Logic and Its Discontents: 
Jurisprudential Tensions Between Emotion and Reason

By Kathleen A. Tarr*

“IF I WERE A WOMAN,” I continued, fully immersed in the logic of my argument. “You are a woman,” he reminded me. “Oh, yes.” I can’t remember what we had been discussing, two college students intellectualizing on our way out of the gym, me raised in a home with a father I idolized who in turn idolized S’chn T’gai Spock Cha’ Sarek (a.k.a, Spock); logic was (is) my God. That I neglected my own demographics during a discussion was therefore not surprising, but it was . . . well, odd.

As Spock would tell you, when it comes to humans, emotions reign. There aren’t many worshippers in the Logos congregation, a fact I wish I’d scrutinized—and frankly been taught—during those college years and law school, too. I was drawn to the practice of law in large part because I believed it was an arena of logical argument with clearly written rules and reasoned decision-makers. However, despite all desire to the contrary, the bar and judiciary are only partially motivated by logic. Ironically, if you want Logos to seize the day, then you must account for and appeal to Pathos.

The road to marriage equality is a perfect illustration. As in Loving v.

---

* Kathleen A. Tarr is a Harvard Law School graduate, former Skadden Fellow, and Lecturer in the Program in Writing and Rhetoric and tutor at the Hume Center for Writing and Speaking at Stanford University. Kathleen would like to thank the staff of the University of San Francisco Law Review, particularly Cole Benbow, for editing assistance.


2. Logos, DICTIONARY.COM, http://dictionary.reference.com/browse/logos?s=t (last visited Sept. 22, 2015) (“[T]he rational principle that governs and develops the universe” (philosophical definition); “[T]he divine word or reason incarnate in Jesus Christ (as in the Gospel of John)” (theological definition)).

3. Pathos, DICTIONARY.COM, http://dictionary.reference.com/browse/pathos?s=t (last visited Sept. 22, 2015) (“The quality or power in an actual life experience or in literature, music, speech, or other forms of expression, of evoking a feeling of pity, or of sympathetic and kindly sorrow or compassion.”).
Virginia, there was no new legislation that decided Obergefell v. Hodges in the summer of 2015. The right to same-sex marriage, like that of miscegenation, was read into the Fourteenth Amendment, which had been established in 1868. Before Loving was decided in 1967, there had been multiple, unsuccessful challenges to anti-miscegenation laws, the first came before the Court in 1883. While it did not similarly take eighty-four years for justice under the law, the challenge to same-sex marriage inequality first reached the United States Supreme Court more than forty years ago, another considerable delay. In 1972, the Court dismissed the appeal of Richard John Baker and James Michael McConnell who were denied a Minnesota marriage license. In March of 1975, Boulder County Clerk Clela Rorex issued a marriage license to David McCord and Robert Zamora and five subsequent same-sex couples before being advised by Colorado’s Attorney General to cease issuance (although the District Attorney had initially advised that there was nothing in the marriage code prohibiting such marriages). Why did it take lifetimes for these rights to be recognized by the courts, the Supreme Court in particular? If Equal Protection is actually meant to protect equally, why are certain people’s rights deferred?

The answer we most often hear seems simple enough: the times.

4. 388 U.S. 1 (1967) (holding Virginia’s statutory scheme to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clause of the Fourteenth Amendment).
5. 135 S. Ct. 2584 (2015) (establishing that the Fourteenth Amendment requires a State to license a marriage between two people of the same-sex and to recognize a marriage between two people of the same-sex when their marriage was lawfully licensed and performed out-of-State).
6. See Pace v. Alabama, 106 U.S. 583 (1883) (ruling that the Alabama anti-miscegenation statute did not violate the Fourteenth Amendment because both races were treated equally, as both Whites and Blacks were punished in equal measure for breaking the law against interracial marriage and interracial sex).
7. See Baker v. Nelson, 409 U.S. 810 (1972) (discussing that there is no substantial federal question in a state’s decision to ban same-sex marriages).
10. See, e.g., LEE F. ARNHEIM & RICHARD L. ROE, GREAT TRIALS IN AMERICAN HISTORY: CIVIL WAR TO THE PRESENT 68 (2d ed. 1965) (describing an American-born citizen
However, if one believes the role of the judiciary is to determine standing law—not advocate for favored interpretations—then the delay in recognizing these populations’ fundamental right to marry should be deeply troubling. If current interpretation of the rights to marriage equality is correct, “the times” is a euphemism for a majority that tyrannized those with a more accurate understanding of the law.

The history of Jim Crow and segregation is another example of this phenomenon. In New York City on July 16, 1854, Elizabeth Jennings was forcibly removed from a segregated rail car and subsequently sued the driver, conductor, and railroad company. Represented by Chester A. Arthur—future President of the United States—Jennings and Arthur appeared before Judge William Rockwell of the Brooklyn Circuit Court who ruled, “[c]olored persons if sober, well-behaved, and free from disease, had the same rights as others and could neither be excluded by any rules of the Company, nor by force or violence.” Judge Rockwell awarded Jennings expenses and 10% above the jury’s finding of damages. Within a month, another African American, Peter Porter, was barred from a rail car and subsequently sued. The company settled out of court and African Americans were thereafter allowed to ride on an equal basis in the region.  

It is not only in the arena of civil rights that emotion plays such an integral role. It is understood that in fair use cases, there is a “fifth” unwritten factor in determining copyright infringement: whether the defendant is good or bad. Fair use cases sometimes contradict themselves because they involve a judge or jury’s subjective judgments including about right and wrong. Some have explained that, “[d]espite the fact that the Supreme Court has indicated that offensiveness is not a fair use factor, . . . a morally offended brought to trial for refusing relocation to a federal internment camp and how “[h]is conviction was upheld by the Supreme Court despite the strong arguments of Justice Murphy. Perhaps it was because of the times: The United States was still at war with Japan, and the civil rights issues that would find their way to the Supreme Court in the 1960s were not among the major concerns of that day.” (emphasis added). See also John Blake, Supreme Court a Force For Change? Not So Fast, CNN (June 27, 2015), http://www.cnn.com/2015/06/21/us/supreme-court-change/ (“The court eventually comes around, changing with the times just as the American people do.”).


judge or jury may rationalize its decision against fair use.” As one example, consider the following:

In one case a manufacturer of novelty cards parodied the successful children’s dolls the Cabbage Patch Kids. The parody card series was entitled the Garbage Pail Kids and used gruesome and grotesque names and characters to poke fun at the wholesome Cabbage Patch image. Some copyright experts were surprised when a federal court considered the parody an infringement, not a fair use.

Here exists formal recognition that despite “logical” interpretation of law, the human variable brings with it a variety of responses that may not only surprise but also determine legal outcomes.

In the practice of law, one will not always be in front of a Judge William Rockwell. Clients will not always have first engaged with a Clela Rorex. Nevertheless, there are ways to press logic to the fore. As I myself try to nudge the bar and judiciary toward recognizing that employment discrimination in the entertainment industry is, in fact, illegal, I am well aware that logic alone will not win the day—because it hasn’t yet. Despite a simple concept and already existent laws about non-discrimination based upon race, age, disability, gender, etc. in employment, the courts have been reluctant to rule in favor of plaintiffs whose complaints seem so obviously to delineate discriminatory behavior due compensation under law. An industry in which a production studio can demand Mario Van Peebles star the likes of Tom Cruise in his movie about the Black Panthers or not get his movie made

13. Id.
17. See, e.g., Lyle v. Warner Bros. Television Prod., 132 P.3d 211 (Cal. 2006) (describing that writers’ conduct in the creation of show script was deemed insufficient evidence of hostile environment or sexual harassment of writing assistant because speech that is part of the creative process is protected by the First Amendment). Compare Brief of Appellant at 20, Lyle v. Warner Bros. Television Prod., 94 P.3d 476 (Cal. 2004) (No. S125171), 2004 WL 3256430 (regarding defendant’s Friends star, Courtney Cox’s, fertility: “[her] pussy was full of dried up twigs” and “if her husband put his dick in her she’d break in two”; note the character Courtney Cox played was named “Monica Geller,” logically placing a discussion of Courtney Cox’s fertility outside of any professed creative process). See also Sarah Pahnke Reisert, Let’s Talk About Sex Baby: Lyle v. Warner Brothers Television Productions and the California Court of Appeal’s Creative Necessity Defense to Hostile Work Environment Sexual Harassment, 13 J. GENDER, SOC. POLY & L. 111 (2006); Claybrooks v. Am. Broad. Cos., Inc. 898 F. Supp. 2d 986, 1000 (M.D. Tenn. 2012) (district court dismissed a class action alleging racial discrimination in casting of shows The Bachelor and The Bachelorette holding that First Amendment protects defendants’ casting decisions).
at all violates every conscionable sense of justice and fairness. And yet . . .

Research shows that those who hold a strong sense of justice are in fact more strongly rooted in logic, not emotion. Perhaps what that means is that while lawyers have a “special responsibility for the quality of justice,” not everyone practicing law is as dedicated to equal justice under law. The bottom line? If you are practicing law (and even if you are not), be prepared. Know that it is a long, challenging journey when trying to move human emotion, either in one direction or out of the way, and the task cannot be separated from legal practice—no matter how logical you would like jurisprudence to be.

18. Nick Charles, Clawing to Get ’Panther’ to Screen Melvin and Mario Van Peebles Went Rough to Get Movie About Black Radicals Produced, N.Y. DAILY NEWS (May 2, 1990, 12:00 AM), http://www.nydailynews.com/archives/nydn-features/clawing-panther-screen-melvin-mario-van-peebles-rough-route-movie-black-radicals-produced-article-1.687046 (“When we first floated the story for the studio we were dealing with, they talked about having a white lead . . . a part for someone like Tom Cruise,” says Mario. “We balked and what eventually happened is that we had to buy the project back from them and call in a lot of favors to finish this film. We ended up having to make it for less than $9 million, a third of what we originally wanted.”).

19. Keith Yoder & Jean Decety, The Good, the Bad, and the Just: Justice Sensitivity Predicts Neural Response During Moral Evaluation of Actions Performed by Others, 34 J. NEUROSCIENCE 4161, 4161 (2014) (“Brain scans link concern for justice with reason, not emotion,”); see Univ. Chi., Brain Scan Links Concern For Justice With Reason, Not Emotion, SCIENCE DAILY (Mar. 28, 2014), http://www.sciencedaily.com/releases/2014/03/140328102909.htm (“People who care about justice are swayed more by reason than emotion, according to new brain scan research. Psychologists have found that some individuals react more strongly than others to situations that invoke a sense of justice—for example, seeing a person being treated unfairly, or mercilessly. The new study used brain scans to analyze the thought processes of people with high ‘justice sensitivity.’”).

20. MODEL RULES OF PROF’L CONDUCT § 1 (Preamble and Scope) (2009); see also id. § 6 (“As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.”).