

# NARRATIVE-ERASING PROCEDURE

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## INTRODUCTION

A plaintiff beginning a lawsuit has a hero's journey<sup>1</sup> ahead of her, replete with challenges, as she strives to present a compelling narrative to a decisionmaker, one that will demonstrate her entitlement to relief under the relevant law. In recent years, this journey has become more difficult due to the rise of what is best described as "narrative-erasing procedure" in civil pretrial litigation.<sup>2</sup> For instance, the Supreme Court has imposed the heightened "plausibility" pleading standard she must surpass to survive the motion to dismiss.<sup>3</sup> If she makes it past the plausibility hurdle to discovery, the plaintiff may request relevant information—but only insofar as it is "proportional to the needs of" her case.<sup>4</sup> Before she can tell her story, she may be swept up in the wave of high rates of settlement.<sup>5</sup> Her likelihood of reaching a merits determination in her case is very low.<sup>6</sup> And her quest will be especially challenging if she is asserting a civil rights claim or asserting she was subject to unlawful discrimination.<sup>7</sup>

These trends in civil procedure have been debated in the literature.<sup>8</sup> Yet that debate has ignored the effect of pretrial procedure on the values that narra-

<sup>1</sup> See, e.g., CHRISTOPHER VOGLER, *THE WRITER'S JOURNEY: MYTHIC STRUCTURE FOR WRITERS* 7 (Paul Norlen ed., 3d ed. 2007) (describing the hero's story).

<sup>2</sup> By using the term "narrative-erasing procedure," I intend to call to mind Marc S. Galanter's *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459–60 (2004) and Brooke D. Coleman's *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501, 503 (2012). However, rather than simply declare narratives are vanishing, I want to highlight that procedure is responsible for narratives' erasure. In using "narrative-erasing procedure," I am also referencing the work of Peter Brooks, who described law as keeping its narrativity "under erasure." Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?*, 18 YALE J.L. & HUMAN. 1, 21 (2006).

<sup>3</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). See also *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56, 560 (2007).

<sup>4</sup> FED. R. CIV. P. 26(b)(1). See also U.S. SUPREME COURT, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6–7 (2015), <https://www.supremecourt.gov/publicinfo/year-end/2015-year-endreport.pdf> [<https://perma.cc/R8LN-UF7V>] (describing changes to Rule 26(b)(1)).

<sup>5</sup> Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1953 (2009).

<sup>6</sup> See *id.* at 1956 ("As nontrial terminations of various sorts have increased, the civil trial has all but disappeared."). See also Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. TIMES (Aug. 7, 2016), <http://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html> [<https://perma.cc/J9VQ-ZPZQ>] ("The national decline in trials, both criminal and civil, has been noted in law journal articles, bar association studies and judicial opinions.").

<sup>7</sup> See Coleman, *supra* note 2, at 503 ("[T]he price of a restrictive shift in procedural doctrine is that it marginalizes particular claims, and by extension, particular people.").

<sup>8</sup> See A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 353–54 (2010). See also Alexander A. Reinert, *The Burdens of Pleading*, 162 U. PA. L. REV. 1767, 1769 (2014) (describing "how restrictions on courthouse access and other changes have reshaped the nature of litigation in the federal courts").

tive supports in civil litigation. Narrative is central to the proper functioning of the civil litigation system, including in litigation prior to trial: the law produces narratives, narratives grow the law, and narrative ensures the participation of citizens in the democratic operation of litigation. This article argues that the narratives generated in pretrial litigation, which are understudied, have deep importance to civil litigation's democratic value.

Narrative-erasing procedure endangers the civil litigation system by silencing litigants' voices and depriving the law of the stories it needs to progress. Narrative-erasing procedure also has a particularly harsh impact on individuals who are already marginalized in society. Ultimately, narrative-erasing procedure threatens the quality of justice. As this article explains, we need narrative for the law to address longstanding problems and for it to develop in constantly-changing times.

This article proceeds in four parts. Part I provides an essential primer on narrative theory, including the way narrative functions in law, to ground my account of the dangers of narrative-erasing procedure. Part II then illustrates the importance of narrative to pretrial litigation, by providing a detailed account of the presence and value of narratives in the civil pretrial system. In Part III, the article addresses narrative erasing procedural devices, by locating three procedural hurdles that threaten narratives, and by studying the impact of this narrative erasure on pretrial litigation. Finally, in Part IV, I recommend solutions for the problems narrative-erasing procedure causes, including policy recommendations for courts and rule-makers to better account for the value of narrative, and tools for lawyers and legal scholars to introduce narrative by other means, drawing on Marshall Ganz's work on "public narrative" in the social movements literature.

### I. NARRATIVE THEORY FOR LAWYERS

Because of narrative's importance to law and to pretrial procedure, and because of narrative-erasing procedure's dangers, it is imperative for the law to pay attention to narrative. Narrative ought to be a familiar subject to legal scholars and lawyers, because law and narrative are inextricably linked and the study of narrative offers helpful insights for the study of law.<sup>9</sup> Too often, though, legal training and legal scholarship ignore law's narrative content, simplify law and narrative to a set of practical instructions, and otherwise relegate law-and-narrative studies to a distant corner of the legal academy.<sup>10</sup> We cannot

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<sup>9</sup> See ROBIN WEST, *NARRATIVE, AUTHORITY & LAW* 345 (1993); see also Brooks, *supra* note 2, at 3 ("[I]f the ways stories are told, and are judged to be told, makes a difference in the law, why doesn't the law pay more attention to narratives, to narrative analysis and even narrative theory?").

<sup>10</sup> See, e.g., Peter Brooks, *Literature as Law's Other*, 22 *YALE J.L. & HUMAN.* 349, 360 (2010) ("Trial lawyers know that they need to tell stories—that the evidence they present in court must be bound together and unfolded in narrative form. . . . Yet the law rarely speaks in a doctrinal or analytic way about its narrative dimension.").

reckon with narrative-erasing procedure without a robust understanding of what narrative means and how it works. We also need an understanding of the wisdom narrative theory has to share about persuasion and possibility in law.

A. *Defining Narrative: More Than Just a Good Story*

For a profession that constantly utilizes narratives, the legal profession has a limited understanding of the meaning of the term “narrative.”<sup>11</sup> The term “narrative” is misused and overused in legal scholarship.<sup>12</sup> Although lawyers use narrative in many aspects of their practice, and although legal scholars use the term “narrative” with some frequency, the academic definition of narrative is poorly understood in law.

James Phelan’s definition of narrative is notable for its simplicity and universality: “[S]omebody telling somebody else on some occasion and for some purpose(s) that something happened.”<sup>13</sup> Phelan’s definition should resonate with lawyers for its references to purpose and audience, both central considerations for legal writers.<sup>14</sup>

While Phelan’s definition captures the important aspects of narrative, it may be deceptively simple for legally-trained readers used to complicated definitions, so I offer another definition: “[T]he representation of an event or a series of events.”<sup>15</sup>

The word “representation” leads to a significant point: lawyers may find themselves tripped up in confusion over the difference between “narrative” and “story.” A narrative is the representation of the events that occur in a story (the story-events). Most English speakers are familiar with using the term “story” to mean what this article refers to as “narrative.”<sup>16</sup>

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<sup>11</sup> Law has an uneasy relationship with narrative: Rather than acknowledge its debt to narrative, law as a discipline “wants to believe that it is rooted in irrefutable principles and that it proceeds by its own special methodology.” Brooks, *supra* note 2, at 20.

<sup>12</sup> See, e.g., Simon Stern, *Narrative in the Legal Text: Judicial Opinions and Their Narratives*, in *NARRATIVE AND METAPHOR IN LAW 5* (Michael Hanne & Robert Weisberg eds., 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2830904](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2830904) [<https://perma.cc/Y9P9-LLCP>] (“[L]egal scholars often speak of ‘narratives’ when they mean something else. . . . Frequently, the label means simply that an interpretation is about to follow . . .”).

<sup>13</sup> James Phelan, *Narratives in Contest; or, Another Twist in the Narrative Turn*, 123 *PUBLICATIONS MOD. LANGUAGE ASS’N* 166, 167 (2008).

<sup>14</sup> See ALEXA Z. CHEW & KATIE ROSE GUEST PRYAL, *THE COMPLETE LEGAL WRITER* 6–7 (2016) (encouraging legal writing students to consider the audience—“any possible reader of your legal document”—and purpose—“the task that the document is meant to complete”—when writing a legal document).

<sup>15</sup> H. PORTER ABBOTT, *THE CAMBRIDGE INTRODUCTION TO NARRATIVE* 12 (2008). For yet another definition of narrative, see ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 113 (2000).

<sup>16</sup> ABBOTT, *supra* note 15, at 16–17. As Abbott explains, “[m]ost speakers of English grow up using story to mean what [narrative theorists] . . . refer[] to . . . as narrative. . . . [T]he distinction between story and narrative discourse is vital for an understanding of how narrative works.” *Id.* at 18.

When this article uses the term narrative, it refers to a particular representation of a series of events: a text or other embodiment of a certain telling or treatment of a story's events. (Note that a narrative does not have to be a written language text—though it often is, of course.) “Story” on the other hand, means the “action”—it is the “event or sequence of events” that will be represented.<sup>17</sup> The narrative is the representation of those events.<sup>18</sup>

The representation of story in narrative is flexible; “narrative discourse is infinitely malleable.”<sup>19</sup> For instance, to use a well-known example of the variety of narratives that can be created out of a series of events or happenings, consider Birmingham, Alabama on the days around Easter 1963.<sup>20</sup> The events are recounted in a number of different narratives, including the Supreme Court's opinions in *Walker v. City of Birmingham*<sup>21</sup> and *Shuttlesworth v. City of Birmingham*.<sup>22</sup> *Walker*'s majority opinion, authored by Justice Stewart, and its dissent authored by Justice Brennan create different narratives out of the same underlying events; the majority opinion in *Shuttlesworth*, authored by Justice Stewart, presents yet another narrative.<sup>23</sup> The opinions in *Walker* and *Shuttlesworth* demonstrate how the same story-events can be represented in different narratives, or, in Phelan's terms, how narratives are told on different occasions for different purposes: to explain and justify the results in two separate cases.<sup>24</sup> Thus, “story” is indeed a component of studying narrative, but the concept of story is different from the narrative that emerges from the act of narration.<sup>25</sup>

<sup>17</sup> *Id.* at 19.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 17.

<sup>20</sup> For a thorough discussion of the historical events described here, see David Benjamin Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964*, 29 U.S.F. L. REV. 645, 645–46 (1995).

<sup>21</sup> *Walker v. City of Birmingham*, 388 U.S. 307, 308–09 (1967).

<sup>22</sup> *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 148–49 (1969).

<sup>23</sup> For insightful discussions of the different narratives that emerged in the court opinions, see Julie M. Spanbauer, *Teaching First-Semester Students that Objective Analysis Persuades*, 5 J. LEGAL WRITING INST. 167, 178–85 (1999); see also Shaun B. Spencer, *Dr. King, Bull Connor, and Persuasive Narratives*, 2 J. ASS'N LEGAL WRITING DIRECTORS 209, 209 (2004).

<sup>24</sup> For instance, Justice Brennan's dissent in *Walker* created a narrative that gave the marchers “human, sympathetic faces.” Spencer, *supra* note 23, at 214 (citing *Walker*, 388 U.S. at 338 (Brennan, J., dissenting)). Justice Stewart's majority opinion in *Walker* has no such clear protagonist. *Id.*; see also Spanbauer, *supra* note 23, at 182 (“[T]he marchers [that] appear in the *Walker* account [are described] as aggressive, disorderly, and dangerous[.]”). However, by the time Justice Stewart wrote the majority opinion in *Shuttlesworth*, the marchers are characterized as an “organized group with defined leadership. They have, in just two years, become orderly, reasonable. . . .” *Id.* By emphasizing different facts and eliding some details altogether, the opinions created different narratives. See *id.*

<sup>25</sup> ABBOTT, *supra* note 15, at 17–20. See also Brooks, *supra* note 2, at 24. Other scholars use the Russian structuralist terms of the *fabula* (the underlying story) and the *szujet* (the treatment of the story in the narrative). ABBOTT, *supra* note 15, at 18. The narrative discourse and the story combine into the narrative. *Id.*

The events that make up the story told in the narrative also deserve consideration. Scholars of narrative classify the events of a story according to relative importance.<sup>26</sup> Constituent events “are necessary for the story to be the story it is. They are the turning points, the events that drive the story forward and that lead to other events.”<sup>27</sup> Supplementary events, on the other hand, do not “drive the story forward”: they “are [not] necessary for the story. . . .”<sup>28</sup> Some events may themselves be micro-narratives, which provide “the building blocks out of which all the more complex [narrative] forms are built.”<sup>29</sup>

### B. *Insights from Narrative Theory*

Just as there is a difference between narrative and story, there is a difference between the storytelling and the field of narrative theory.<sup>30</sup> While the legally-trained reader may regard “narrative theory” as the practice of thinking about how to tell a client’s story most convincingly, there is more to the field: narrative theory is a rich field of study about the nature, composition, and power of narratives.<sup>31</sup>

Narrative theory offers important insights for the study of law. For the purposes of this article, two insights are especially important: First, narrative theory provides a compelling explanation of the reason narrative is so powerful. Second, narrative theory provides a useful way to think about the inherently contestable nature of narrative.

#### 1. *Why is Narrative So Powerful?*

Narrative is vital to human life, because narrative is how we make sense of the world.<sup>32</sup> Indeed, Jerome Bruner has written that the very concept of the self depends on having a narrative of one’s own life.<sup>33</sup>

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<sup>26</sup> ABBOTT, *supra* note 15, at 22.

<sup>27</sup> *Id.* (constituent events can also be thought of as “nuclei” or “kernels”).

<sup>28</sup> *Id.* at 22–23 (supplementary events can also be thought of as “catalyzers” or “satellites”).

<sup>29</sup> *Id.* at 13.

<sup>30</sup> See, e.g., Christy H. DeSanctis, *Narrative Reasoning and Analogy: The Untold Story*, 9 LEGAL COMM. & RHETORIC: JALWD 149, 153 (2012) (noting the difference between storytelling and narrative theory). “[S]torytelling” is used to describe the actual practice of telling stories, and “narrative theory” is used to refer to the *nature and process* of storytelling at a higher level of abstraction.” *Id.*

<sup>31</sup> See Phelan, *supra* note 13, at 167. Narrative theory offers a way to look at “individual narratives as . . . freestanding formal structures” and as “historically and culturally situated entities.” *Id.* See also Peter Brooks, *The Law as Narrative and Rhetoric*, in LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW 14, 17 (Peter Brooks & Paul Gewirtz eds., 1996) (describing narratology as offering “some hypotheses, distinctions, and analytic methods that could be useful to legal scholars, if they were to pay attention”).

<sup>32</sup> See, e.g., ABBOTT, *supra* note 15, at 1 (“[A]s true as it is that narrative can be an art and that art thrives on narrative, narrative is also something we all engage in. . . . We make narratives many times a day, every day of our lives.”); Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275, 282 (2011) (narrative “is

Cognitive science has contributed much to our understanding of how narrative shapes the human understanding of the world.<sup>34</sup> We understand the world through narrative by using “schema.”<sup>35</sup> Essentially, a “schema” functions as shorthand for an event or series of events that we’ve seen, heard, or experienced before.<sup>36</sup> Instead of “schema,” one could think “mental blueprints” or “stock structures”.<sup>37</sup>

Through schema, we know what it is to see a sunset, take a bus, or order food from a drive-through. As long as “the stimuli we encounter falls within our pre-conceived expectations, identification is automatic.”<sup>38</sup> Our use of schema enables us to process what we are doing and predict what will come next.<sup>39</sup> Without applying schema, cognitive science tells us, we would be forced

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based on components we unconsciously understand because of our experience in the world”); Linda H. Edwards, *Where Do the Prophets Stand? Hamdi, Myth, and the Master’s Tools*, 13 CONN. PUB. INT. L.J. 43, 51 (2013) (“Human beings are hard-wired to organize the world narratively, with abstract reasoning and deductive processes only arising derivatively from the preexisting narrative structure.”); Maureen Johnson, *You Had Me at Hello: Examining the Impact of Powerful Introductory Emotional Hooks Set Forth in Appellate Briefs Filed in Recent Hotly Contested U.S. Supreme Court Decisions*, 49 IND. L. REV. 397, 400 (2016) (noting that humans are “‘hard-wired’ for story”).

<sup>33</sup> Jerome Bruner, *Life as Narrative*, 54 SOC. RES. 11, 11 (1987). Bruner calls narrative “a precondition for our collective life in culture”; our collective life would not “be possible were it not for our human capacity to organize and communicate experience in a narrative form.” JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE 16 (2002) (hereinafter BRUNER, MAKING STORIES).

<sup>34</sup> Narrative theory has gained a great deal from the field of cognitive science, particularly concerning the roles of stories in perception and the relationship between cognition and narrative. See *Cognitive Narratology*, in ROUTLEDGE ENCYCLOPEDIA OF NARRATIVE THEORY 67 (David Herman et al. eds., 2005); David Herman, *Narrative Theory and the Cognitive Sciences*, 11 NARRATIVE INQUIRY 1, 2 (2001) (“[N]arratology, like linguistics, can be recharacterized as a subdomain of cognitive-scientific research.”). See also Edwards, *supra* note 32, at 50, 50 n.31 (citing STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND xi–xvii (2001)).

<sup>35</sup> See Edwards, *supra* note 32, at 50–51; Johnson, *supra* note 32, at 407.

<sup>36</sup> Humans use a store of situational and contextual knowledge to integrate their experiences into the larger conceptual frameworks. *Cognitive Narratology*, *supra* note 34, at 67, 69. The terminology applied to this knowledge varies: terms include frames, scripts, and schema. *Id.* at 67. “Frames” tend to cover standard situations (the experience of seeing a tree) while “scripts” apply to action sequences (the experience of taking the bus). *Id.* at 69. This article uses “schema” to cover both frames and scripts: the term covers that underlying encoded knowledge that we use to make sense of the world. *Id.* at 67. See also Edwards, *supra* note 32, at 50–51 (“A schema functions as a blueprint that organizes people, places, and events into roles made familiar by that particular schema.”).

<sup>37</sup> Johnson, *supra* note 32, at 407.

<sup>38</sup> *Id.* See also Edwards, *supra* note 32, at 51 (Once a schema is activated, “[t]he resulting cognitive organizations and perceptions seem to the individual as the natural and ‘true’ state of affairs. Once within the frame of such a cognitive structure, escape is difficult.”).

<sup>39</sup> See Berger, *supra* note 32, at 282 (“[N]arrative makes experiences understandable and allows us to roughly predict the result.”).

to re-learn the world anew every day, which would powerfully limit our ability to do anything else.<sup>40</sup>

To the extent we share the same underlying schemas as others, we can understand what others are doing or even thinking.<sup>41</sup> The more schemas with which we are familiar, the better we are able to understand the world.<sup>42</sup>

The power of narrative grows from this cognitive process that relies on schema.<sup>43</sup> Some schemas or stock structures are actually stories—in other words, plots with events that take the shape of a beginning, middle and end—about the way things happen in our experience or in our culture.<sup>44</sup> This process of narrative-construction—matching experience to a schema—is automatic; we likely do not realize we are doing it.<sup>45</sup>

Certain stories enjoy special resonance within particular cultures.<sup>46</sup> We might call these archetypes, cultural master stories, or master narratives.<sup>47</sup> With respect to these master narratives, “[w]e carry the blueprints of these archetypal situations, and when events activate those archetypes, we create at least the rough outlines of a particular mythological story through which we view those events.”<sup>48</sup> Cultural master narratives exist related to law: for instance, about the

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<sup>40</sup> *Id.* at 281.

<sup>41</sup> ROGER C. SCHANK, TELL ME A STORY: NARRATIVE AND INTELLIGENCE 7 (Peter Brooks & Paul Gerwitz eds., 1990) (“Scripts are useful for understanding the actions of others as long as we know the script they are following.”).

<sup>42</sup> *Id.* at 8 (“The more scripts you know, the more situations will exist in which you feel comfortable and capable of playing your role effectively. But the more scripts you know, the more situations you will fail to wonder about, be confused by, and have to figure out on your own.”).

<sup>43</sup> See Berger, *supra* note 32, at 279, 281.

<sup>44</sup> See *id.* at 278 (“If you tell the story well, the listener will expect certain characters and plot developments even though other storylines might also explain the same events.”). See also AMSTERDAM & BRUNER, *supra* note 15, at 30–31.

<sup>45</sup> BRUNER, MAKING STORIES, *supra* note 33, at 8.

<sup>46</sup> See ABBOTT, *supra* note 15, at 46–47. The “stories that we tell over and over in myriad forms and that connect vitally with our deepest values, wishes, and fears” can be called “masterplots.” *Id.* at 46. “[T]he more culturally specific the masterplot, the greater its practical force in everyday life. All national cultures have their masterplots, some of which are local variations on universal masterplots.” *Id.* at 47. See also LEE ANNE BELL, STORYTELLING FOR SOCIAL JUSTICE: CONNECTING NARRATIVE AND THE ARTS IN ANTIRACIST TEACHING 23 (2010) (“Stock stories are the tales told by the dominant group, passed on through historical and literary documents, and celebrated through public rituals, law, the arts, education and media. . . . [S]tock stories tell a great deal about what a society considers important and meaningful. . . .”); Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors’ Implicit Racial Biases*, 115 W. VA. L. REV. 305, 335 (2012).

<sup>47</sup> ABBOTT, *supra* note 15, at 47. A masterplot also could be called a “master narrative,” “story skeleton,” “canonical story,” or an “archetype.” *Id.*; see also Wilkins, *supra* note 46, at 335.

<sup>48</sup> Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 890 (2010).



way law works, or about what causes or cures crime, about how different groups of people interact.<sup>49</sup>

As Linda Berger has written: “[S]tories embedded in our experience provide mental blueprints and cognitive shortcuts. . . . Stories also make it easier for us to communicate our experiences, help us predict what will happen, and sketch out what we will need to do when we find ourselves entangled in a typical plight.”<sup>50</sup> Through those schema, stock stories, or cultural master narratives, we use narratives to tell and re-tell our history, our traditions, and our values.<sup>51</sup> In short, we experience life in narrative. Narrative “allows us to gather [events], group them together, . . . [and] place them into a storyline with a beginning and end.”<sup>52</sup> Without narrative, life wouldn’t make much sense.<sup>53</sup>

As many intuitively know, narrative is powerfully persuasive. Because of its order of events, narrative creates a sense of causation in the audience.<sup>54</sup> The “impression of causation” that narrative creates is a “powerful” way of “suggesting normality”: “Bringing a collection of events into narrative coherence can be described as a way of *normalizing* those events. It renders them plausible, allowing one to see how they all ‘belong.’”<sup>55</sup>

Narrative is powerful because it is natural, inviting, and shared.<sup>56</sup> When an audience receives a narrative, the audience becomes part of the telling, and may use their schema to understand the story or may learn a new way of understanding.<sup>57</sup> Thus, narrative can create understanding and enhance identification.<sup>58</sup> Narrative also provokes active thinking and promotes problem solving.<sup>59</sup>

Stock stories or master-narratives are particularly persuasive because they are enshrined in a culture.<sup>60</sup> Master-narratives may seem inflexible, but even those stories can be unseated, through telling and re-telling.<sup>61</sup>

<sup>49</sup> See Wilkins, *supra* note 46, at 336.

<sup>50</sup> Berger, *supra* note 32, at 281.

<sup>51</sup> See Edwards, *supra* note 32, at 51 (“Myths and master stories operate widely within cultures to mediate new events and infuse them with shared social meaning[ and] to channel other potentially similar events into a well-worn path. The outcome suggested by the myth or master story will seem both true and inevitable.”).

<sup>52</sup> Berger, *supra* note 32, at 275.

<sup>53</sup> See *id.* at 275. See also ABBOTT, *supra* note 15, at 11 (“[W]herever we look in this world, we seek to grasp what we see . . . Narrative gives us this understanding . . . [W]ithout understanding the narrative, we often feel we don’t understand what we see.”).

<sup>54</sup> ABBOTT, *supra* note 15, at 41 (“We are made in such a way that we continually look for the causes of things. The inevitable linearity of story makes narrative a powerful means of gratifying this need. . . . Narrative . . . , simply by the way it distributes events in an orderly, consecutive fashion, very often gives the impression of a sequence of cause and effect.”).

<sup>55</sup> *Id.* at 44.

<sup>56</sup> Berger, *supra* note 32, at 281.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 282.

<sup>59</sup> ABBOTT, *supra* note 15, at 11.

<sup>60</sup> See, e.g., Phelan, *supra* note 13, at 168.

In light of narrative's power, a number of commentators have warned that narrative's persuasive effect can be dangerous.<sup>62</sup> This critique is longstanding: As reported in Plato's Republic, Socrates would have banned poets from his republic because their art influenced the heart rather than the mind.<sup>63</sup> Critics of narrative's power emphasize that narrative can be false or irrational—a dangerous combination when paired with narrative's ability to create the impression of causation.<sup>64</sup> And while stories are able to unseat stereotypes, they themselves may call on cognitive shortcuts like stereotypes.<sup>65</sup>

To sum up, this is the first big point narrative theory has to teach the law: narrative is universal, because it's how we experience the world and communicate our experience—which is what makes it powerfully persuasive.

## 2. *A Theory of Narratives in Contest*

A second important insight that narrative theory offers to legal thinkers is the concept of narrative contest: narratives are always potentially in contest, and a responsiveness to that contest is “built into the nature of narrative[s].”<sup>66</sup> By considering the other possible narratives that could compete with the narrative we are encountering, we can reach a more meaningful assessment of a particular narrative.

When we study a narrative, we can see what it encodes about the nature of narrative or about the time, place, and people from which it arose.<sup>67</sup> Implicit in

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<sup>61</sup> See ABBOTT, *supra* note 15, at 59–60 (“[F]or there to be any kind of success in narrative, the codes and formulas that go into it have to be sufficiently flexible to permit all kinds of variation in the details.”). See also BRUNER, MAKING STORIES, *supra* note 33, at 91 (“[C]ulture is not all of a piece, and neither are its stock stories. Its vitality lies in its dialectic, in its need to come to terms with contending views, clashing narratives.”).

<sup>62</sup> See, e.g., Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835, 1839 (2005).

<sup>63</sup> See *id.* at 1839; PLATO, THE REPUBLIC OF PLATO (Allan Bloom ed. & trans., 2d ed. 1991) (stating “[s]uch a soul will be like that banished poetry which contained images of vice as well as of virtue”).

<sup>64</sup> See ABBOTT, *supra* note 15, at 42 (noting that the same causation that makes narrative a gratifyingly persuasive experience “can also make it a treacherous one, since it implicitly draws on an ancient fallacy that things that follow other things are caused by those things.”); Peter Brooks, *Narrative in and of the Law*, in A COMPANION TO NARRATIVE THEORY 415, 416 (James Phelan & Peter J. Rabinowitz eds., 2005) (“[N]arrative is morally a chameleon that can be used to support the worse as well as the better cause.”); Yoshino, *supra* note 62, at 1890 (describing “literature’s ostensible vices: its falsity, irrationality, and seductiveness.”).

<sup>65</sup> Catharine A. MacKinnon, *Law’s Stories as Reality and Politics*, in LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW 232, 235 (Peter Brooks & Paul Gewirtz eds., 1996) (“[T]he [narrative] form itself is no guarantee of a view from the outside or the bottom. Stories break stereotypes, but stereotypes are also stories, and stories can be full of them.”). See also SCHANK, *supra* note 41, at 57 (“Different people understand the same story differently precisely because the stories they already know are different.”).

<sup>66</sup> Phelan, *supra* note 13, at 166.

<sup>67</sup> *Id.* at 167.

the study of narratives is the idea that we never observe a story directly; we are always putting it together from what we are told or what we read.<sup>68</sup>

In addition to a narrative's characteristics relative to the circumstances of its telling, another feature of narrative deserves attention: the fact that "every story is potentially contestable by multiple alternatives."<sup>69</sup> In other words, because narrative involves "telling" an account of freestanding events (the story), for some purpose and for some audience, then every narrative could be told in multiple ways for different purposes and for different audiences.<sup>70</sup> The potential for contest between narrative accounts is built into the nature of narrative itself.<sup>71</sup>

Narrative's contestability comes from its inherent flexibility.<sup>72</sup> Because tellers can craft a narrative in different ways, for different purposes, anytime a story is told, the teller is making a choice among possible alternatives, based on her awareness of audience and her purposes.<sup>73</sup> For instance, a story might be told differently in order to align with different audience values, create different responses (say, laughter or inspiration) in the audience, or offer contrasting views on a subject.<sup>74</sup>

The fact that every narrative is potentially contestable means that "tellers are likely to construct their tales at least partly in response to or anticipation of one or more possible alternatives."<sup>75</sup> That is, those who would study particular narratives can not only look at the narrative itself but can also study the narrative in terms of "the role of those alternatives in a narrative's construction."<sup>76</sup>

Narratives are not always in contest on a "level playing field."<sup>77</sup> Some narratives "have the strong endorsement of culturally powerful groups," making them particularly hard to contest; indeed, some narratives rise to the level of "sacred."<sup>78</sup> Especially when a culturally powerful narrative is being communicated, reading the narrative with an awareness of the possible contesting alter-

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<sup>68</sup> "[S]tory is always mediated (constructed) by narrative discourse." ABBOTT, *supra* note 15, at 21. *See also id.* at 25 ("Narrativity" is "the sense of someone 'telling a story,' of a performance, of narrative 'for its own sake.'").

<sup>69</sup> Phelan, *supra* note 13, at 168.

<sup>70</sup> *Id.* ("If I can go from experience to narrative in multiple ways and with multiple interpretive purposes, then the way I choose to go can be countered by tellers who prefer different routes.").

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* *See also* ABBOTT, *supra* note 15, at 153 ("[N]arratives are in combat in most compartments of life, public and private.").

<sup>74</sup> Phelan, *supra* note 13, at 168.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

native narratives can illuminate “the cultural power of both the given narrative and its alternatives.”<sup>79</sup>

That legal narratives are in contest is obvious to any lawyer who has written a reply brief—or indeed, to any person who has watched a Law & Order episode dramatizing two dueling closing statements. But “courts of justice are not the only place that contests of narratives can be found.”<sup>80</sup> Narrative’s contested nature suggests something that goes deeper than the battle between trial narratives that is apparent on the surface of any courtroom drama: even when narratives are not ostensibly engaged in a head-to-head battle, they are nonetheless being shaped by the possibility of contest and by all the choices that can be made among alternative narrations.<sup>81</sup> A narrator’s awareness of her purpose, her audience, her audience’s shared master-narratives, and possible relevant alternative narrations of her story, will all inform her choice of narrative treatment.<sup>82</sup>

As the next section will explain, these two points—that narrative is ubiquitous and compelling and that narratives are shaped in part by possible alternatives—have special importance for law. The following section provides an overview of law and narrative theory, in order to situate this piece within the larger context of the literature on narrative theory and law.

### C. Narrative Theory and Law

It stands to reason that, because narrative is important to life, it is also important to law.<sup>83</sup> Indeed, “[l]aw lives on narrative” and “the law is awash in storytelling.”<sup>84</sup> According to scholars of law and narrative, law is “a social and cultural activity, . . . something we do . . . with language,” and “a kind of rhetorical and literary activity.”<sup>85</sup> On the robust view of law’s relationship to narrative, the two are inextricably intertwined.<sup>86</sup> As a result, narrative theory has a great deal to impart to the study of law.<sup>87</sup>

Some of law’s relationship to narrative comes from the fact that humans understand the world and their experience through narrative. Law is inherently narrative because “[a]t its heart . . . [the law] is a way of telling a story about

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<sup>79</sup> *Id.*

<sup>80</sup> ABBOTT, *supra* note 15, at 50.

<sup>81</sup> Phelan, *supra* note 13, at 168.

<sup>82</sup> *Id.*

<sup>83</sup> AMSTERDAM & BRUNER, *supra* note 15, at 110.

<sup>84</sup> *Id.* See also Brooks, *supra* note 64, at 416 (describing “the pervasive presence of narrative throughout the law”).

<sup>85</sup> JAMES BOYD WHITE, HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW x (1985).

<sup>86</sup> See, e.g., WEST, *supra* note 9, at 419 (“Simply put, stories are a part, and seemingly an indispensable part, of the law with which rights are protected, and as a consequence, storytelling and rights construction inevitably intertwine.”).

<sup>87</sup> See JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 17 (1990) (thinking of law as a narrative or literary activity allows us “a range of remarkable opportunities not otherwise available” for interpretation).

what has happened in the world and claiming a meaning for it by writing an ending to it.”<sup>88</sup> According to James Boyd White, the legal process is narrative because it begins with a story told to a lawyer by a client,<sup>89</sup> and continues with that story being told and retold throughout the legal process.<sup>90</sup> Narrative is present in many places in the legal process, as many scholars have recognized.<sup>91</sup>

Further, the common-law tradition of precedent has much in common with the practice of narrative.<sup>92</sup> We know the common law through telling and re-telling stories in the form of cases.<sup>93</sup> Ronald Dworkin compares judges deciding cases and writing in the common law tradition to the position of “chain novelists,” an artificial literary genre made up of “a group of novelists writ[ing] a novel *seriatim*”: “[E]ach novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on.”<sup>94</sup> To Dworkin, the judge—like the chain novelist—must make the best of “the material he has been given, what he adds to it, and (so far as he can control this) what his successors will want or be able to add.”<sup>95</sup> Similarly, Peter Brooks writes that the Constitution is “a master narrative, into which each new narrative episode must be fitted.”<sup>96</sup>

As judges write in the common-law tradition, legal rules and principles become refined through telling and re-telling, testing against new sets of facts, in a similar fashion to the way stories told and retold become powerful cultural

<sup>88</sup> WHITE, *supra* note 85, at 36 (1985).

<sup>89</sup> *Id.* (“[T]here cannot be a legal case without a real story about real people. . . . Some actual person must go to a lawyer with an account of the experience upon which he or she wants the law to act, and that account will always be a narrative.”).

<sup>90</sup> *Id.* (“The client’s narrative is not simply accepted by the lawyer but subjected to questioning and elaboration . . . In the formal legal process that story is then retold . . . in developing and competing versions, until by judgment or agreement an authoritative version is achieved.”).

<sup>91</sup> Bruner has written that narrative’s presence in law is one way it claims validity: “[T]he use of recognizable, garden-variety narrative in legal pleading gives us assurance that the ‘law still belongs to the people.’” BRUNER, MAKING STORIES, *supra* note 33, at 47–48.

<sup>92</sup> See, e.g., RONALD DWORKIN, LAW’S EMPIRE 229 (1986) (“A judge deciding [a case] adds to the tradition he interprets; future judges confront a new tradition that includes what he has done.”); see also Martha Minow, *Stories in Law*, in LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW 24, 25 (Peter Brooks & Paul Gewirtz eds., 1996) (“[S]torytelling offers real continuities with common-law reasoning; it dwells on particulars while eliciting a point that itself may be molded or recast in light of the story’s particulars reviewed in a different time.”).

<sup>93</sup> For instance, on pinpointing the meaning of a legal term like “attractive nuisance,” Bruner wrote: “Well, we cannot define it precisely, but we can illustrate by a line of legal precedent that tells supposedly similar stories.” BRUNER, MAKING STORIES, *supra* note 33, at 9.

<sup>94</sup> DWORKIN, *supra* note 92, at 229.

<sup>95</sup> *Id.*

<sup>96</sup> Brooks, *supra* note 2, at 27 (considering the implications of Justice O’Connor’s statement, in *Planned Parenthood v. Casey*, 505 U.S. 833, 901 (1992) that the Constitution is “a covenant running from the first generation of Americans to us and then to future generations”).

master narratives.<sup>97</sup> Others have made the point that a court opinion, perhaps the best and most powerful example of which is the Supreme Court opinion, is the ultimate narrative in the legal system.<sup>98</sup> It is the point where a story has been officially adopted or recognized as “correct,” and with the full coercive power of the state behind it, the narrative and resolution—incarceration, release, injunction, desegregation—that the court has adopted is ordered and put into force. This is undeniably a powerful instance of narrative in the legal system, and its power is one of the things that make studying the function of narrative in law so rich and valuable.

But the narrative function of the law is not limited to a particular case’s opinion. Because these master-narratives-as-legal-principles are always susceptible to revision, re-interpretation, and re-telling, both judges and lawyers must be attuned to the possibility of change in the law.<sup>99</sup> The narrative of an opinion continues after its publication: in our common law system, new narratives are always being generated in each new case. The opinion from one case is scaffold and support for the next case to come, which will rely on concepts from earlier cases for its narrative and legal authority.<sup>100</sup> Every opinion is part of a longer conversation of opinions, all narratives about how the law operates in particular circumstances. The common law, with its insistence on “like” cases being treated “alike,” depends on narrative construction of cases—how after all could we know what cases are alike until we have a narrative about what each case is actually like?<sup>101</sup>

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<sup>97</sup> See, e.g., WHITE, *supra* note 85, at 87, 98 (“Our central common-law terms acquire their meaning from their gradual re-definition, over time, as cases are decided in a wide variety of factual circumstances. . . . [T]he law can more properly be seen not as a set of commands or rules (even with a set of restatable principles or values behind them) but as the culture of argument and interpretation through the operations of which the rules acquire their life and ultimate meaning.”).

<sup>98</sup> Brooks, *supra* note 2, at 26 (“Thinking about the place of narrative in American law must also and perhaps finally pay attention to the fact that issues of telling and listening—like all other issues—find their ultimate commentary in the judicial opinion, especially the Supreme Court opinion.”).

<sup>99</sup> See, e.g., DWORKIN, *supra* note 92, at 89 (noting how, as case law develops in the common-law process, “[s]uddenly what seemed unchallengeable is challenged, a new or even radical interpretation of some important part of legal practice is developed in someone’s chambers or study which then finds favor. . . .”); Minow, *supra* note 92, at 36 (“A story also invites more stories, stories that challenge the first one. . . .”); WHITE, *supra* note 85, at 34 (“[I]n speaking the language of the law the lawyer must always be ready to try to change it: to add or to drop a distinction, to admit a new voice, to claim a new source of authority, and so on.”).

<sup>100</sup> See WHITE, *supra* note 87, at 91 (“The process of giving life to old texts by placing them in new ways and in new relations is of course familiar to us as lawyers. It is how the law lives and grows and transforms itself. . . . We try to place texts of both sorts in patterns of what has been and what will be, and these patterns are themselves compositions. The law is thus at its heart an interpretive and compositional—and in this sense a radically literary—activity.”).

<sup>101</sup> In making this point I am relying on the great work by Linda Edwards and others on “narrative reasoning.” See, e.g., Linda H. Edwards, *The Convergence of Analogical and Dia-*

The court opinion, the culmination of the case that serves as a basis for other narratives and opinions, comes out of a narrative contest. In our adversarial system, we rely on contest between advocates—a contest between two narratives—to flush out the ultimate legal narrative.<sup>102</sup> Our adversarial system embodies a value that contesting narratives best promotes the fair resolution of disputes.<sup>103</sup> The contest of narrative is a fundamental part of the way law operates, and in the words of James Boyd White, it is “not its weakness, but its strength.”<sup>104</sup>

One implication of the contest of narratives in litigation is the necessary consciousness—by decisionmakers and advocates—of the narrativity of any legal discourse. That is, because everything—fact or argument—presented to a decisionmaker is narrated, it is always a representation, always filtered through the narrator.<sup>105</sup>

Thus, from the well-recognized contest of narratives at trial, in closing and opening statements, in briefs, I discern this value that a contest of narratives is positive for the democratic function of the litigation system.<sup>106</sup> I also discern that the proper functioning of the civil litigation system, which uses adjudications as a system for testing narratives, relies on an actual contest between

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*lectic Imaginations in Legal Discourse*, 20 LEGAL STUD. F. 7, 11 (1996). There is also a rich literature on how reliance solely on analogical reasoning and “category” thinking can lead to harmful or limiting results. See generally Lucille A. Jewel, *Old-School Rhetoric and New-School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 LEGAL COMM. & RHETORIC: JALWD 39, 39 (2016) (explaining that “categories can be harmful because they tend to erase important context from the client’s story”).

<sup>102</sup> In litigation, “the contesting of interpretation is expected: the conventions of the genre call for oppositional debate.” AMSTERDAM & BRUNER, *supra* note 15, at 173 (emphasis omitted). “Even if no interpretive challenger has yet appeared upon the scene, the legal setting warns you that one may.” *Id.*

<sup>103</sup> BRUNER, MAKING STORIES, *supra* note 33, at 37 (“[O]pposing stories are at the heart of what we loosely refer to as ‘having your day in court.’”).

<sup>104</sup> WHITE, *supra* note 85, at 104 (“[L]aw is . . . the open hearing in which one point of view, one construction of language and reality, is tested against another. . . . [It] makes room for different voices, and gives a purchase by which culture may be modified in response to the demands of circumstance. It is a method at once for the recognition of others, for the acknowledgement of ignorance, and for cultural change.”).

<sup>105</sup> See, e.g., AMSTERDAM & BRUNER, *supra* note 15, at 111 (“[I]ncreasingly, we are coming to recognize that both the questions and the answers in . . . matters of ‘fact’ depend largely upon one’s choice (considered or unconsidered) of some overall narrative as best describing what happened or how the world works. . . . [S]tories are not just recipes for stringing together a set of ‘hard facts’; . . . stories construct the facts that comprise them.”).

<sup>106</sup> BRUNER, MAKING STORIES, *supra* note 33, at 42 (As a society, we have confidence in the use of stories in the legal process because we have inherent “faith that confrontation is a good way to get to the bottom of things.”). Alexandra Lahav has explained civil litigation as “a form of democratic deliberation,” as “a process in which litigants perform self-government,” and as a way of forming a “collective identity.” Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1659, 1677 (2016).

competing substantive narratives; without such a contest, litigation is not operating in the way it should.<sup>107</sup>

Not only does law develop along a path that narrative helps explain, narrative operates effectively in law as a means of persuasion.<sup>108</sup> For instance, scholars argue that legal decisionmakers, including judges and juries, are highly persuadable by narrative.<sup>109</sup> Excellent lawyers know—sometimes instinctively—that the most effective way to present a legal case is by matching it to a stock story or cultural master narrative that the audience will share.<sup>110</sup>

Scholars have argued that narrative is part of the reasoning that takes place in legal opinion writing, when judges tell stories about the law.<sup>111</sup> For instance, Linda Edwards has carefully demonstrated how, in a case without a single clear, undisputable legal answer, different narrative frames can be used by decisionmakers to justify widely different results.<sup>112</sup> The narrative preconstructions of law are often well hidden, but the narrative foundations are there nonetheless.<sup>113</sup>

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<sup>107</sup> See WHITE, *supra* note 85, at 174 (“[T]here is in the law an openness to multiple stories. . . . This openness is not accidental but structural, and it has significant political and ethical consequences as well as intellectual ones. It is in fact built into the idea of the hearing, the central form of legal life and discourse, for at the hearing two stories are told in competition with one another, and a choice between them—or of a third—is forced upon the decider.”).

<sup>108</sup> See, e.g., Daniel A. Farber & Suzanna Sherry, *Legal Storytelling and Constitutional Law: The Medium and the Message*, in LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW 37, 42 (Peter Brooks & Paul Gewirtz eds., 1996) (“[S]tories have a persuasive power that transcends rational argument.”) Farber and Sherry argue that language does important work in the law, “bypass[ing the] process of rational consideration” and “instead creat[ing] the structure or mindset in which what society calls rationality takes place.” *Id.* at 41.

<sup>109</sup> The party who can tell the most coherent narrative, using the details available to them, will be successful at trial or in a request to a decisionmaker such as a decision on admitting evidence or seeking summary judgment. See Stern, *supra* note 12, at 8.

<sup>110</sup> Against the cognitive backdrop of stock scripts and culturally-significant narratives, the lawyer “designs a rhetorical strategy.” AMSTERDAM & BRUNER, *supra* note 15, at 48. “The lawyer is called upon to present (or imagine) the best possible case . . . and must do so in full knowledge that a lawyer for the other party may, presumably with equal assiduity, present a contrary brief. Immediately or potentially, categorizing under law is an adversary process.” *Id.* See also Brooks, *supra* note 31, at 17 (“No doubt any courtroom advocate knows the importance of narrative presentation instinctively.”).

<sup>111</sup> See, e.g., Linda H. Edwards, *The Humanities in the Law School Curriculum: Courtship and Consummation*, 51 WAKE FOREST L. REV. 355, 360 (2016). These stories sometimes resemble larger cultural “myths” or “master narratives” of a culture. *Id.*; see also *id.* at 360–61, n.42 (“Master narratives can also be thought of as myths. In its technical sense, a myth is a story that transmits a portion of a worldview held by a particular people.”).

<sup>112</sup> See *id.* at 363. Edwards aptly demonstrates how, in situations where the law is not clear or where both parties can present reasonable and logical arguments, “legal outcomes can be dictated not so much by deductive argument and traditional Langdellian legal analysis but rather by the choice of constitutive myth.” *Id.* at 380.

<sup>113</sup> *Id.* at 361 (“That these stories do their formative work beneath the surface of routine law talk simply makes them all the more powerful and all the more worthy of our attention.”).



For all these reasons, the legal system is a paradigmatic example of narratives in contest.<sup>114</sup> The trial, in particular, with its competing narratives told through opening and closing statements, witness testimony, and cross-examination, has been thoroughly studied by scholars of law and scholars of narrative alike.<sup>115</sup>

Narrative's persuasive power has given rise to law and narrative as a discipline.<sup>116</sup> A rich tradition of law-and-narrative, or law-and-literature, scholarship emerged from the legal academy beginning in the 1980s and 1990s.<sup>117</sup>

The study of narrative in law has also sparked some resistance to the use of storytelling, particularly in light of its persuasive abilities.<sup>118</sup> Often, the concept of narrative in law is conflated with disfavored emotional appeals. For instance, some commentators advocate, with good reason, that narrative that is only an emotional appeal has no place in legal documents.<sup>119</sup>

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<sup>114</sup> See, e.g., Robert A. Ferguson, *Untold Stories in the Law*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 84, 86 (Peter Brooks & Paul Gewirtz eds., 1996) (explaining that courtroom "advocacy leads to a natural proliferation of stories at trial. Lawyers like to put every conceivable account on the table."); Paul Gewirtz, *Narrative and Rhetoric in the Law*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 2, 5 (Peter Brooks & Paul Gewirtz eds., 1996) ("Storytelling in law is narrative within a culture of argument. Virtually everyone in the legal culture—whether a trial lawyer presenting her case to a court or jury, a judge announcing his findings about what happened in the case, even a law professor writing an article—is explicitly or implicitly making an argument and trying to persuade.").

<sup>115</sup> See, e.g., ABBOTT, *supra* note 15, at 175–83 (analyzing narrative function in trials); Gewirtz, *supra* note 114, at 7 (explaining that the study of trial narratives is a "large and immensely rich subject[]") and also "familiar . . . in the legal literature, where extensive consideration is given to trial procedures"). See generally W. LANCE BENNETT & MARTHA S. FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE* (1981); ROBERT P. BURNS, *A THEORY OF THE TRIAL* (1999).

<sup>116</sup> See, e.g., Farber & Sherry, *supra* note 108, at 49 ("Any effort to persuade . . . must take place at a . . . deep level and clearly cannot put its main reliance on the indeterminate process of legal reasoning. Hence, as the storytelling literature teaches, the way to proceed is not through traditional forms of rational argument. Instead, persuasion must take place through the use of stories which can operate at a deep level of mindset construction. . . . At the level of methodology, this means legal storytelling.").

<sup>117</sup> See Linda H. Edwards, *Speaking of Stories and Law*, 13 *LEGAL COMM. & RHETORIC: JALWD* 157, 160 (2016).

<sup>118</sup> See, e.g., Farber & Sherry, *supra* note 108, at 50 ("Law . . . has often been seen as the province . . . of reason rather than emotion. . . . This belief in the primacy of reason rather than rhetoric underlies much of the resistance to both the message and the medium of storytelling."). For examples of criticism of the power of storytelling in law, see, for example, Alan M. Dershowitz, *Life Is Not a Dramatic Narrative*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 99, 102 (Peter Brooks & Paul Gewirtz eds., 1996).

<sup>119</sup> See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 31 (2008) (advising against "a blatant appeal to sympathy or other emotions" in legal writing because "reason is paramount with judges and . . . overt appeal to their emotions is resented").

Applying narrative theory to law has also revealed some broader hostility to narrative.<sup>120</sup> For instance, one scholar has written that law ignores its narrative content because law “wants to believe that it is rooted in irrefutable principles and that it proceeds by reason alone.”<sup>121</sup>

Some of the resistance to narrative’s use in the law comes from the recognition that narrative can be manipulated to reach ends that are not necessarily just or efficient.<sup>122</sup> There is a concern that using narrative in law implies a teleology that doesn’t actually exist in the real world: a sense that the story as narrated moves naturally to its ending and that we can draw normative conclusions from the phenomena in the real world that make up the events of a tale as told.<sup>123</sup>

Certainly, master narratives are persuasive, including in law.<sup>124</sup> Lucy Jewel has explained that certain “tropes and images,” when raised in the courtroom, can “trigger[] deeply engrained neural networks” and give rise to negative reactions.<sup>125</sup> And the practice of narrative, when it does not match audience expectations, can drive division between audience and narrator.<sup>126</sup>

But to the extent that a powerful master narrative is at work in a legal context, advocates are not limited to the stories they receive from the dominant culture. The audience, whether judge or jury, can be influenced through narrative to change the way it thinks. A powerful counter-narrative—that is, a narrative

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<sup>120</sup> Bruner notes that law’s concern with narrative has often been “to control it or to sanitize its effects,” such as through “forg[ing] procedures for keeping the stories of plaintiffs and defendants within recognized bounds.” BRUNER, MAKING STORIES, *supra* note 33, at 11. *See also id.* at 48 (“[A]ttorneys and judges do not like being complimented as great storytellers. They work hard to make their law stories as unstorylike as possible, even *anti*-storylike: factual, logically self-evident. . .”).

<sup>121</sup> Brooks, *supra* note 64, at 415–16. To the extent the law does recognize its entanglement with narrative, it “reacts to [narrative] with unease and suspicion, so that the neglect of narrative as a legal category is possibly an act of repression, an effort to keep the narrativity of the law out of sight.” *Id.* at 415.

<sup>122</sup> For instance, should a decisionmaker such as a jury be swayed by an advocate’s narrative “characterization,” there may be a “situation in which the power of the culture itself, residing in the deeply inculcated beliefs of a dominant element of the culture” may prevail, contrary to the facts but “without at all violating the letter of the law.” ABBOTT, *supra* note 15, at 187–88.

<sup>123</sup> *See* Dershowitz, *supra* note 118, at 102–03 (arguing there is no “internal logic” or “sequential progression” of events in the real world).

<sup>124</sup> ABBOTT, *supra* note 15, at 185 (“[T]hey can be powerful rhetorical tools when activated. They can absorb the complexity of a defendant’s human nature into the simplicity of a type.”).

<sup>125</sup> Lucy Jewel, *Neurorhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, 76 MD. L. REV. 663, 681 (2017) (“In any criminal proceeding, a simple reference that a legal actor is a black male with a firearm is likely to trigger deep-seated neural pathways related to fear.”).

<sup>126</sup> There is a “complex relationship between storyteller and listener.” Gewirtz, *supra* note 114, at 6. Storytelling “can undoubtedly provoke new understandings and engagement from listeners. But storytelling (particularly storytelling self-styled as oppositional) can also divide teller from listener. . . .” *Id.*

that undermines the master narrative—can help to lessen the power of cultural master narratives and to de-bias the audience.<sup>127</sup>

This process need not only happen on the level of an individual case. Through the common-law process, master-narratives can be expanded, deepened, challenged, shifted, or changed. By paying attention to the narrative underpinnings and constructions of legal arguments and decisions, advocates may be able to minimize the impact of individual bias or perspective on judging. With a richer catalog of law-stories, judges and juries will be able to attend to and understand different stories, rather than relying on the stories that they already possess based on individual life circumstances.<sup>128</sup> Thus, the presence of narrative in law not only ensures the robust contest on which the adversarial system is based, it also makes available a diversity of perspectives, which can function as a check on culturally powerful master-narratives.

Narrative theory teaches that narrative's presence in the law should be theorized and understood: to leave legal stories unquestioned and uncontested is to give them an outsized power to determine legal questions.<sup>129</sup> The reality, described above, that narrative is a powerfully persuasive, inviting, and entirely natural human mode of communication, means that lawyers, judges, and legal scholars ignore narrative at their peril.

## II. A NARRATIVE ACCOUNT OF CIVIL PRETRIAL LITIGATION

Even as law's clear connection to narrative has been recognized, the scholarship on law and narrative has left a gap when it comes to the presence of narrative in pretrial litigation. As this section describes, pretrial litigation should be recognized as a narrative-building and narrative-testing system, because pre-

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<sup>127</sup> See ABBOTT, *supra* note 15, at 188 (“[I]t has been argued that the way to make a deep cultural transformation is through the dissemination of counter-narratives, narratives that undermine or counterbalance the dominant masterplots of a culture and thus weaken the power of prejudicial types.”). The act of receiving stories alone may free listeners from their categorical biases. See Harlon L. Dalton, *Storytelling on Its Own Terms*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 57, 58 (Peter Brooks & Paul Gewirtz eds., 1996) (“When we engage in traditional legal reasoning, we operate from within existing categories. . . . We take doctrinal and procedural building blocks as more or less given . . . and we scarcely notice the ways our thinking is structured and cabined. In contrast, when we listen to stories well told, we step outside the existing categories and the prevailing mindset.”); see also Jewel, *supra* note 125, at 690 (describing the challenge of using counter-narratives to “alter pre-existing majoritarian neural pathways”).

<sup>128</sup> See Farber & Sherry, *supra* note 108, at 42 (explaining that “the tacit understandings that determine mindsets may be transmitted through stories”—“particularly if the term ‘stories’ is considered to include narratives, images, and similar types of communication” and that “it is only a small step to the view that mindsets are created by and changed through stories.”). See also ABBOTT, *supra* note 15, at 188.

<sup>129</sup> See, e.g., Edwards, *supra* note 111, at 381 (“If we accept a myth—any myth—without question, we have given up a portion of our freedom. The unseen work of the myth creates our assumptions and constrains our options. But we cannot cross-examine a myth unless we recognize its work, becoming aware of its fingerprints on the legal issues of our day.”).

trial narratives are foundational to the proper functioning of the U.S. justice system.

#### A. *Neglected Pretrial Narratives*

Although law rests on narrative,<sup>130</sup> certain areas of legal practice and procedure are more thoroughly studied in the field of law and narrative. First, law and narrative scholarship tends to focus on criminal, rather than civil, cases and on formal trial and appellate, rather than pretrial, narratives. Studies of narrative in the courtroom focus on witness testimony and lawyers' argumentation, and on the resulting court opinions,<sup>131</sup> and attention is most often given to the most privileged form of legal writing, judicial decisions,<sup>132</sup> so that U.S. Supreme Court decisions receive the most attention.

Yet the function of narratives in civil pretrial has received less study. I draw attention to the following points about the gaps in coverage of law and narrative scholarship both to emphasize the tradition on which I am building and to point out a space for analysis that this article begins to fill. As this section explains, all the reasons narrative's function in pretrial procedure may have been previously neglected are, in fact, valuable reasons to attend to it now.

##### 1. *Shifting Focus from Criminal to Civil Narratives*

The archetypal law-and-narrative project seems to be the analysis of the narratives produced in a criminal case.<sup>133</sup> Scholars have, for instance, devoted considerable attention to the impact that evidentiary rules have on the narratives developed in criminal prosecution.<sup>134</sup> Similarly, scholars have explained

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<sup>130</sup> See Stern, *supra* note 12, at 10 ("Various forms of legal writing and explanation are imbued with narrative qualities. . . .").

<sup>131</sup> See *id.* at 9.

<sup>132</sup> See *id.* at 10 (noting that, in the study of law and narrative, "it is worth focusing specifically on judgments because they figure so prominently, for lawyers and for the public, as the law's own means of justifying its conclusions and describing its operations").

<sup>133</sup> See, e.g., BENNETT & FELDMAN, *supra* note 115, at 32 ("[T]he procedures in criminal trials seem designed to promote objectivity in the process of making judgments about carefully circumscribed issues."); see also, e.g., PETER BROOKS, *TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE* 8 (2000) (considering the law's treatment of confession in criminal adjudication); BURNS, *supra* note 115, at 103, 123 (interpreting the narratives used in the opening statements in a murder case); Anne M. Coughlin, *Interrogation Stories*, 95 VA. L. REV. 1599 (2009) (arguing "that the police confessional is a space where the truth is produced by the interrogator's strategic use of narratives that exploit popular ways of thinking about the gap between legal liability and moral culpability for criminal misconduct"); Gewirtz, *supra* note 114, at 2–3 (noting that the public's interest in law's stories is particularly strong when it comes to "criminal investigations and trials," because "the criminal prosecution most fully engages the public's narrative desires and the scholar's narrative speculations").

<sup>134</sup> See Peter Brooks, *Clues, Evidence, Detection: Law Stories*, 25 NARRATIVE 1, 3–4 (2017) (considering Fourth Amendment search and seizure doctrine); Peter Brooks, "Inevitable Discovery"—*Law, Narrative, Retrospectivity*, 15 YALE J.L. & HUMAN. 71, 79 (2003) (ex-

how “rape shield” laws “limit women” by forcing women to “narrate an archetypal ‘story[.]’”<sup>135</sup> In the criminal context, law often excludes narrative from formal proceedings—which is generally in line with law’s sense of discomfort around narrative.<sup>136</sup>

Despite the criminal focus of prior law and narrative studies, there is no reason to prefer criminal to civil litigation. The function of narrative in civil suits is just as worthy of serious study as narrative in criminal cases. Criminal trial narratives may present the archetypal example of individual versus state power<sup>137</sup> and ideas with which narrative theory is concerned, like stock stories.<sup>138</sup> But civil matters are sufficiently complex and important that they deserve as serious narrative study as do criminal law matters.<sup>139</sup>

As scholars have recognized, a focus on criminal over civil matters ignores the importance of vindicating individual rights against private as well as government actors.<sup>140</sup> Civil suits impact interests that are important to citizens’ eve-

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ploring the “‘narratological’ implications” of the inevitable discovery rule); *see also, e.g.*, Robert P. Burns, *A Short Meditation on Some Remaining Issues in Evidence Law*, 38 SETON HALL L. REV. 1435, 1440 (2008); Bruce Ching, *Narrative Implications of Evidentiary Rules*, 29 QUINNIPIAC L. REV. 971, 972 (2011); Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 298 (2013); Kara MacKillop & Neil Vidmar, *Decision-Making in the Dark: How Pre-Trial Errors Change the Narrative in Criminal Jury Trials*, 90 CHI. KENT L. REV. 957, 969 (2015); Simon Stern, *Legal Fictions and Exclusionary Rules*, in LEGAL FICTIONS IN THEORY AND PRACTICE 157, 166 (Maksymilian Del Mar & William Twining eds., 2015).

<sup>135</sup> Kathryn C. Swiss, *Confined to a Narrative: Approaching Rape Shield Laws Through Legal Narratology*, 6 WASH. U. JURIS. REV. 397, 398, 401, 414 (2014) (considering “the ways in which rape shield laws ‘shape’ the narrative space, and thus the narrative capacity, of rape victims. . . . [A]s a narrator, the victim must attempt to bring her story . . . to conform with an archetype in order to succeed at trial. Breaking from the expected story model . . . is dangerous, because it deprives the audience (the jury) of an archetypal story they believe evokes guilt.”); *see also* Kim Lane Scheppelle, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2085–86 (1989) (considering competing narratives in rape cases).

<sup>136</sup> *See* Brooks, *supra* note 2, at 20 (“The law tends to limit and formalize conditions of telling and listening, as if from a suspicion of the force of narratives.”).

<sup>137</sup> *See, e.g.*, Jenny E. Carroll, *The Resistance Defense*, 64 ALA. L. REV. 589, 615, n.144 (2013) (“[C]riminal law is a tangible, unfiltered, and constant exercise of state power in our lives.”).

<sup>138</sup> Embedded knowledge structures, such as stock stories, function powerfully in criminal law, as Sherri Keene has explained. Sherri Lee Keene, *Stories That Swim Upstream: Uncovering the Influence of Stereotypes and Stock Stories in Fourth Amendment Reasonable Suspicion Analysis*, 76 MD. L. REV. 747, 757 (2017) (“Put plainly, as jurors heard the prosecution’s story . . . they may have unconsciously referenced a familiar stock story, and the image invoked in their mind might have involved a similar scene with similar characters.”). *See also* Justin Hansford, *Demosprudence on Trial: Ethics for Movement Lawyers, in Ferguson and Beyond*, 85 FORDHAM L. REV. 2057, 2065 (2017) (noting that stock stories have a great deal of power in the criminal context).

<sup>139</sup> As in other legal contexts, it is time for the study of law and narrative to expand from criminal to the civil context. *See, e.g.*, Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1109 (2006) (“The idea that individuals ought to be empowered and equipped in the contest with the state migrated from the criminal side to civil litigation.”).

<sup>140</sup> Even civil lawsuits have the potential to interrupt justice and inflict injury. *See, e.g.*, DWORKIN, *supra* note 92, at 1–2 (“The injury is gravest when an innocent person is convict-

ryday lives,<sup>141</sup> including lawsuits involving civil rights, employment discrimination, consumer protection, debts, child custody, landlord-tenant and foreclosure, contracts, personal injury, products liability, and medical malpractice. Civil judgments carry significant collateral consequences<sup>142</sup> and the potential to impose harmful stigma.<sup>143</sup> Studying civil lawsuits is especially important given the legal power of private actors.<sup>144</sup> As well, criminal trials, like civil trials, are increasingly rare.<sup>145</sup>

This article's focus on civil pretrial narrative recognizes the special value that narrative offers to litigants concerned with civil rights; the focus reflects a deep belief that civil litigation is a meaningful route for vindicating those rights. Indeed, many valuable rights have been vindicated or recognized by civil lawsuits. Though the impact of social inequality and the influence of bias based on race, economic class, gender, and religion are often at work in criminal trials and the stories constructed there, civil lawsuits present an important opportunity to explicitly address unlawful bias, discrimination, and inequality.

## 2. *Shifting Focus from Appellate to Pretrial Narratives*

Court opinions are another main focus of law and narrative study.<sup>146</sup> The iconic situation for narrative analysis is a major rights-deciding case that reaches the United States Supreme Court, resulting in a dominant narrative adopted as “the law of the land.”<sup>147</sup> Beyond the study of opinions, academic attention

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ed of a crime, but it is substantial enough when a plaintiff with a sound claim is turned away from court or a defendant leaves with an undeserved stigma.”); Kathryn A. Sabbeth, *The Prioritization of Criminal over Civil Counsel and the Discounted Danger of Private Power*, 42 FLA. ST. U. L. REV. 889, 889 (2015).

<sup>141</sup> See, e.g., Sabbeth, *supra* note 140, at 908 (defining “‘basic human needs’” potentially affected in civil lawsuits to “include five categories: shelter, sustenance, safety, health, and child custody”).

<sup>142</sup> *Id.* at 913 (“[A]ny civil judgment will damage the defendant’s credit, and a person’s credit score in the U.S. economy is one of his or her most valuable possessions.”).

<sup>143</sup> *Id.* at 915 (“[S]tigma is not unique to criminal convictions.”).

<sup>144</sup> See, e.g., *id.* at 892 (“Private actors control access to essential goods and services as well as information and communication mechanisms that facilitate participation in democratic society. . . . The power of these private actors, like the power of government actors, is subject to abuse when left unchecked.”).

<sup>145</sup> The plea bargain is almost ubiquitous. See Stephen B. Bright, *The Richard J. Childress Memorial Lecture 2016 Keynote: The Continuing Denial of Counsel and Assembly-Line Processing of Poor People Accused of Crimes*, 61 ST. LOUIS U. L.J. 605, 606 (2017) (“Ninety-five percent of the cases in the criminal justice system are resolved by plea bargains.”).

<sup>146</sup> See Gewirtz, *supra* note 114, at 9 (“The judicial opinion is a central text in the American legal system.”); WHITE, *supra* note 87, at 91 (“The great contribution of the judicial mind is not the vote but the judicial opinion, which gives meaning to the vote.”).

<sup>147</sup> See, e.g., AMSTERDAM & BRUNER, *supra* note 15, at 54 (analyzing the narrative categorization occurring in two U.S. Supreme Court opinions); BRUNER, *MAKING STORIES*, *supra* note 33, at 53 (using *Brown v. Board of Education* as “an example of how literature finds its way into the law’s *corpus juris*. . . .”); see also Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 187, 193 (Peter

has tended to focus on narrative in appellate briefs<sup>148</sup> and on the narratives that result from the trial process and post-trial proceedings.<sup>149</sup> Although many forms of legal writing involve narrative, the attention is most often given to the most privileged forms of legal writing, including judicial decisions.<sup>150</sup>

As a result, civil pretrial narratives are understudied relative to appellate decisions, for several possible reasons. First, there is a well-noted bias in legal scholarship in favor of federal appellate decisions, especially decisions of the Supreme Court, as a subject of study<sup>151</sup>; the study of narrative is no different. Pretrial procedure is far-removed from the appellate bench and happens even in non-federal courts.<sup>152</sup>

The more-studied appellate and trial narratives happen at significant rhetorical crossroads in a case. These narratives usually occur in response to well-

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Brooks & Paul Gewirtz eds., 1996) (noting that, “[b]ecause of the fixation by most constitutional scholars on the decisions and practices of the Supreme Court alone, academic ink is spilled almost exclusively over [Supreme Court] cases. . .”).

<sup>148</sup> See, e.g., Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 J. LEGAL WRITING INST. 127, 137 (2008). For a useful bibliography on applied legal storytelling (“[T]he use of stories—and of storytelling or narrative elements—in law practice, in law-school pedagogy, and within the law generally.”), see J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 LEGAL COMM. & RHETORIC: JALWD 247, 248, 254 (2015).

<sup>149</sup> ABBOTT, *supra* note 15, at 177 (noting how a trial is “a contest of stories played out in a contest of narratives.”); BRUNER, MAKING STORIES, *supra* note 33, at 37 (“A legal story is a story told before a court of law.”); BERNARD S. JACKSON, LAW, FACT AND NARRATIVE COHERENCE 61–88 (1988) (considering narrative theories of the trial).

<sup>150</sup> See Stern, *supra* note 12, at 10 (noting that “[v]arious forms of legal writing and explanation are imbued with narrative qualities” but concluding that in the study of law and narrative, “it is worth focusing specifically on judgments because they figure so prominently, for lawyers and for the public, as the law’s own means of justifying its conclusions and describing its operations.”).

<sup>151</sup> See, e.g., Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1820 (2010) (“The Court’s docket generally has more normatively difficult, high-stakes cases than the lower federal courts, and perhaps more than state supreme courts. . . . [T]hese types of cases are the focus of legal scholarship, law teaching, and public attention.”); Hon. Jack L. Landau, *Oregon as A Laboratory of Statutory Interpretation*, 47 WILLAMETTE L. REV. 563, 564 (2011) (“[F]or too long, legal scholarship in this area has focused on decisions of the United States Supreme Court, as if that were all the law that matters.”); cf. Levinson, *supra* note 147, at 193 (“[M]ost ordinary citizens receive their law from [lower federal and state] courts rather than from the absent, often-mysterious entity far off in Washington, D.C.”).

<sup>152</sup> This article does focus on federal pretrial litigation, in part because federal courts hear much of the nation’s civil rights litigation. See, e.g., Judith Resnik, *Revising Our “Common Intellectual Heritage”: Federal and State Courts in Our Federal System*, 91 NOTRE DAME L. REV. 1831, 1838, 1863 (2016). State court litigation is worthy of study as well, in light of the sheer volume of cases handled by state courts and resulting impact on the lives of Americans. See, e.g., David Lyle, *The Politicization of State Courts Threatens Fundamental Rights: The Empirical Case*, 42 HUM. RTS. 5, 5 (2017) (“[F]or most Americans, state courts are ‘the law’ because they handle over 90 percent of the nation’s judicial business.”). Federal courts are also a useful focal point because procedural practice in state courts often resembles that of federal courts. See also Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1049 (2016); Resnik, *supra* note 139, at 1111.

known genres and rules (for instance, the opinion's rhetorical structure, or the framework for direct and cross-examination), and they are highly processed (by which I mean the tellers have worked them over and over to create a seamless tale, a clean narrative line, and an air of authority).<sup>153</sup> By their very nature, appellate court opinions command authority as the definitive narration of a legal story; a well-written opinion admits of no indecision.<sup>154</sup> And with respect to Supreme Court cases, there is a very limited data set to review.<sup>155</sup>

The narratives that emerge in pretrial litigation lack most, or all, of these characteristics. Pretrial matters may appear routine.<sup>156</sup> Pretrial procedures may not produce instances of a recognized genre of legal narrative like a brief. Unlike the narratives in an appellate opinion or brief, narratives developed prior to trial may not have a clean narrative line.<sup>157</sup> They may deal in probabilities, not certainties. They are often stories about what might or can or is likely to develop—what may be discovered to be the case.

As well, pretrial narratives tend to be products of complex, often geographically unique rules.<sup>158</sup> Unlike narratives developed in the Supreme Court or even in federal appellate cases, which tend to be uncontested and based on a set record, the narratives developed in pretrial may be as unique and varied as claims and local practices and court orders in specific cases. Finally, narratives prior to trial may escape notice because they are generated and developed outside a court's view.<sup>159</sup> The narratives' content may only come before a court when packaged into a motion.<sup>160</sup>

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<sup>153</sup> See Resnik, *supra* note 152, at 1833. Trial-level decisions often contain more factual detail than appellate decisions. See Stern, *supra* note 12, at 21 (“Trial decisions, for example, typically include enough facts to support any of the alternative theories that might justify the judge’s conclusions, whereas appellate decisions, zeroing in on a particular doctrinal issue, can be sparer . . .”).

<sup>154</sup> A judicial opinion can imply the given narrative “simply *is* what happened, and there is no underlying story worth excavating and comparing.” Stern, *supra* note 12, at 11. “[T]he decision eschews any narrative techniques that would elicit another version of the story.” *Id.* Stern’s statement suggests that richer sources of narrative exist in litigation than the “elaborately processed text” of the judicial opinion. *Id.*

<sup>155</sup> See Resnik, *supra* note 152, at 1833 (“Fixing attention on the U.S. Supreme Court has become easy by its production of a predictable and tidy corpus, down to fewer than ninety opinions annually and concluding major pronouncements each year by July 1.”).

<sup>156</sup> Pretrial litigation may be ignored because, as Amsterdam and Bruner write, “familiarity is dulling . . . when our ways of conceiving of things become routine, they disappear from consciousness and we cease to know *that* we are thinking in a certain way or *why* we are doing so.” AMSTERDAM & BRUNER, *supra* note 15, at 1.

<sup>157</sup> See, e.g., Stern, *supra* note 12, at 12 (“[T]rials (and the events leading up to them) abound in the features that make narratives absorbing.”).

<sup>158</sup> See, e.g., Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 757 (1995).

<sup>159</sup> Typically, legal narratives only reach a court after significant narrative practice has already occurred. See, e.g., AMSTERDAM & BRUNER, *supra* note 15, at 110 (“Clients tell stories to lawyers, who must figure out what to make of what they hear. As clients and lawyers talk, the client’s story gets recast. . . . If circumstances warrant, the lawyers retell their clients’ stories in the form of pleas and arguments to judges and testimony to juries.”). A great deal



Even scholars interested in the highly visible world of appellate cases and theory should pay attention to the narrative-erasing functions of pretrial procedure. Without narrative development prior to trial, there is less chance of meaningful narrative contest on appeal. For instance, a summary judgment motion decided on discovery limited under the proportionality standard cannot present as rich a contest of narratives on the substantive law as one developed with narrative-rich discovery. Appellate case law's development depends on the quality of narrative development in lower courts, which depends on pretrial litigation. The foundational nature of pretrial narratives to many aspects of law's development is an important reason for pretrial narratives to receive more attention.

### *B. Locating Narrative in Pretrial Litigation*

Although little attention has been paid to pretrial narratives, the pretrial process generates texts that should be understood as narratives in their own right. Using the understanding of narrative and its place in the law set forth above, we can locate narrative throughout pretrial litigation, and identify the forces that shape narrative prior to trial. Narratives developed prior to trial determine the narratives that can be developed during the rest of a case's lifetime. By identifying some of the value associated with pretrial narratives, this article demonstrates that narrative's function in pretrial litigation, long understudied, is deserving of serious attention.

#### *1. Pretrial as a Narrative System*

Litigation is a narrative-creating process, and litigation prior to trial is packed with narrative.<sup>161</sup> In fact, to use the words of narrative theorists, the civil trial process is a narrative system.<sup>162</sup> As defined by narrative theorist Mieke Bal, a narrative system is one in which narrative texts can be produced according to the shared understanding of the participants in the process.<sup>163</sup>

As described above, the civil trial process produces easily recognized narrative texts, including court opinions. The civil trial process also produces texts less-commonly understood to be narratives, but that exhibit narrative features. The shared understanding of the participants in the pretrial process—advocates,

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of law occurs outside the purview of the courts. DWORKIN, *supra* note 92, at 12 (“[J]udges in black robes . . . are not the only or even the most important actors in the legal drama.”).

<sup>160</sup> See, e.g., Lindsey D. Blanchard, *Rule 37(a)'s Loser-Pays “Mandate”: More Bark Than Bite*, 42 U. MEM. L. REV. 109, 132, n.88 (2011) (“[J]udicial reluctance to deal with discovery disputes is due in part to the courts’ lack of the time and resources necessary to engage in . . . fact-intensive review. . .”).

<sup>161</sup> See Stern, *supra* note 12, at 12 (“[T]he trial process is a narrative process.”). *Id.* at 21 (explaining that, at the beginning of a litigation, “there is a proliferation of narrative energy”).

<sup>162</sup> MIEKE BAL, *NARRATOLOGY: INTRODUCTION TO THE THEORY OF NARRATIVE* 3 (2d ed. 1997).

<sup>163</sup> *Id.* at 3–4.

parties, the court—embodied in the rules and practices that govern litigation prior to trial, produces a number of narrative texts that merit the same attention as the well-studied narratives described in the previous subsection.

This article argues that pretrial documents such as depositions and discovery are also narratives. Although these documents generated in pretrial litigation are, like judicial opinions, not literary narratives,<sup>164</sup> they nonetheless embody the characteristics of narrative. Proceeding from Phelan's definition of a narrative as someone telling someone else about something that happened, for a particular purpose,<sup>165</sup> pretrial documents like pleadings, motions (dispositive and procedural), depositions, and discovery all possess the features of narrative.

Perhaps most obviously, pleadings and motions have long been treated as having narrative aspects. Motions, for instance, most closely resemble the format of what we consider a narrative: the statement of facts lays out the story of the parties' relevant interactions in a format that many would recognize as a narrative. And a wide range of books and articles on legal writing impart the wisdom that the statement of facts in a brief should read and function like a "story"—in other words, a narrative.<sup>166</sup>

The complaint has also been recognized for its narrative qualities.<sup>167</sup> Even though the complaint, with its numbered paragraphs and recitation of legal claims, perhaps less obviously demonstrates the characteristics of a narrative, it still relates a story. After all, the complaint's stated purpose is to "show[] that the pleader is entitled to relief,"<sup>168</sup> mirroring the writing-workshop advice "show, don't tell."<sup>169</sup> And the answer, which responds to the allegations in the complaint, is an instance of narrative as well—a counter-narrative told in response to the narrative of the complaint.

Beyond these pretrial texts that have been recognized as narratives, even less-obviously-narrative materials produced in litigation prior to trial (depositions, discovery, and case management documents) can be seen as narrative texts and are deserving of careful study.

Depositions present near-archetypal instances of narrative texts. At a deposition, a witness presents testimony under oath, typically in response to oppos-

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<sup>164</sup> See Stern, *supra* note 12, at 2.

<sup>165</sup> See *supra* note 13 and accompanying text.

<sup>166</sup> See, e.g., ROSS GUBERMAN, POINT MADE: HOW TO WRITE LIKE THE NATION'S TOP ADVOCATES 58 (2d ed. 2014) (advising that "the facts in a brief should read like narrative nonfiction, a bit like something you'd read in *The Atlantic* or *The New Yorker*. Or perhaps in *A River Runs Through It*.").

<sup>167</sup> AMSTERDAM & BRUNER, *supra* note 15, at 134 (describing "pleadings" as "rhetorical narratives"); Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 J. LEGAL WRITING INST. 3, 3 (2009); Anne E. Ralph, *Not the Same Old Story: Using Narrative Theory to Understand and Overcome the Plausibility Pleading Standard*, 26 YALE J.L. & HUMAN. 1, 57 (2014).

<sup>168</sup> FED. R. CIV. P. 8(a)(2).

<sup>169</sup> Ralph, *supra* note 167, at 40–41 n.245.

ing counsel's questioning.<sup>170</sup> The deposition, then, functions similarly to the cross-examination of a witness at trial, but in a setting without a judge. The deposition, too, fits Phelan's definition of a narrative: someone (the deponent) telling someone else (the audience for a deposition is broad—more on that in a moment) something that happened (the events concerning the lawsuit, for instance) for a particular purpose. The purpose of the "telling" in the deposition may be to create an account of the underlying events in the case, to elucidate the legal issues in a case, to strengthen one party's claims or defenses, to demonstrate the deponent's strengths as a witness, or to encourage resolution.<sup>171</sup> And the deposition's audience is broad: not only is the deponent narrating her story to opposing counsel, but to her own counsel, and to others involved who may come into contact with the deposition transcript—the court, other parties to the case, and the eventual jury or mediator.<sup>172</sup>

Beyond depositions, other forms of discovery should be considered narrative texts. For instance, responses to interrogatories, pursuant to Rule 33, demonstrate narrative qualities. Through interrogatories, the requesting party may ask the responding party to respond to questions that "relate to any matter that may be inquired into under Rule 26(b)."<sup>173</sup> Interrogatory responses that represent the responding party telling the requesting party "something that happened" are pretrial narratives.

Responses to document requests, on the other hand, may be less easily recognized as narrative. For instance, in response to requests by an opposing party, a party may produce documents within the scope of discovery responding to a particular request. Are these responses narratives? On one view, yes: the documents themselves are telling the requesting party what documents are, in the responding party's view, relevant to the request, for the purpose of establishing the case's facts or strengthening one party's claims. But even if a skeptic would not accept a pile of documents as a narrative, any responses to document requests have narrative value because they present the constituent and supplementary events that can later be formed into a narrative in a motion or at trial.

What about case management documents, including reports to the court such as the Rule 26(f) report of the parties<sup>174</sup> and court-generated documents

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<sup>170</sup> FED. R. CIV. P. 30(c)(1); *see also* DAVID M. MALONE & PETER T. HOFFMAN, *THE EFFECTIVE DEPOSITION: TECHNIQUE AND STRATEGIES THAT WORK* 3 (4th ed. 2012) ("Few hard and fast rules control the conduct of depositions").

<sup>171</sup> *See, e.g.*, MALONE & HOFFMAN, *supra* note 170, at 25–33 (describing purposes of deposition); THOMAS A. MAUET & DAVID MARCUS, *PRETRIAL* 286 (9th ed. 2015) (describing deposition's utility to opposing counsel, deponent's counsel, and trial).

<sup>172</sup> *See* MALONE & HOFFMAN, *supra* note 170, at 31; MAUET & MARCUS, *supra* note 171, at 286.

<sup>173</sup> FED. R. CIV. P. 33(a)(2).

<sup>174</sup> *See* FED. R. CIV. P. 26(f)(1)–(2) (requiring parties to "confer as soon as practicable" and to "submit[] to the court within 14 days after the conference a written report" on matters such as a proposed discovery schedule).

such as the scheduling order pursuant to Rule 16?<sup>175</sup> These documents share some of the features of narratives: Court orders, such as scheduling orders, resemble narrative in that someone (the court) is telling someone else (the parties) about how future events will happen, for the purpose of further developing the case's claims and narratives. And reports of the parties, whether joint or individual,<sup>176</sup> demonstrate narrative characteristics in a similar way. Whether or not case management documents are in fact entirely of a piece with narrative, they nonetheless shape pretrial narratives, as set forth below.

With an understanding that these pretrial documents—pleadings, motions, discovery and depositions—are narrative texts, this article now proceeds to look at the ways that these pretrial narrative texts are shaped.

## 2. *Narrative-Shaping in Pretrial Litigation*

There is already an understanding that trial narratives and judicial opinion narratives are highly processed texts: for instance, the presentation of trial evidence is shaped by evidentiary and procedural rules, and the narratives that emerge in judicial opinions are constrained by the genre's conventions. The insight that procedural and evidentiary rules are narrative-shaping devices is not new; in other contexts, scholars have pointed out that rules constrain or enlarge the kind of stories that can be told and points at which those stories can be given voice.<sup>177</sup> However, there is little scholarly attention to the fact that the underlying texts that contribute to these canonical narratives are themselves constrained and processed in particular ways.

This section begins to highlight the ways that pretrial legal rules and procedures shape pretrial narratives. Unless we pay attention to these shaping devices, we risk assuming that these stories reach the trial or the opinion as “pure” or un-narrated, un-mediated material. Being conscious of the narrativity of these pretrial texts allows us to reflect carefully on the strengths and weaknesses of the litigation system in which they are generated.

Several elements shape narratives in pretrial litigation: pretrial procedure (including formal rules and informal practices), the other contents of a case, and the inherent contestability built into all narratives. First, any student of civil procedure can identify the most obvious devices that shape pretrial narrative: The Federal Rules of Civil Procedure provide a uniform set of practices that “govern the procedure in all civil actions and proceedings in the United States district courts.”<sup>178</sup> The complaint, for instance, is governed by Rule 8, which requires a pleading to include “a short and plain statement of the grounds for

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<sup>175</sup> See FED. R. CIV. P. 16(b)(1)(A) (requiring judge to issue a scheduling order “after receiving the parties’ report under Rule 26(f)”).

<sup>176</sup> See FED. R. CIV. P. 26(a)(1)–(3) (setting times for parties to make initial disclosures, disclosures of expert witnesses, and disclosures about evidence the parties may present at trial).

<sup>177</sup> See, e.g., BRUNER, MAKING STORIES, *supra* note 33, at 12.

<sup>178</sup> FED. R. CIV. P. 1.

the court's jurisdiction," "a short and plain statement of the claim showing that the pleader is entitled to relief," and "a demand for the relief sought."<sup>179</sup> The complaint is also shaped by Rule 10, which requires a party to "state its claims . . . in numbered paragraphs, each limited as far as practicable to a single set of circumstances."<sup>180</sup> These rules shape the narrative in the complaint by indicating how detailed the narrative should be—"short" and "plain"—and by indicating the form the narrative should take. No advocate, having read Rule 10, would mistakenly believe that a pleading should be presented in the form of a sonnet or a screenplay.

To the extent that court-made rules add to the requirements of pretrial procedural rules, those are also narrative-shaping devices. For instance, since the *Twombly/Iqbal* pleading revolution, a court reading a complaint to determine whether it states a claim should consider not only whether the plain text of Rule 8 is met but also whether the plaintiff has met the heightened plausibility standard.<sup>181</sup> This court-made plausibility rule shapes the complaint in a different way, encouraging pleaders to add factual content.<sup>182</sup>

In addition to formal rules, pretrial narratives are shaped by less formalized practices. Consider, for example, the common deposition practice of reserving all objections except as to form.<sup>183</sup> In this practice, for instance, an objection to hearsay testimony (which would not be admissible at trial and which would be ineligible for consideration at summary judgment) would not need to be raised at deposition.<sup>184</sup> In a deposition following this practice of reserving all objections except as to form, the deposition testimony—the narrative generated at deposition—could be detailed, broad, and certainly different than the narrative that would be generated at a deposition where every objection successfully limited testimony. The deposition narrative is also broader than what could be narrated in the statement of facts in a brief at the summary judgment phase.

Pretrial narratives are also shaped by attorneys. It would be a mistake to assume that there is any pretrial narrative that tells things as they really are, without mediation or narration. Attorneys draft pleadings, they assist in answering discovery, they often draft affidavits and declarations that accompany formal filings in court, and they prepare their clients for participation in the lawsuit. Depositions, for instance, present as verbal answers of a deponent, but the deponent is not the only author of her deposition testimony. The party's attorney will have prepared her in an attempt to shape the narrative that emerges; such

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<sup>179</sup> FED. R. CIV. P. 8(a)(1)–(3).

<sup>180</sup> FED. R. CIV. P. 10(b).

<sup>181</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

<sup>182</sup> *See infra* Section III.

<sup>183</sup> It is commonly understood that the most important privileges that must be asserted at deposition are attorney-client privilege and the privilege against self-incrimination. *See MAUET & MARCUS, supra* note 171, at 315.

<sup>184</sup> *See id.*

preparation might include advice on what information and key details (constituent events, in the language of narrative theorists) to emphasize.

Pretrial narratives are also shaped by other documents in the case, such as procedural orders. Court orders on procedural matters are narrative-shaping devices, meaning that they are determinants of future stories that can be told—when, how, by whom, and on what topics.

Similarly, discovery and depositions, in addition to being narratives themselves, are also narrative-shaping devices. Unlike rules and orders that primarily shape by defining or constraining the space for narratives within the trial system, discovery and depositions make possible future texts within the system, because they introduce the constituent events that future narratives in the case will use.<sup>185</sup> Discovery is not just gathering outside events (e.g., plucking them from some outer-existing narrative) for later narrative construction. In discovery, advocates co-create the events from which later treatments will emerge by selecting and describing those events.

Discovery introduces events in two senses. First, discovery translates or particularizes outside events into the case as knowable pieces of information: events that have happened, or are alleged to have happened, in the “real world” become cognizable in the world of the case. Discovery ensures that there are no last-minute surprises in civil suits.<sup>186</sup>

Discovery also creates constituent, as opposed to supplementary, events by beginning to create a narrative teleology: that is, by identifying things as “evidence of” or “causation for” or “reasons for” particular claims, beliefs, or allegations, discovery starts to shape random points of time or circumstances into events. Actions start to take on the shape of purpose. Significant events crystallize; a party is seen to have made realizations or taken steps. After discovery, future narratives will contest the meaning or relationship of the particular pieces of information, competing to find the narrative that should be preferred as most plausible or persuasive.

With the information translated into the world of the case, the advocates and ultimately the finder of fact not only have the narratives that result from the discovery of information, they also have the substance for the future narrative texts that will develop in the case. While not all the information gained in discovery will be part of the future narrative texts in the case, all discovery material nonetheless has the potential to shape those future texts. Not all material gleaned in discovery is ultimately admissible for consideration by a court or jury as to legal liability. Indeed, Rule 26 embodies the principle that information need not be admissible to be discoverable.<sup>187</sup> Disputes over admissibility come

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<sup>185</sup> See *supra* note 27.

<sup>186</sup> See, e.g., *Costa v. AFGO Mech. Serv., Inc.*, 237 F.R.D. 21, 26 (E.D.N.Y. 2006) (“Open discovery is the norm. Gamesmanship with information is discouraged and surprises are abhorred.”).

<sup>187</sup> FED. R. CIV. P. 26(b)(1); see also David M. Katz, *Assessing the Federal Rules’ Proportionality Amendment: Why Proportionality Is Philosophically Proper, yet Practically Prob-*

later—particularly at the summary judgment phase or at the motion in limine phase immediately prior to trial.<sup>188</sup>

Even the ultimately-inadmissible material gained in discovery has the potential to shape future narratives in the suit, because the discovery events that will never see the light of day in an officially sanctioned narrative such as trial testimony, a motion, or a court opinion can still suggest to the advocates relationship of causation, intention, connection, or directionality that will show up in the eventual narrative treatment of the case's events. Thus, even if a hearsay statement gained at a deposition never enters the later narrative discourse of a case, it can still inform the advocate's ultimate selection of a narrative treatment and subtly have influence on the case.<sup>189</sup>

The inherent contestability of narrative also shapes pretrial narrative, because the litigation system is built around the idea of opposing parties. For every pretrial narrative—every deposition, every interrogatory answer—there is the possibility that a different, opposing narrative could be crafted. No story is told in pretrial litigation without a consciousness of the contest of narrative.

Pretrial narratives seek not only to persuade of their content, but also to persuade of the effectiveness of that communication in the contest of narratives. Often, stories are told in pretrial for a procedural purpose: not necessarily to show something did happen—as with trying to convince a jury of a fact or of guilt or liability—but to earn the right to tell that ultimate story in the contest of narrative at trial. The advocates' storytelling may be about whether it is at least plausible or not that X happened (at the motion to dismiss phase), or whether there is any question whether Y happened (at the motion for summary judgment phase). The litigants and the court are always evaluating the quality of the narrative as against other stories that could be (and are being) told, aware that the party who can present the most coherent narrative, using the details available to them, will be successful at trial or in a request to a decisionmaker such as a motion seeking summary judgment.<sup>190</sup>

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*lematic*, 67 SYRACUSE L. REV. 583, 593 (2017) (“From 1938 until December 2015, discovery analysis generally centered on relevance. . . . Under the relevance system, information was discoverable if (1) the information was non-privileged and (2) the information was relevant to the suit.”).

<sup>188</sup> Generally, hearsay or other inadmissible evidence should not be considered on summary judgment. See CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE 10B § 2738 (4th ed. 2016). But ultimately-inadmissible evidence is often sought in the form of discovery or depositions. Broad discovery thus encourages the development, translation, and particularization of even details that will later be closed out—further evidence that discovery is narrative-generating and narrative-fueling process.

<sup>189</sup> Of course, the advocate can also use the procedural devices of a motion in limine to at least put this information before a judge if not a jury—to frame the judge's understanding of the narrative in the eventual contest of narratives to follow.

<sup>190</sup> See Stern, *supra* note 12, at 8–9 (“[W]e may say that the most successful trial narrative or interpretation of a precedent will be the one that does the most work in explaining and assigning meaning to the details vying for legal significance.”).

### 3. *The Value of Pretrial Narratives*

Having made the point that narrative texts are produced in a case prior to trial, I want to turn to the value of these narratives. My account relies on a concept of litigation as not only a mechanism for dispute resolution but also as the way that litigants—including individual citizens—can participate in the American government process.<sup>191</sup>

Litigation involves narrating and re-narrating circumstances giving rise to a lawsuit, while also bringing those narrations into an official, ceremonial arena.<sup>192</sup> Through participation in pretrial litigation, litigants bring their individual circumstances and grievances to a lawyer, concretize those experiences into written pleadings and other legal documents, present those representations of their experiences to opposing parties and to a judge within the court system, and begin to refine and contest those representations.<sup>193</sup>

Because litigation often doesn't reach trial, encouraging the development of pretrial narratives has significant expressive value. Even for litigants who do not receive a court judgment in their matter, the opportunity to present their narrative in a pleading has value. Because so many cases are resolved without trial (through neglect, settlement, or pretrial judgment),<sup>194</sup> the early phases of litigation—pleading, motions to dismiss, and discovery—all present important opportunities to be heard by the court. But the value of narratives told in pretrial litigation is not limited to the value of feeling one's grievances are heard.

Pretrial narratives—even in cases that do not reach trial—also contribute to the law's development in significant ways. Even the limited kinds of legal decisions that might be made in a case that resolves prior to trial—for instance, on a motion to dismiss, that a particular set of facts does give rise to a plausible claim for relief, or on a motion to compel discovery, that a particular kind of information is relevant to the subject matter of an action—can make interstitial advances in the law.<sup>195</sup>

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<sup>191</sup> See, e.g., BRUNER, *MAKING STORIES*, *supra* note 33, at 90.

<sup>192</sup> Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1836 (2014) (“Courts model the democratic precepts of equal treatment, demonstrate that the state itself is subject to democratic constraints, and facilitate democratic revisions of governing norms.”); see also Lahav, *supra* note 106, at 1667 (“For some, the process of litigation is about . . . recognition from a government official.”).

<sup>193</sup> See WHITE, *supra* note 85, at 168 (“[T]he law always begins in story: usually in the story the client tells . . . It ends in story too, with a decision by a court or jury, or an agreement between the parties, about what happened and what it means.”).

<sup>194</sup> See John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524 (2012) (“By the year 2002, only 1.8% of federal civil filings terminated in trials of any sort, and only 1.2% in jury trials.”).

<sup>195</sup> See Lahav, *supra* note 106, at 1658 (“[A]ccess to litigation is necessary for the law to evolve because by bringing cases litigants force the courts to interpret and develop the law, which information is then used by others to guide their own conduct.”).



The narratives produced in pretrial can also bear fruit at the merits resolution stage of the case.<sup>196</sup> Pretrial narratives populate the world of the merits resolution (whether at trial or summary judgment), giving advocates a rich tapestry of information from which to choose in crafting their ultimate persuasive narratives, and giving decisionmakers access to narrative richness in issuing their decisions. Rich merits-stage narratives at the trial level also lead to more narrative richness in appeals.<sup>197</sup>

Over time, the effect of narratives told in pretrial litigation can be great.<sup>198</sup> Not only can small changes occur in individual cases—ultimately, the effect of narration will compound. A judge who hears stories in pretrial litigation again and again, even if he is initially disinclined to recognize a legally-significant narrative, may ultimately be moved to understand a particular kind of narrative differently through the recognition of patterns and the function of narrative.<sup>199</sup> On a larger scale, the repetition of pathbreaking pretrial narratives across the judicial system may give rise to scholarly, media, or legislative attention to ways law might change.<sup>200</sup>

The account I have drawn of the value of pretrial narrative to law's development has special import for civil rights plaintiffs, including victims of discrimination or of government abuses. In a litigation system that generates narrative and allows it to develop, the process of telling and re-telling legal narratives by citizens whose legal claims have been marginalized, can result in judicial awareness of more representative narratives.

It should be noted that the presence of narrative in pretrial litigation is morally neutral—the existence of pretrial narratives is not a guarantee that a judge will properly apply the law or be free from the influence of harmful mas-

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<sup>196</sup> See Robert P. Burns, *A Short Meditation on Some Remaining Issues in Evidence Law*, 38 SETON HALL L. REV. 1435, 1437 (2008) (explaining how “a single additional detail, and certainly a constellation of additional details, can substantially change the significance of the stories told at trial.”).

<sup>197</sup> See Anne Moses Stratton, *Courtroom Narrative and Findings of Fact: Reconstructing the Past One (Cinder) Block at a Time*, 22 QUINNIPIAC L. REV. 923, 924 (2004). At a trial, the trier of fact weighs competing narratives to determine legal liability. See *id.* at 945–46. On appeal, the appellate court reevaluates the narrative. See *id.* at 946.

<sup>198</sup> Ultimately, airing stories that are unfamiliar allows them to take on legal significance as stating a viable claim. See, e.g., Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 713 (2007) (“If women’s experiences of harm that would otherwise be ‘invisible’ are heard more frequently in courts and public settings, those experiences may ultimately be viewed by judges as constituting a legal claim, and take on legal ‘visibility.’”).

<sup>199</sup> See Stern, *supra* note 12, at 9.

<sup>200</sup> See, e.g., Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 804 (2008) (“By observing the redundancy of various claims of right and the processes, allegations, and behaviors that become the predicates to judgments, debate can occur not only about the particulars of a given procedure and its outcome but also about what the underlying norms ought to be.”).

ter narratives.<sup>201</sup> Judges, like all people, are susceptible to cognitive biases.<sup>202</sup> And judges are participants in the same culture as other Americans and may be influenced by the all the factors that create cognitive biases.<sup>203</sup>

For instance, judges may be affected by “belief perseverance,” which causes individuals to place too much weight on evidence that supports an initial belief and to discount evidence that contradicts that initial belief, and by “confirmatory bias,” which causes individuals to interpret ambiguous evidence as supportive of their belief.<sup>204</sup> Thus, a judge who believes herself to be familiar with a particular kind of case may form an initial judgment about its merits that undermines the judge’s ability to assess plausibility or summary judgment.<sup>205</sup> The problem of cognitive bias can, of course, be especially pernicious when a case involves biases based on race, ethnicity, or gender.<sup>206</sup>

Although judges bring a “particularized stock of life experiences and understandings” to their work, scholars working in law and narrative have recognized the potential of counter-narratives to combat judge’s cognitive biases.<sup>207</sup> Delgado and Stefancic described the need for “saving narratives,” which they describe as “a well-written, deeply felt counternarrative” that would have exposed a judge in a particular case “to other points of view,” increasing empathy

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<sup>201</sup> Harmful master narratives may exist about a number of types of cases. *See, e.g.*, Matthew I. Fraudin, *Decision-Making in Dependency Court: Heuristics, Cognitive Biases, and Accountability*, 60 CLEV. ST. L. REV. 913, 940 (2013) (describing how news media portrayal of child welfare and foster care lead to an “overarching narrative” that may not accurately reflect reality). Judges under particular time pressures or who frequently face similar kinds of cases may resort to “cognitive shortcuts that sometimes cause illusions of judgment.” *Id.* at 939. More broadly, studies of judicial decisionmaking shows “judges tend to make decisions in a largely intuitive way.” Chris Guthrie et. al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 19 (2007).

<sup>202</sup> *See* Stern, *supra* note 12, at 9.

<sup>203</sup> Certainly, “stories in the media depicting policy debates, major events, and individual stories alike” can “affect judges who, at the end of a day, go home and read the newspapers, watch television, go to the movies, and otherwise participate in daily life in America in similar ways to the general public.” Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 216 (2012).

<sup>204</sup> Reinert, *supra* note 8, at 1786. Individuals also tend to be overconfident in their own abilities and to “underestimate their own biases.” *Id.* at 1787.

<sup>205</sup> *Id.*; *see also* Jeffrey W. Stempel, *Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice*, 43 LOY. U. CHI. L.J. 627, 636 (2012) (“[J]udges should be reluctant to grant summary judgment unless there is essentially *no* serious prospect that others will disagree as to whether the facts are at issue and what the facts show.”).

<sup>206</sup> Reinert, *supra* note 8, at 1788.

<sup>207</sup> Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929, 1930 (1991); *see also id.* at 1953 (“[W]e are all . . . constituted in large part by the ‘stories’ or narratives by which we understand and impose order on reality. Divergent new narratives, ones that could jar and change us, always spark resistance. . . .”).

and understanding “through vicarious experience.”<sup>208</sup> Cognitive science also teaches that a broader range of pretrial narratives may be able to change judges’ cognitive biases, because the neural pathways that schema and stock stories occupy are changeable.<sup>209</sup>

To skeptical readers, the question will occur: isn’t narrative a “moral chameleon”?<sup>210</sup> What constrains the potential use of narrative for undesirable purposes? Ultimately, traditional safeguards—such as review against constitutional principles and checks and balances—offer some guarantee that narratives will not get out of hand. Perhaps more importantly for the subject of this article, the availability of more narrative—telling counter-narratives, contesting narratives, weighing narratives—offers the best inoculation against harmful uses of narratives.

As this article argues, narratives need not reach the U.S. Supreme Court to have value. My account of the value of pretrial legal narrative is much more akin to a process value—the generation, development, contest, selection, and refinement through the common-law process—matters not just because the end result may work its way up to the Supreme Court and become the law of the land, but rather because many cases *do not* follow that path. The narratives developed and grown in lower-profile, less expensive, less dramatic cases affect the legal rights of citizens and whether they can exercise those rights.

Stories are what the law produces, and stories are what grow the law.<sup>211</sup> Every legal narrative developed becomes a potential contact point—a small ledge for a future litigant to affix a grappling hook and hang his or her legal argument. Over time, as an expanding catalog of legal narratives have been contested and resolved in litigation, new legal pathways develop. Thus, narratives enable the law to accommodate citizens in constantly changing times.

### III. NARRATIVE-ERASING PROCEDURE

Because pretrial narratives have such value to the law, and because rules and procedure undeniably shape them, it is vital to pay attention to a phenomenon that has, so far, escaped critical notice: what I call narrative-erasing procedure.

Scholars have noted the decline of a number of features of the civil justice system: the disappearance of trial in civil cases,<sup>212</sup> the significant losses and costs that accompany the ever-increasing rates of settlement of civil cases,<sup>213</sup>

<sup>208</sup> *Id.* at 1931, 1933. Delgado and Stefanie concluded that “saving narratives rarely alter judges’ behavior because they are rarely found in the ‘canon’—the group of texts recognized as valid and legitimate, the ‘classics’—at any given period in history.” *Id.* at 1953.

<sup>209</sup> See Jewel, *supra* note 125, at 692 (“[A]lternative discourses, when they become widely dispersed in a culture, have the potential to reshape collective neural pathways.”).

<sup>210</sup> See Brooks, *supra* note 31, at 416.

<sup>211</sup> See, e.g., Bruner, *MAKING STORIES*, *supra* note 33, at 93–94.

<sup>212</sup> See, e.g., Langbein, *supra* note 194, at 526.

<sup>213</sup> See Comment, Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1085 (1984).

and the rise of restrictive procedure.<sup>214</sup> Restrictive trends in civil procedure tend to limit access to courts.<sup>215</sup> Restrictive procedure has an especially harsh impact on cases that involve various “out-groups” and otherwise marginalized individuals.<sup>216</sup>

The scholarly debate has ignored, however, the effects of these restrictive procedural trends on narrative. While other scholars have written that procedural changes can have substantive effects,<sup>217</sup> and that restrictive procedure tends particularly to harm already-marginalized populations,<sup>218</sup> this article makes a novel contribution to the literature by identifying a particular *narrative* problem: increasingly high procedural hurdles, individually and in combination, tend to deprive the court system of narrative.

Narrative-erasing procedure is problematic because, when narratives are erased from litigation, the generation, development, and contest of narratives that fuels the civil justice system is dampened. Another goal of litigation—the right of individual litigants to be heard—is sacrificed when parties lose their ability to bring their narratives into court, to have those narratives heard and considered by a decisionmaker. Moreover, when narrative-erasing procedure takes hold, future litigants’ abilities to tell their own stories are sorely limited.

Narrative theory also provides a way to look at the particular threats of narrative-erasing procedure. Specifically, scholars of law and narrative have considered the consequences for the legal system when particular narratives are not raised in formal court proceedings.<sup>219</sup> This article extends these insights to the consequences of erasing narratives from litigation prior to trial.

When procedural and substantive rules and common practice all permit the expression of narratives, those narratives become the common property of the

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<sup>214</sup> Spencer has argued that a “restrictive ethos” in civil procedure has led to “many rules being developed, interpreted, and applied in a manner that frustrates the ability of claimants to prosecute their claims and receive a decision on the merits in federal court.” Spencer, *supra* note 8, at 353–54; *see also* A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 188–89 (2010).

<sup>215</sup> Spencer, *supra* note 8, at 370.

<sup>216</sup> Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1822–23 (2015) (noting that “the shifting civil litigation presumptions have also resulted in higher (and sometimes insurmountable) barriers to marginalized individuals,” resulting in “certain kinds of claims [being] lost.”); Spencer, *supra* note 8, at 371 (noting the particular effects of restrictive procedure on including cases involving fraud, malicious prosecution, civil rights, securities, antitrust, and employment discrimination); *see also id.* at 370 (explaining that “[c]ivil procedure tends to favor the interests of” a commercial class by, among other things, “protecting commercial defendants against claims by members of various out-groups”).

<sup>217</sup> *See, e.g.*, Dana Shocair Reda, *What Does It Mean to Say That Procedure Is Political?*, 85 FORDHAM L. REV. 2203, 2222 (2017) (“Discovery rules are and will be policy determinations. . . .”); Paul J. Stancil, *Close Enough for Government Work: The Committee Rulemaking Game*, 96 VA. L. REV. 69, 71 (2010) (“Procedure is substance.”).

<sup>218</sup> Coleman, *supra* note 2, at 503 (“[T]he price of a restrictive shift in procedural doctrine is that it marginalizes particular claims, and by extension, particular people.”).

<sup>219</sup> *See* Ferguson, *supra* note 114, at 87 (asking “[w]hat, in effect, happens when a relevant story is actively repressed in a republic of laws?”).

legal system: “[A] relevant story that is effectively told belongs to the republic of laws for ready use. . . . Ideologically, it remains available to everyone.”<sup>220</sup> But when narratives are excluded from law, the equivalent of psychological repression occurs.<sup>221</sup> Like psychologically repressed information, repressed narrative in the law does not go away.<sup>222</sup> Erased narratives can return to “haunt” the law, both as a “cultural narrative” and as a “renewed legal event.”<sup>223</sup>

Yet while they are repressed, erased narratives cannot be used, effectively holding up the law’s progress.<sup>224</sup> Neglecting law’s narrative content can also result in ignoring “individual and social responsibility.”<sup>225</sup> Thus, “[t]he price of repression in a republic of laws can be very high.”<sup>226</sup> Ultimately, the law’s development suffers when narratives are erased.

### A. *Three Instances of Narrative-Erasing Procedure*

In recent years, we have seen the concerning rise of what is best described as narrative-erasing procedure in civil pretrial litigation. This section will discuss three instances of narrative-erasing procedure: 1) the Supreme Court imposing the heightened “plausibility” pleading standard,<sup>227</sup> 2) the Rules Advisory Committee altering the discovery rules to further emphasize “proportionality” in discovery requests,<sup>228</sup> and 3) settlement pressures increasing at every stage of pretrial litigation.<sup>229</sup>

#### 1. *The Plausibility Pleading Standard*

The motion to dismiss, which in the *Twombly/Iqbal* era is judged against the “plausibility standard,”<sup>230</sup> is a form of narrative-erasing procedure. Prior to *Twombly*, civil complaints were judged against Rule 8 of the Federal Rules of Civil Procedure and the longstanding *Conley* standard, which provided that “a complaint should not be dismissed for failure to state a claim unless it appears

<sup>220</sup> *Id.* at 96.

<sup>221</sup> *Id.* at 88.

<sup>222</sup> Rather, it takes on the form of “something secretly familiar that has undergone repression and then returned to consciousness all of a sudden in sometimes frightening and recurring patterns.” *Id.* at 89.

<sup>223</sup> *Id.* at 88, 97.

<sup>224</sup> *Id.* at 97 (“The law does not get beyond what it has not worked through.”).

<sup>225</sup> WEST, *supra* note 9, at 427 (“[O]ne of the dangers of a society that relies . . . insufficiently on narrative, is that it may be dangerously inattentive to the very real need to assign and then acknowledge both individual and societal responsibility for the consequences of actions.”).

<sup>226</sup> Ferguson, *supra* note 114, at 96.

<sup>227</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

<sup>228</sup> Order Amending Federal Rules of Civil Procedure, 305 F.R.D. 457 (2015).

<sup>229</sup> See Richard D. Freer, *Exodus from and Transformation of American Civil Litigation*, 65 EMORY L.J. 1491, 1512 (2016); see also Clermont, *supra* note 5, at 1956.

<sup>230</sup> *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 556.

beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>231</sup> The *Conley* rule was understood to reflect the desires of the drafters of the 1938 Federal Rules of Civil Procedure for pleading—and all of litigation—to be governed by rules that were “simple, uniform, and transsubstantive.”<sup>232</sup>

Then in 2007, the Supreme Court, in *Bell Atlantic Corp. v. Twombly*, initiated a revolution in pleading practice.<sup>233</sup> The Court held that, for an antitrust claim under Section 1 of the Sherman Act, surviving a Rule 12(b)(6) motion to dismiss for failure to state a claim “requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.”<sup>234</sup> In other words, the Court was “[a]sking for plausible grounds to infer an agreement.”<sup>235</sup> The plausibility standard, it emphasized, “calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”<sup>236</sup>

In *Iqbal*, the Court confirmed that the “plausibility” standard applies to all cases governed by Rule 8.<sup>237</sup> The Court further explained the plausibility standard, writing that “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”<sup>238</sup> Only “well-pleaded factual allegations” would be considered by a court to “determine whether [the allegations in a complaint] plausibly give rise to an entitlement to relief.”<sup>239</sup> Put differently, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements” would not be enough to establish a claim’s plausibility.<sup>240</sup>

*Twombly* and *Iqbal* spawned a decade’s worth of scholarship criticizing the plausibility standard. As relevant to this article’s concerns, some argue that courts, by trying to screen out meritless litigation through granting motions to dismiss, can hold up the law’s progression.<sup>241</sup> Others have noted that the heightened motion to dismiss standard presented by plausibility pleading is un-

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<sup>231</sup> *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), *abrogated by* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>232</sup> Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 556 (2002).

<sup>233</sup> *See, e.g.*, Benjamin P. Cooper, *Iqbal’s Retro Revolution*, 46 WAKE FOREST L. REV. 937, 939 (2011).

<sup>234</sup> *Twombly*, 550 U.S. at 556.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 679.

<sup>240</sup> *Id.* at 678.

<sup>241</sup> *See, e.g.*, Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1232 (2014).

democratic, in part because it frustrates congressional intent embodied in statutes designed to “enable private enforcement of important social norms.”<sup>242</sup>

The plausibility standard has influenced the grants of motions to dismiss: “dismissal rates have increased significantly post-*Iqbal*.”<sup>243</sup> Most troublingly, perhaps, a 12(b)(6) motion is more likely to be granted in cases where plaintiffs are least likely to have access at the pleading stage to the kind of information that makes a claim plausible. The plausibility standard has had a particularly negative effect on civil rights plaintiffs, and some evidence shows that motions to dismiss in civil rights cases may be decided differently depending on the race of the plaintiff and/or the race of the judge.<sup>244</sup>

I have written, as have others, about the way the plausibility standard articulated in *Twombly* and *Iqbal* can be read as a call for more storytelling in pleading.<sup>245</sup> Even if the litigant heeds advice to “tell a story” in pleading, with factual detail, character, and scene, the amorphous and ill-defined plausibility standard leads to narrative erasure by courts.

First, at the pleading stage, plaintiffs may not have access to full information about the underlying story—events, actions, and entities involved—that would allow them to construct a rich, plausible narrative. The motion to dismiss post-*Twombly* and *Iqbal* is problematic in part because it allows the party in possession of all the factual details to attack the other side for not having a plausible narrative.<sup>246</sup> The higher hurdle that the plausibility standard poses also

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<sup>242</sup> See Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring A Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 405 (2011) (describing four ways the *Twombly* and *Iqbal* decisions function as an attack on American democracy).

<sup>243</sup> Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2121 (2015). Reinert found that a case being decided post-*Iqbal* “is highly correlated with an increase in the likelihood that a case (or the majority of the claims challenged by motion) will be dismissed.” *Id.* at 2157.

<sup>244</sup> See *id.* (“The increased rate of dismissal [was] more pronounced for particular kinds of cases (employment discrimination, civil rights, and financial instruments), [and] particular kinds of claimants (individual) . . . ”); see also Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal’s Effect on Claims of Race Discrimination*, 17 MICH. J. RACE & L. 1, 5, 40 (2011) (finding, post-*Iqbal*, statistically significant increases in dismissal of African-American plaintiffs’ claims of race discrimination in the workplace and of similar claims from African-American pro se plaintiffs, and finding a “marginally significant trend” showing white and African-American judges apply *Iqbal* differently). Quintanilla concluded that application of *Twombly* and *Iqbal* have resulted in “increased dismissals of Black plaintiffs’ claims of race discrimination,” suggesting that it “is likely that the same natural psychological processes that disadvantage Blacks are operating against other stereotyped groups at the pleading stage.” *Id.* at 60.

<sup>245</sup> Ralph, *supra* note 167, at 57; see also Fajans & Falk, *supra* note 167, at 4.

<sup>246</sup> See Samuel Issacharoff & Geoffrey Miller, *An Information-Forcing Approach to the Motion to Dismiss*, 5 J. LEGAL ANALYSIS 437, 446 (2013) (“The Court has now created a species of factual inquiry in which one side has the burden of establishing a factual threshold while the other is free to critique it without proffering its own factual claims.”). As Issacharoff and Miller write, trials present “a confrontation between competing accounts of the relevant facts” and even summary judgment allows claims to be tested “against a completed discovery record.” *Id.*

limits narratives that can develop later in a case. Increased granting of motions to dismiss deprives the system of narratives that could be developed and of advances in the law.<sup>247</sup>

Second, judges applying the plausibility standard may rely on their existing narrative schema and cognitive biases.<sup>248</sup> Given the privileged position of judges, who tend to be well educated and politically elite,<sup>249</sup> the plausibility standard may invite them to unconsciously apply a master-narrative that differs radically from the narratives that civil rights plaintiffs and members of marginalized groups may wish to tell.

Third, the higher plausibility standard may also force plaintiffs into existing narratives to demonstrate their claim's plausibility, rather than working creatively to develop a path-breaking narrative of liability in a claim. Legal narratives that have already been recognized as plausible—or better yet, that have already led to relief on the merits—will cast a long “shadow.”<sup>250</sup> Plaintiffs who have a pre-approved narrative available may find that narrative a safer bet and may forgo novel legal theories. Plausibility forces parties into set pathways that become ossified.<sup>251</sup> At the 12(b)(6) stage, courts read a complaint for whether it states a plausible claim; but the court decides this, not only on its own reading of the complaint, but also on the briefing of the parties. Both in pleading decisions and in motion to dismiss preparation, the framing effects of the plausibility standard mean that parties' worlds and narrative possibilities are narrowed, forcing them early to focus on what may yet be proved.

Even parties who can survive a motion to dismiss still may find themselves limited in the narratives that they can develop through discovery and at sum-

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<sup>247</sup> See Coleman, *supra* note 2, at 502 (describing how “our collective legal consciousness would be impoverished if . . . plaintiffs [in seminal civil rights cases] had never had their paradigmatic day in court” due to heightened pleading standards).

<sup>248</sup> As Reinert has explained, judges assessing plausibility are not immune from cognitive bias. See Reinert, *supra* note 8, at 1786 (“When judges attempt to evaluate the merits of a claim, cognitive biases may taint their assessment. . . .”); see also Mitchell F. Crusto, *Empathic Dialogue: From Formalism to Value Principles*, 65 SMU L. REV. 845, 850 (2012) (“[J]udges who focus on their umpire role may fail to consider how their unconscious biases affect their decisions and the litigants themselves.”); Nicole E. Negowetti, *Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators*, 4 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 278, 299–300 (2014) (“[R]ecent studies have demonstrated that even the most qualified judges may rely on intuitive thought processes, resulting in judgment that is flawed with systemic errors.”).

<sup>249</sup> See Spencer, *supra* note 214, at 197.

<sup>250</sup> In essence, plaintiffs who worry about facing a “plausibility” motion to dismiss find themselves pleading “in the shadow of the law.” See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1979).

<sup>251</sup> See Reinert, *supra* note 241, at 1233 (noting that restrictive procedure “prevents litigants from engaging in the kind of factual discovery that can prompt future changes in legal rules. . . . [A]s cases are dismissed at earlier and earlier procedural stages, the announcement of relevant legal rules inevitably will be more generalized and less tailored to specific factual scenarios, thus depriving future litigants of meaningful guidance.”).



mary judgment, by virtue of having framed the narrative in a particular way at the pleading stage to achieve plausibility.

In the face of the plausibility standard and the higher hurdle of a motion to dismiss post-*Twombly* and *Iqbal*, it is likely that some litigants are dissuaded from ever initiating a lawsuit. There is no way to measure the impact of the absence of narratives that are never even whispered in a lawsuit.<sup>252</sup>

## 2. *Proportional Discovery*

If a plaintiff makes it past the motion-to-dismiss phase, she faces another hurdle: proportional discovery under the recently revised Rule 26(b)(1), another instance of narrative-erasing procedure. Rule 26(b)(1), which sets the scope of discovery, has been amended specifically to add proportionality calculus, effective December 1, 2015.<sup>253</sup>

The Federal Rules of Civil Procedure are intended to be transsubstantive and assure the “just, speedy, and inexpensive” resolution of claims.<sup>254</sup> They are also supposed to treat cases equally.<sup>255</sup> But as Paul Stancil has noted recently, the “formal equality” promoted by the transsubstantive rules does not actually support substantive equality or procedural justice, and produces “predictably *unjust* outcomes in many categories of cases.”<sup>256</sup> The concept of transsubstantivity in procedure fails to take into account the growth of federal private rights of action, including in the civil rights context, and the extent of information disparities between parties in particular cases.<sup>257</sup> The substantive inequality the rules produce has significant effects on narrative. One example of this is the recent move to include “proportionality” in the definition of discoverable information in Rule 26(b)(1).

Prior to the 2015 amendments, the language of Rule 26(b)(1) defined the scope of discovery as follows: “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense. . . .”<sup>258</sup> With the proportionality language added to Rule 26(b)(1), the scope of discov-

<sup>252</sup> Even meritless litigation can have salutary consequences for development of the law. *Id.* at 1235 (“[M]eritless litigation can . . . prompt legal change, or provoke a broader discussion of legal norms.”).

<sup>253</sup> Order Amending Federal Rules of Civil Procedure, 305 F.R.D. 457 (2015).

<sup>254</sup> FED. R. CIV. P. 1.

<sup>255</sup> See Paul Stancil, *Substantive Equality and Procedural Justice*, 102 IOWA L. REV. 1633, 1690 (2017) (“[T]he decision to employ formally equal transsubstantive procedure seems to have been based upon the erroneous assumption that all federal civil cases were *and always would be* sufficiently ‘like’ along the relevant dimensions to justify a formally equal approach.”).

<sup>256</sup> *Id.* at 1635; see also *id.* at 1649 (“[A] procedurally just system must strike the appropriate balance among three potentially competing ends: accuracy, cost, and meaningful participation rights. These foundations of procedural justice are inconsistent with the formal equality norm embodied in the current transsubstantive rules.”).

<sup>257</sup> *Id.* at 1665, 1672–74.

<sup>258</sup> FED. R. CIV. P. 26(b)(1) (2010) (amended 2015).

ery is now as follows: “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case,” with proportionality determined by weighing “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”<sup>259</sup> Though proportionality is not new to the Federal Rules of Civil Procedure, its inclusion in the scope of discovery is novel.<sup>260</sup>

The addition of “proportionality” to the Rule 26(b)(1) definition of the scope of discovery grew out of a 2010 conference at Duke where participants concluded discovery had become too burdensome.<sup>261</sup> Accordingly, the Duke Conference Subcommittee developed proposed amendments to Rule 26 that were approved by the Advisory Committee and Standing Committee and submitted to the Judicial Conference for adoption by the Supreme Court.<sup>262</sup>

The move to include proportionality in the scope of discovery was not without objections. Objections to adding proportionality included: that it would favor only defendants, that it was subjective and could not be uniformly applied, and that it would defeat claims like employment and civil rights where plaintiffs labored under information asymmetry relative to defendants who were likely to possess all important information.<sup>263</sup>

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<sup>259</sup> FED. R. CIV. P. 26(b)(1).

<sup>260</sup> The concept of “proportionality” has been a part of the Federal Rules of Civil Procedure since 1983. *See* Order Amending Federal Rules of Civil Procedure, 461 U.S. 1097, 1103–04 (1983). Most recently, the proportionality standard and the factors that influence proportionality were part of Rule 26(b)(2)(c). *See* FED. R. CIV. P. 26(b)(2)(C)(i)–(ii).

<sup>261</sup> ADVISORY COMM. ON CIVIL RULES, REPORT OF THE DUKE CONFERENCE SUBCOMMITTEE, 82–84 (2014). *See also* Reda, *supra* note 217, at 2208 (“The 2015 amendments were animated by ongoing concerns over the cost and delay of discovery.”); Elizabeth Thornburg, *Cognitive Bias, the “Band of Experts,” and the Anti-Litigation Narrative*, 65 DEPAUL L. REV. 755, 758 (2016) (“The Advisory Committee claims that the 2015 discovery amendments arise out of the ‘Duke Conference,’ . . . at which panels addressed assumed issues of cost and delay. . . . But . . . the Duke Conference itself resulted, in part, from ongoing pressure from corporate America to amend the Federal Rules of Civil Procedure in ways that make it more difficult for plaintiffs to succeed.”).

<sup>262</sup> ADVISORY COMM. ON CIVIL RULES, *supra* note 261, at 79. The Subcommittee did recommend withdrawal of recommendations that would reduce the number of depositions, interrogatories, and requests to admit and that would reduce deposition length from seven to six hours. *Id.*

<sup>263</sup> *Id.* at 81. Summarizing the comments on the Rule 26 amendments, the Center for Constitutional Litigation concluded that the majority of legal academics and current and former federal judges opposed it. Letter from Valerie M. Nannery, Senior Litig. Couns., Ctr. for Const. Litig., to Hon. David G. Campbell, Chair, Civ. Rules Advisory Comm. 2–3 (Apr. 9, 2014). Opponents of the change to Rule 26 argued that adding proportionality to 26(b)(1) would elevate cost-benefit analysis to a position “co-equal to relevance” in discovery. CTR. FOR CONST. LITIG., Preliminary Report on Comments on Proposed Changes to Federal Rules of Civil Procedure 19 (2014). Objectors also argued the change would “creates classes of litigants, based on their resources and the amount in controversy, providing less discovery to

Nonetheless, the Subcommittee concluded that the change to include proportionality should be made. Although the “proportionality” language and elements were not new, moving the language into Rule 26(b)(1) no doubt reflected an attempt to satisfy the long-stated desire to “improve[]” discovery.<sup>264</sup> Chief Justice Roberts announced the changes in his 2015 Year End Report on the Federal Judiciary, explained that the amendment to Rule 26 would place “reasonable limits on discovery” by relying on “common[]sense.”<sup>265</sup>

Since the inclusion of proportionality in the scope of discovery, scholars have noted that the rule changes reflect the biases of lawyers who practice in corporate defense and complex litigation, including a mistaken belief that the costs of discovery are too high.<sup>266</sup> However, empirical evidence showed that in most cases, discovery costs were “both modest and proportional.”<sup>267</sup> Scholars have also noted that the revised standard will take time to understand and, in the meantime, will lead to discovery battles.<sup>268</sup> Battles over the new standard will also increase discovery costs.<sup>269</sup>

In addition to increasing costs and uncertainty, defining discovery in terms of proportionality threatens to obstruct narrative development of cases. Narratives are what grow the law, and events—constituent events and supplementary events, to use the language of narrative theorists—are what populate narratives. Thus, parties need access to information, gained through discovery, to develop narratives. As I have described, discovery enables future narratives in a case by translating events into the world of the lawsuit that are available for future treatments. Robust discovery enables narrative development, while restrictions on discovery limit the kinds of stories that can be told in a case.

As well, from a narrative standpoint, the problem with the proportional approach is that sometimes it is impossible to tell what is unnecessary or wasteful

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(and thus less protection of the rights of) those with fewer resources and low or no monetary damages.” *Id.* at 23.

<sup>264</sup> Indeed, the Subcommittee report concluded that “transferring the [former] Rule 26(b)(2)(C)(iii) factors to the scope of discovery” would “constitute a significant improvement to the rules governing discovery.” ADVISORY COMM. ON CIVIL RULES, *supra* note 261, at 82. The Subcommittee also concluded that the change to include proportionality in 26(b)(1) allowed “more proportional discovery” which would “decrease the cost of resolving disputes in federal court without sacrificing fairness.” *Id.* at 84–85.

<sup>265</sup> U.S. SUPREME COURT, *supra* note 4, at 6. Chief Justice Roberts’s Report reflects a skepticism of discovery’s necessity: “I cannot believe that many members of the bar went to law school because of a burning desire to spend their professional life wearing down opponents with creatively burdensome discovery requests[.]” *Id.* at 11.

<sup>266</sup> See Coleman, *supra* note 152, at 1017; Thornburg, *supra* note 261, at 759.

<sup>267</sup> Thornburg, *supra* note 261, at 759.

<sup>268</sup> Some scholars have suggested the proportionality amendments make no substantive changes to discovery. See, e.g., Andrew S. Pollis, *Busting Up the Pretrial Industry*, 85 *FORDHAM L. REV.* 2097, 2105–06 (2017). Others have argued that proportionality is appropriate. See Burbank & Subrin, *supra* note 242, at 401.

<sup>269</sup> Pollis, *supra* note 268, at 2106; see also *id.* at 2099 (“[J]udges have made it virtually impossible for parties with legitimate grievances but limited resources to have their day in court, especially against wealthier adversaries.”).

until after the fact. In reality, the proportionality factors such as “the importance of the discovery in resolving the issues”<sup>270</sup> are not always obvious; a telling detail may not appear valuable before it is discovered. Although events appear to have a teleological orientation when written into a narrative such as a summary judgment brief, at the time the story-events are still being developed through discovery, there is no way for the parties (or the court) to know which events are truly the constituent events on which the ultimate narrative depends, and which events are only supplementary, non-essential, events.

These amendments, with their professed underlying concerns about efficiency and waste, can give judges cover to limit discovery and narrative. The same narrative schema and cognitive biases that may affect judges’ sense of plausibility also threaten to affect their judgment of proportionality. The factors weighed in determining proportionality, which include “the importance of the discovery in resolving the issues,” invite subjectivity. Proportionality can also give well-resourced parties the ability to drive up the costs of discovery in a quest to pinpoint the imprecise notion of proportionality.<sup>271</sup> This would discourage claims and further repress narratives. In short, limiting discovery to only what is “proportional” will have a negative effect on narrative at the pretrial stage.

### 3. Settlement

As Owen Fiss argued more than thirty years ago in “Against Settlement,” increasing rates of settlement in civil trials means that numerous democratic values are threatened.<sup>272</sup> He wrote that settlement is “the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done.”<sup>273</sup>

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<sup>270</sup> FED. R. CIV. P. 26(b)(2)(C)(iii) (2014) (identifying list of factors to be considered when determining proportionality of discovery).

<sup>271</sup> See, e.g., David M. Katz, *Assessing the Federal Rules’ Proportionality Amendment: Why Proportionality Is Philosophically Proper, Yet Practically Problematic*, 67 SYRACUSE L. REV. 583, 599 (2017) (predicting that the proportionality amendment will lead to a “whole track of discovery motion practice”).

<sup>272</sup> Fiss, *supra* note 213, at 1085. See also Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 306–07 (2013) (expressing “increasing[] concern[s]” over rising rates of settlement because trial is “an important aspect of our democratic tradition, and preserve[s] the credibility of our civil justice system.”).

<sup>273</sup> Fiss, *supra* note 213, at 1075.

Fiss's concerns remain relevant today. There is a robust debate on the desirability of settlement.<sup>274</sup> And statistics on settlement are difficult to gauge.<sup>275</sup> But there is understanding that settlement is the dominant method of civil case disposition,<sup>276</sup> and that judicial involvement in settlement may create undue pressure on a party.<sup>277</sup> The Supreme Court's recent jurisprudence has also transformed arbitration, leading to increased challenges for "diffuse consumers, workers, and citizens attempting to deal with concentrated corporate power."<sup>278</sup>

Consider how settlement and other forms of alternative dispute resolution affect the narrative population of the civil justice system. When a case settles, particularly before summary judgment briefing, the contest of narratives phase is lost. The narrative contest is avoided: the two narratives that would have duled are erased, and with them the fodder for later narratives, for instance, on appeal. None of the supporting materials that can be used in narrative construction come to light, either. Specific details that make a rich legal narrative disappear. Further, many settlements are sealed.<sup>279</sup>

A settled case means no trial-level weighing that results in a narrative-containing opinion; no trial-level opinion means that no narratives from the case will eventually filter up to higher courts for narrative-weighing. No democratic branch of government hears the narratives about how law applies in a particular situation.

The rise of settlement affects not only the narrative in cases that settle—it affects narratives developed in non-settled cases and the narrative population of the civil legal system generally. As pressures on parties to settle increase, and as involved judicial management of settlement discussion becomes the norm, the way parties approach narrative construction in cases will change. If parties calculate that settlement is likely, they may choose not to develop the story-events of an eventual narrative; in other words, narrative details may never be

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<sup>274</sup> See, e.g., Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2663 (1995) (describing the "polarized debate about how disputes should be resolved").

<sup>275</sup> See Clermont, *supra* note 5, at 1953 (noting that "we do not know much about the actualities of settlement. . . . It is obvious, nevertheless, that the settlement rate is high.").

<sup>276</sup> See *id.* at 1956.

<sup>277</sup> See Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 339 (2008) ("Judges pressure settlement in individual cases and do so without much concern about a party's day in court."); Blake D. Morant, *The Declining Prevalence of Trials as a Dispute Resolution Device: Implications for the Academy*, 38 WM. MITCHELL L. REV. 1123, 1127 (2012) ("While settlement conferences are often voluntary, judges can exert extreme pressure that encourages parties to settle their disputes.").

<sup>278</sup> Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. REV. 462, 528 (2017).

<sup>279</sup> Generally, settlement is seen as reducing narratives. Judith Resnik, *supra* note 192, at 1818 ("[S]ome courts permit sealing [of settlements] . . . Moreover, stipulations of dismissal need not include underlying agreements."). Some scholars have recognized that certain settlements, appropriately structured, can give rise to narratives. See, e.g., Lahav, *supra* note 106, at 1680.

mined at all. That lack of development of narrative ingredients can affect even non-settled cases, resulting in cases presented to judges and juries that have not had their possible narratives developed thoroughly. When a case reaches a judge with an impoverished narrative, the resulting opinion will fail to contribute fully to the narrative development of the law.

### *B. Effects of Narrative-Erasing Procedure*

The effects of all these narrative-erasing procedures that I have described end up compounding one another.<sup>280</sup> Ultimately, the function of all these narrative drop-offs is that fewer and fewer narratives will ever reach summary judgment or trial. Even if a case survives the hurdles of narrative-erasing procedure, the case will be impoverished of narrative by the time it is ready for disposition by summary judgment or trial.

If a case is barreling towards an ending in which storytelling before a jury<sup>281</sup> or judge is not anticipated or the norm, attention to narrative details, possibility, and construction will lapse during the case's development—a kind of atmospheric effect. In the contest of narratives that the parties engage in before the court's decision, the parties themselves are stripped of narrative possibility. The burdens of plausibility pleading, the limited discovery process, and the settlement pressure will have depressed the narrative content in the case. When a case's narrative content is weakened, the contest of narratives in litigation is dulled. Accordingly, this contest ceases to be a true contest because the parties' narratives have not been fully developed.

The repression that narrative-erasing procedure creates extends beyond the consequences in one case. When narratives are erased in one case, both that case and any cases that may come after suffer. That is, cases that would have utilized prior-case narratives will have a shallow set of legal narratives from which to draw.

Ultimately, the law suffers when procedure erases narratives. Without narrative richness, the judge or finder of fact cannot make the best decision in a

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<sup>280</sup> See, e.g., Reinert, *supra* note 8, at 1785 (describing “a federal judiciary that has very little experience evaluating the merits of claims,” due to the combination of a decrease in trials and an increase in alternative dispute resolution, summary judgment, and secret settlement).

<sup>281</sup> Juries “hear less than one percent of civil cases in federal and state courts.” Suja A. Thomas, *The Missing Branch of the Jury*, 77 OHIO ST. L.J. 1261, 1262–63 (2016). Although the jury itself does not sanction a “winning” version of the narrative, the way a judge could in a trial or appellate opinion, the jury functions as an arbiter of narrative and chooses the winning side according to which side can tell the most convincing narrative. BURNS, *supra* note 115, at 22–26; Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 520 (1991). Several scholars have derided the reduction in trials generally as anti-democratic and threatening to underlying American values. See, e.g., Burbank & Subrin, *supra* note 242, at 401. (“This right to be heard, the core of due process of law, has been integral to democratic thought and institutions at least since the English Magna Carta in the thirteenth century.”).

particular case or in the long-term life of the law.<sup>282</sup> Narrative generally promises a richer catalog of law-stories. But without new stories or new narratives, new legal pathways cannot develop. Without new narratives, the law cannot adapt to the times to accommodate citizens.

Narrative-erasing procedure is especially troublesome because limiting the entry of stories into the law has an especially powerful impact on individuals from marginalized groups. The effectiveness of storytelling for bringing outsider perspectives into the law and the courtroom is well recognized.<sup>283</sup> The same concerns that gave rise to the legal storytelling movement in the 1980s and 1990s—namely, a need for women and people of color to be heard telling stories about their experiences at the hands of the law—still exist today. Because as a group judges are highly educated and very often members of a political or social elite, they may not share the same “stock stories” with the litigants from outsider groups who appear before them. But we know narratives can create empathy and persuade in a way that cold logic or impersonal data cannot.

Narrative-erasing procedure hampers the ability of litigants from marginalized groups to develop narratives that would increase empathy from the judge or jury, create cross-cultural communication, and ultimately result in greater understanding. Those repressed legal narratives do not simply disappear—they reappear as repeated cries for justice. Law’s openness to multiple stories has been recognized as a structural feature, one with profound democratic implications.<sup>284</sup> When the civil justice system’s procedures close out narratives, its very authority is at risk.

Finally, erasing narrative from litigation is concerning because the practice robs litigants of a chance to truly be heard. Our American legal system embodies the idea of the “right to be heard” and erasing narratives chips away at that right.

What has driven these changes to “narrative-erasing procedure”? Scholars have put forth a number of theories, including data-driven efficiency<sup>285</sup> and capture of the courts by a class of wealthy corporate litigants.<sup>286</sup> In addition to these causes, the rise of narrative-erasing procedure may be motivated by law’s

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<sup>282</sup> “Today’s opinion, making law, is tomorrow’s precedent; taken as a whole, a string of opinions represent a collective effort to come to terms with a problem of legal judgment in varying contexts.” WHITE, *supra* note 87, at 89.

<sup>283</sup> See, e.g., Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412–14 (1989); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparation*, 22 HARV. C.R.-C.L. L. REV. 323, 323–26 (1987).

<sup>284</sup> See WHITE, *supra* note 87, at 174.

<sup>285</sup> Coleman has argued that a commitment to data-driven efficiency has pushed the civil litigation system to favor non-trial resolution of cases and to be skeptical of plaintiffs. Coleman, *supra* note 216, at 1778. She has also argued that efficiency is too often associated with a focus on “simple costs,” while ignoring “a comprehensive set of costs that, although more difficult to quantify, are critical to an accurate measure of efficiency.” *Id.*

<sup>286</sup> Coleman has argued that procedural cases that benefit what she calls “the one percent” of elite litigators and their clients have influenced the law to change in a way that does not serve most of the parties engaged in civil litigation. See Coleman, *supra* note 152, at 1062.

general anti-narrative bias. Even if these changes can be ascribed to an attitude of benign neglect in the context of attempts to deal with caseloads in federal courts and the threat of baseless litigation, perhaps rule-makers and courts failed to consider the changes' effects on narrative because they are accustomed to ignoring narrative's presence in the law. Put simply, narrative-erasing procedure may be going unquestioned because no one is bothering to look.

#### IV. SOLUTIONS TO THE PROBLEM OF NARRATIVE-ERASING PROCEDURE

To properly value pretrial narratives and to combat this dangerous phenomenon of narrative-erasing procedure, lawyers, courts, and scholars should first recognize the function and value of pretrial narratives, as described above. This article also makes several recommendations to combat narrative-erasing procedure. Some of these recommendations call for action within the existing structures of the legal system and are a natural fit for lawyers, scholars, judges, and rule-makers. The article's final recommendation calls for lawyers and scholars to engage in narrative advocacy outside the court to expand the stock stories available for narrative use in pretrial litigation.

##### A. *Within the Legal System: Advocating for Narrative*

For lawyers, judges, and scholars concerned about the effects of narrative-erasing procedure, I propose a number of solutions to be pursued while acting within the traditional roles of lawyers and judges.

First, advocates, as part of their ethical duties to advance the law and the cause of justice, should use narrative in representation decisions wherever possible.<sup>287</sup> This advice is already put into practice by many excellent advocates, and is already advised by scholars of persuasion and advocacy.<sup>288</sup> Moreover, advocates should explicitly highlight the value of narrative when making procedural arguments. For instance, when arguing a motion to dismiss for failure to state a claim, the plaintiff's counsel could argue to the court that a variety of narrative frames could be applied to the plaintiff's factual assertions in the complaint—essentially de-biasing the court by pointing out the way narrative

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<sup>287</sup> BURNS, *supra* note 115, at 38–39 (noting that what a lawyer may tell about her case are limited by ethical rules, the need to maintain the credibility of the client's story, and the need to account for/accommodate other information that may arise in the case).

<sup>288</sup> Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 867 (1992) (“prescrib[ing] awareness of universalized [poverty] narratives and how lawyers should receive and translate client stories”); JoNel Newman, *Identity and Narrative: Turning Oppression into Client Empowerment in Social Security Disability Cases*, 79 ALB. L. REV. 373, 374 (2016) (encouraging lawyers to “focus on client narratives” when representing individuals with disabilities). See also sources cited *supra* note 148.



might be affecting him or her unconsciously. Legal scholars can also educate judges about the value of narrative.<sup>289</sup>

Second, I recommend that courts and rule-makers explicitly take narrative into account when altering procedural standards, and that courts adopt a narrative lens in even seemingly procedural decisions. Narrative-erasing procedures should only be adopted after explicitly considering the consequences for narrative and determining that the procedural change's benefits outweigh the potential justice-promoting values of narrative.

These entities should explicitly consider how their choices, embodied in decisions and rules, would affect the narratives that can be developed in pretrial litigation. In addition to other recognized policy goals like economic efficiency, the entities involved in making rules for pretrial litigation should promote the policy goal of encouraging narratives to flourish in the pretrial setting. Responsible entities include the U.S. Judicial Conference, its Standing Committee, and advisory committees.<sup>290</sup> In addition, the Supreme Court and lower courts issue decisions through the common law process that affect pretrial procedure and the development of narrative prior to trial.<sup>291</sup>

For instance, a court considering a decision that would affect pleading, or a rule-making body drafting a rule that would affect discovery, should weigh in its consideration questions such as: Will this rule demand a narrative that is

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<sup>289</sup> For examples of scholars highlighting the need for new narratives in particular kinds of cases, see Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 *YALE J.L. & FEMINISM* 75, 115 (2008) (noting that, although most "lawyers organize their cases around . . . stock characters and stories, seeking to situate their clients' narratives within the skeletons of past successes," a change in narrative and the resulting "failure to conform can be disastrous for litigants."); Keyes, *supra* note 203, at 211 (exploring "the complicated, multilayered ways in which . . . societal narratives about immigrants arise in immigration decisions and affect the exercise of discretion.").

<sup>290</sup> Under federal law, the United States Supreme Court has "the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts." 28 U.S.C. § 2072 (2011). The Court has delegated the work of the rulemaking process to committees of the Judicial Conference, the national policy-making body of the federal courts; the Judicial Conference "prescribe[s] and publish[es] the procedures for the consideration of proposed rules." *Id.* § 2073(a)(1). The Judicial Conference's rulemaking activities are overseen by its Committee on Rules of Practice and Procedure (also known as its "[S]tanding [C]ommittee"). *Id.* § 2073(b). Further, the Judicial Conference is authorized to, and does, appoint advisory committees to "recommend[] rules to be prescribed" by the Standing Committee. *Id.* § 2073(a)(2). The Standing Committee reviews recommendations of the advisory committees and "recommend[s] to the Judicial Conference rules of practice, procedure, and evidence and such changes in rules . . . as may be necessary to maintain consistency and otherwise promote the interest of justice." *Id.* § 2073(b). The Standing Committee holds open meetings, invites public comments, and issues written reports. *See, e.g.*, Brooke D. Coleman, *Recovering Access: Rethinking the Structure of Federal Civil Rulemaking*, 39 *N.M. L. REV.* 261, 279 (2009).

<sup>291</sup> *See* Stancil, *supra* note 255, at 1647 (noting that the Supreme Court "fulfills an ostensibly interstitial *interpretive* role, providing guidance and clarification as to the meaning and application of the" Federal Rules, making it "doubly appropriate to include the Court in the list of rulemakers involved in the process.").

more detailed or consistent than a party with a successful claim might be able to narrate at this point in a case? Will this rule force litigants into existing master-narratives, thereby either prejudicing a party due to the master-narrative's resonance, or foreclosing the opportunities to tell new stories and develop the law? Does this rule limit the kinds of stories that can be told later on in the case? More broadly, in making pretrial decisions, judges should also consider the effect on their judging of the master-narratives that are familiar to them. Considering the effect of master-narratives, a judge would weigh concerns such as whether the judge's experiences and his or her set of received stock stories might affect openness to a party's narrative.

Adopting this recommendation would require a paradigm shift for courts and rule-makers. Courts, for instance, do not often consider the effects of their decisions on narrative. However, in one instance, the Supreme Court has attended to the narrative consequences of one of its decisions—resulting in an opinion that demonstrates the kind of consideration that courts should be giving to narrative.<sup>292</sup>

*Old Chief v. United States* asked whether a defendant could concede a prior conviction for the record, or whether, on the other hand, the trial court could refuse the defendant's offer and allow the prosecution to present evidence of the full record of the prior judgment.<sup>293</sup> In *Old Chief*, Justice Souter, writing for the Court, held that refusing to permit the defendant to stipulate to his conviction would be an abuse of discretion in any case “in which the prior conviction is for an offense likely to support conviction on some improper ground.”<sup>294</sup>

Justice Souter's opinion clearly considered the effect that evidence of the prior conviction would have on the case's narratives. The opinion noted that “making a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness.”<sup>295</sup> A piece of evidence, such as the fact of a prior conviction, “has force beyond any linear scheme of reasoning, and as [multiple] pieces come together a narrative gains momentum . . .”<sup>296</sup> Souter recognized that the “persuasive power of the concrete and particular” is important to allowing the jury to construct a holistic narrative of the facts of the case; generalizations are typically not persuasive because a “syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it.”<sup>297</sup>

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<sup>292</sup> See *Old Chief v. United States*, 519 U.S. 172, 191–92 (1997); see also Brooks, *supra* note 2, at 21 (describing *Old Chief* as the “only” instance “in which the Supreme Court overtly recognizes what one might call the legal stakes of narrative in adjudication.”); John B. Mitchell, *Evaluating Brady Error Using Narrative Theory: A Proposal for Reform*, 53 *DRAKE L. REV.* 599, 610 (2005) (analyzing *Old Chief* as using “narrative theory as a framework to understand an aspect of the legal system (here, a jury trial”).

<sup>293</sup> *Old Chief*, 519 U.S. at 174.

<sup>294</sup> *Id.* at 191.

<sup>295</sup> *Id.* at 187.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 189.

Having considered the narrative power of evidence, the opinion concluded that the Rules excluded evidence of the prior conviction, and that such exclusion does not unduly hamper the prosecution's ability to create a coherent narrative: "Proving status without telling exactly why that status was imposed leaves no gap in the story . . . , and its demonstration by stipulation . . . neither displaces a chapter from a continuous sequence of conventional evidence nor comes across as an officious substitution . . ." <sup>298</sup> Souter's opinion thereby implied that direct evidence would have told a narrative *too* powerful to be permitted by the Rules of Evidence. Thus, there would be no countervailing narrative that could overcome the prejudice created by the jury learning the particulars of Old Chief's prior conviction. <sup>299</sup>

Similarly, in *Swanson v. Citibank, N.A.*, the Seventh Circuit explained its decision's effects on narrative when reversing the grant of a motion to dismiss under the *Twombly/Iqbal* plausibility standard. <sup>300</sup> In *Swanson*, a plaintiff alleging fraud and discrimination in violation of several statutes, including the Fair Housing Act, appealed the grant of a motion to dismiss. <sup>301</sup> Writing for the court, Judge Wood explained that the plausibility standard required "that the plaintiff must give enough details about the subject-matter of the case to present a story that holds together. In other words, the court will ask itself *could* these things have happened, not *did* they happen." <sup>302</sup> Judge Wood characterized the court's holding in terms of the narrative that the operative procedural rule required from plaintiffs. Although the Seventh Circuit did not announce a new procedural standard, the court's reference to narrative still illustrates how a court can explain a procedural ruling in narrative terms. <sup>303</sup>

The *Old Chief* and *Swanson* decisions are models for other courts considering procedural decisions that will have effects on narrative. Rule-makers, too, can take guidance from those models. When rule-makers and courts consider the effects of their procedural decisions on pretrial narratives, they can ensure that decisions properly reflect the value of narrative in pretrial litigation. <sup>304</sup>

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<sup>298</sup> *Id.* at 191.

<sup>299</sup> See Brooks, *supra* note 2, at 23 ("Souter appears to recognize what a few scholars within and without the legal academy have argued, that the law's general assumption that it solves cases with legal tools of reason and analysis that have no need for a narrative analysis could be mistaken").

<sup>300</sup> *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010).

<sup>301</sup> *Id.* at 402–03.

<sup>302</sup> *Id.* at 404.

<sup>303</sup> See Ralph, *supra* note 167, at 47 (explaining that opinion in *Swanson* called for complaints that embody narrative characteristics such as "narrative coherence—a story that holds together—and narrative correspondence—could the story have happened, does this represent an understanding about the way the world works").

<sup>304</sup> Justice processes can change "within a society as functions of time and circumstance," and "for justice to have meaning, it *must* reflect the social understandings common in a society and it must incorporate changes in those understandings over time." BENNETT & FELDMAN, *supra* note 115, at 21.

*B. Outside the Legal System: Public Narrative*

In addition to encouraging rule-makers and courts to recognize the value of pretrial narratives, this article recommends an approach that lawyers and scholars can use to combat narrative-erasing procedure: public narrative. Public narrative has great promise as a tool for working in the context of difficult procedural developments to incorporate the kind of narratives that help the law progress.

Its name is deceptively simple: public narrative is not just telling a story in public. Instead, it is a model for composing a narrative. Public narrative, as described in the work of Marshall Ganz, is a leadership art that uses storytelling to translate values into action.<sup>305</sup> The practice of public narrative has long been a tool of community organizers and social movement leaders.<sup>306</sup> For advocates and legal scholars working to combat narrative-erasing procedure, public narrative is a tool that can be used in op-ed pieces, articles, books, and other public statements.

A narrative that fits the model of public narrative has three components: it tells “a story of self, a story of us, and a story of now.”<sup>307</sup> According to Ganz, a story of self is focused on an individual identity: “Telling one’s story of self is a way to communicate our identity, the choices that have made us who we are, and the values that shaped those choices—not as abstract principle, but as lived experience.”<sup>308</sup>

Through the “story of us” part of the formula, the teller “link[s] individual threads into a common weave” by “‘nest[ing]’ the individual’s story in the ‘collective stories’ of a community, a movement, or a nation.”<sup>309</sup> The “story of us” should sound familiar to scholars of narrative, because the concept relies on something like stock stories; as Ganz writes, “Our cultures are repositories of stories. Stories about challenges we have faced, how we stood up to them, and how we survived are woven into the fabric of our political culture, faith traditions, and so on. . . . We . . . weave new stories from old ones.”<sup>310</sup>

Finally, through the “story of now” part of the formula, the teller “articulates the urgent challenge to the values that we share that demands action now.

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<sup>305</sup> Marshall Ganz, *Leading Change: Leadership, Organization, and Social Movements*, in HANDBOOK OF LEADERSHIP THEORY AND PRACTICE 527, 533, 537 (Nitin Nohria & Rakesh Khurana eds, 2010) [hereinafter Ganz, *Leading Change*]; see also Marshall Ganz, *Public Narrative, Collective Action, and Power*, in ACCOUNTABILITY THROUGH PUBLIC OPINION: FROM INERTIA TO PUBLIC ACTION 273, 274 (Sina Odugbemi & Taeku Lee eds., 2011) [hereinafter Ganz, *Public Narrative*].

<sup>306</sup> One of Ganz’s best-known studies is of the public narrative used by the California Farm Worker Movement. See MARSHALL GANZ, *WHY DAVID SOMETIMES WINS* (2009).

<sup>307</sup> Ganz, *Leading Change*, *supra* note 305, at 540.

<sup>308</sup> *Id.* at 541; see also *id.* at 540–41 (“A story of self communicates the values that call one to action.”).

<sup>309</sup> Ganz, *Public Narrative*, *supra* note 305, at 285.

<sup>310</sup> Ganz, *Leading Change*, *supra* note 305, at 543.

What choice must we make? What is at risk? And where is the hope?”<sup>311</sup> The story of now has “hope” as a key element, because it must offer a “credible vision of *how to get from here to there*.”<sup>312</sup>

In the past, public narrative has been used primarily to galvanize public opinion in support of a social movement, rather than as a legal tool. But public narrative as described by Ganz holds promise as a tool for combatting narrative-erasing procedure. Lawyers may be unfamiliar with the practice of public narrative. While a lawyer frequently serves as a public spokesperson for her client as an informal practice, she does so for the mostly tangential, if salutary, side effects—such as favorably influencing public opinion.<sup>313</sup> But it is important for advocates and scholars to consider the ways that engaging in public narrative can directly benefit their work on behalf of their clients.

Advocates and scholars should embrace the practice of public narrative as a means to achieve a primary benefit: systematic expansion to the kind of narratives available as “schema,” “stock stories” or “master narratives” for their clients. With a broader range of stock stories available even outside the context of the law, there will be a greater likelihood that the client’s narrative can fit a schema that can allow the client to surpass the hurdles of narrative-erasing procedure.

While the prospect of public narrative may raise skepticism, there is evidence that out-of-court narrative can have in-court effects. For instance, consider Justice Sotomayor’s dissent in *Utah v. Strieff*.<sup>314</sup>

In *Strieff*, the Court held that evidence obtained after an unlawful investigatory stop did not need to be excluded if, subsequent to the stop, an officer discovered a valid, pre-existing, and untainted arrest warrant.<sup>315</sup> The discovery of a warrant attenuates the connection between the evidence and the unlawful stop sufficiently to overcome Fourth Amendment objections.<sup>316</sup>

Justice Sotomayor dissented, stating her view that the Fourth Amendment should not permit the conclusion that “the discovery of a warrant for an unpaid

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<sup>311</sup> *Id.* at 544.

<sup>312</sup> Ganz, *Public Narrative*, supra note 305, at 287. Ganz illustrates this formula using President Obama’s 2004 speech to the Democratic National Convention. *See id.* at 282. In telling a “‘story of self,’” Obama focused on his father’s decision to study in America, his parents’ decision to marry despite prejudice, and their choice to name him “Barack,” or blessing, as a sign of faith in a tolerant America. *Id.* at 284. Obama’s “‘story of us’” concerned shared values: he described “choices made by the founders to begin this nation” and a long tradition of striving for equality, tying the audience to the shared tradition of striving for equality. *Id.* at 286. For the “‘story of now,’” Obama focused on details: stories of “specific people in specific places with specific problems,” using the audience’s “empathy” to remind them that all people have the capacity for change. *Id.* at 287–88.

<sup>313</sup> *See* Ronald D. Rotunda, *Dealing with the Media: Ethical, Constitutional, and Practical Parameters*, 84 ILL. B.J. 614, 614 (1996) (“Lawyers are often the most effective spokespersons before the media, because we are trained as advocates.”).

<sup>314</sup> *Utah v. Strieff*, 136 S. Ct. 2056, 2064 (2016) (Sotomayor, J., dissenting).

<sup>315</sup> *Id.* (majority opinion).

<sup>316</sup> *Id.* at 2063.

parking ticket will forgive a police officer's violation of [an individual's] Fourth Amendment rights."<sup>317</sup> She reasoned that the officer discovered the drugs in question "by exploiting his own illegal conduct": he "illegally stopped [the defendant] and immediately ran a warrant check," in a move "'calculated' to procure the evidence."<sup>318</sup>

In addition to her legal reasoning, Justice Sotomayor's dissent contains a powerful testament to the potential of public narrative, which she achieved by citing a series of non-legal narratives in a portion of the dissent written for herself alone (Justice Ginsburg joined the dissent as to the other arguments) and which she based on her own "professional experiences."<sup>319</sup>

Justice Sotomayor explained that "unlawful 'stops' have severe consequences much greater than the inconvenience suggested by the name."<sup>320</sup> She wrote about the arbitrariness of stops and the degradation that so often accompanies a stop.<sup>321</sup> She wrote about the indignity of a search of a bag or of a person.<sup>322</sup> And she wrote about the extreme harm done to people of color by the knowledge that one's "body is subject to invasion while courts excuse the violation of your rights," "that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged."<sup>323</sup>

For support, she cited non-legal narratives: W.E.B. DuBois's *The Souls of Black Folk*; James Baldwin's *The Fire Next Time*; and Ta-Nehisi Coates's *Between the World and Me*.<sup>324</sup> The narratives she cited arguably meet the definition of public narrative: that is, these non-legal narratives represent the stories of individuals ("a story of self") and connected them to the shared identity of the nation ("a story of us"), highlighting the importance of the narrative to the moment in which the writer was writing ("a story of now").

Justice Sotomayor's *Strieff* dissent presents a powerful example of a way that narratives that do not otherwise make it into the court system—for a variety of reasons—can still influence the justice system. This example demonstrates public narrative's influence on a court at the highest level. This article proposes that public narrative can have an impact on other levels of the court system—even in pretrial phases of cases that affect many more citizens. Trial court judges may be influenced by narratives in making determinations in pre-

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<sup>317</sup> *Id.* at 2064 (Sotomayor, J., dissenting).

<sup>318</sup> *Id.* at 2066.

<sup>319</sup> *Id.* at 2069.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at 2070 ("The officer may next ask for your consent to inspect your bag or purse without telling you that you can decline. Regardless of your answer, he may order you to stand helpless, perhaps facing a wall with your hands raised. If the officer thinks you might be dangerous, he may then frisk you for weapons.") (citations and internal quotations omitted).

<sup>323</sup> *Id.* at 2070–71.

<sup>324</sup> *Id.* at 2070 (citing W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* (1903); JAMES BALDWIN, *THE FIRE NEXT TIME* (1963); TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* (2015)).

trial in the same way that Justice Sotomayor was conscious of narratives in *Strieff*.

True, Justice Sotomayor's dissent is just that—a dissent. But in the tried and true phrase: “‘Today's dissent is tomorrow's majority opinion.’”<sup>325</sup> Sotomayor's reliance on so many narratives in her dissent is a powerful statement about the effect that public narrative can have on preserving narrative in the law.

Ultimately, the art of public narrative and its potential to influence the law deserves a more thorough treatment than this article can provide—it is a subject for another piece. But even this brief treatment of public narrative's power, as evidenced by Sotomayor's dissent in *Strieff*, demonstrates that it deserves attention as a tool for combatting narrative erasure.

#### CONCLUSION

As scholars of law and narrative have long recognized, narrative matters to the life of the law; it matters to our democratic value of ensuring citizens the right to have their stories heard; and it matters to the law's ability to adapt to changing times. Pretrial narrative practice deserves careful attention for its role in promoting the values that narrative supports in litigation. While recent procedural trends threaten to erase vital narratives from civil litigation, a greater attention to the function and value of pretrial narratives by judges, lawyers, and scholars can help ameliorate the dangers that narrative-erasing procedure poses.

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<sup>325</sup> See, e.g., Martha F. Davis, *Participation, Equality, and the Civil Right to Counsel: Lessons from Domestic and International Law*, 122 YALE L.J. 2260, 2262 (2013) (“The origins of the phrase ‘today's dissent is tomorrow's majority’ are obscure, but the phrase itself, a reference to the way in which the Supreme Court's jurisprudence evolves and even reverses itself over time, is ubiquitous.”).

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