

Empathy and Procedural Justice in Clash of Rights Cases*

I. Introduction

How should judges and the courts deal with litigation where there is plausible argument that each side's rights have or would be violated and where at the heart of the dispute lies moral and cultural disagreement about ideas of equality, free speech and the relevance of religion in professional and public life? These were the issues that arose in two well known cases decided by two Supreme Courts on either side of the Atlantic. In *Masterpiece Cakeshop v Colorado Civil Rights Commission*,¹ a bakery refused to supply a gay couple with a cake for their wedding celebration.² In the similar, but relevantly different, case of *Lee v Ashers Baking Company*³ a bakery refused to provide a cake with the phrase 'Support Gay Marriage' and a picture of Bert and Ernie from Sesame Street on it. This paper considers the narratives put forward by the litigants in these cases and assesses the judgments from the perspective of the concept of the culture of justification. The focus will therefore not be on the doctrinal merits or otherwise of the decisions themselves but on how the literature on procedural justice, empathy and legal storytelling can provide new insights into these kinds of cases and particularly into improving the decision and judgment making process.

The legal process is of course a lengthy one with many significant actors. In *Masterpiece* the events took place in 2012 and were finally resolved in 2018. The case was heard by the Colorado Civil Rights Commission who referred the case for a formal hearing before an Administrative Law Judge. This decision was then affirmed by the Colorado Court of Appeals and was finally heard by the Supreme Court. In *Ashers*, the events took place in May 2014 and were resolved by the domestic courts in October 2018. The case was heard by the County Court, the Court of Appeal and the Supreme Court. This litigation is still ongoing as Lee is taking his case to the ECHR, alleging the Supreme Court's decision violated Arts 8, 9 and 10

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¹ 584 U.S. ___ (2018), 138 S. Ct. 1719.

² The case predates legal same sex marriages in Colorado and so Craig and Mullins planned to marry legally in Massachusetts and then have a reception in Colorado.

³ [2018] UKSC 49.

of the Convention, taken in conjunction with Art 14.⁴ In order to keep this article within a manageable scope I will therefore only refer to the Supreme Courts' judgments and the earlier process as recorded there and, to a lesser extent, the proceedings as demonstrated by the written transcripts provided by the US Supreme Court.⁵ I will not focus on other important aspects of the process in terms of fairness and inclusion such as judicial demeanour,⁶ the use and management of emotion⁷ or treatment 'behind the scenes'.

This predominant focus on the written judgment may be open to criticism when the argument relates to the subjective feelings of litigants, but the judgment is the culmination of the legal process for appellate decisions. It is a 'speech act' in that saying it performs an action⁸: the law becomes what has been spoken. It also, through the system of precedent, has ongoing effects for other actual or potential litigants and their lawyers and will be reported in the mainstream and specialised media and discussed by interested individuals in a way that other parts of the process will not. 'Law is a profession of words'⁹ and this is nowhere more true than in formal legal declarations such as appellate decisions.

This article therefore focuses on the decision making process as detailed in legal judgments and the way they are presented to litigants. Sections II and III develop my general argument as to the significance of procedural justice and the role empathy should play in decision making. Section IV considers the idea of narratives of parties and their use in judgments, taking into account the principles earlier identified. Section V considers narratives within the particular context of highly publicised (and politicised) 'clash of rights' cases. The narratives of the litigants in *Ashers* and *Masterpiece Cakeshop* are then explored in Section VI and the requirements of empathy and procedural justice are applied to these cases in Section VII

II. Why does the process matter?

⁴ ECHR App no. 18860/19

⁵ Available from https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f314.pdf (Last accessed 10 April 2020)

⁶ See eg Kathy Mack and Sharyn Roach Anleu, 'Performing Impartiality: Judicial Demeanor and Legitimacy' (2010) 35 *Law & Social Inquiry* 137.

⁷ See eg Cyrus Tata and Fiona Jamieson, 'Just Emotions? The Need for Emotionally Sensitive Justice Policy' 5 *Scottish Justice Matters* 32.

⁸ John L Austin and James O Urmson, *How to Do Things with Words: The William James Lectures Delivered at Harvard University in 1955* (2. ed., [repr.], Harvard Univ Press 2009).

⁹ David Mellinkoff, *The Language of the Law* (Resource Publ 2004) vi.

It might be queried why the process is so important: the important point is surely whether the decision made is right as a matter of law and/or justifiable in terms of striking the best balance of rights.¹⁰ The ultimate decision in favour or against Masterpiece Cakeshop or Ashers Bakery is of course important but the process, and in particular the way the decision is expressed, matter too. While it is in the nature of a legal system that there will be winners and losers, and this is not in itself problematic, judges have obligations to the parties beyond deciding fairly who should win and lose. This is for both normative and instrumental reasons.

Firstly it is normatively important for reasons of legitimacy. A ‘culture of justification’ characterises, or should characterise, a modern liberal democracy. This phrase was first put forward by Etienne Mureinik regarding the post-Apartheid South African regime. He described it as ‘a culture in which every exercise of power is expected to be justified’.¹¹ What matters is not (or not only) *who* has the power to make a decision, as in a ‘culture of authority’ or even that the correct decision is made, but *why* the decision was made.¹² This is particularly true for legal judgments. Fiss argues that judges are only legitimate and have moral authority because they have an obligation to engage in a special dialogue whereby they listen to all grievances, hear from all the interests affected and give reasons for their decisions.¹³ Judges must justify, and not merely enforce, their decision,¹⁴ so legal proceedings, and indeed the community more generally, are dominated by ‘an ethic of persuasion’.¹⁵

Reason-giving is a particularly important part of the culture of justification, even aside from any benefits it bring in terms of improving the quality of the actual decision, by requiring a judge to fully consider the decision she is making. Firstly, it enables onlookers to see the ‘working out’ behind the judge’s decision, thus aiding transparency and therefore the moral authority of the judgment. If reasons are not given, then the judge may have ‘hit upon the right

¹⁰ This section builds on my previous work in Megan Pearson, *Proportionality, Equality Laws and Religion: Conflicts in England, Canada and the USA* (Routledge 2017) Ch 5.

¹¹ Etienne Mureinik, ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 South African Journal on Human Rights 31, 32. See also Moshe Cohen-Eliya and Iddo Porat, ‘Proportionality and the Culture of Justification’ (2011) 59 The American Journal of Comparative Law 463; Frederick Schauer, ‘Giving Reasons’ (1995) 47 Stanford Law Review 633, ‘The act of giving a reason is the antithesis of authority’.

¹² See Cohen-Eliya and Porat *ibid*.

¹³ Owen Fiss, ‘The Bureaucratization of the Judiciary’ (1983) 92 Yale Law Journal 1442.

¹⁴ Rebecca Brown, ‘Liberty, The New Equality’ (2002) 77 New York University Law Review 1491.

¹⁵ Mureinik (n 11) 35.

reason but there is no reason for us to believe that he is right'.¹⁶ Secondly, at a more fundamental level, giving reasons treats people with respect as capable of making and understanding rational arguments, rather than merely as a passive recipient of a decision made about them. By treating litigants' concerns as serious and legitimate it means that they are seen as *worthy* of justification and as an active participant in the process.

In this respect, by allowing parties to make their submissions and present evidence, to examine the submissions of the other party, and to be treated respectfully and listened to by an independent third party the law, 'conceives of the people who live under it as bearers of reason and intelligence'¹⁷. Thus, as Waldron has argued, a fair procedure protects the dignity of those to whom the norms are applied by showing 'law's dignitarian faith in the practical reason of ordinary people.'¹⁸

a) Procedural Justice

A fair procedure is therefore significant because it is morally illegitimate for the state to subject a person to a decision affecting their rights or a significant interest without it, even if the ultimate decision is legally correct and morally justifiable. Dialogue and reason-giving is also important for more instrumental reasons. In his highly influential work on procedural justice, Tom Tyler has shown the significance of fair procedures in terms of support for decision making and compliance with decisions.

In his seminal work, 'Why People Obey the Law', he undertook a very large study of those who had direct contact with the police or the courts in Chicago in the 1980s in order to assess the perceived legitimacy of law enforcement.¹⁹ His findings have subsequently been elaborated and tested in his later works and by many others in different contexts.²⁰ Tyler found that the most significant aspect in perceived legitimacy was a fair process rather than the fairness of

¹⁶ Fiss (n 13) 1445.

¹⁷ Jeremy Waldron, 'Thoughtfulness and the Rule of Law' (2011) 18 *British Academy Review* 1, 8

¹⁸ Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' in *The Rule of Law* (James Fleming ed, 2011). See also Waldron, 'How Law Protects Dignity' (2012) 71 *Cambridge Law Journal* 200.

¹⁹ Tom R Tyler, *Why People Obey the Law* (Princeton University Press 2006).

²⁰ See eg Tom R Tyler and Yuen J Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (Russell Sage Foundation 2002); Mary Konovsky and Robert Folger, 'Relative Effects of Procedural and Distributive Justice on Employee Attitudes' (1987) 17 *Representative Research in Social Psychology* 15.

the decisions themselves. A fair process provided a cushion of support when authorities were delivering unfavourable outcomes,²¹ to the extent that the outcomes themselves could be unfair over a significant period of time but still would largely be perceived as fair as long as the process was. He also demonstrated that even where litigants won, the process was more important to them than the outcome. 'Fairness' is of course a somewhat amorphous concept, but his research demonstrated that people had a highly sophisticated and multifactorial intuitive understanding of the concept. He has summarised the various aspects to it as follows:²²

Voice: the ability of litigants to participate in the case by expressing their viewpoint, directly if possible.

Neutrality: consistently applied legal principles, unbiased decision makers, and a transparency about how decisions are made.

Respectful treatment: individuals are treated with dignity and their rights are openly protected.

Trustworthy authorities: authorities are benevolent, caring, and sincerely trying to help the litigants, a trust that is garnered by listening to individuals and by explaining or justifying decisions that address litigants' needs²³

These aspects are themselves multi-faceted, *voice* for example includes such things as having the perception that sufficient time has been given to consideration of the case and sufficient control over the process. It requires not only a formal opportunity for a party to explain their case (something which in the context of an adversarial legal system should be fairly easy to provide) but also a sense that those involved have been listened to when they have chosen to use this opportunity.²⁴

²¹ Tom R Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 *Crime and Justice* 283.

²² Tom R Tyler, 'Procedural Justice and the Courts' 44 *Court Review: The Journal of the American Judges Association* 26, 30.

²³ See also on this aspect, Herbert M Kritzer, 'Toward a Theorization of Craft' (2007) 16 *Social & Legal Studies* 321. Referring to the importance of 'conveying a sense of caring and concern' see Kathy Mack and Sharyn Roach Anleu, 'Getting Through the List': Judgecraft and Legitimacy in the Lower Courts' (2007) 16 *Social & Legal Studies* 341.

²⁴ Tom R. Tyler and Robert J. Bies, *Beyond Formal Procedures: The Interpersonal Context of Procedural Justice* in *Applied Social Psychology and Organizational Settings* John S. Carroll (ed) (Psychology Press, 1990).

b) *Constitutional losers*

Although it has been applied in other contexts, Tyler's work is predominately about legally low level decision making: the police or first instance courts, mostly relating to minor offences. Appellate courts are of course different. The parties themselves are far less involved. The judge interacts with the party's legal representative rather than the party herself. The arguments are far more technical and the emotion has been 'filtered out'.²⁵ Nevertheless, procedural justice is still relevant, even though the procedures are mediated through legal representatives. While the arguments may be technical and the parties may not even attend, they should not be forgotten: their story is still at the centre of the dispute. This is particularly true in the eventual judgment. Of course, a Supreme Court judgment has other important purposes beyond those merely relating to the parties, such as determining the law and giving guidance to other courts, lawyers and their clients in how it will be applied in future. However, the judgment is addressed to the parties and they will have to act in the way directed by the court: pay damages to the other side, modify their behaviour to comply with the law and so on. Therefore in order to be both an objectively legitimate use of the state's power and to be perceived as legitimate by those most affected, the judgment must still give litigants a voice to express their views, there should still be unbiased decision making, the judgment should be respectful of the litigants and so on. As I will discuss later in my discussion of *Ashers* and *Masterpiece Cakeshop*, this can be done in practical ways without detracting from the clarity or the legal merits of the decision.

While the main context of Tyler's work is different from the present, in some respects, procedural justice is particularly important in constitutional and rights cases, especially for what Calhoun refers to as 'constitutional losers'.²⁶ Calhoun argues that all those who bring a potentially arguable rights case possess 'constitutional stature'. By constitutional stature she means that all of those who take part in rights litigation have an 'equal moral and political agency', 'capacity to reason about constitutional principles' and an 'equal role in participating in developing constitutional meaning'.²⁷ Since they possess this constitutional stature, judges should not characterise constitutional losers as valueless or acting wrongly, but instead as

²⁵ Sharyn Roach Anleu and Kathy Mack, 'Magistrates' Everyday Work and Emotional Labour' (2005) 32 *Journal of Law and Society* 590.

²⁶ Emily M Calhoun, *Losing Twice: Harms of Indifference in the Supreme Court* (Oxford University Press 2011).

²⁷ *ibid* 1.

‘worthy and respected proponents of non-frivolous constitutional arguments’.²⁸ To do otherwise would be to ‘violate justices’ obligations to citizens’ and has the potential to cause ‘outrage’ among those who do not agree with the judgment, because they can (correctly) perceive that their claim is thought of as worthless. The attitude should be one of a ‘tragic choice’: an awareness that whatever decision is made by the courts, moral wrongdoing may occur to the loser.²⁹ This does not mean the decision should not be made, but there needs to be an awareness of the context of the decision and an appreciation that there is a genuine moral dilemma. In situations where judges must declare a winner, they can at least make a series of ‘ritual bows’³⁰ to the losing party with respect to the arguments that they have put forward.

More generally, this means that the state must justify why the right (whether to non-discrimination, freedom of religion or expression) has been burdened. A fundamental first step in this process is to allow both claims to be assessed and taken seriously and an ‘accurate and respectful account of their values and views’ given.³¹ James Boyd White draws attention to the significance of ‘voice’; conceiving the legal process as conversations which ‘construct communities and culture’.³² For him, what is important is whether the ‘voice of the judge leaves room for the voices of the parties’. To do this requires the judge to consider opportunities for real engagement as a way of respecting the parties’ equal worth, and not merely paying lip service to it.³³ Being able to put across your narrative of loss to a court is a significant part of being treated as an equal and respected citizen. Its failure at its extreme leads to Lyotard’s concept of the differend, where the victim experiences ‘damage accompanied by the loss of the means to prove the damage’ because there is no way of expressing the harm caused.³⁴ His example relates to the Holocaust denier, Faurisson, who would only take as proof that the gas chambers had occurred direct testimony of a victim: an obvious impossibility.³⁵ The situations

²⁸ *ibid* 4–5.

²⁹ Martha C Nussbaum, ‘The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis’ (2000) 29 *The Journal of Legal Studies* 1005.

³⁰ A. Stone Sweet and J. Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Colum. J. Transnat’l L.* 73, 89

³¹ Calhoun (n 26) 27.

³² James Boyd White, *Heracles’ Bow: Essays on the Rhetoric and Poetics of the Law* (University of Wisconsin Press 1985) 48.

³³ As White puts it, ‘how completely is each relevant voice given the opportunity to speak?... how adequate is our recognition of the equal humanity and equal worth of all people?’ White *ibid*.

³⁴ J. Lyotard *The Differend: Phrases in Dispute* (Manchester University Press 1988).

³⁵ See also, David Luban; ‘A procedural system that simply gagged a litigant and refused even to consider her version of the case would be in effect, treating her story as if it did not exist’ in *Lawyers*

at issue here clearly do not reach these extremes, but it illustrates the sense of powerlessness and exclusion that a failure to be included and to be given an opportunity to express one's point of view can bring.

III. Empathy and Judgment

Procedural justice, in particular as it relates to constitutional losers, therefore gives rise to varied and significant demands on judges. Empathy is a significant tool in achieving many of these, particularly those relating to treating litigants with respect, being perceived as trustworthy and giving litigants a voice. This is not to say that courts should be driven by emotion or become unnecessarily emotional spaces. Empathy involves understanding emotion but it is not an emotion in its own right: rather it is a cognitive process of understanding the perspective of another person.³⁶ Empathy allows an outsider to consider the 'rationale for action of the parties involved, to evaluate their narratives, and to understand their positions'.³⁷ It is distinct from sympathy, which *is* about an emotional response to a situation, and it certainly does not mean acceptance that the perception of the person being empathised with is morally correct or even objectively factually correct. For example, in the criminal sentencing context we should use empathy to understand why a defendant took the actions they did (poverty, fear, lack of impulse control, subjectively justifiable anger etc), but we do not necessarily need to feel sympathy in the sense of feeling sorry for them despite their actions or believing that their behaviour was justifiable in any way.

Empathy is also distinct from compassion. Compassion goes beyond sympathy to require 'a strong feeling of sympathy and sadness for the suffering or bad luck of others and a wish to help them'.³⁸ By contrast, empathy does not lead necessarily to any action to help the other,

as Upholders of Human Dignity (When They Aren't Busy Assaulting it)' (2005) University of Illinois Law Review 815, 819

³⁶ Susan Bandes, 'Empathetic Judging and the Rule of Law' [2009] Cardozo Law Review De Novo 133, 136. Hoffman similarly distinguishes between cognitive empathy, which is about having awareness of another's feelings, and affective empathy which is about feeling what another feels (Martin Hoffman, 'Empathy, Justice, and the Law', *Empathy: Philosophical and Psychological Perspectives* (Oxford University Press 2011).) The sense of empathy I am arguing for is closer to the first sense than the second.

³⁷ Stina Bergman Blix and Åsa Wettergren, 'A Sociological Perspective on Emotions in the Judiciary' (2016) 8 Emotion Review 32, 33.

³⁸ Cambridge English Dictionary definition. Available from: <https://dictionary.cambridge.org/dictionary/english/empathy> (Last accessed 10 April 2020)

other than an acknowledgment that their feelings exist and will be considered in forming a judgment. Judges may of course sometimes rightly be sympathetic or compassionate towards those they deal with: but this should happen only on selective occasions as a result of an emotional response to an unusual situation. By contrast, empathy is a frame of seeing which should be applied to all.

It could be argued that to require empathy in this way is a violation of the rule of law because judges should decide cases only by reference to law and not be swayed by emotion. For example, when Barack Obama was candidate for President he received substantial criticism for saying that he would select judges to the Supreme Court because they showed empathy to the marginalised.³⁹ His use of the concept seems to move empathy more towards an emotional response akin to sympathy than the sense in which I am using it, but in any case there are two responses to this.

Firstly, I am not arguing that cases should be decided wholly on the basis of empathy, but rather that empathy should be used to give a fuller picture which better reflects the issues at stake in order to take seriously the voice of the parties and to treat them with equal respect as worthy of such attention.⁴⁰ Take the situation for example at issue in the English case of *Kiarie*.⁴¹ The court had to decide whether there had been a violation of the right to Art 8 ECHR (right to respect for private and family life) in a policy of ‘deport first appeal after’ for foreign nationals who had been convicted of a serious criminal offence, at the end of their prison sentence. This meant that they could only make an appeal against their deportation from their home country even if the appeal had a good chance of showing that they could not legally be deported.

³⁹ Obama stated, ‘[W]e need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old. And that's the criteria by which I'm going to be selecting my judges’. Speech to the Planned Parenthood Action Fund (July 17, 2007), available at <http://lauraetch.googlepages.com/barackobamabeforeplannedparenthoodaction> (Last accessed 10th April 2020)

See for criticism eg Steven G. Calabresi, Opinion, Obama’s “Redistribution” Constitution, Wall St. J., Oct. 28, 2008

⁴⁰ See also Bandes discussion of *Redding* which raised the question of whether it was constitutional for a school when fearing a 13 year old student was in possession of drugs (in this case prescription ibuprofen) make her strip down to her underwear to search her. Understanding that this would be a frightening and humiliating experience for the girl did not resolve the case by itself because balanced against this must be the school’s interest in providing a safe environment for all its students but it gave a fuller understanding of the issues and enabled her voice to be heard. Bandes (n 36).

⁴¹ *Kiarie and Byndloss v Secretary of State for the Home Department* [2017] UKSC 42

Empathy, seeing the issues from the perspective of the deportee, shows the potential uselessness of only allowing a right to appeal in those circumstances, given as the court found, the logistical difficulties in bringing a case without legal aid, without being able to be present or give evidence in person at any hearing and the difficulties of video-link evidence, and the fact that damage to the family relationship would have already occurred by deportation even if the appeal was later successful.⁴² For one of the applicants this would have meant he would be sent to a country where he had not lived since he was a child with at best a difficult process, and at worst a purely illusory right, to challenge this decision.

Understanding this by itself and allowing the applicant's voice to be heard however, does not necessarily mean that the case should be resolved in his favour. Firstly, there must be a legal right to be treated according to a fair process in matters of deportation and the Court must have the legal power to constrain the actions of the government in such matters. These legal rights had previously been established by, respectively, the case law of the ECtHR⁴³ and the Human Rights Act 1998. The judges were therefore making a legal, and not merely moral decision, which they had been given the authority to make. As this example shows, there are therefore, rightly, institutional and precedential limits on judges' behaviour. If a judge does not act in accordance with these then this is a bad and unprincipled decision, regardless of whether it is empathetic, or indeed morally correct. Empathy may provide a 'catalyst for action'⁴⁴ but that is not always so and cannot be so where the other elements for action are not present. Secondly, while empathy helps to ensure the interests of the parties are identified and explained, it is only one part of the process. It would be possible to empathise with the applicants and appreciate the difficulty of their situation but to hold that their rights had been outweighed by society's interest in being protected from crime and the government's right to control the immigration status of foreign nationals. Nevertheless, at the least their story should be heard, considered and explicitly referred to in the judgment in order to show due consideration to them.

The second reason why criticisms of the use of empathy are misguided is that having an explicit commitment to empathy is important as a way of ensuring equal treatment to all. Many writers have pointed out that because of our life experiences we inevitably have empathy for some,

⁴² *Kiarie*, paras 52-76

⁴³ See eg *Moustaquim v Belgium* (1991) 13 EHRR 802; *Beldjoudi v France* (1992) 14 EHRR 801; *Keles v Germany* (2007) 44 EHRR 12.

⁴⁴ Lynne Henderson, 'Legality and Empathy' (1987) 85 Michigan Law Review 1574, 1579.

predominantly those who share our experiences or who have similar opinions to our own.⁴⁵ A conservative Christian judge, for example, may be likely to empathise automatically with claims made by other conservative Christians, but may not necessarily do so easily for a gay man seeking equal relationship recognition. This can be seen in Scalia J's dissent in the successful challenge to sodomy laws in *Lawrence v Texas*⁴⁶ in 2003 where he held that:

Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.⁴⁷

He therefore argued that these kinds of laws should be left to the democratic process.⁴⁸ He did not discuss the actual situation which led to the prosecution, and the effect on the people involved, only the possible slippery slope consequences of such a decision. Gay people were therefore not seen as real people with needs and desires for sexual relationships like any other, but merely as vague and impersonal purveyors of an immoral lifestyle. *Lawrence* and *Garner* are nowhere even mentioned by name in Scalia's Opinion. Including empathy as a necessary part of judgecraft helps to correct this tendency.

IV. Narratives

Empathy is closely related to the idea of paying attention to the narratives that the parties make about themselves. A narrative is, 'a true or fictional account of a sequence of events unfolding in time, the events being invented, selected, emphasized or arranged in such a way as to explain, inform, or edify.'⁴⁹ It tells a story.⁵⁰ As Posner emphasizes, a narrative relies heavily on choices

⁴⁵ White (n 32). Bandes (n 36) makes the point that we are bad at spotting our blindspots.

⁴⁶ 539 U.S. 558 (2003)

⁴⁷ *Lawrence*, 602. See also Henderson's critique of the earlier case of *Bowers v Hardwick* 478 U.S. 186 (1986) on the same issue. Henderson (n 44).

⁴⁸ *Lawrence*, 603. Somewhat oddly, the majority opinion given by Kennedy J also sees the defendants as an abstraction by seeming to respectabilise them by treating them as if they were in a committed relationship, when this was at most a casual relationship. See Katherine Franke 'The Domesticated Liberty of *Lawrence v Texas* (2004) 104 Colum L Rev 1399.

⁴⁹ Robert Posner, 'Legal Narratology' [1997] University of Chicago Law Review 737.

⁵⁰ See also Northrop Frye, '[The] principal property [of narrative] is its inherent sequentiality: a narrative is composed of a unique sequence of events, mental states, happenings involving human beings as characters or actors ... [The] meaning ... [of these events] is given by their place in the overall

about what is included and what is not. It is not a direct reflection of what actually happened but a ‘translation of their “real” story into the narrative and rhetorical forms authorized by law’.⁵¹ A narrative also has a social element to it: it is designed to be heard.⁵² Law and storytelling are inextricably linked.⁵³ These stories are created right from the beginning: a person goes to a lawyer or contacts a government or not for profit organisation they think will be sympathetic to them with their story of a perceived wrong. This story is then questioned and retold. A narrative is therefore not the ‘truth’ but is socially-constructed. A narrative may not even be truthful in terms of being what subjectively motivates the parties⁵⁴ but rather, in this context, the narrative they put forward in terms of their perception as being wronged constitutional citizens. This has some similarities to the process of constructive interpretation put forward by Dworkin in interpreting law whereby it is considered in terms of its best possible interpretation.⁵⁵

Given the significance of these stories to the individuals involved, they should be at the centre of the legal process as the way of understanding the parties and giving them a voice. This can be done by making use of an empathic narrative. This ‘includes descriptions of concrete human situations and their meanings to the persons affected in the context of their lives. It is contextual, descriptive and affective... the telling of the stories of persons and human meanings.’⁵⁶ In order for the decision maker to give voice to the litigants, to treat them with respect and as a first step towards demonstrating empathy, it is necessary for the judge to recognise the narratives that the parties are putting forward and to pay respect to them insofar as they amount to a recognisable (although not necessarily persuasive) rights claim.

Considering empathic narratives therefore requires considering emotions but does not mean being sentimental or becoming unnecessarily emotional. Giving a calm and careful account of

configuration of the sequence as a whole.’ Northrop Frye and Robert D Denham, *Myth and Metaphor: Selected Essays, 1974-1988* (Univ Press of Virginia 2000) 157.

⁵¹ Posner (n 53) 738.

⁵² James Boyd White, ‘Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life’ in JS Nelson (ed), *The Rhetoric of the Human Sciences* (University of Wisconsin Press 1987).

⁵³ As James Boyd White points out, law ‘always begins in story’. White (n 32) 168.

⁵⁴ This is the case for any litigation, however mundane. The fact for example that the ‘actual’ motivation for suing someone is personal dislike does not prevent a breach of contract claim being brought if this can be put into a recognisable legal claim.

⁵⁵ R. Dworkin, *Law’s Empire* (Belknap Press, 1986)

⁵⁶ Henderson (n 44) 1592.

each litigant's side is required⁵⁷ and an overwrought over-rhetorical analysis is actively unhelpful. I am not saying that judges should turn into (bad) lyrical poets or are required to copy the distinctive style of Lord Denning.⁵⁸ In fact, analysis of Lord Denning's judgments shows how narrative can be used in a way which unfairly promotes the interests of one side, rather than to give a full descriptive of the interests at stake. Look for example at his famous opening of *Miller v Jackson*,⁵⁹ a case involving litigation over a cricket club alleged to be a nuisance:

In summertime village cricket is the delight of everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in County Durham they have their own ground, where they have played these last seventy years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short. It has a good club-house for the players and seats for the onlookers. Yet now after these 70 years a Judge of the High Court has ordered that they must not play there anymore, he has issued an injunction to stop them... The cricket ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much the poorer. And all this because of a newcomer who has just bought a house there next to the cricket ground.⁶⁰

By telling the story in this way, it advances a particular legal argument to the extent that the 'facts' provide the substance of the decision.⁶¹ This is unfair storytelling because it is based largely on supposition and Denning's own prejudices. The rhetorical form relies on well-known tropes to be effective. It pits 'a community bonded together by the common interest' against the narrative framework of an 'outsider' which comes laden with social disapproval.⁶²

⁵⁷ See Nussbaum's analysis of Posner judgment in *Carr v Allison Gas Turbine Division, General Motors Corp* 32 F.3d 1007 of sexual harassment and the effect it had on the only female worker in the tinsmiths' section at a General Motors factory in Martha Nussbaum, 'Judicial Rhetoric and the Literary Imagination' (1995) 62 University of Chicago Law Review 1477.

⁵⁸ For analysis of such styles of writing see, Brady Coleman, 'Lord Denning and Justice Cardozo: The Judge as Poet-Philosopher' (2001) 32 Rutgers Law Journal 485.

⁵⁹ [1977] QB 966

⁶⁰ *Ibid.*, 976

⁶¹ William L Twining, *Rethinking Evidence: Exploratory Essays* (2nd ed, Cambridge University Press 2006) Ch 7.

⁶² Bernard Jackson, 'Narrative Theories and Legal Narrative' in *Narrative in Culture: The Uses of Storytelling in the Sciences, Philosophy and Literature* (Routledge 1990) 25.

The judge then becomes another outsider, thereby combining this narrative with the well-known one of a ‘person in authority who interferes with the traditional pleasures of the people’.⁶³ The judgment thus fails in the obligation to understand the empathetic narratives of both sides equally. The Millers are merely characterised as ‘newcomers’ with very little other description. They become an abstract idea and thus responsible in a way for all ills of modernity in contrast to the time honoured traditions of rural England. It is therefore a good example of the problems of partial empathy as described above by Henderson. Although its outward form is empathetic and it appears to take seriously the narrative expressed by the cricket club, this is far from the use of empathy that I am suggesting.

V. Rhetoric and the Culture of Justification

The argument has so far been that the decision-making process matters, and in particular judges and other decision makers need to pay attention to the need to give adequate voice to the narratives of the parties. The particular narratives at issue in the ‘cake cases’ will be discussed in the next section. Before considering these it might be objected that the narratives in these particular kinds of culture war or clash of rights cases are distorted or overblown to the point that they are not an accurate representation of what has actually been experienced and therefore should not be taken seriously. These disputes are, the argument runs, not about personal hurt or subjective experience but politics and are merely proxies for cultural disputes.

Certainly, litigation in ‘culture wars’ cases is strategic. All the litigants in *Masterpiece* and *Ashers* had their litigation funded by external funders. These will have had their own reasons for taking on the cases (to clarify the law, to illustrate a wider campaign, etc.) which may be very different to the reasons why the litigants initially sought to bring legal action (to assert a perceived right, to avoid a financial penalty, a feeling of injustice, etc.). There are of course many uses of litigation other than to defend plausibly claimed legal rights. A claim with very little likelihood of success may even be made specifically in order to gain support or sympathy for a wider purpose. Indeed, in some cases involving a similar clash of rights to the cake cases there has been criticism from judges because the case advanced was made at a very general

⁶³ Ibid.

level with limited reference to the precise legal dispute in issue and therefore appeared to be being used openly as a strategic rhetorical platform rather than a legal case.⁶⁴

Nevertheless, the cake disputes are ‘real’ in the sense there was a genuine dispute which raised a legal issue. In both *Masterpiece* and *Ashers* there was a refusal to provide a service, the desire for the service was real and the refusal was unexpected.⁶⁵ Even though the litigants are not perfect interlocutors who are only interested in defending their rights and nothing more (which would in any case be a strange and disembodied way of living) they still are constitutional losers in Calhoun’s sense. The more strategic, underlying motives of the funders therefore do not need to be taken into account because it is the subjective experiences of legitimacy, of being treated with respect and so on for the individual parties involved that are relevant.

Given that, it is important to distinguish between the much wider rhetoric surrounding these cases and the actual narratives of the parties. In considering whether cases violate the culture of justification and the obligations owed to constitutional losers, we need to be careful not to assume the validity of claims of violations of these principles merely because someone has claimed that there is a violation. While it is important for a court only to apply a light touch sincerity standard and to take the narratives of loss at face value, ignoring potential background motivations, this does not mean that the narrative one side gives about the other or claims of failure of respect by the court need to be also taken at face value. That is, we should assume the validity of the narrative a litigant gives about themselves, but not about other actors.

As Linda McClain has shown regarding American disputes, a litigant may say they have been called or treated as a bigot when they have not.⁶⁶ Sometimes these claims of bigotry may be

⁶⁴ See eg *Johns v Derby City Council* [2011] EWHC 375, paras 32-34, ‘In his skeleton argument and in his oral submissions, Mr Diamond [counsel for the claimants] lays much emphasis upon various arguments, many of them couched in extravagant rhetoric, which, to speak plainly, are for the greater part, in our judgment, simply wrong as to the factual premises on which they are based and at best tendentious in their analysis of the issues...It is hard to know where to start with this travesty of the reality’

⁶⁵ Although see the later complaint where a different plaintiff, Autumn Scardina, deliberately tried to orchestrate facts which would lead to Phillips refusing to provide the cake. Of course it would not matter as a matter of law whether or not the dispute was manufactured in this sense as long as it actually took place. The case in fact settled. See <https://www.cpr.org/2019/06/06/masterpiece-baker-jack-phillips-is-up-against-yet-another-legal-complaint/> (Last Accessed 10 April 2020)

⁶⁶ Linda C McClain, ‘The Rhetoric of Bigotry and Conscience in Battles over “Religious Liberty v. LGBT Rights”’ in William N Eskridge Jr and Robin Fretwell Wilson (eds), *Religious Freedom, LGBT Rights, and the Prospects for Common Ground* (1st edn, Cambridge University Press 2018).

made deliberately, if not cynically, to gain sympathy for the litigant and support for their point of view. As McClain points out, the Supreme Court's majority decisions in the landmark US decisions advancing gay rights in *Lawrence v Texas*,⁶⁷ *United States v Windsor*⁶⁸ and *Obergefell v Hodges*⁶⁹ did not claim the opposing side was bigoted even when rejecting their arguments. However, some critiques maintained that they did, including the dissenting judgment of Roberts CJ in *Windsor*. The same may well apply to UK disputes. There may of course be accusations of bigotry from the media or other interested groups but that is quite different to such claims being made by the state or other decision-making bodies, or even from those formally involved in litigation such as the parties' lawyers or amicus briefs. With this in mind, I now turn to the narratives that these parties put forward in the final contexts of *Ashers* and *Masterpiece*, bearing in mind that these narratives may well have changed as the legal process progressed.

VI. Narratives in the Cake Cases

a) *Narratives in Ashers*

Gareth Lee's narrative was that by being refused the cake order he was made to feel like a 'second class citizen' because of his sexuality. He felt he was a clear victim of discrimination in completing a rather mundane task in a context that, from his perspective, had nothing to do with religion. He believed that if the refusal to serve him was not held to be illegal it would deny him the certainty in knowing he would receive services in his everyday life, given that he was unaware of the religious beliefs of the owners of Ashers Bakery even though he had been a regular customer there. He feared that judgment for Ashers would mean such refusals would become more widespread in the context of a still predominantly religious society where there is considerable religious opposition to same-sex marriage.⁷⁰

On the other side of this dispute, the McArthurs put forward what they perceived as their basic right to live by their beliefs, which should apply in work as well as outside it. They were not

⁶⁷ 539 U.S. 558 (2003).

⁶⁸ 570 U.S. 744 (2013).

⁶⁹ 576 U.S. ____ (2015).

⁷⁰ According to a 2018 survey, 68% of people in Northern Ireland thought marriages between same-sex couples should be legally valid and 24% should not, but opposition increased to 35% of Protestants. See https://www.ark.ac.uk/nilt/2018/LGBT_Issues/SSEXMARR.html#rel (Last accessed 10 April 2020)

opposed to serving gay customers and would, and did, happily have Mr Lee as a customer. They were polite to him and disclaimed any homophobia.⁷¹ Their objection was only to the message, ‘Support Gay Marriage’ because they felt this meant they had to promote a cause with which they fundamentally disagreed. The case was, they argued, not just about the rights of Christians but the rights of everyone who did not want to support causes they disagree with in their work, in their case a small family run bakery. They pointed to support even from those disagreed with their beliefs.⁷² Using Christian imagery they argued this was a David and Goliath struggle since Lee was supported by the taxpayer in bringing his claim and they did not have similar resources.

b) Narratives in Masterpiece

Phillips, the owner of Masterpiece Cakeshop, put forward a slightly different narrative to the McArthurs, given the different facts of the dispute. Kennedy J summarised Phillips’ objection to providing the cake as being because of his belief that ‘creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs’. Phillips believed that his ‘main goal in life is to be obedient to Jesus Christ’ and this applied to his work at the cake shop. He told the couple that although he would provide cakes for other occasions he would not create wedding cakes for same-sex weddings. His narrative was therefore based on participating and giving a personal endorsement of the ceremony and about his artistic skill and his personal expression in making cakes, and not about providing goods more generally.

This narrative may show how narratives are constructed via a process of social construction. It is not entirely obvious that making custom cakes would be seen intuitively by someone with no legal knowledge as a matter of speech, rather than a claim of religious liberty. However, given current US law a claim based only on the free exercise of religion. The Supreme Court held in *Employment Division v Smith*⁷³ that where the law was neutral and generally applicable the state no longer had to demonstrate that the law was required to fulfil a compelling state

⁷¹ On the practice of disclaiming homophobia see P. Johnson and R. Vanderbeck, *Law, Religion and Homosexuality* (Routledge, 2014)

⁷² This support certainly existed. See eg Peter Tatchell ‘I’ve Changed My Mind on the Gay Cake Row. Here’s Why’ *The Guardian* 1st Feb 2016.

⁷³ 494 U.S. 872 (1990). See Daniel Conkle, ‘Equality, Animus, and Expressive and Religious Freedom Under the American Constitution: Masterpiece Cakeshop and Beyond’ in Guglielmi Gilles (ed), *La Liberté d’Expression en Droit Comparé* (Les Editions Panthéon-Assas 2020).

interest. Since the law prohibiting sexual orientation discrimination is not aimed at any particular religious group and is applied to all equally, a claim based only on the free exercise of religion would therefore be very likely to fail. Therefore there was a higher prospect of success in characterising it as a speech claim. Regardless of this, the forced speech narrative was still the narrative that Phillips put forward to the Court and the basic idea that he should not be required to create a wedding cake because it was contrary to his beliefs remained the same.

Charlie Craig and David Mullins's narrative centred around the effect of the discrimination on them, especially at a time when they were excited about getting married. They framed this as one of a series of discriminatory treatments they had received throughout their lives but a particularly shocking one to them. It occurred in the relative safety they thought they would experience in Denver, a liberal major city with laws preventing sexual orientation discrimination.⁷⁴ In a similar way to Lee, the discrimination was entirely unexpected. They only went to the bakery because it had been recommended to them by a wedding planner. Later, they also saw themselves as having ongoing obligations to combat discrimination and a more activist role, stating that 'we want to ensure that people don't have to go through the same humiliation and helplessness that we had to go through'.⁷⁵

There are of, are course,⁷⁶ some difficulties in these narratives and they should not be taken as necessarily an accurate account of the situation. Ashers for example made use of David and Goliath imagery to suggest the full power of the state arrayed against a powerless individual. Whilst the ECNI (Equality Commission Northern Ireland) did support Lee in bringing his claim,⁷⁷ Lee is an ordinary individual, and until he had the support of the ECNI, presumably

⁷⁴ The lack of same-sex marriage was held to violate the Due Process and the Equal Protection Clauses of the Constitution in *Obergefell*. However, there is no federal protection against sexual orientation discrimination although there have been many attempts to introduce it. Therefore the only protection will be from state or local laws.

⁷⁵ <https://www.nbcnews.com/feature/nbc-out/meet-couple-behind-masterpiece-cakeshop-supreme-court-case-n826976> (Last Accessed 10 April 2020)

⁷⁶ 'Of course' because all narratives are partial.

⁷⁷ It did receive some criticism of the way it had acted from the Court of Appeal, on the basis that the Commission should have taken a more even handed approach to the dispute and should have provided advice to Ashers at an earlier stage. The ECNI responded to this by pointing to its limited powers. It stated that its legal role was to complainants or prospective claimants and it did not have the power to support the respondents in discrimination cases, although it provided advice and guidance to all businesses. See M. Wardlow, 'Ashers Ruling Not a Defeat for Religious or any Other Freedoms'.

had very limited resources. The McArthurs also gained funding for the litigation and wider support from the Christian Institute. The Attorney General for Northern Ireland intervened in the litigation from the Court of Appeal stage onwards and was supportive of the McArthurs. It is also interesting that the McArthurs elided their rights with the rights of the bakery which is a completely distinct legal entity, particularly where Ashers Bakery, while family owned, is not a very small company. At the time it employed 65 people and had 6 shops. It also sells its goods to convenience shops. To say this is not to say that their narrative is particularly objectionable but rather that all narratives are partial.

VII. Culture of Justification in the Cake Cases

a) Ashers

In *Ashers*, the way these narratives were dealt with differed at each level of decision making, not least because the County Court and the Court of Appeal decided the case in favour of Lee, but the Supreme Court in favour of Ashers. The Court of Appeal and the Supreme Court also characterised the case in different ways. The Court of Appeal, because it held that there was direct sexual orientation discrimination, saw the case as balancing the equality right against the right to freedom of religion and expression. There was a clear attempt to present the narrative put forward by each party and to respect the right of the McArthurs as constitutional losers. Morgan LCJ stated the importance to Northern Ireland of its ‘large and strong faith community’ and the fact that religion ‘informs every aspect of the manner in which those of faith conduct their lives’.⁷⁸ The Court of Appeal did not accept that there had been ‘forced speech’ because providing the cake did not demonstrate any support for gay marriage in the same way that providing a football team based cake does not show support for that football team.⁷⁹ However, this misunderstood the nature of their objection, which primarily related to acting in a way which contravened their conscience, by conveying a message they were opposed to, rather than a fear that their beliefs would be mistaken by third parties. On the other side, the Court pointed

<https://www.equalityni.org/Footer-Links/News/Employers-Service-Providers/Ashers-ruling-not-a-defeat-for-religious-or-other> [Last Accessed 18th April 2019]. (Last accessed 10 April 2020)

⁷⁷ [2016] NICA 55, para 49.

⁷⁸ [2016] NICA 55, para 49.

⁷⁹ NICA decision, para 67.

out the recent historical context of discrimination against gay people in Northern Ireland which criminalised sexual acts between men until 1985.⁸⁰

The Supreme Court reached the opposite conclusion, holding that there had been no direct sexual orientation discrimination and, although there was the ‘possibility’⁸¹ that there was political opinion discrimination⁸² should not be read in a way ‘to compel providers of goods, facilities and services to express a message with which they disagree, unless justification is shown for doing so’.⁸³ This means that there was little explicit balancing of the two narratives. The tone of the decision is one of technicality, with the audience primarily a legal one rather than the parties themselves. Even so, there is a direct nod to the narratives of both parties. Lady Hale recognised that discrimination is ‘deeply humiliating, and an affront to human dignity’.⁸⁴ Given that Lady Hale has been astute to discrimination claims in previous cases such as *Bull v Hall*,⁸⁵ has long been publicly committed to gay rights,⁸⁶ as well as having written sympathetically in favour of a reasonable accommodation approach to religious claims⁸⁷ this is to be expected.

However, having stated that discrimination is deeply humiliating she immediately went on to say that, ‘that is not what happened in this case and it does the project of equal treatment no favours to seek to extend it beyond its proper scope’.⁸⁸ This comes close to saying that the sense of humiliation Lee experienced was unfounded. For this reason Cousins has characterised Lady

⁸⁰ NICA decision, para 50.

⁸¹ SC decision para 56.

⁸² Unlike the rest of the UK, political opinion discrimination is prohibited by the Fair Employment and Treatment (Northern Ireland) Order 1998.

⁸³ SC decision para 56.

⁸⁴ SC decision para 35.

⁸⁵ [2013] UKSC 73. *Bull v Hall* concerned hoteliers who refused to give a room with a double bed to a gay couple in a civil partnership because of their religious beliefs that forbade sex apart from between married couples, at a time when marriage was not available to same sex couples. Lady Hale found that this amounted to direct discrimination, holding that ‘Now that, at long last, same sex couples can enter into a mutual commitment which is the equivalent of marriage, the suppliers of goods, facilities and services should treat them in the same way’ (para 36).

⁸⁶ See for example, her comments on same sex marriage and civil partnerships in the F.A. Mann Lecture delivered in 2005, available from <https://www.biicl.org/eventpapers/36/29th-annual-f-a-mann-lecture-baroness-hale-of-richmond> (last accessed 10 April 2020)

⁸⁷ Brenda Hale, ‘Religion and Sexual Orientation: The clash of equality rights’, speech given at the Comparative and Administrative Law Conference, Yale Law School, 7 March 2014. Available from: <https://www.supremecourt.uk/docs/speech-140613.pdf> (Last accessed 10 April 2020)

⁸⁸ SC decision, para 35

Hale's comments merely as 'handwringing'.⁸⁹ This is unfair. Her comments had a valid and important purpose and there is no reason to believe that she was insincere in what she meant. Her statements were not mere disclaiming of homophobia but a genuine attempt to grapple with the boundaries of the law. Nevertheless it would have been better to recognise Lee's feelings explicitly but to say that this is beyond the scope not of the 'equal treatment project' itself, but of the limited role of coercive law. There are many kinds of behaviour which may hinder substantive equality and inclusion which should not be legally prohibited but only subject to more informal mechanisms of change.⁹⁰

While some criticisms of both the Court of Appeal and Supreme Court's decisions can therefore be made, overall they both respect the culture of justification and obligations to constitutional losers, even though they reach different conclusions.

b) Masterpiece

There were numerous stages to the litigation and 5 opinions issued in the Supreme Court.⁹¹ Therefore I will not discuss all of these in detail but will focus on Kennedy J's opinion for the Court deciding the case in favour of Masterpiece and, since it drives this judgment, the original decision-making process of the Colorado Civil Rights Commission.

Kennedy J from the beginning perceived this as a difficult question with each side presenting weighty and significant arguments:

The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State... to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment.⁹²

⁸⁹ Mel Cousins, 'Taking Equal Protection beyond Its Proper Scope? Why People with Sincere Religious Beliefs Can Continue to Discriminate' (2019) 41 *Journal of Social Welfare and Family Law* 222.

⁹⁰ See for example 'soft law' measures discussed in Tamara K Hervey, 'Thirty Years of EU Sex Equality Law: Looking Backwards, Looking Forwards' (2005) 12 *Maastricht Journal of European and Comparative Law* 307 and the role of 'gender mainstreaming' discussed in Sophie Jacquot, 'The Paradox of Gender Mainstreaming: Unanticipated Effects of New Modes of Governance in the Gender Equality Domain' (2010) 33 *West European Politics* 118.

⁹¹ In addition to the opinion given by Kennedy J there were 3 concurring opinions filed and a dissenting opinion by Ginsburg J, joined by Sotomayor J.

⁹² *Masterpiece*, 1723.

Kennedy J therefore made a clear attempt to pay respect to the narratives put forward by both parties.⁹³ There are a series of ‘ritual bows’ made to Mullins and Craig. He makes clear the importance of (hard fought for and only recently recognised) gay rights, stating that ‘gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth’ and their civil rights must be protected.⁹⁴ To have an extensive exception to civil rights laws would lead to a ‘community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations’.⁹⁵ Unlike the dissent by Scalia J in *Lawrence v Texas*, there is no distancing of the couple. Kennedy J showed empathy to both sides.⁹⁶ The parties are embodied rather than an abstraction.⁹⁷ Importantly, his decision is immediately grounded not as an exercise of discretion or of a competition for sympathy in the culture wars but as an important *legal* decision on the meaning of the First Amendment, personalised by giving appropriate facts. This allows the baker and the couple to become the centre of the legal argument.

Despite the recognition of the power of the narrative that Craig and Mullins put forward, Phillips’ claim that the Civil Rights Commission had acted wrongly in holding that he had unlawfully discriminated against the couple was successful. This was because Kennedy J held there had not been a sufficient recognition of Phillips’s claim by the Commission because they had violated the duty to give it ‘neutral and respectful consideration’.⁹⁸ He argued that this failure occurred in two ways. The first related to two sets of comments made by some members of the Commission which could be seen to have an anti-religious bias. The second, the apparent inconsistency in the Masterpiece decision compared to others where bakeries were permitted to refuse to put an anti-gay message on cakes for a Christian customer. Although these two factors were combined in his judgment they are very different in terms of the impact they have

⁹³ See Conkle (n 77).

⁹⁴ *Masterpiece*, 1727.

⁹⁵ *Masterpiece*, 1727. See also Conkle (n 71). ‘[The Opinion] offered respectful consideration, and a measure of hope, to each side’.

⁹⁶ See *ibid.* describing Kennedy’s judgment in this sense as a ‘masterpiece’ and, in a similar way to Lady Hale’s decision in *Ashers*, are in line with his previous decisions showing respect for both gay people and people of faith. See *Lawrence v Texas*, 539 U.S. 558 (2003) *United States v Windsor* 570 U.S. 744 (2013) and *Obergefell v Hodges* 576 U.S. ___ (2015) and *Church of the Lukumi Babalu Aye v City of Hialeah* 508 U.S. 520 (1993).

⁹⁷ See eg the explicit references to the situation of those involved, eg ‘Jack Phillips is an expert baker who has owned and operated the shop for 24 years. Phillips is a devout Christian’ and on the other side, ‘Craig and Mullins were planning to marry... At that time Colorado did not recognize same-sex marriages, so the couple planned to wed legally in Massachusetts and afterwards to host a reception for their family and friends in Denver.’

⁹⁸ *Masterpiece*, 1729

on the demands of procedural justice and the duty to treat constitutional losers as having constitutional stature.

Looking first then at the comments made by the Commissioners, one Commissioner stated that Phillips can believe ‘what he wants to believe,’ but cannot act on his religious beliefs ‘if he decides to do business in the state’ and ‘if a businessman wants to do business in the state and he’s got an issue with the law’s impacting his personal belief system, he needs to look at being able to compromise.’⁹⁹ This by itself may just be a straightforward explanation of a dilemma which has to be resolved somehow rather than necessarily being ‘inappropriate or dismissive’¹⁰⁰ but it becomes more significant when taken with the comments made by another Commissioner who stated that:

I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust... we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.’¹⁰¹

This may of course be *true*, but there are plenty of true things a judge or similar decision maker should not say because it violates the obligation owed to constitutional litigants to be treated with equal respect and the expectation that they will receive a fair opportunity to put across their case. As explained above, the attitude should be one of appreciation that a tragic choice has to be made between individuals’ rights not to be discriminated against in the public sphere and the desire to live in accordance with one’s most significant beliefs. It does not show empathy for a party who is arguing that they have been forced into a difficult conscientious dilemma.

This conclusion has been criticised. Ginsburg J, dissenting, pointed out that the Commission was merely one decision maker and the decision had been upheld by many who had not expressed similar thoughts. This is true, but as demonstrated above, a fair process is important regardless of its actual impact or otherwise on the eventual decision. Ginsburg’s opinion

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

¹⁰¹ *Ibid.*

therefore downplays the importance of the comments, stating that ‘whatever one may think of the statements in historical context, I see no reason why the comments of one or two Commissioners should be taken to overcome Phillips’ refusal to sell a wedding cake to Craig and Mullins’.¹⁰² Even the way she characterises the comments fails to see their significance, for example the dismissiveness of ‘one or two’ as if the actual number is unimportant.

Kendrick and Schwartzman have also characterised the Commissioners as demonstrating a failure of ‘etiquette’ rather than ‘civility’.¹⁰³ Although they mean more by etiquette than the way it is usually used,¹⁰⁴ it is not merely ‘etiquette’ for the decision maker to ensure that they appear respectful and considerate of both sides’ views, but rather an essential aspect of constitutional and other decision-making. As Kennedy J recognised, the Commissioners’ comments have significance for both the perceived and objective legitimacy of the decision.

These comments therefore violate the demands of procedural justice. The second issue Kennedy J discussed, which was also at the core of Gorsuch J’s concurring judgment, is less clear cut. This relates to separate cases decided by the Colorado Civil Rights Commission. William Jack asked 3 bakeries to provide cakes with anti-same sex marriage messages on them and when they refused, complained to the Commission that there had been religious discrimination.¹⁰⁵ His case was rejected. The Commission held the refusal was not unlawful, partly basing their decision on the offensiveness of the messages.

For Kennedy J, a principled rationale for distinguishing the cases cannot depend on offensiveness. There is, however, vagueness over the exact role offensiveness plays in the Commission’s decision.¹⁰⁶ If offensiveness had been used by the Commission as the overriding criterion as a device to distinguish between the two types of case then Kennedy J is right to be uneasy about it. Using offensiveness as a criterion is imprecise because it can be taken to rest entirely on the subjective experience of the person it is aimed at and so does not explain the

¹⁰² *Masterpiece*, 1751

¹⁰³ Leslie Kendrick and Micah Schwartzman, ‘The Etiquette of Animus’ (2018) 132 *Harvard Law Review* 133.

¹⁰⁴ Referring to etiquette as ‘the importance of appearing respectful and considerate’ *ibid* 135.

¹⁰⁵ The cakes were to be in the shape of an open Bible with an image of two grooms crossed out and ‘God hates sin—Psalm 45:7’ and ‘Homosexuality is a detestable sin—Leviticus 18:22’ on one cake and ‘God loves sinners’ and ‘While we were yet sinners Christ died for us—Romans 5:8’ on the other. *Jack v. Gateaux, Ltd.*, Charge No. P20140071X (Mar. 24, 2015); *Jack v. Le Bakery Sensual, Inc.*, Charge No. P20140070X (Mar. 24, 2015); *Jack v. Azucar Bakery*, Charge No. P20140069X (Mar. 24, 2015).

¹⁰⁶ Lawrence Sager and Nelson Tebbe, ‘The Reality Principle’ [2019] *Constitutional Commentary* 171.

exact wrong that has been committed. But as Sager and Tebbe point out, there is a difference between offensiveness being used as a criterion by the state and offensiveness as a criterion for an individual's action.¹⁰⁷ It is plausible that by referring to offensiveness the Commission did not mean that the state thought that these messages should be restricted, but merely that the owner of the bakeries found this message offensive and refusing to make cakes with subjectively offensive messages did not here contravene any ground of discrimination law.

Kennedy J is not wrong to point out that where the State agency has the role of protecting both parties from relevant discrimination, it would lessen the sense of presumptive bias of the decision maker to not refer to offensiveness. It could add to the sense that there has been 'a signal of official disapproval of Phillips' religious beliefs', as he put it in his judgment.¹⁰⁸ However, his judgment is ambiguous as to whether he means that the same decision should have been reached in *Jack* as in *Phillips* and the Commission's failure to do *by itself* demonstrates bias or simply whether the way the Commission discussed them added to a sense of failure of empathy. The mere fact that these cases reach different conclusions does not by itself demonstrate a failure of equal respect or that Jack was discriminated against because he was a Christian. As Kagan J pointed out, it would be easy to have distinguished the cases on the basis that they simply did not demonstrate religious discrimination because the bakeries in *Jack* would not have made the cake for any customer (i.e. it goes to the message/person distinction at issue in *Ashers*).¹⁰⁹

This failure is clearer in the opinion of Gorsuch J, who rested part of his argument on what he took to be that put forward by Kennedy J. He argued that the two cases shared 'all legally salient features' and so the Commission 'failed to act neutrally by applying a consistent legal rule'.¹¹⁰ In Jack's case, he argued, the Commission knowingly denied service to someone in a protected class but found no violation because the bakers only intended to distance themselves from the offensive nature of the message, but in Phillips' case it found his intentions were

¹⁰⁷ Sager and Tebbe (n 110)

¹⁰⁸ *Masterpiece*, 1731

¹⁰⁹ See Sager and Tebbe (n 110) arguing that 'protecting a couple from being refused a wedding because they are both men and protecting a person who wants to buy a cake inscribed with words denouncing same-sex marriage' are not the same. There will be of course be issues as to where exactly the line is but this does not make the enquiry an unprincipled or impossible one. Although see Douglas Laycock, 'The Broader Implications of Masterpiece Cakeshop' (2019) 7 *Brigham Young University Law Review* 170, for an opposing view.

¹¹⁰ *Masterpiece*, 1735

inextricably tied to the sexual orientation of the parties involved. This was therefore a ‘double standard’ because ‘just as cakes celebrating same-sex weddings are (usually) requested by persons of a particular sexual orientation, so too are cakes expressing religious opposition to same-sex weddings (usually) requested by persons of particular religious faiths’.¹¹¹ However, this is not so. Gorsuch’s opinion sees a ‘wedding cake’ as an entirely different product to a wedding cake for a gay couple in order to argue that this by itself means that the Commission could only have decided the case in that way because it disapproves of Jack’s message. At its core though, discrimination law concerns discrimination against people, and not messages. It is therefore not a necessary part of discrimination law to require businesses to publish messages they disagree with, whether these are pro or anti-gay rights.¹¹² Discrimination against same-sex marriages however is inextricably tied into a societal structure which discriminated at every level, and to a lesser extent still discriminates, against gay people.

Gorsuch J’s opinion suffers from not taking seriously requirements of equal respect and empathy towards the couple and to gay people in general. Because of his overwhelming focus on the actions of the Commission and its perceived bias, the couple hardly feature at all. On the one hand this simply be seen as a way of aiming to ‘rebalance’ the rhetoric from the Commission. Certainly, appellate judgments are a response to previous judgments and it would seem logical that the more one sided a previous judgment is perceived to be, the more likely it is those who disagree with it will focus on the other side. Nevertheless, as Kennedy J’s judgment shows, it is possible to disagree with a previous judgment, whilst still respecting both parties. Nowhere in Gorsuch’s opinion is the harm to the couple expressed and neither are they given a voice to express their narrative.

Thomas J’s opinion too makes this mistake. His overwhelming concern is about the consequences to free speech.¹¹³ He considers the baker’s conduct to be expressive and points to Phillips’ classification of himself as an artist.¹¹⁴ However, as discussed in the oral argument, this argument was so wide that it would be very difficult to exclude any business from having an expressive purpose. There is no discussion of the narrative of the other and the effect having

¹¹¹ *Masterpiece*, 1736

¹¹² I leave open the question here of whether it would be legitimate for the state to do so explicitly if it so wished.

¹¹³ Stating that: ‘states cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable or undignified’, *Masterpiece*, 1746.

¹¹⁴ *Masterpiece*, 1742

such a significant carve out from anti-discrimination laws would have. Excepting individuals who conscientiously object to these laws, however sincerely, could have a significant effect on the right not to be discriminated against.¹¹⁵

Finally, what is surprisingly missing from all the judgments, even those sympathetic to the claimants, is a consideration of the appropriate remedy. The majority agree that the initial decision was vitiated by overt apparent bias from the Commission but this does not explain why Masterpiece Bakery won its case outright and the decision was not merely remanded back to the Commission, which had in any case had a change of membership by this point, to decide afresh. This therefore left the couple without true redress.

VIII. Conclusion

It should not come as a surprise to lawyers that words matter. By a judgment a judge's word becomes law. A perception of the fairness of the process matters and not just the conclusion. Particularly in cases characterised by rhetoric and claims of bigotry and intolerance such as these, decision makers need to take seriously obligations of justification and equal respect, giving them an opportunity to put forward their narrative and to have their voice fully heard. This is especially important for 'constitutional losers' who should be treated as 'worthy and respected proponents of non-frivolous constitutional arguments'. These obligations were broadly respected in *Ashers*, although with some undervaluing of the issues from Lee's perspective in the Supreme Court's decision. The US Supreme Court too, on the whole, appreciated the importance of the failure of the Commission to be free from apparent bias but Kennedy's judgment was not clear enough about what was problematic and what was not. Other judgments were only partial in the empathy they showed to the litigants. Taking such requirements seriously is part of an obligation of civility to all.

¹¹⁵ See eg Robert Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others: Accommodating Religious Beliefs' (2014) 77 *The Modern Law Review* 223.