra* note 27.

36. See, e.g., Delgado, *supra* note 24; Matsuda, *supra* note 25.

37. A provocative question, which I think could easily be the subject of an entire separate symposium, is this: Why is Patricia Williams’ “sausage story” so marvelously, unforgettably “good”? See Williams, *supra* note 25, at 2130-31.



Luban describes.<sup>38</sup> This view implies that all voices are equal, and that diversity of voice should be a paramount political value. Human dignity — each storyteller is an end, not a means — seems to be an implicit normative principle of the legal storytelling approach.<sup>39</sup> A further normative implication is, I believe, that our ultimate goal should be “minimalist rules,” in order to maximize multi-voicedness and freedom.

Beyond such very general shared concerns and values, however, I find little consensus among these writers about the implications of the call to context. For example, some writers suggest that we need rules that silence some voices, and fortify other storytellers who, historically, have been silenced. This is, of course, inconsistent with a view that each voice counts, regardless of its message. Some writers invoke the call to context to further the critique of liberalism. Still others invoke “voice” to encourage a shift away from individualism to the so-called ethic of care. For these reasons, the “call to context” is complex, often contradictory, and difficult to summarize. This essay is a preliminary attempt to make some sense of this movement, and to express some doubts and hopes about its future course.

## II. CRITIQUE

A call for more “empathy,” more human “stories,” and more liberated “voices” has intuitive and immediate appeal. Many people, myself included, agree that individuals should be noticed, heard, and respected by the law, and that current legal discourse may undermine or undervalue these concerns in serious and painful ways. I write not to reject or discredit this claim, but to suggest that the new terminology may not be helpful; to express several concerns about the limitations of the “call to context”; and to encourage a shift in focus to what I believe is the deeper malady that triggers the criticism that the law is “unempathetic” to individual needs. I focus my remarks primarily on the application of the empathy, or “context,” discourse to the work of judges, rather than to lawyers, legislators, or legal scholars.

### A. *The Terminology*

As an analytical tool, the term “empathy” is not very helpful. Pro-

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38. Luban, *supra* note 27.

39. For an excellent discussion and sensitive critique of the legal storytelling movement see Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 MICH. L. REV. 543, 578-81 (1988). See also Bartlett, *Storytelling* (Book Review), 1987 DUKE L.J. 760 (noting that storytelling can be used equally for progressive reform and for other, contradictory purposes).

fessor Henderson correctly notes that although “[e]mpathy has become a favorite word in critical and feminist scholarship[,] . . . it is never defined or described — it is seemingly tossed in as a ‘nice’ word in opposition to something bad or undesirable.”<sup>40</sup> Her clarification of the empathy phenomenon, however, helps explain why the word is of limited use when applied to concrete legal problems.

First, the term is borrowed from psychological literature. This obviously does not discredit it as a legal term, but it does suggest that it may have a different meaning and function when exported to the unfamiliar context of law. Psychological theories about empathy and empathic understanding presuppose a setting in which law rarely operates: one person feeling the distress of another person. If a judge (one person) were asked only to consider and experience the distress of one other person, then the concept of empathy might prove a significant tool for describing *and* improving the judging process. But the judge in an adversary system such as ours must empathize with, or “stand in the shoes of,” several people, or, more often, business organizations, the government, or other representative groups. The judge hears conflicting “stories,” and must order competing “voices.” Of course, an empathic person will better “hear” all stories — that is, “both sides” — than one who heeds only one voice. This insight is well understood, though, and may not require extended consideration.

The context and functions of psychology differ from that of law in numerous other ways relevant to the empathy phenomenon.<sup>41</sup> For example, the psychiatrist (or mental health counselor) has no set time within which the psychological intervention, such as therapy, must be completed; a legal decisionmaker does. The psychiatrist is not expected to, or in conventional psychotherapy allowed to, judge a patient, let alone sentence her to death; legal decisionmakers must judge.<sup>42</sup> The psychiatrist has the opportunity for repeated interactions with the patient over an extended period of time, in private settings, with no other people present; the judge may only see the parties’ lawyers, not the parties themselves, usually in a public courtroom during brief, episodic encounters. When the parties do appear, the setting is

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40. Henderson, *supra* note 3, at 1578.

41. My colleague Walter Weyrauch has developed a comparison of “legal therapy” and “psychological therapy,” in which he points out differences between them and argues that legal therapy is, in many ways, more effective. W. Weyrauch, *Some Propositions That Speak for Legal over Psychiatric Counseling* (unpublished manuscript on file with the author).

42. See Cover, *The Supreme Court, 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1983) (describing the “jurispathic” role of courts and their essentially coercive nature). Of course, when expert psychological testimony is used by law — such as in making predictions of future dangerousness or assessing legal insanity — the psychiatrist is contributing to judgments that carry severe sanctions, including capital punishment.

hardly intimate or otherwise conducive to “knowing” someone. Either empathy advocates must favor radical restructuring of court procedures to make them more congenial to “contextual” justice,<sup>43</sup> or they mean something different from this strong sense of “empathy” — some weaker phenomenon that *can* happen in public courtroom settings, through lawyer representatives.

I believe these differing missions of law and psychiatry, and the functional restrictions of law, make the deeper meaning of “empathy” useful in psychology, but dramatically less so in law.<sup>44</sup> It is no wonder, then, that when pressed into service in the complicated, dynamic and unfamiliar real-world territory of legal conflicts, the psychological term “empathy” becomes little more than a soft, “nice” word.

I also have reservations about Professor Henderson’s suggestion that a refined appreciation of the empathy phenomenon offers a distinctive tool for analyzing legal decisions. Her specific examples of a breakthrough of empathic understanding — *Brown v. Board of Education*<sup>45</sup> and of empathic failure — *Bowers v. Hardwick*<sup>46</sup> are not self-proving. Each decision can be supported or condemned on different grounds. *Brown*, which abolished separate-but-equal schools, may be read simply as a long-overdue realization that separate is not equal: a straightforward constitutional analysis. Or it may have been an emotional, adverse response to the harsh effects of discrimination on school-aged black children. *Hardwick*, which upheld the Georgia sodomy statute, may be read simply as a refusal to include in our catalogue of individual rights the right to engage in certain types of sexual activity<sup>47</sup>—also routine constitutional analysis. Or it may have been an emotional, adverse response to homosexuality. The opinion cites history and scripture, suggesting still other bases for the result.

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43. I am unaware of any such proposal, although the Alternative Dispute Resolution (ADR) movement comes close. The absence of such proposals is striking and significant. As Frank Michelman has observed: “[T]he reality and even the possibility of legalist justification have been under sharp and sustained attack in this country for sixty years and more, and yet the attackers, so far as I know, have not advocated abolition of the courts . . . .” Michelman, *supra* note 19, at 83.

44. A lawyer *argues* for an empathic distress response. Hers is an appeal for particular legal action and not — in the end — for mere empathic understanding. She is saying, as many of this symposium’s participants are saying, that a given story deserves to be heard and heeded. This type of advocacy is not, to my knowledge, part of the psychiatrist’s traditional professional role.

45. 347 U.S. 483 (1954); see Henderson, *supra* note 3, at 1593-609.

46. 478 U.S. 186 (1986); see Henderson, *supra* note 3, at 1638-50.

47. At least one court, however, has interpreted *Hardwick* not as a judgment favoring heterosexuality over homosexuality, but as a judgment that the right to privacy does not extend to sexual activity outside of marriage. Thus, a Maryland law proscribing oral sex was held constitutional, as applied to unmarried heterosexuals. See *Schochet v. Maryland*, 75 Md. App. 314, 541 A.2d 183 (1988); *Anti-Sodomy Law May Be Applied to Consenting Unmarried Heterosexuals*, 14 Fam. L. Rep. 1380 (1988).

“Traditional legal thinking” thus was not necessarily the villain in *Hardwick*, and “empathic understanding” was not necessarily the hero in *Brown*.

Explaining these results or analyzing what “really” determines the rulings of the United States Supreme Court or of lower court judges is a confounding and complicated endeavor, as the depth and variety of legal scholarship on this topic proves. I submit that the task of describing and defending choices about what *should* happen in these cases is both a more important and more difficult task. Moreover, I believe that the term “empathy” does not help us measurably in these endeavors. To say, for example, that “[t]he goal of the law . . . should be to encourage . . . empathic intersubjectivity”<sup>48</sup> — an “empathic and loving community”<sup>49</sup> does not begin to answer whether affirmative action laws or sodomy laws deserve support, unless “empathy” means far *more* than the psychological definition implies. The “empathy” concept does not offer reasons why human distress is something we should alleviate, or criteria for choosing *whose* distress should trigger our response. The residual meaning, and potential usefulness of the term for law, therefore seem to be indistinguishable from that of many other terms, such as compassion, tolerance, justice, equity, or simple human kindness.

Judicial decisions surely are explainable, at least in part, by a judge’s ability to understand, “hear,” or empathize with certain litigants.<sup>50</sup> But we already know that. Moreover, Professor Henderson’s reading of the psychological literature suggests that our empathic capacity is determined, to a large extent, by our upbringing. This means that judges, as human beings, *cannot* empathize with all litigants.

“Law” likewise cannot “empathize” with everyone equally. All stories cannot be given equal value. To do so would deny the ordering of interests inherent to law. For example, Professor Matsuda asks that we give greater value to the victim’s story than to that of the first amendment absolutist, or to that of the promoter of racial hatred.<sup>51</sup> To criminalize the telling of any story is to *silence* that voice. She

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48. West, *supra* note 3, at 863.

49. *Id.* at 860-61.

50. This would seem to be especially true at the trial court level, where the judge has personal contact with the parties. At the appellate level, the judge’s only personal contact is with the parties’ lawyers. In some cases, even this contact will not occur if the case is decided without oral arguments. Moreover, appellate judges have limited fact-finding powers. Ted Schneyer has observed, in his reaction to an earlier version of this essay, that the empathy writers’ emphasis on the role of experiential understanding may therefore turn legal academics’ attention more toward the trial, rather than the appeal, as the paradigm legal event; and to the jury, rather than the judge, as the paradigm legal decisionmaker.

51. See Matsuda, *supra* note 25.

wants the law to assure that this person will *not* incline our hearts, or persuade members of our community to heed this story. The “proper” ordering of voices thus seems to be the underlying fundamental issue. The significant modern questions thus are not whether judges and “law” should “empathize,” or whether stories are exceptional windows to experience, but with whom should we empathize — why, when, and according to what procedures? Which stories should law privilege? Which stories are profane? These are, of course, very familiar questions about law, which are no less intractable when addressed with new terminology.

### B. *The Rule-of-Law Model as Villain*

Most writers who argue for more empathy in the law concede that law must resort to some conventions and abstract principles. That is, they do not claim that legal rules are, as rules, intrinsically sinister. Rather, they argue that we should design our legal categories and procedures in a way that encourages the decisionmakers to consider individual persons and concrete situations. Generalities, abstractions, and formalities should not dominate the process. The law should be flexible enough to take emotion into account, and to respond openly to the various “stories” of the people it controls. We should, as I have said, move toward “minimalist” law.

Yet despite their acknowledgment that some ordering and rules are necessary, empathy proponents tend to approach the rule-of-law model as a villain. Moreover, they are hardly alone in their deep skepticism about the rule-of-law model. Most modern legal theorists question the value of procedural regularity when it denies substantive justice.<sup>52</sup> Some even question the whole notion of justifying a legal

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52. See generally J. FRANK, *LAW AND THE MODERN MIND* 165-66 (1963); H.L.A. HART, *THE CONCEPT OF LAW* 121-50 (1961); M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 25 (1977); R. UNGER, *supra* note 20, at 52-57, 192-223; Barnett, *Foreword: Can Justice and the Rule of Law Be Reconciled?*, 11 HARV. J.L. & PUB. POLY. 597 (1988); Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 377-91 (1973); Schauer, *supra* note 19, at 509; Thompson, *The Role of the Rule of Law in the Liberal State*, 1 NATAL U. L. & SOCY. REV. 126 (1986); Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH L. REV. 1502 (1985). A complicated strand of the attack on the “Rule of Law” appears in feminist jurisprudence and in particular in the writings of Professor Robin West. She claims that “the Rule of Law does not value intimacy — its official value is autonomy,” West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 58 (1988), and that it does not recognize “the contradiction which characterizes women’s, but not men’s lives: while we value the intimacy we find so natural, we are endangered by the invasion and dread the intrusion in our lives which intimacy entails, and we long for individuation and independence.” *Id.* at 59. In making her claim, as I understand it, Professor West is using the term “Rule of Law” far more broadly than I am — to mean the prevailing jurisprudence in American (patriarchal) society. Her criticism of that model therefore proceeds from a different point and is directed at a deeper, systemic problem in our legal system. I do not think that she would argue that, in a post-patriarchal world, procedural regularity would be abandoned or formal rationality would disappear as one part of a just legal system.

decision by appealing to a rule of law, versus justifying the decision by reference to the facts of the case and the judges' own reason and experience.<sup>53</sup> I do not intend to enter this important jurisprudential debate, except to the limited extent that the "empathy" writings have suggested that the rule-of-law chills judges' empathic reactions. In this regard, I have several observations.

My first thought is that the rule-of-law model is only a model. If the term means absolute separation of legal decision and "politics," then it surely is *both* unrealistic and undesirable.<sup>54</sup> But our actual statutory and decisional "rules" rarely *mandate* a particular (unempathetic) response. Most of our rules are fairly open-ended. "Relevance," "the best interests of the child," "undue hardship," "negligence," or "freedom of speech" — to name only a few legal concepts — hardly admit of precise definition or consistent, predictable application. Rather, they represent a weaker, but still constraining sense of the rule-of-law model. Most rules are guidelines that establish spheres of relevant conversation, not mathematical formulas.

Moreover, legal training in a common law system emphasizes the indeterminate nature of rules and the significance of even subtle variations in facts. Our legal tradition stresses an inductive method of discovering legal principles. We are taught to distinguish different "stories," to arrive at "law" through experience with many stories, and to revise that law as future experience requires. Much of the effort of most first-year law professors is, I believe, devoted to debunking popular *lay* myths about "law" as clean-cut answers, and to illuminate law as a dynamic body of policy determinations constrained by certain guiding principles.<sup>55</sup>

As a practical matter, therefore, our rules often are ambiguous and fluid standards that offer substantial room for varying interpretations. The interpreter, usually a judge, may consult several sources to aid in decisionmaking. One important source necessarily will be the judge's own experiences — including the experiences that seem to determine a person's empathic capacity. In fact, much ink has been spilled to illuminate that our stated "rules" often do not dictate or explain our legal results. Some writers even have argued that a rule of law may be, at times, nothing more than a post hoc rationalization or attempted legi-

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53. See, e.g., Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984). For a description of the Critical Legal Studies critique of legalism, and a cogent, thoughtful response, see Michelman, *supra* note 19.

54. See Michelman, *supra* note 19, at 86.

55. The law school emphasis on the indeterminacy of rules may be exaggerated, in part because of professors' tendency to focus on difficult appellate cases. See Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717 (1988).

timization of results that may be better explained by extralegal (including, but not necessarily limited to, emotional) responses to the facts, the litigants, or the litigants' lawyers,<sup>56</sup> all of which may go unstated. The *opportunity* for contextual and empathic decisionmaking therefore already is very much a part of our adjudicatory law, despite our commitment to the rule-of-law ideal.

Even when law is clear and relatively inflexible, however, it is not necessarily "unempathetic." The assumed antagonism of legality and empathy is belied by our experience in rape cases, to take one important example. In the past, judges construed the general, open-ended standard of "relevance" to include evidence about the alleged victim's prior sexual conduct, regardless of whether the conduct involved the defendant.<sup>57</sup> The solution to this "empathy gap" was legislative action to make the law more specific — *more* formalized. Rape shield statutes were enacted that controlled judicial discretion and specifically defined relevance to exclude the prior sexual history of the woman, except in limited, justifiable situations.<sup>58</sup> In this case, one can make a persuasive argument not only that the rule-of-law model does explain these later rulings, but also that obedience to that model resulted in a triumph for the human voice of the rape survivor. Without the rule, some judges likely would have continued to respond to other inclinations, and admit this testimony about rape survivors. The example thus shows that radical rule skepticism is inconsistent with at least some evidence of actual judicial behavior. It also suggests that the principle of legality is potentially most critical for people who are least understood by the decisionmakers — in this example, women — and hence most vulnerable to unempathetic ad hoc rulings.

A final observation is that the principle of legality reflects a deeply ingrained, perhaps inescapable, cultural instinct. We value some procedural regularity — "law for law's sake" — because it lends stasis and structure to our often chaotic lives. Even within our most intimate relationships, we both establish "rules," and expect the other

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56. See, e.g., J. FRANK, *supra* note 52, at 130; Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981); Weyrauch, *Law as Mask — Legal Ritual and Relevance*, 66 CALIF. L. REV. 699, 710-11 (1978).

This argument against legality is different from one that claims that rules chill empathy. Here the concern is that rules may be illusions or masks. We *claim* judges follow rules, but they in fact follow extra-legal instincts that are wrapped in rules' clothing. That is, stated rules do not constrain (or chill) after all.

57. See generally, Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977); Estrich, *Rape*, 95 YALE L.J. 1087 (1986); Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763 (1986); Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395 (1985).

58. See, e.g., FED. R. EVID. 412.

party to follow them.<sup>59</sup> Breach of these unspoken agreements can destroy the relationship and hurt us deeply, regardless of the wisdom or “substantive fairness” of a particular rule. Our agreements create expectations, and their consistent application fulfills the expectations. The modest predictability that this sort of “formalism” provides actually may encourage human relationships.<sup>60</sup>

These points together suggest that “legality,” as we actually experience it in American culture, is not the natural enemy of empathy. When pared to its roots, the “empathy” theme therefore seems not to be a call for more empathy, but for a different ordering of our empathic responses. It represents a hope that certain specific, different and previously disenfranchised voices — such as those of blacks and women and poor people and homosexuals — will be heard, *and will prevail*. This is not a call to conversation; it is *convert*-sation. For example, Professor Henderson’s condemnation of the Supreme Court’s decision in *Bowers v. Hardwick* may be read as a call for more empathy for homosexuals and *less* empathy for people who are fearful of, incensed about, or otherwise disturbed by homosexuality. This appeal is not necessarily an indictment of legality, or even of any particular legal principle — whether it is “equal protection” or “right to privacy.” Nor is it an endorsement of storytelling as an intrinsically good act: a homophobic story is told by a human being too. Rather, the empathy discourse implies a political and ethical agenda, which involves making choices among competing values or sets of feeling. Adherence to “law for law’s sake” therefore poses a problem *only* if one deems that particular law or its application to be foolish, cruel, narrow, or shortsighted.<sup>61</sup>

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59. See, e.g., Weyrauch, *The Family as Small Group*, in *GROUP DYNAMIC LAW: EXPOSITION AND PRACTICE*, 153 (D. Funk ed. 1988).

Kundera captures this sense when he describes the law of personal relationships as follows:

[E]very love relationship is based on unwritten conventions rashly agreed upon by the lovers during the first weeks of their love. On the one hand, they are living a sort of dream; on the other, without realizing it, they are drawing up the fine print of their contracts like the most hard-nosed of lawyers. O Lovers! Be wary during those perilous first days! If you serve the other party breakfast in bed, you will be obliged to continue same in perpetuity or face charges of animosity and treason!

M. KUNDERA, *THE BOOK OF LAUGHTER AND FORGETTING* 36 (1981).

60. The inconsistent application of “rules” can be psychologically destructive. The famous studies by Seligman on the effects on animals of noncontingent negative reinforcement demonstrate this in a dramatic fashion. See M. SELIGMAN, *HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH* (1975).

61. As Galligan has written:

The simple point is that once the substantive requirements of a theory of justice have been applied, there is no remainder to which the idea of formal justice refers. It is the substantive principles of the particular theory that regulate the distribution of benefits and burdens, and so determine how individuals are to be treated. . . . The precept to treat like cases alike is satisfied by the rational application of a substantive theory of justice.

D. GALLIGAN, *DISCRETIONARY POWERS* 160 (1986). That is, the rule-of-law model — which



I agree with the instincts — that is, with the outcomes — that these empathy writers seem to favor. I nevertheless believe that we cannot intelligently further a particular political agenda, such as permitting homosexuals to engage in private, consensual intercourse, *without* invoking such acontextual principles as individual autonomy, the value of sexuality, and appropriate limits on state power to intervene in private affairs.<sup>62</sup> Concrete stories that illustrate why a contrary rule is mean-spirited and deeply alienating for some human beings would (and should) support that claim, but “hurtfulness” alone will not persuade many people to change the rules. Rather, this hurtful character must be evaluated in the context of some philosophy of social justice, some (abstract) theory of law. As Professor Sylvia Law recently said:

The unnecessary human suffering caused by laws that punish sexual intimacy should be a critical component of constitutional analysis.

Yet, to evaluate individual interests in sexual expression solely in terms of avoidance of harm is inappropriately narrow. . . . [T]he core human importance of sexuality suggests that our constitutional visions of liberty and equality should encompass a more affirmative perspective on sexuality than simply the avoidance of state-inflicted danger and pain.<sup>63</sup>

That is, it is not only “hurtful” to discriminate against blacks and homosexuals and women — it also is wrong as a matter of principled ordering of relevant interests in American constitutional law. Not all hurtful rules, however, will be “wrong” rules.<sup>64</sup> For example, a rule that requires testing for AIDS may not be “wrong,” though it may

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includes the notions that laws should be “prospective, open and clear,” see Thompson, *supra* note 52, at 126, and that similar cases should be treated similarly — itself is benign *if* the underlying substantive law is benign.

62. In fact, one cannot talk about the issue without moving beyond context. What, for example, do we mean when we say “homosexual”? We are not, I assume, talking only about Mr. Hardwick’s experiences. Nor are we talking about all of his life experiences. We are limiting our “context,” to certain aspects of his life — ones we deem “relevant” to the legal question. For an in-depth exploration of this problem of rules and “context,” see F. Schauer, Three Comments on Context (unpublished paper presented at Harvard Law School, Apr. 1988) (on file with author).

63. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. REV. 187, 227-28 (footnote omitted).

64. Professor Joan Shaughnessy examines this problem of pain — how law hurts — in the following passage:

In the course of their work, lawyers and judges are frequently required to inflict great pain. . . .

. . . It is difficult to inflict pain, and the more intimately we know another person, the more difficult it becomes. To know all may well be to forgive all, and that the law cannot afford. . . .

. . . In short, the professional roles we assume as lawyers and judges have built into them a protective distancing mechanism, a mechanism explained by the need for lawyers and judges to inflict pain in the course of carrying out the law’s coercive power in our society. Shaughnessy, *supra* note 11, at 23-24. Indeed, much of her elegant essay tracks the concerns I express here. Cf. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (observing that “[l]egal interpretation takes place in a field of pain and death”).

well be "hurtful" to those affected. We therefore need to explain and justify "right" and "wrong" in terms of our political and constitutional doctrines, and underlying values.

A final, and important, observation is that our legal procedures do not block the *lawyer's* opportunity to tell a client's story. Modern trial procedures do not prevent the lawyer who represents the victim of state-inflicted danger and pain from bringing this anguish to the factfinder's attention. Client stories thus can be, and often are, both told and heard, even when reported judicial opinions fail to mention these details of trial-level dramas.<sup>65</sup> Human suffering is not "irrelevant" as a matter of American law or procedure. Yet it is clear that some peoples' suffering is consistently discounted or denied by the humans who draft and enforce our laws. Also clear is that legal rules and their enforcement restrict the range of discourse,<sup>66</sup> and do so in ways that tend to reflect (and sometimes, to magnify) the prejudices, empathic blindness, and insensitivities of the dominant communities. The voices of the dominant communities typically receive the validation of rules, so that other voices lack this "reification" and validation. But the problem often originates in the community — in us — not in the written rule. Law is not merely a cause; it is also an effect. "Legalism" alone does not *cause* slavery, discrimination, or gross disparities in wealth and social goods. To claim that it does is to lay the blame for cruelty outside the human hearts and minds that invent it. Laws surely reinforce and thus can entrench the status quo, but are, at root, human inventions. To return to one of Henderson's examples, the "empathy-blocker" in *Hardwick* likely was deep-seated antipathy toward homosexuals in the dominant heterosexual community,<sup>67</sup> and *not* the rule-of-law model, the Constitution, legal training, or judicial personality. That is, some human voices were heard in *Hardwick*, but not the "right" ones.

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65. Although his voice did not prevail, the voice of infant Joshua DeShaney was heard all the way up to the United States Supreme Court. Joshua was beaten by his father so severely that he became brain-damaged. A lawsuit was filed against the county department of social services, alleging that its failure to intervene on Joshua's behalf was a violation of due process. *DeShaney v. Winnebago City Dept. of Social Servs.*, 109 S. Ct. 998 (1989). Most striking was Justice Blackmun's heartfelt dissent in which he writes: "Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who . . . did essentially nothing." 109 S. Ct. at 1012-13 (Blackmun, J., dissenting). "Poor Joshua," indeed. These two simple words are among the most eloquent in recent Supreme Court history.

66. As Duncan Kennedy has said, "For any given factual conflict of rights, the doctrinal structure will offer a choice of categorizations; the techniques of reasoning that are supposed to tell us which choice to make will themselves reproduce that choice at another level." Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 360 (1979).

67. See, e.g., Law, *supra* note 63, at 227-28 (arguing that the basis for negative attitudes toward homosexuals is the desire to preserve traditional concepts of masculinity and femininity and to uphold the political, market and family structures premised on gender differentiation).

In summary, the rule-of-law model and empathy are not natural, inevitable antagonists. American statutory and decisional laws rarely are so specific that they require wooden, “unempathetic” results. Modern American trial procedures do allow trial lawyers to personalize their clients and tell their stories.<sup>68</sup> The dilemma lies in the realizations that all stories cannot dominate, and that law often privileges the stories of the powerful and drowns out the voices of the weak and marginal. We cannot escape this problem of power, or the fact that legal decisions must be based on some set of political and moral values. The concept of empathy does not, I regret, assist us in making these hard choices. It does not help solve the underlying issues of social policy and social justice.<sup>69</sup> It offers, perhaps because of its roots in psychology, a new diagnosis for a known condition, rather than the much needed prognosis or recommended course of treatment.

### C. *The Call for Individualized Justice and the Link to Discretion*

The argument for more empathy often includes a call for more “individualized” justice. The claim is that judges should focus more on context — the result in *this* case to *these* parties — and less on formal rationality — squaring this result with results in other cases. This means that law must be more open-ended or general, and that legal decisionmakers must be given greater flexibility to reach “right” decisions.<sup>70</sup> No two applicants for welfare, no two alleged rapists, no two tort-feasors or tort victims will have the *same* story. Accordingly, if we want judges to hear these varying stories, and to craft decisions that meet individual, contextual needs, then legislators must give wide — even limitless — discretion to judges and other legal decisionmakers. The inevitable link between discretion and empathy<sup>71</sup>

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68. Cf. Cunningham, *supra* note 25.

69. The problem, of course, is not new. The proposed solution — rejection of legal formalism — is not new either. Galligan describes the course of the movement away from formalism and the obstacles it encountered as follows:

It was a common theme of the realist and sociological schools of jurisprudence that a wider view of the legal domain ought to be taken by casting aside formal, rule-based constraints, so that issues of social policy and social justice could be confronted by legal institutions and, with assistance from the social sciences, be resolved. The delegation of tasks to specialized administrative authorities appeared to answer that call exactly; but it soon became clear that the precepts of social justice may be more difficult to determine, communities more divided in their interests and values and the contribution of the social sciences more limited.

D. GALLIGAN, *supra* note 61, at 70-71 (footnote omitted).

70. The more one focuses on substantive rationality (specific outcomes) of the law, rather than formal rationality (consistent or even-handed application of rules within a system of laws), the greater the discretion in that legal order. *See id.* at 70.

71. Discretion, in turn, is linked to judicial lawmaking versus judicial law enforcement. The question therefore becomes the procedural one of *who* should decide issues of social policy and social justice. The principle of legality suggests a set procedure for these determinations. As Selznick phrased it: “Legality has to do mainly with *how* policies and rules are made and applied

thus deserves attention in any discussion of empathy and law.

A proposal implying that greater discretionary authority should be given to legal decisionmakers betrays tremendous faith in the wisdom and responsiveness of our decisionmakers.<sup>72</sup> One reason to be skeptical about this faith is that "empathic capacity," as well as other relevant decisionmaking qualities, are unevenly distributed among human beings. Official discretion is dangerous. A second reason to resist giving greater discretion to judges is that American law already affords pervasive discretionary authority to judges, administrators, and other officials responsible for law enforcement and application. Moreover, much of this discretion is standardless and virtually nonreviewable.

The practical and theoretical dangers of discretion are well known and much discussed. As Professor Francis Allen has observed, giving discretion to decisionmakers competes with our desire for "a viable system of comprehensible authoritative norms that contain and direct the exercise of power by judicial, executive, and administrative officials."<sup>73</sup> Perhaps especially in the area of criminal law, convention holds that legal order depends upon having a prior, clear statement of the legal standard so that potential offenders know when they may be violating law and what punishment may follow.<sup>74</sup> In American law, however, this principle is modified by the practices of jury nullification and prosecutorial discretion, which permit broad opportunities for individualized reaction to perpetrators. The result has been empathy for some defendants, but not for others. An escape from legal formality thus can lead, and has led to impressionistic, idiosyncratic, or stand-

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rather than with their content. The vast majority of rules, including judge-made rules, spell out policy choices, choices not uniquely determined by the requirements of legality." P. SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* 11 (1969).

72. I recognize that to embrace even a weak version of the rule-of-law model likewise betrays faith in judges. It reflects faith that judges can, and do, by and large follow "law." This means both that I believe legal texts have more or less persuasive, or accurate, interpretations and that judges should and often do feel constrained by the more persuasive ones.

73. Allen, *The Erosion of Legality in American Criminal Justice: Some Latter-Day Adventures of the Nulla Poena Principle*, 29 *ARIZ. L. REV.* 385, 387 (1987). Galligan makes a similar point. He writes that "discretionary powers are sometimes considered to undermine an important conception of legal authority: the lack of commitment to general decision rules, the consequential merging of political and legal processes, and the diminution in importance of adjudication." D. GALLIGAN, *supra* note 61, at 64.

74. The undesirability of "wide-open" decisionmaking might be underscored by an example. Would law students (or faculty) favor the following disciplinary rule?

Any faculty member may institute dismissal proceedings against any student for cause. "Cause" shall be determined by one faculty judge, according to her discretion. This judge shall be appointed by the Dean, but may not be the faculty member who instituted the proceeding.

Or would faculty favor an equally open-ended standard for decanal decisions regarding salaries, research leaves, and teaching loads?

ardless justice, which may not treat all stories equally.<sup>75</sup>

American society is pluralistic. We do not share one religion, one dogma, one concept of justice. At first glance, our heterogeneity makes "flexible justice" seem attractive. In order to satisfy the multiple, varying interests there must be elasticity, *i.e.*, discretion, built into the system. A closer look, however, indicates that a large number of genuinely conflicting interests and views make official discretion *more* troublesome, not less. If our voices truly are different, then decisionmaker flexibility may lead more often to the suppression, rather than the release of some of these different voices. "Formalistic" justice, in the abstract, represents an attempt to avoid the exaggerated influence of one particular decisionmaker's personality — or empathic capacity — by compelling her to follow stated and necessarily abstract legal standards. It also represents our preference for popular, *i.e.*, majoritarian, constraint on governmental action. That is, we may want someone other than the individual judge to make the rules.<sup>76</sup> Absent some requirement, *i.e.*, legal rule, to listen, or a predefined way of ordering these voices, a judge or other law official likely will not hear those people who are culturally, morally, ethnically, or otherwise alien to that judge or official. The vague hope that this will not occur without dramatic, perhaps infeasible, restructuring of the American judiciary (if not of human nature) is overly optimistic.<sup>77</sup>

Moreover, as I have indicated, opportunities for individualized justice and "discretion" — explicit and implicit — already are dramatically pervasive in American law.<sup>78</sup> The nature of the modern state, and the role of law today within that state, indicate that this current call for greater flexibility or "contextualized justice" is an old argu-

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75. This point has been emphasized in the empirical and critical responses to the ADR movement. See, e.g., Conley & O'Barr, *Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts*, 66 N.C. L. REV. 467 (1988); Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality, Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; O'Barr & Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives*, 19 LAW & SOC. REV. 661 (1985). See generally 1 & 2 THE POLITICS OF INFORMAL JUSTICE (R. Abel ed. 1982).

76. Cf. Schauer, *supra* note 62, at 23.

77. As Professor Allen has cautioned, "Realism teaches us not to expect too much of the ethics of state action in any arena." F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 62 (1981); cf. W. BENNETT & M. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM 169-83 (1981) (describing the problem of bias in legal decisionmaking as rooted, in part, in the difference in storytelling practices among various groups in society). For a provocative look at four radically different communities within American society, see F. FITZGERALD, CITIES ON A HILL (1981).

78. See, e.g., K. DAVIS, DISCRETIONARY JUSTICE IN EUROPE AND AMERICA 65-67 (1976); Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Preemptive" Sentencing*, 126 U. PA. L. REV. 550 (1978); Vorenburg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981).

ment wrapped in new words. As the modern state expanded its authority into broader arenas and attempted to legislate on such complex topics as social welfare, environmental protection, and rehabilitation of criminals, the goal of "formal rationality" gave way to the desire to promote "substantive ends."<sup>79</sup> This movement toward more discretionary, contextualized justice has encountered significant obstacles and criticism, as the shortcomings and failures of "flexible justice" become apparent. For example, greater discretion in the hands of prison officials or officers dealing with juveniles often has *not* resulted in more empathic justice.<sup>80</sup>

Of course, no one denies that discretion is an indispensable feature of just law. I again quote Professor Allen, who has observed that to deny discretion to those who wield power is to deny to society attainment of those ends that can only be achieved through discretionary exercises of power. Since those ends include many of the most important policy goals, goals relating to national defense and to human welfare, the objective of a discretion-free policy is doomed before it begins. This being true, the aspiration of legality confronts the perpetually difficult task of guaranteeing officials the freedom of action to deal with situations that cannot be anticipated in all respects in advance, insuring that when action is taken, it will conform tolerably well to the general norms of morality and action expressed and validated in advance by the established governmental processes.<sup>81</sup>

We therefore confront an inescapable dilemma. If we limit discre-

79. See D. GALLIGAN, *supra* note 61, at 72 (noting that "[i]t has become commonplace that a notable characteristic of the modern legal system is the prevalence of discretionary powers vested in a wide variety of officials and authorities"); see also R. HOFRICHTER, *NEIGHBORHOOD JUSTICE IN CAPITALIST SOCIETY* (1987); R. UNGER, *supra* note 20, at 193-200 (describing the decline of the rule of law in the welfare state). See generally *THE POLITICS OF INFORMAL JUSTICE*, *supra* note 75.

80. See, e.g., M. KADISH & S. KADISH, *supra* note 19, at 43 ("[T]he contemporary problem is not the existence of discretionary government but how, again in Professor Davis's words, 'to confine, to structure, and to check' its appropriate exercise.") (quoting K. DAVIS, *DISCRETIONARY JUSTICE* 4 (1969)); Scull, *Progressive Dreams, Progressive Nightmares: Social Control in 20th Century America* (Book Review), 33 *STAN. L. REV.* 575 (1981) (reviewing D. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* (1980)) (describing the often empty promises of the Progressive movement toward individualized criminal justice and juvenile reform); see also Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 *HARV. C.R.-C.L. L. REV.* 301 (1987) (describing the danger of informality in legal procedures); Williams, *Alchemical Notes: Reconstructing Ideals From Reconstructed Rights*, 22 *HARV. C.R.-C.L. L. REV.* 401, 423 (1987) (describing the problem of fair outcomes as not hinging on informal versus formal procedures, but on learning to use effectively the signs of the prevailing system of rhetoric in order to obtain just outcomes).

A recent news item underscores the potential complexities of "individualizing" justice. A Chinese man was given five years' probation in the beating death of his wife because of "cultural" differences — that "explained" his conduct. See Sherman, "Cultural" Defenses Draw Fire, *Natl. L.J.*, Apr. 17, 1989, p. 3 col. 1. It is perhaps ironic that the feminist community in particular was outraged by the use of this "cultural" defense.

81. Allen, *supra* note 73, at 412 (footnote omitted).

tion in an effort to achieve equality of treatment, then we may limit the possibilities of justice in individual cases. Strict rules, strictly followed, can become the instrument of the "status quo,"<sup>82</sup> and may perpetuate injustice. But so can open — ended rules, construed by people interested either in preserving the status quo or in promoting other unjust ends. And, as I have said, some status quo rules may be worth preserving, whereas others may be ripe for reform. Discretion may license a decisionmaker to ignore the rules we think are worthy of support, in favor of her private agenda or personal experiential understanding. To choose between "good rules" and "bad rules," or to decide when to depart from a basically good rule in a particular case, therefore requires more justification than empathy for the parties.

### III. BEYOND CRITIQUE

This is familiar territory. We are presented with the ancient and perpetual task of balancing two important yet conflicting desires, both of which are essential to our sense of "justice" or "fairness." We have always desired rule predictability/clarity/consistency yet also valued rule flexibility/responsiveness. The former division between "law" and "equity" was a physical, institutional manifestation of these two desires.<sup>83</sup> It may have reflected our innate sense that for every rule — the expression of the privileged status of one interest over another — there is always an argument that this interest should not always trump other interests. So we set rules to guide us and establish the outlines of "relevance" and of our priorities, but we do this *knowing* that in practice, *i.e.*, concrete settings, we sometimes need to compromise or juggle those arrangements within the general parameters of the rules or even, at times, outside them. The tension between our competing, even contradictory, desires for clarity and fluidity never will disappear.<sup>84</sup>

The empathy writers surely know this. They are well aware of the pedigree of this underlying jurisprudential debate. They are familiar with the dangers of discretion. They have argued before, talked to, or studied enough judges, administrators, and other legal decisionmakers to appreciate that Hercules and Solomon are aspirational figures, not

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82. *See id.*

83. *See* P. SELZNICK, *supra* note 71, at 13 ("Rigid adherence to precedent and mechanical application of rules hamper the capacity of the legal system to take account of new interests and circumstances, or to adapt to social inequality."). More radical critics of the rule-of-law model maintain that it offers ideological support for social and economic inequalities of the liberal capitalist systems that emphasize it. Indeed, some writers argue that the sole purpose of the law is its ideological function, and that if capitalism disappeared, the rule-of-law would too. For a discussion of these theories, see D. GALLIGAN, *supra* note 61, at 91.

84. *See generally* K. DAVIS, *supra* note 78; M. KADISH & S. KADISH, *supra* note 19.

judicial Everymen. They know, too, that Holmes already described many years ago the role of experience in the law,<sup>85</sup> and that American law students — probably all of them — are taught his insight.

If all of this is understood both by empathy writers and their audience, then something else must be afoot. This talk about empathy must be directed toward ends I have not discerned, and spring from frustrations with the existing order that I have not identified.<sup>86</sup> I doubt that the underlying purpose is simply to rephrase in modern terms the old dialogue between formal and substantive justice.

One likely purpose is to develop further the vocabulary of communitarianism. The point of reference for communitarians is “the shared lives of people,”<sup>87</sup> not the “unencumbered’ individual.”<sup>88</sup> The psychological phenomenon of empathy demonstrates that people can, and do, understand and react to each others’ experiences. This is an important observation for a political theory that stresses the intersubjectivity of meaning, the significance of our communal identity to our personal identity and the interrelationship of people, rather than their autonomy, detachment, and antagonism.<sup>89</sup>

The empathy phenomenon, though, both supports and undermines the “shared lives” view of personal identity. As I already have indicated, the psychological literature shows that our empathy capacity is limited by our life experiences; we are rimmed and, in some respects, stunted people. This means that we can share in only some lives, and relate to only some voices. We are part of some communities, but not others. I may be bigger than my single physical self, but I am not the

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85. O.W. HOLMES, *THE COMMON LAW* 1 (1881). Indeed, the recent movement toward pragmatism as the philosophical key to understanding and evaluating legal principles may signal Justice Holmes’ emergence as the paradigm modern judge, rather than Dworkin’s Hercules. See, e.g., Farber, *Legal Pragmatism and the Constitution*, 72 *MINN. L. REV.* 1331, 1377-78 (1988); Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 *NW. U. L. REV.* 541 (1988).

86. Or, perhaps I grasp the ends but remain unpersuaded by the method.

87. Waldron, *When Justice Replaces Affection: The Need for Rights*, 11 *HARV. J.L. & PUB. POLY.* 625, 630 (1988).

88. *Id.*

89. The observation is also important to feminist scholarship that builds on the Carol Gilligan “different voice” theory of moral development. Minow describes this work as follows:

Male psychology, feminist theorists argue, is the source in a male-dominated society of conceptions of rational thought that favor abstraction over particularity and mind over body. Similarly, the assumption of autonomous individualism behind American law, economic and political theory, and bureaucratic practices rests on a picture of public and independent man rather than private — and often dependent, or interconnected — woman.

Minow, *Feminist Reason: Getting It and Losing It*, 38 *J. LEGAL EDUC.* 47, 48 (1988). A focus on human connection, rather than separation, necessarily will emphasize aspects of psychological, biological, philosophical, and other literature that illuminate the favorable possibilities of knowing others. See West, *supra* note 3, at 859-64 (describing the feminist response to legal liberalism and its emphasis on separation).



world. Rather, my “self” may resemble the concentric circles that appear when a stone is tossed into a lake. The most distinct and powerful circles are clustered tightly at the source (my physical self). Ripples extend beyond that source, but these circles grow more attenuated as they extend from the source and, eventually, *they disappear*. This vanishing point — the limit of self and the exhaustion of connection — is often the beginning point for law.<sup>90</sup>

The sense that our law is “unempathetic” thus may stem from the fact that our public rulemaking often begins where our shared values and community consensus end. Only when we begin to disagree do we need legal decisionmakers to order or reconcile our conflicting views. If this is the underlying problem, then our law always will seem unempathetic, and can hardly be criticized on this basis. Where consensus ends, lines are drawn; and those outside the line — legal losers — always will feel unheard and wounded.

Of course, empathic failure occurs not only because all rules — even in a more perfect world — involve the exclusion or muting of some voices, but also because the rules of our imperfect world consistently privilege some perspectives over others. That is, we tend to start with the same “stones” as the source of most of our legal “circles.”<sup>91</sup> And this, I believe, is the root of many — but not all — writers’ call to empathy. It is a desire to be heard — to join in the circle. Again, however, this is the age-old problem of power — which is neither

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90. See Black, *The Mobilization of Law*, 2 J. LEGAL STUD. 125, 134 (1973) (observing that “the greater the relational distance between the parties to a dispute, the more likely is law to be used to settle the dispute.”); cf. Cover, *supra* note 64, at 1629 (noting the limits on comparing legal interpretation to literature interpretation, insofar as legal interpretation destroys meaning: “[A]s long as legal interpretation is constitutive of violent behavior as well as meaning, as long as people are committed to using or resisting the social organizations of violence in making their interpretations real, there will always be a tragic limit to the common meaning that can be achieved.”).

Of course, my assumption that the self knows limits may be wrong. Perhaps those who stress intersubjectivity and empathic understanding in law are reacting to developments in scientific theory which suggest that “[t]he material world . . . no longer appear[s] as a machine, made up of a multitude of separate objects, but rather as an indivisible whole; a network of relationships that includ[es] the human observer in an essential way.” F. CAPRA, UNCOMMON WISDOM: CONVERSATIONS WITH REMARKABLE PEOPLE 18 (1988).

91. For example, feminist scholarship uncovers and critiques the male reference point that often underlies many legal principles. See, e.g., MacKinnon, *Feminism, Marxism, Method, and the State: Toward a Theory of Feminist Jurisprudence*, 8 SIGNS 635 (1983); Minow, *supra* note 11; Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEXAS L. REV. 387 (1984); West, *supra* note 3.

An ironic twist has developed in the feminist scholarship, however, which is pertinent to the empathic failure problem. In the political and jurisprudential effort to encourage a broader, more representative perspective that includes women’s voices, some feminist writing tends to define all women as a single category, and the differences among us are, at times, de-emphasized. That is, abstract and general categories, which devalue our individual characteristics, appear even within movements aimed at escaping categories. See Minow, *supra* note 11, at 47-50.

made clearer nor less thorny by the empathy theme. Indeed, to best further the specific ends that many empathy writers admire, such as to reduce discrimination in our society, we would do well to focus on the limits of connection rather than our shared lives. If we are mindful of the failures of community, and of the hard lines of our personal empathic limitations, we may develop more realistic legal proposals that better account for peoples' predisposition not to see beyond their own concerns. We also must consider the practical, day-to-day restraints on even well-intentioned efforts to understand others.<sup>92</sup> The very fact of pervasive human suffering in our culture offers a sobering caution against unchecked optimism about human kindness. Acts of generosity and charity do happen, but I fear they are not the public or private norm.<sup>93</sup>

Despite these limitations on our individual and collective empathic capacity, however, there is an important "more or less" quality at stake here. The jurisprudential message of the call for empathy is an appeal for legislative and judicial procedures that permit decisionmakers to reexamine regularly the lines that law draws.<sup>94</sup> Although we "know" at some level that we tend to treat people like ourselves better than those outside our spheres of familiarity, we often ignore this knowledge. If verbal reminders of this tendency are built directly into our legal discourse, they may stimulate legal decisionmakers to reach beyond those tendencies more consistently.<sup>95</sup>

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92. I wonder, for example, whether academics who favor empathic law have applied these ideas to their law school communities. If so, what changes were effected? In particular, what rules, if any, were abandoned and/or adopted?

93. This sentiment is echoed in this recent statement by Schall, relying on Aquinas: "[T]he world is not conceived ultimately in justice, even though there is a place for justice in the world." Schall, *Human Rights As an Ideological Project*, 32 AM. J. JURISPRUDENCE 47, 59 (1987).

94. This is a vague, essentially hortative, proposal. But it may be necessarily so, given the broad and rather unfocused claims of the call for greater "empathy," or "passion," or "humanity" in law. For a similar view, with equally loose criteria for improved judging, see Minow & Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 50-51 (1988). Cf. R. BERNSTEIN, *supra* note 3, at 162-63 (arguing that to conceive of the political realm as based on "the principle of dialogue or conversation" is a "powerful regulative ideal that can orient our practical and political lives"); Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455 (1984) (discussing judges' roles as encouraging communal reconciliation among conflicting groups in American society through commands that people listen to one another and attempt to notice their shared interests); Carter, *Bows and Arrows, Bows and Cellos* (Book Review), 20 GA. L. REV. 793, 798-803 (1986) (reviewing J.B. WHITE, HERACLES' BOW, *supra* note 3, and concluding it simply means we should all continue to talk with open minds).

95. I think, for example, of how jarring it is to see the word "love" in legal scholarship. Roberto Unger and Robin West's writings come to mind. Perhaps my discomfort is analogous to that of some business people when words like "child care," "nursery," or "breastfeed" filter into the boardroom.

Good reason exists, however, to be skeptical of the power of new words to change behaviors that reflect underlying power arrangements. Again, the irony is revealed through feminist works. Mary Daly has done ground-breaking work on the patriarchal conversion of some words, once positive and affirming, into negative and pejorative labels. She traces words like "spinster,"

They also may foster a healthy, perpetual skepticism about prevailing categories and legal paradigms. Questions may be raised more often about which voices are tuned out, and which voices are given leading roles. Legal outcomes that wound may be harder to tolerate, and thus more susceptible to reform, if we routinely ask how we would feel if we were to suffer that same pain — whether it is the pain of job discrimination, segregation, termination of welfare benefits or some other form of loss or unfairness that the law seeks to redress. The new words may rekindle our interest in addressing the age-old problem of injustice. Moreover, we may better escape the truly dismal fate of apprehending that our present legal order is merely a convention, not divinely or rationally ordained, yet thinking it cannot ever be improved or changed. Whether “empathy” is the right word, or the best word, or the only word, to further this reformist agenda may not matter. The spirit behind its invocation seems benign.

If this is the “point,” however, I believe we need not develop further the concept of empathy.<sup>96</sup> Rather, we need to consider concrete proposals for legislative, doctrinal, structural, and procedural reform that will encourage greater responsiveness to multiple voices and communities.<sup>97</sup> We should turn to the next, very difficult questions. How, for example, should we measure our progress toward a goal of empathic law? What do communitarian rules look like? Who should the lawmakers be in an empathic legal system?<sup>98</sup> How do we realize, in a

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“hag,” and “crone” to their roots, and finds they once had favorable meanings. Over time, however, the words became disabling epithets reserved for certain women. See M. DALY & J. CAPUTI, *WEBSTERS' FIRST NEW INTERGALACTIC WICKEDARY OF THE ENGLISH LANGUAGE* (1987). One caution to be derived from her work is that new words may not change the underlying arrangements or biases; rather, these new words may be co-opted, transmuted, and redefined to reflect the results that best suit the dominant word-wielders' needs.

96. My feeling at this point brings to mind a Gerald Graff essay, which appeared in the *Texas Law Review* symposium on Law as Literature. Graff was commenting on Sanford Levinson's article, in which Levinson argues that interpretations are made by us, not found. Graff responds:

What these theorists insist on over and over again is the Nietzschean idea that interpretations are *made* by us and not found, that it is we who have created the standards and norms of interpretive truth that we so confidently attribute to the nature of things, and that we must recognize our personal and political responsibility for this creation. But taken merely thus far, such an assertion is merely a platitude, to which the proper reply is not “No, that's not the case,” but rather “Yes that's true, but *so what?*” . . . What alternative to current interpretive practices ought we take up?

Graff, “*Keep Off the Grass, “Drop Dead,” and Other Indeterminacies: A Reply to Sanford Levinson*,” 60 *TEXAS L. REV.* 405, 413 (1982) (footnote omitted).

97. See, e.g., Kelman, *Trashing*, 36 *STAN. L. REV.* 293, 297-304 (1984) (attempting to make concrete “Critical Legal Theory” proposals); see also Farber, *Legal Pragmatism and the Constitution*, 72 *MINN. L. REV.* 1331, 1341-49 (1988) (suggesting that legal pragmatism is the appropriate foundation for judicial decisions and offers a workable and sensible method for developing substantive and procedural rights).

98. As to who should be the decisionmakers in a more empathic legal system, I assume that the argument points in the direction of multiple decisionmakers, e.g., a jury, rather than one

workable way, these utopian objectives? Can we do more than tinker, yet less than damn?

Even if we do fashion a new world of legal order, however, the principle of legality will not disappear. I may embrace the concept of empathy and the possibility of a loving law, but not escape the task of assigning priorities among the objects of my caring.<sup>99</sup> I may accept that logic and meaning can be circular or "dialogic," yet eventually need to draw lines — boundaries — around the circles in order to end/decide a legal matter. I may recognize that the "whole" and its "parts" are inextricably bound, yet still need some concept of the "whole" when deciding what to do about a particular legal controversy. Some hierarchy, some linear thinking, and some emphasis on consistent application of prior-stated standards seem unavoidable, even in any "new-age" law.<sup>100</sup> Moreover, this normative and procedural inquiry must take into account existing social and legal arrangements and actual human behavior.

The guideposts for assigning our priorities are missing in the empathy literature. Indeed, they are missing from much contemporary American legal scholarship,<sup>101</sup> perhaps because of the influence of the deconstruction school of literary criticism or perhaps because guideposts of this sort are too difficult to establish or to defend. The prob-

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person. If one's empathy hinges on one's life experience, then more peoples' input into the fact-finding and law-finding process may increase the chances that the particular litigants will be heard and understood. American law reflects this hope in the sixth and seventh amendments, which provide for jury trials, and in the concept of a trial by one's "peers." I have argued elsewhere that the peer concept, and peer participation, are crucial aspects of our notion of a fair jury. See Massaro, *Peremptories or Peers? — Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 547-60 (1986). Indeed, I use the word "empathy" to describe this capacity to understand another person. *Id.* at 552. My conclusions about the proper composition of the lay jury comport with the conclusions I reach here: that is, empathic capacity is unevenly and variously distributed among us.

99. Empathizing with another person in any robust sense requires tremendous concentration, dedication, energy, and — most importantly — time. Taken seriously, this level of interaction can be complex and draining, especially when the "other" is in real distress. To empathize fully with even one other person can be all-consuming and, ultimately, unsuccessful in many ways. Setting priorities helps us to attend adequately to some few others, rather than attend inadequately to many others. Judges' time constraints, among other limitations, suggest they cannot reasonably be expected to apply their hearts and minds to every litigant in any deep empathic sense.

100. See Sherwin, *supra* note 39, at 603-05.

101. An exception is the work of Unger, who offers a blueprint for institutional and structural change, which he believes would further his social ideals, or "superliberalism." See, e.g., Unger, *supra* note 19, at 586-602. He defines this superliberalism as a program that pushes the liberal premises about state and society, about freedom from dependence and governance of social relations by the will, to the point at which they merge into a larger ambition: the building of a social world less alien to a self that can always violate the generative rules of its own mental or social constructs and put other rules and other constructs in their place.

*Id.* at 602.

lem of priorities, however, has not disappeared. On the contrary, in our complex world of shrinking resources the problem of priorities will only grow more fierce.<sup>102</sup> We therefore cannot outrun the practical-moral task of distinguishing the possibilities of good from the possibilities of evil.<sup>103</sup>

What I have concluded, based on my reading of the empathy strand of legal scholarship, is not that the rule-of-law model is fatally flawed or malevolent. Rather, the call to context, at its best, simply counsels against complacency. We are admonished to revisit our experience and feelings,<sup>104</sup> along with other guides to reasoned judgments, and to guard against empathic or intellectual blind spots when we construct and critique the legal institutions and standards that govern us. Foolish formalism, they caution, is to be feared. But so too, I would demur, is unguided emotion.

Movement in any direction involves choices. Greater receptivity to multiple voices and a sharp awareness that our organizing principles are debatable — perhaps even hideously wrong<sup>105</sup> — may illumi-

102. Societies today are becoming more complex, with direct and troubling consequences for law and legal theory. Niklas Luhmann identifies three reasons why this complexity has increased. First, there is a diversity of interests, groups and values within societies. Second, science and technology have increased the number of possibilities. Third, world economic systems today are interrelated. See N. LUHMANN, *TRUST AND POWER* (1979). This last point suggests that decentralization of legal/political authority may be an unrealistic proposal, though it might further the goal of making law more responsive to individual or community needs.

103. I am not arguing that we can, or should ever attempt to find “an answer.” I am simply denying that all things, all results, all stories or conversations, are equal. We need context *and* acontextual categories, immediate sensation and past experience, conformity to rules and ways to escape from rules. Stories may ground us in reality and even shape that reality, but we need some theory to make sense of our stories.

104. For an entertaining discussion of the proper role of empathy (he calls it “sympathy”) in developing moral principles, see Bennett, *The Conscience of Huckleberry Finn*, 49 *PHILOSOPHY* 123 (Apr. 1974). He concludes, as I do here, that the proper course is to “try to keep my morality open to revision, exposing it to whatever valid pressures there are — including pressures from my sympathies.” *Id.* at 133.

A far more sophisticated and radical statement of the goal of opening ourselves to new forms of meaning and justice is Roberto Unger’s. See Unger, *supra* note 19, at 584-86.

105. I do not want to live my life, professional or personal, “in a world of broken dreams and paper-pushing, of abstractions that have long ceased to be living theory and that, once routinized and mutilated, turn into the guiding principles or the empty forms of social practice to which they lend the spurious semblance of sense, authority, or necessity.” Unger, *supra* note 19, at 670. *No one does.* But neither do I want all context smashed, all order “unpacked,” all received authority ridiculed and mocked. I fear that radical skepticism about all “guiding principles” can derail any practical effort to define or guide ourselves, as well as each other. Instead, we could spend our time in endless imagining of alternatives to any “limiting” conception of ourselves or others. It seems to me that we need a starting point — some framework or implicit, shared sense of relevance — lest we live our entire lives as my friend Jerry Leavitt would put it, “playing handball against a curtain.” Moreover, anyone who has experienced times when their life’s philosophy — or even some part of it — was *truly* “deconstructed,” knows that to face perpetual, uninterrupted “delegitimation” of all one’s assumptions and dreams would be hell on earth. False hopes look and feel exactly like real ones, until they are dashed.

nate our way. But we need more than a lamp for a mapless journey;  
we also need a compass.