# WRITING AS REMEDY: THE POSSIBILITIES OF COURT-GENERATED NARRATIVE IN "PERSONAL STATUS LITIGATION"

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ABSTRACT

Since the early 1980s, numerous commentators both inside and outside of academia have called attention to a staggering number of civil cases filed in federal trial courts arising under civil rights laws, particularly § 1983 and Title VII. Often, this observation is coupled with a complaint about excessive numbers of "frivolous" lawsuits. The perception has some basis in fact: statistics show that the number of private civil rights cases began growing exponentially in the 1960s, largely as a result of the Supreme Court's decision in *Monroe v. Pape*,[1] and that cases arising under § 1983 and Title VII currently account for about fifteen percent of all federal district court filings. Furthermore, plaintiffs in these cases are disproportionately unsuccessful compared to plaintiffs bringing other types of claims. These facts could be seen as confirming the hypothesis of a burgeoning mass of frivolous claims; however, § 1983 and Title VII cases spend more time on courts' dockets and consume more judicial resources than average cases, suggesting that they have enough merit to survive early attempts by defendants to have the cases dismissed.

In Part I of this paper, I use statistics and other scholarship to argue that, rather than a mass of frivolous civil rights cases, trial courts are instead faced with a mass of cases that have some merit, some basis in fact, but ultimately fail to satisfy all of the formal requirements for recovery under § 1983 or Title VII. The plaintiffs who bring these cases have often experienced action by someone in a position of relatively greater social prestige and power that calls into question their status as an equal member of society, entitled to an equal share of rights and dignity. At the same time, they often cannot meet all of the prerequisites to recover damages or obtain an injunction. They have experienced harm without a legally cognizable injury (in the sense of the Latin maxim *damnum absque injuria*). For this

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1. Monroe v. Pape, 365 U.S. 167 (1961).

reason I call this group of cases "personal status litigation": the plaintiffs come to court and fight what are often losing battles because they seek affirmation of their personal status in society from the court, society's designated articulator of public legal values. Their cases present a dilemma, in that the court is faced with an apparently inescapable choice between doing justice (at the expense of the consistency of the law and the democratic values served by the traditional separation of powers) and following the letter of the law (and reaching a seemingly harsh result).

The remainder of this paper is devoted to exploring a third way. The court can uphold the formal requirements of the law and also promote justice if it recognizes that its written opinion can, in itself, be a form of remedy. Part II discusses the role of the written opinion in Legal Process scholarship and other schools of thought. I argue that, beyond any instrumental value it may serve, the written opinion reflects deeply-seated norms of participation and representation in the adjudicative process. Furthermore, the literature dealing with litigants' experiences of adjudicative processes suggests that litigants place a great deal of value on the opportunity to be heard and to tell their story in the court's public forum. Finally, I discuss narrative scholarship and its central contention that storytelling promotes dignity and inclusiveness, particularly with respect to marginalized or "outsider" groups. The last section of this paper applies these insights to the problem of personal status litigation. I argue that courts can provide a "remedy" that is especially relevant to the reasons that personal status plaintiffs come to court by writing opinions that are attentive to and mirror plaintiffs' stories and experiences, giving voice to their narratives and affirming their status as equal, valued members of society.

## INTRODUCTION

Before Abram Chayes published *The Role of the Judge in Public Law Litigation*[2] in 1975, the term "public law litigation" had appeared only once in American law reviews.[3] Twenty years later, Chayes's article occupied sixth place on Fred Shapiro's study of the most cited—and presumably most influential—law review articles of all time.[4] The massive influence of Chayes's article was not attributable to the fact that the phenomenon he described was particularly new or that it had previously escaped the attention

2. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

3. Based on Westlaw search of pre-1975 American journals and law reviews.

4. Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 767 (1996). According to Shapiro's study, Chayes's article had been cited 645 times.

of the legal academy. *Brown v. Board of Education*,[5] the most famous example of "public law" or "structural reform" litigation, was more than 20 years old when Chayes's paper appeared, and it had engendered copious academic commentary (as well as copious amounts of litigation that followed in its footsteps).[6] Rather, Chayes's article was significant because he provided a valuable new perspective on what was already right beneath the legal community's collective nose. Chayes avoided the tendency—which still plagues legal academia—to overemphasize "doctrinal statement in appellate opinions," looking rather to "what the courts will do in fact" in the "vast bulk" of decisions.[7] From this new vantage point, Chayes was able to identify "the emergence of a new model of civil litigation" that centered on the "vindication of constitutional or statutory policies" vis-á-vis public institutions rather than private disputes between individuals.[8] The identification of a new and distinct subgroup of cases, characterized by common substantive legal principles, occupying common procedural postures, and seeking common goals, provided a valuable analytical framework that allowed Chayes to challenge traditional conceptions of the role of the judge as a passive referee and raise important questions about the nature of litigation, adjudication, and the adversarial process.

This paper seeks, albeit on a humbler scale, to achieve what Chayes's classic work achieved. Chayes looked to the on-the-ground realities of the federal court system to identify public law litigation as a distinct genre within American law as it was actually practiced. I argue in a similar vein that there exists a class of cases and litigants in the federal courts today that I group together under the heading of personal status litigation. Several commonalities, I argue, unite this group of cases and litigants. Substantively, their claims are generally brought in federal courts as federal question cases arising under either § 1983 or the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964.[9] What sets personal status cases apart from the mass of § 1983 and Title VII cases is that the plaintiffs' claims fall in a no-man's land of legal doctrine. They are not frivolous in the sense of being brought solely for cynical or opportunistic motives: the plaintiffs genuinely believe that they have been wronged and

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5. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

6. Laura Kalman's *The Strange Career of Legal Liberalism* contains a fascinating discussion of *Brown*'s impact in elite legal academic circles. LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 2 (1996).

7. Chayes, *supra* note 2, at 1281–82, 1287.

8. *Id*. at 1282, 1284.

9. *See* 42 U.S.C. § 1983 (2006) (providing a cause of action for deprivation of constitutional rights by individuals acting under color of state law); 42 U.S.C. 2000(e) (prohibiting employers from discriminating on the bases of race, gender, religion, or national origin).

their dignity injured, almost always by someone in a position of superior socioeconomic power, such as a police officer, a government official, or an employer. At the same time, their cases lack a formal element necessary to satisfy the doctrinal requirements of the statutes they invoke. Perhaps the constitutional right they claim to have been denied was not "clearly established" as the courts have defined that term,[10] the substandard care they received in the prison infirmary did not rise to the level of "deliberate indifference,"[11] or they cannot point to a similarly-situated employee who was directly comparable in all material respects other than race, gender, etc. who was treated more favorably by an employer.[12]

In the terminology of the common law, the cases are *damnum absque injuria*, "damage without [a legally] wrongful act."[13] In other words, the scope of legally cognizable harm—the Latin *injuria*—is more circumscribed than the hedonic injury to the plaintiff that we intuitively perceive as fellow humans. These are the types of cases that bring to mind Oliver Wendell Holmes's famous observation that "hard cases make bad law,"[14] cases that "present[] vivid factual settings whose very vividness [makes] proper resolution of the particular case especially salient even when that proper resolution would have negative effects on future and different cases."[15] The temptation—to which, one suspects, judges succumb more often than they admit—is to stretch the rigid boundaries of doctrinal law in order to achieve justice in the individual case. This is certainly not a new problem. The need to bridge the gap between the law's formal procedures and categories and the substantive justice of individual cases was one basis for the establishment of courts of equity in medieval England.[16] At the same time, we live in an era when opposition to "activist judges" is a rallying point for those who would circumscribe the power of the federal judiciary, and even the most liberal advocates of flexible legal interpretation must acknowledge that unbridled discretion in the hands of

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10. *See, e.g.*, Michael C. v. Gresbach, 526 F.3d 1008, 1013 (7th Cir. 2008) (holding that child welfare caseworker not entitled to sovereign immunity because worker's conduct violated right to be free from unreasonable searches).

11. *See* Farmer v. Brennan, 511 U.S. 825, 828 (1994) (holding that "deliberate indifference" requires conscious disregard of known substantial risks of serious harm).

12. This is a required element of a prima facie case of employment discrimination under the "indirect" method of proof first recognized by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 792–93 (1973).

13. BLACK'S LAW DICTIONARY 398 (7th ed.1999).

14. N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

15. Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 884 (2006).

16. Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 452–53 (1996).

judges threatens the intelligibility of our legal system, as well as democratic values such as predictability and the rule of law.

So what is to be done for the litigant who seeks vindication of her personal dignity and affirmation of her equal status as a member of society in a federal trial court but who cannot prove an injury formally cognizable under § 1983 or Title VII? The choice between simply tossing her out of court based on a strictly formalistic application of the statutes on the one hand, and achieving "justice" in a way that detracts from the comprehensibility and predictability of the law on the other, is an unappealing one. This paper proposes a third way. The key to a possible resolution of the conflict between the need to preserve the integrity of the law and the need to affirm the integrity of individual dignity, I argue, lies in the role of the court as a public forum and the role of the judicial opinion as a means of publicly communicating societal values and affirming the worth of individuals in the eyes of society. In other words, it is a cramped and overly formalistic view of courts that sees their remedial powers as limited to awarding damages or granting injunctive relief. Beyond the explicit power granted by statutes or established principles of common law, there is a "soft power" that arises out of the nature of courts as public fora that allow for a sort of dialogue between individuals and broader society, a dialogue different from that that takes place through other mechanisms of social expression such as elections.

In personal status cases, plaintiffs come to court seeking formal remedies, but they also come to tell a story. Even when sound jurisprudential principles make an award of monetary or injunctive relief impossible, the court can use its soft power to provide a "remedy" of sorts by receiving that story and reflecting it publicly in a written opinion that empathetically mirrors the plaintiff's story and assures her that society, through the court, recognizes her rights, dignity, and value as a human being. This status-affirming "relief" may even speak more directly to the need that prompted the plaintiff to initiate litigation than an award of damages, while at the same time preserving the doctrinal integrity of the law and democratic values that are served by what some commentators have called "judicial minimalism."[17] The court's opinion, then, *is* the remedy, a tool of social healing.

In Part I, I discuss the broad outlines of the genre of cases I have grouped under the heading of personal status litigation. I argue that these cases, in which plaintiffs assert § 1983 and Title VII claims that are formally lacking but are based on real personal traumas at the hands of

17. *See, e.g.*, Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454 (2000) (advocating for procedural minimalism to legitimize the Supreme Court's role in American deliberative democracy).

more socially-powerful individuals and institutions, comprise a significant portion of the docket in the federal district courts. If we regard the law and litigation as social phenomena and accept that the circumstances in which members of society interact with and experience the legal system are worthy of study, then we should be interested in these cases that otherwise may appear unremarkable from a doctrinal standpoint. In Part II, I discuss a variety of norms that are reflected in the structure of our legal system as well as public expectations regarding the elements of "legitimate" adjudication. At the end of Part II, I focus on the role of the written judicial opinion in adjudication. In Part III, I argue that in the large group of cases that I have identified where plaintiffs seek affirmation of their personal status by asserting formally flawed claims under civil rights statutes, trial courts should recognize that the written opinion itself can serve a remedial, healing function that simultaneously respects plaintiffs' sense of injury and broader systemic concerns about democratic lawmaking and the rule of law. Rather than simply ignoring the often compelling stories that accompany these cases or trying to conform the law to the equities of the case, judges should embrace the courts' roles as mouthpieces of public values and their institutional capacity to heal and empower through written opinions that reflect plaintiffs' experiences and affirm their status as citizens possessing equal rights and dignity.

## I. PERSONAL STATUS LITIGATION

### *A. Section 1983*

The statutory provision 42 U.S.C. § 1983, which lawyers, judges, and academics encounter frequently enough that they often refer to simply as "Section 1983," is undoubtedly a much more significant part of the federal legal landscape today than it was when it was enacted nearly 140 years ago. Today's § 1983 began its life as part of the Ku Klux Klan Act of 1871, which provided civil liability for "any person who, under color of any . . . statute, . . . custom, or usage of any State . . . [subjects] . . . any person . . . to the deprivation of any rights, privileges or immunities secured by the Constitution . . . ."[18] Passed by a Reconstruction-era Congress, the Act sought to provide a federal source of protection against the terrorism and violence of the Klan, which was directed not only against newly-emancipated blacks but also white Republicans present in the South during

18. Ku Klux Klan Act, ch. 22, § 17 Stat. 13, 13 (1871).

Reconstruction.[19] The original Act must be understood in light of the realities of the post-Civil War South, where, in the words of one member of Congress:

> Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection.[20]

Commentators have observed, in light of the specific historical context of the Act, that it was intended to address "an enormously important, but nevertheless limited, problem."[21] Yet it is striking today, taking the text of the Act in conjunction with the quote above, that from its inception § 1983 has been concerned with the effective *silencing* of individuals by state officials and state courts and has responded by providing a specific federal forum in which they can be heard and vindicate their equal entitlement to the rights, privileges, and immunities of American citizenship. It is not too much of a stretch to say that from the beginning § 1983 has implicitly recognized that an individual's status as a citizen—her equal rights and personhood—is inseparably linked to the individual's ability to assert and vindicate this status to the public at large in a public forum: the court.

Despite its latent potential, § 1983 did not take on its current prominent role in the world of federal litigation until more than ninety years after its enactment. The Supreme Court's 1961 decision in *Monroe v. Pape*[22] served as the catalyst for the dramatic growth of § 1983 litigation over the last fifty years. After the enactment of the Ku Klux Klan Act in 1871, courts had consistently given a narrow interpretation to the phrase "under color of" state law, holding that the Act, and later § 1983, provided a remedy only against actions that were actually authorized by state law.[23] In *Monroe*, the Court vastly expanded the practical scope of § 1983's application when it held that "[m]isuse of power, possessed by virtue of state law and made

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19. *See* Robert J. Kaczorowski, *Reflections on* Monell*'s Analysis of the Legislative History of §1983*, 31 URB. L. 407, 408–09 (1998) (arguing Monell made numerous factual and interpretative errors in his examination of § 1983's legislative history).

20. CONG. GLOBE, 42d Cong., 1st Sess., at 78 (1871), *quoted in* Theodore Eisenberg, *Section 1983: Doctrinal Foundations and Empirical Study*, 67 CORNELL L. REV. 482, 484–85 (1982).

21. Eisenberg, *supra* note 20, at 485.

22. Monroe v. Pape, 365 U.S. 167 (1961).

23. Michael Wells, *The Past and the Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules*, 19 CONN. L. REV. 53, 55 (1986).

possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[24] In other words, the Court's interpretation of "under color of" state law shifted the focus from the defendant's actual legal authority to act to the apparent authority and power the defendant wielded when "clothed with the authority" of the state. This doctrinal shift opened the federal courthouse doors to "personal injury-based claims that resemble common law torts . . . "[25] against defendants acting under the newly-expanded "color of state law."

As Christina Brooks Whitman observes, "[i]t is conventional, and correct, to describe *Monroe* as clearing the way for the striking increase in § 1983 litigation" that has taken place since the early 1960s.[26] First, as discussed above, the *Monroe* decision shifted much of the focus of § 1983 litigation from the nature of the allegedly violative act (i.e., whether or not it was officially authorized under state law) to the identity of the actor (i.e., whether he was cloaked with the authority of state law, regardless of whether his actions were authorized). It also shifted the emphasis from the official relationship between the defendant and the state to the practical power relationship between the defendant and the plaintiff. This focus on the defendant and his (at least apparent) state authority vis-á-vis the plaintiff opened the door to a new class of claims based on acts that were essentially common law torts. These claims took on a constitutional cast only by virtue of the state power wielded by the putative tortfeasor: for example, claims for false arrest, unlawful trespasses and searches, and use of excessive force generally fall under the Fourth Amendment, while other physical injuries may be violations of a liberty interest protected by the Due Process Clause when they are inflicted by a state actor.[27]

Another less obvious ramification of *Monroe*'s expansion of the substantive scope of § 1983 was a broadening of the ranks of potential plaintiffs who would have standing to assert constitutional tort claims. As Whitman explains, by allowing plaintiffs to assert tort-like claims against state officials under § 1983, even when state common law tort remedies were available, the *Monroe* court made wholly retrospective constitutional tort litigation possible for the first time.[28] Although § 1983 plaintiffs had asserted retrospective claims before, their cases had always been anchored

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24. *Monroe*, 365 U.S. at 184 (quoting U.S. v. Classic, 313 U.S. 299, 326 (1941)).

25. Michael Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 CHI.-KENT L. REV. 617, 620 (1997).

26. Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 664 (1997).

27. *See* Wells, *supra* note 25, at 621–22, 632 (reviewing a series of cases expanding the realm of "constitutional torts").

28. *See* Brooks Whitman, *supra* note 26, at 664.

by a claim for prospective relief. As a result, "the only people who could even attempt to challenge government action in court were those who were subject to continuing government control, either through government-initiated litigation such as criminal prosecutions or through ongoing conduct of the sort that would support a request for injunctive relief."[29] Even if, as Whitman notes, claims based on completed official actions were not exactly a novelty in federal courts, as a practical matter the ability to make freestanding retrospective damage claims based on tort-like actions by government officials greatly expanded the potential pool of § 1983 plaintiffs in the wake of the *Monroe* decision.

At least as early as the 1980s, there was a widespread perception that the § 1983 litigation that followed in the wake of *Monroe* was growing uncontrollably. In 1981, Supreme Court Justice Powell and future Supreme Court Justice O'Connor each wrote separately about the issue of burgeoning § 1983 litigation.[30] Theirs were far from the only judicial voices expressing concern about the volume of litigation unleashed by the doctrinal innovations of *Monroe* and its progeny.[31] Whatever other motivations the critics may have had, their concerns were supported by a real and staggering increase in case filings. Setting aside prisoner litigation, between 1961 (the year in which *Monroe* was decided) and 1979, the number of § 1983 claims in federal district courts increased from 296 to 13,168—an increase of approximately 4,400%.[32] In 1976, nearly one-third of all "private" federal question suits were civil rights lawsuits against a state or local official.[33] This figure does not distinguish between § 1983 and other civil rights cases; however, as Whitman notes, "virtually all civil rights cases filed against states in federal court include a § 1983 claim."[34] Theodore Eisenberg, who has conducted invaluable empirical research on § 1983 litigation, argues that the perceived "explosion" in the wake of *Monroe* is overstated.[35] However, even Eisenberg's study of cases filed in the United States District Court for the Central District of California in the mid-1980s

29. *Id*. at 667.

30. *See* Parratt v. Taylor, 451 U.S. 527, 546, 553–54 n.13 (1981) (Powell, J., concurring) ("The statute with a clearly understood and commendable purpose no longer is confined to deprivations of individual rights as intended in 1871."); Sandra D. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 815 (1981).

31. *See* Eisenberg, *supra* note 20, at 524–25 nn.178 & 180 (collecting contemporary expressions of judicial concern over § 1983).

32. Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 6 (1980).

33. *Id.*

34. *Id.* at 6 n.9.

35. Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 642–43 (1987).

showed that nearly 50% of all civil rights cases were based on § 1983, with the rest being primarily Title VII employment discrimination claims.[36]

Perhaps because the legal establishment's concern with the proliferation of § 1983 litigation appears to have peaked in the early- to mid-1980s, detailed statistics from more recent years are harder to come by. But the precise number of cases is not particularly important so long as we recognize, qualitatively, that these cases comprise a very substantial portion of all federal civil litigation. This remains the case today. According to the Federal Judicial Center, "civil rights" filings in U.S. district courts represented 31,756 cases out of a total of 257,507 filed in 2007 (12.3%, or about one-eighth).[37] In a court serving a major urban center, such as the U.S. District Court for the Northern District of Illinois (located in Chicago), this proportion rises to 1614 to 7620 (21.2%).[38] If Eisenberg's figures from the 1980s remain true today, § 1983 should account for approximately half of these totals, or ten percent of all civil cases in districts like the Northern District of Illinois.[39] Looking at raw numbers, this ratio would mean about 16,000 cases per year.

The numbers we have show that § 1983 cases make up a massive portion of federal court civil litigation. Of course, that is not news to legal academics, much less anyone who has been involved in the administration of the courts as a judge or law clerk. Beyond the sheer volume of cases, § 1983 claims consume proportionally more judicial resources on average than the standard non-civil rights case: they spend more time on the docket, require more discovery and are more likely to require a hearing.[40] But for my purposes what is more significant than raw numbers are the characteristics common to a large subset of these claims.

First, there is the power dynamic. As the statute's requirement of action "under color of" state law would suggest, defendants in § 1983 cases generally occupy positions of authority and socioeconomic power vis-á-vis the plaintiffs. In Eisenberg's study, more than half of non-prisoner constitutional tort claims were brought against police (37%) and employers (16%).[41] The addition of due process claims, which are necessarily based on the actions of governmental authorities, brings the percentage to two-

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36. *Id*. at 669–70.

37. FEDERAL JUDICIAL CENTER, JUDICIAL CASELOAD PROFILE REPORT FOR ALL UNITED STATES DISTRICT COURTS (2007), *available at* http://www.uscourts.gov/cgi-bin/cmsd2007.pl.

38. FEDERAL JUDICIAL CENTER, JUDICIAL CASELOAD PROFILE REPORT FOR THE NORTHERN DISTRICT OF ILLINOIS (2007), *available at* http://www.uscourts.gov/cgi-bin/cmsd2007.pl.

39. *See* Eisenberg & Schwab, *supra* note 35, at 669–70 (stating that nearly 50% of civil rights litigation in his study involved § 1983 claims).

40. *Id.* at 672–75.

41. *Id.* at 690.

thirds.[42] On the defendant's side, then, we typically find individuals with some type of social or economic "power." At the same time, as Daryl Levinson has noted, the victims of paradigmatic constitutional torts such as those based on overly aggressive police action tend to be relatively disadvantaged individuals who lack political or economic influence and are unlikely to be effectively organized.[43] A similar power dynamic is present in cases brought by employees against employers, the next largest group of cases in Eisenberg's study, and in cases involving alleged denials of due process. We may also infer a lack of power and influence among § 1983 plaintiffs from the fact that, in Eisenberg's study, they were less likely than average litigants to be represented by counsel.[44] Therefore, it is not a stretch to assert that, in general, the vast majority of § 1983 cases involve claims by a plaintiff in a position of inferior socio-political power against a relatively more powerful defendant. As Dauenhauer and Wells have written, "most constitutional tort plaintiffs are the kinds of people who get beaten up by the police, prosecuted on dubious grounds, subjected to harsh prison conditions, or fired for what their bosses consider insubordinate speech."[45]

A second commonality lies in the types of claims they bring. As discussed above, the Supreme Court's decision in *Monroe* (along with its decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[46] which found an implied § 1983-like cause of action against defendants acting under color of federal law) increased the volume of § 1983 claims by a factor of 40 because it allowed suits based on conduct that would be actionable under state common law tort principles: assaults and batteries, trespasses, malicious prosecutions, and so on. While much commentary has focused on the tort aspect of these "constitutional torts," it is the "constitutional" dimension that ties them to more traditional § 1983 claims and brings them within the ambit of § 1983. As Christina Brooks Whitman has argued:

> [I]t is true that many unconstitutional acts do damage by causing physical and emotional injuries of the sort traditionally protected by tort law. Unlike many personal injury actions, however, constitutional wrongs are not only, or even primarily, subject to

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42. *Id.*

43. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 378–79 (2000).

44. Eisenberg & Schwab, *supra* note 35, at 680–81.

45. Bernard P. Dauenhauer & Michael L. Wells, *Corrective Justice and Constitutional Torts*, 35 GA. L. REV. 903, 910 (2001).

46. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

> legal sanction because of the character of the injuries they inflict. It might be closest to the truth to say that constitutional damage actions are like the classic intentional torts that protect the dignity of the person of the plaintiff by specifying limits on the defendant's potentially intrusive conduct. . . . [T]he substantive heart of the case is the special power of the government to do harm, rather than the quality of the plaintiff's injury.[47]

In other words, even in the most tort-like § 1983 action, the plaintiff necessarily alleges something more than a mere tort: she alleges an affront to her dignity that takes on its constitutional mien because the defendant is cloaked with governmental power. As Whitman observes, the use of the federal forum to affirm the plaintiff's status as a member of society with equal dignity and value "best justifies the existence of a federal cause of action where a state tort remedy exists."[48] This facet of § 1983—the invocation of a federal forum to vindicate equality and personhood that have been denied by government officials—has been present from the statute's inception in 1871.[49]

There is one more characteristic of § 1983 litigation that is important to defining the category of "personal status litigation" I am proposing. Eisenberg's empirical research indicates that, as compared to non-civil rights litigants, § 1983 constitutional tort litigants have a disproportionately low rate of success, prevailing less often at trial and receiving fewer monetary settlements.[50] Moreover, successful civil rights plaintiffs receive smaller awards than other types of plaintiffs.[51] One possible explanation for these facts is that § 1983 plaintiffs simply bring more frivolous claims. Undoubtedly many people in the courts and in the public who are concerned with burgeoning judicial caseloads would accept this explanation. However, the claim that a relatively greater percentage of § 1983 lawsuits are frivolous is undercut by Eisenberg's research indicating that constitutional tort cases, on average, consume more judicial resources because they require more discovery and more hearings.[52] If it were true that § 1983 claims are generally more frivolous, one would expect that they would be dismissed more quickly, particularly because § 1983 defendants have a qualified immunity defense that protects them not only from

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47. Brooks Whitman, *supra* note 26, at 669.

48. Whitman, *supra* note 32, at 52.

49. Ku Klux Klan Act, ch. 22, 17 stat. 13, 13 (1871).

50. Eisenberg & Schwab, *supra* note 35, at 679–80.

51. Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1580 n.62 (1989).

52. Eisenberg & Schwab, *supra* note 35, at 674–75.

liability, but also from litigating the suit itself.[53] In context, therefore, the fact that § 1983 lawsuits tend to linger in the court system cuts against the frivolousness argument. The alternative explanation is that a significant number of § 1983 cases exist in a no-man's-land between a complete lack of merit and success on the merits. These are cases brought by plaintiffs who have had *something* happen to them that motivated them to sue, who have enough of a case to avoid outright dismissal at an early stage, but apparently cannot satisfy all of the formal requirements for recovery under the statute. To return to the Latin maxim I invoked earlier, their cases are *damnum absque injuria*—harm without injury, wrong without remedy.

These, then, are the three characteristics of the body of § 1983 cases that I group together under the name of "personal status litigation": (1) there is a power disparity between a defendant in a position of authority and strength and a comparatively weaker plaintiff; (2) there is a constitutional aspect of the case that implicates the plaintiff's status as a member of society with an equal entitlement to rights and dignity; and (3) there is a sufficient basis in fact and law for the plaintiff's claim to survive early attempts at dismissal but not enough for the plaintiff to succeed on the merits.

### *B. Title VII*

Much of what was said above in connection with § 1983 litigation applies with equal force to employment discrimination cases brought under Title VII, which prohibits employment discrimination on the basis of "race, color, religion, sex, or national origin."[54] The first point of linkage between Title VII and § 1983 is substantive: just as § 1983 was originally enacted to provide a federal forum and a federal remedy for plaintiffs whose equal entitlement to the rights guaranteed by the Constitution was denied by officials cloaked with state power, Title VII was enacted pursuant to § 5 of the Fourteenth Amendment,[55] which provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[56] Although they differ in terms of the rights they protect and who they protect those rights from, § 1983 and Title VII reflect common norms of equal treatment (whether at the hands of state officials or employers) and

53. *See* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (holding that the Attorney General is not entitled to absolute immunity, but qualified immunity, because the actions did not violate clearly established law).

54. 42 U.S.C. § 2000e-2(a)(1) (2006).

55. Fitzpatrick v. Bitzer, 427 U.S. 445, 447 (1976).

56. U.S. CONST. amend. XIV, § 5.

protection from the abuse of power, be it the *de jure* power of state officials or the *de facto* power wielded by employers over employees.

Beyond shared substantive concerns with equality and abuse of power, § 1983 and Title VII litigation have similar real-world characteristics. Like § 1983 litigation, Title VII cases make up a conspicuous portion of federal trial court dockets. In Eisenberg's study of § 1983 litigation, he found that half of the cases classified as "civil rights" cases contained constitutional tort claims, while the other half was largely comprised of employment discrimination claims.[57] Applying this ratio to the Federal Judicial Center's caseload reports for U.S. District Courts in 2007 suggests that Title VII cases may represent between six and ten percent of all cases filed in federal court.[58] Writing in 2001, Michael Selmi estimated the number of Title VII cases filed in federal courts at about 20,000 per year,[59] which, taken as a percentage of the 2007 total of 257,507 filings, yields a figure of 7.8%, suggesting that the roughly 1:1 ratio between constitutional torts and Title VII cases that Eisenberg identified in the 1980s remains true today. As with § 1983, Title VII litigation has been identified in academic and lay commentary as a source of excessive and frivolous litigation.[60]

Like § 1983 litigants, plaintiffs in Title VII employment discrimination cases are disproportionately unsuccessful. Contesting the conventional wisdom that it is "too easy" to recover in employment discrimination cases, Selmi notes that employment discrimination plaintiffs are more likely than other civil litigants to have their cases thrown out on pretrial motions.[61] Eisenberg's study of civil rights litigation showed that employment discrimination plaintiffs succeed in about 22% of trials,[62] compared to a success rate of about 50% in insurance and other civil litigation.[63] On a

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57. Eisenberg & Schwab, *supra* note 35, at 669. "[O]nly 50.7% of the Administrative Office's 'civil rights' or 'prisoner civil rights' cases actually contain constitutional tort claims. The rest are actions based on a variety of other statutes, primarily Title VII." *Id.*

58. *See* FEDERAL JUDICIAL CENTER, JUDICIAL CASELOAD PROFILE REPORT FOR ALL UNITED STATES DISTRICT COURTS (2007), *available at* http://www.uscourts.gov/cgi-bin/cmsd2007.pl (displaying figures based upon 31,576 "civil rights" cases out of a total of 257,507 (12.3%) multiplied by half (in all district courts) and 1,674 "civil rights" filings out of 7,620 total cases in the Northern District of Illinois (21.2%) multiplied by half).

59. Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 557–58 (2001).

60. *See id.* at 557 n.8 (collecting sources discussing excessive nature of Title VII litigation).

61. *Id.* at 559–61. According to Selmi's numbers, employment discrimination cases are 22% more likely to be resolved on pretrial motions than insurance cases (15.85% versus 12.98%) and 68% more likely to be resolved on pretrial motions than personal injury cases (15.85% versus 9.4%), with 98% of these pretrial resolutions being in favor of defendants.

62. Eisenberg, *supra* note 51, at 1588.

63. Selmi, *supra* note 59, at 560 n.18 (collecting sources showing roughly 50% overall success rate).

national level, Eisenberg found that employment discrimination plaintiffs were almost 28% less likely to prevail than other tort plaintiffs.[64] An even more striking finding of Eisenberg's study is the abysmal 19% success rate for employment discrimination plaintiffs in cases tried before a judge; only prisoner litigants were less successful.[65] Overall, employment discrimination plaintiffs were more than twice as likely to prevail before a jury than before a judge.[66]

As I argued above in the context of § 1983 litigation, a larger-than-average proportion of frivolous lawsuits among Title VII cases might explain a greater tendency towards resolution on pretrial motions to dismiss or to dismiss for summary judgment, but would not explain the dramatically lower rate of success in cases that make it to trial. Selmi, noting plaintiffs' dramatically lower rate of success in cases tried before judges, argues that judicial hostility to employment discrimination claims may be to blame.[67] David Benjamin Oppenheimer, in his study of jury verdicts in California employment cases, finds evidence of judicial and juror bias against minority and female plaintiffs, particularly those over 40 years of age.[68] In a somewhat more nuanced analysis, Eisenberg suggests that factors such as defendants' greater incentive to invest resources in defending cases (in light of the prospect of multiple lawsuits arising out of a single action or policy) and plaintiffs' inflated expectations of success at trial may contribute to lower success rates in employment discrimination cases, though he does not reject the possibility of systemic bias.[69]

While all of these factors may contribute to the lower rate of success in employment discrimination as compared to other forms of civil litigation, none would explain why plaintiffs are so much more likely to succeed before a jury than in a bench trial. Defendants with significant incentives to win at trial are no more likely to end up before a judge than a jury, and neither are plaintiffs and lawyers with inflated expectations of success. Indeed, plaintiffs hoping for a major payday would likely demand a jury trial in light of the general perception that juries are more likely to grant large damage awards. Furthermore, assuming that we accept Benjamin's conclusions about the relative success rates of different types of employment discrimination plaintiffs, are we prepared to conclude that

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64. Eisenberg, *supra* note 51, at 1592.

65. *Id.* at 1591.

66. *Id*.

67. Selmi, *supra* note 59, at 561.

68. David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 517, 566 (2003).

69. Eisenberg, *supra* note 51, at 1581–84.

judges are inherently *more* biased against minorities, women, and plaintiffs over 40 than juries? Perhaps they are merely more cynical about the merits of employment discrimination cases, more inclined to view them as frivolous due to the volume of cases they see. But in order to account for the vast difference in plaintiffs' success rates, judges would also have to be less able to overcome their prejudices and less able to apply the law even-handedly than juries. Both prongs of this provocative hypothesis—that judges are more biased and that judges are less able to control their biases—are probably impossible to prove, highly problematic to accept, and at odds, I would venture to state, with the experiences of most people who have interacted with federal judges.

I propose a simpler and more likely explanation: judges, acting consistently with rule-of-law values, are more inclined to apply the formal letter of the law in a rigorous fashion, even in cases where this may offend their personal sense of the equity or justice of a given case. Juries are more likely to fudge the formal requirements of the law in order to find in favor of sympathetic plaintiffs. Taken as a whole, the statistics suggest that, like § 1983 plaintiffs, a large proportion of Title VII plaintiffs find themselves in a legal no-man's land. They have claims that are substantial enough—in terms of the relief sought and the merits of the case—to survive pretrial motions to dismiss or for summary judgment and make it to trial, but have lower than expected rates of success on the merits. The nature of their claims may tend to make them sympathetic victims whose personhood and equal dignity have been denied by a relatively more powerful employer on the basis of race, sex, religion, or national origin, which may explain the discrepancy between jury and bench trial success rates. There is *something* there that allows them to get to trial, some basis in fact, some injustice, but not enough to sustain a case on the merits in light of the formal categories and requirements of the law. There is hurt, but no remedy—at least within the letter of the law, which juries may be somewhat less likely to observe than judges.

To summarize this section, I have tried to show through statistics and rational inference that there exists a large group of cases filed in federal district courts under § 1983 and Title VII that fits a common profile. First, there is a common power dynamic. These cases are brought by plaintiffs who are in a position of inferior socio-political power to the defendants who have allegedly wronged them. The plaintiffs are private citizens—workers, criminal suspects, sometimes prisoners. The defendants are public officials with official authority—police officers, prison guards, employers, or supervisors. These power dynamics are a natural reflection of the substantive provisions of § 1983 and Title VII, which require action under

color of state law or an adverse employment action, respectively. Substantively, whether they are brought under § 1983 or Title VII, the cases deal with action by a person or persons in a position of power that offends fundamental notions of human dignity and equality, whether they are embedded in the Constitution itself or in Title VII, which was enacted to enforce the equality norms of the Fourteenth Amendment. Practically, the numbers suggest that a very significant proportion of these cases have some merit, enough to justify the denial of dispositive pretrial motions, but not enough to warrant recovery at trial. They are "hard cases" in the sense that there is some substance to the plaintiff's claim, some injustice or harm, but not enough to satisfy the rather stringent formal requirements imposed by § 1983 and Title VII jurisprudence. These are the characteristics of personal status litigation, in which plaintiffs come to court to redress a wrong inflicted by someone in a position of superior power in a way that calls into question their personhood and dignity. Many of their claims are doomed to fail, yet they persist, in part because they seek more than money damages or injunctive relief; they seek affirmation of their status as an equal member of society in the courtroom, a space designated by society for the articulation of public values.

We should care about these cases both because they are numerous in our court system and because, as the discrepancy between plaintiffs' success rates before juries and judges suggests, they are "hard cases" in which the decisionmaker's commitment to the rule of law through the application of established rules to the facts may be challenged by her sense of the equities of the case and her desire to do substantial justice. There is the desire to make the case "fit," to stretch the boundaries of established law in order to accommodate the facts of the case and achieve a just result. This is not the place for a thorough discussion of the proper level of constraint on judicial decisionmaking processes. It is obvious that the abandonment of established law in order to "do justice" is highly problematic, not only from the standpoint of the rule of law and the separation of powers between legislature and judiciary, but from the standpoint of the law itself, which, as Sunstein argues, cannot achieve "truth" per se, but can achieve "principled consistency" through analogical reasoning.[70] Deciding cases based on an intuitive sense of justice rather than reasoning from established law raises the specter of results that are neither principled nor consistent.

While unfettered judicial discretion to "do justice" is clearly not an option, we must appreciate the dilemma that the legal decisionmaker faces

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70. *See* Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 747, 773–77 (1993) (arguing the legal profession should not abandon the use of analogical reasoning because it is the best methodology for evaluating and changing the law).

each time she is faced with this conflict between the demands of justice and the formal categories of the law. The situation is particularly acute when the case involves such core principles as the right to be free from abusive or arbitrary conduct by government officials or the right to be judged in the workplace based on ability rather than race, gender, or religious beliefs—principles that go the core of equality and human dignity as those concepts are generally understood in our society. This is the problem that is posed by a significant number of the § 1983 and Title VII cases filed in federal district courts. In the following sections, I will argue that there is a "middle way" for judicial decisionmakers that accommodates the court's need to do justice and affirm, as an oracle (so to speak) of public values, a commitment to personhood, dignity, and equality, while at the same time preserving the principled consistency and doctrinal integrity of the substantive law. The key to this middle way is a product of the court that, I argue, is often underestimated and viewed in a strictly utilitarian light: the judicial opinion. Beyond merely creating a record for appeal, keeping the court honest, and giving reasons for action or inaction, I believe that the court's opinion can itself be a form of remedy and a tool of healing. Before I fully develop this point, however, I must first discuss the court's diverse functions—law-maker, arbiter of disputes, and public forum—and their relation to the written opinion.

## II. COURTS: ADJUDICATION, DISPUTE RESOLUTION, LAW-MAKING, AND THE WRITTEN OPINION

The question is deceptively simple: What do courts *do*? In fact, the question raises a set of subsidiary questions: do we want to know what courts actually do, or what they should do? Are we expecting an answer from the point of view of some abstract notion of justice, or logic, or the constitutional order? Are we asking as practitioners, admirers, and connoisseurs of the legal system (one might even say "law stylists"[71])? Or are we asking, in the crude language of consumer society, what services courts have to offer to us as citizens, consumers of the law? The answers we get will depend in large part on the kind of answers we are looking for and the context in which we situate the courts and our inquiries about them. This potential for widely divergent, and indeed incommensurable,[72] answers

71. *See 30 Rock: Up All Night* (NBC television broadcast Feb. 8, 2007) (Liz: "You're a lawyer?" Floyd: "I prefer 'law stylist.'").

72. Incommensurability describes a situation of "widely divergent points of view"—so divergent, in fact, that they not only resist other alternatives but resist even acknowledging them as alternatives. *See* PAUL FEYERABEND, AGAINST METHOD (3d ed. 1975) (arguing that anarchism is the

to a single, deceptively simple, question is reflected in the scholarship on courts, their capabilities, and their functions. The subject is too large to be treated comprehensively here, but I wish to outline some of the more well-known and relevant strains of scholarship on courts and adjudication. In doing so, I want to focus on two things: the relationship between courts and litigants, and the role of the written judicial opinion. I hope to show that the written opinion serves as a point of contact between the court, litigants, and the public at large and serves values far beyond the particular outcome of a given case.

### *A. Legal Process: The Tension between Outcome and Input*

Probably the best-known school of thought on the role of the courts and the adjudicative process is the so-called Legal Process school. As the name suggests, Legal Process theorists looked to ground the legitimacy of the American legal system and the judicial power in a theoretical framework that emphasized process and participation at a time when, among other things, the dominant Legal Realist school had successfully undermined the notion of widespread societal consensus about core substantive values.[73] In his essay *The Forms and Limits of Adjudication*, Lon Fuller provided the classic Process School take on the process of adjudication.[74] Rejecting the idea that the "essence of adjudication" could be defined by exploring the role of the judge, Fuller noted that although baseball games and livestock fairs also have people who judge, we would not call this process "adjudication."[75] Rather than the act of judging, Fuller saw that the central aspect of adjudication that sets it apart from other social practices of decision-making and resource allocation is "reasoned argument[]."[76] In Fuller's view, "[i]f . . . we start with the notion of a process of decision in which the affected party's participation consists in an opportunity to present proofs and reasoned arguments, the office of judge or arbitrator and the requirement of impartiality follow as

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best medicine for epistemology for the philosophy of science). Despite their status as a popular illustration of this concept, apples and oranges may or may not be incommensurable, depending on the basis of comparison.

73. *See* KALMAN, *supra* note 6, at 19–20 (describing the genesis of Legal Process theory).

74. For an excellent discussion of Fuller's theory of adjudication, see Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273 (1995).

75. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365 (1978). The 1978 Harvard Law Review publication was based on a 1961 version of the essay, which was first prepared in 1957.

76. *Id.*

necessary implications."[77] Therefore, the essence of the adjudicative process is "a form of participating in a decision that is institutionally defined and assured."[78]

Of course, the opportunity to participate must be distinguished from the right to control outcomes, unlike, for example, a contract negotiation in which the parties to a lawsuit have no right to dictate the substantive result of the case. On the other hand, unlike voters in an election, parties to a suit are entitled to some explanation for any deviation between their desired result and the outcome of the case. The requirement that the court provide an explanation of its actions in relation to the arguments adduced by the parties—what Eisenberg has called the requirement of "strong responsiveness"—is what distinguishes adjudication from a merely "consultative" process, such as the advisory processes envisioned by the Administrative Procedure Act.[79] As one scholar has put it: "It is thus rather narrowminded to think of adjudication as decisionmaking by *judges*. Adjudication is decisionmaking by judges *and litigants* . . . ."[80] Given the overall thrust of this paper, it should be relatively unsurprising that the written opinion of the court is seen as central to the commitment to responsiveness: "These norms [of responsiveness] are respected in most courts by a practice of memorializing judicial decisions in written opinions."[81] The written opinion takes on its significance because norms of participation "demand that the decision be, and be *shown* to be, meaningfully responsive to the facts presented and arguments made by the litigants."[82]

The discussion so far has focused on describing what actually happens, what distinguishes adjudication (at least as practiced in the United States—an important qualification given the diversity of dispute resolution practices in other countries) from other forms of dispute resolution. But why the norm of participation? Why the requirement of responsiveness? Why written opinions? The goal of participation can be achieved without a requirement of responsiveness, as Eisenberg illustrates in his discussion of administrative rulemaking.[83] And if we are concerned with the correct application of authoritative legal principles to specific situations, it would seem that a well-trained, honest judge may do better if she is not distracted

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77. *Id.*

78. *Id.* at 366.

79. Melvin Avon Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410, 414–15 (1979).

80. Peters, *supra* note 17, at 1481.

81. Christopher Peters, *Persuasion: A Model of Majoritarianism as Adjudication*, 96 NW. U. L. REV. 1, 21 (2001).

82. *Id*. at 20–21.

83. Eisenberg, *supra* note 79, at 415.

by responding to the arguments advanced by the parties. While the requirement of participation is sometimes justified on the grounds that the parties have superior information about the circumstances of a case, parties may also have incentives to mislead the court about the applicable law or the facts of a given case in order to achieve a result that is optimal from the standpoint of their personal well-being.[84] From a societal standpoint, party control over the facts and issue presented, combined with a norm of responsiveness, may be detrimental in cases where a court's decision affects large numbers of non-parties.[85] Finally, there is the potential for anomalous or borderline cases to skew the development of the law, a hazard that is reflected in the maxim that "hard cases make bad law."[86]

Certainly there are justifications for written opinions unrelated to the norm of participation. It is generally accepted that courts and their decisions have a lawmaking function,[87] and "[e]xplanation is normally a condition to performance of the rulemaking function, since rules ordinarily cannot emerge from an outcome unless the reasons for that outcome are given."[88] Dan Simon has written that judicial opinions are "a medium through which lawyers are trained, socialized, and professionalized; thus they are disseminated and perpetuated throughout the legal culture."[89] A similar explanation relates the importance of written opinions to the court's "behavior modification" role: written explanations of rules provide guidelines for future application.[90] Finally, opinion writing provides a form of discipline on the judicial decisionmaking.[91] As Duncan Kennedy expressed in inimitable Critical Legal Studies style: "The constraint imposed by the law is that it defines the distance that I will have to work through in legal argument if I decide to come out the way I initially thought I wanted to."[92] If the law and precedent are the hurdles that stand between the facts of a given case and the court's desired finish line, the written opinion provides a sort of "informational regulation" by providing a basis

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84. Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 312–13 (1989).

85. *See* Eisenberg, *supra* note 79, at 417.

86. N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

87. Sward, *supra* note 84, at 306–07.

88. Eisenberg, *supra* note 79, at 412.

89. Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 133 (1999).

90. Sward, *supra* note 84, at 307–08.

91. *See* Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1318 (2008) (describing how the process of writing opinions forces judges to reason through their conclusions).

92. Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomology*, 36 J. LEGAL EDUC. 518, 530 (1986).

upon which reviewing courts can understand and criticize the decision of the lower court.[93] The permanency of a written set of reasons, preserved for further review, may also explain why written explanations are the norm in the United States (as opposed to oral statements, which are the norm in England and some other common law countries).[94]

While we have found persuasive reasons for requiring some sort of explanation, and for committing that explanation to writing, these explanations seem to have gotten away from the norm of responsiveness, which is where we began. A requirement of meaningful participation does not necessarily imply the need for written statements of reasons, and the justifications for written statements of reasons—whether based on rulemaking, behavior modification, discipline, or error correction—are not in any way dependent on meaningful participation. What is missing is something that would justify the requirement of a statement that explains the court's decision *and* does so in terms that are responsive to the arguments and facts brought out by the parties. Some commentators seem to view the requirement of responsive explanation as a means of reinforcing or securing the primary goal of meaningful participation: opinions should be written in a way that shows parties that their participation was actually meaningful.[95] To this end, Chad Oldfather has even suggested that courts incorporate "framing arguments" provided by the parties in their opinions.[96]

But beyond this sort of instrumental value (responsive opinions as guarantors of participation), the judicial opinion founded on the facts and arguments advanced by the parties represents a sort of alchemy that gives adjudication a unique "moral force" absent from other forms of dispute resolution.[97] As Christopher Peters has argued, participatory adjudication is an institution that reflects broadly and deeply-held political norms that value the autonomy and dignity of the individual as well as a bottom-up system of decision-making that respects the diverse experiences, knowledges, narratives, and viewpoints of individual litigants.[98] Peters writes:

> Adjudication in the Anglo-American common-law tradition thus draws legitimacy from the same source as majoritarian political

93. Chad M. Oldfather, *Judicial Inactivism*, 58 FLA. L. REV. 743, 747–48 (2006).

94. *See* Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 IOWA L. REV. 1159, 1162–64 (2004) (arguing that accountability in the U.S. legal system depends upon the ability to read a judicial opinion).

95. Oldfather, *supra* note 93, at 756–57.

96. *Id.* at 748.

97. Eisenberg, *supra* note 79, at 430.

98. Peters, *supra* note 81, at 22.

> decision-making in the western democratic tradition. That source is the meaningful participation of the governed in the making of decisions that will bind them.[99]

Only a deeply-held norm of respect for individuality, dignity, and personal autonomy is capable of explaining the widespread expectation, associated with the Legal Process school, that courts will provide explanations for their decisions that are responsive to the particular parties and arguments before them. Not mere party acceptance but actual legitimacy within the context of our political traditions requires an explanation of reasons framed in terms of the parties' arguments.[100] In this view, then, participation, the equality and dignity of the parties, and the written opinion of the court are inextricably linked.[101]

### *B. The Lay Perspective*

The Legal Process literature discussed above is an elite discourse, one created by and for members of the legal academy, reflecting their concerns about the proper means of adjudicating cases and their ideas about legitimacy and political theories. However, there is another literature—perhaps more appropriately described as a group of literatures—that views the court system from a perspective that is more concerned with the way that non-lawyers perceive and experience the legal system. After all, no one believes any longer that "the law" exists as a metaphysical entity, a platonic object separate from its real-life instantiations; law is "a form of human activity in which political conflicts [are] worked out,"[102] or "a specialized realm of state and professional

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99. *Id.*

100. For all of the controversy they have provoked, so-called "unpublished" opinions by appellate courts (which are actually published, though not in an official reporter) remain true to this premise, despite their potentially harmful effects on other areas, such as the development of coherent precedents and predictable rules of law. See Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004), for a discussion of the history and deleterious effects of "unpublished" appellate court opinions. The fact that time-strapped courts would provide non-precedential opinions, rather than resort to summary dispositions, reinforces the fact that a written explanation of reasons responsive to the facts of every case is central to our perception of legitimate judicial decision-making.

101. It is worth noting that the tradition of the written opinion has remained strong, while other aspects of the traditional adversarial model, such as the tradition of the judge as detached observer, have been abandoned in favor of a more managerial, collaborative model. For a more detailed discussion of these shifts, see, for example, Stephan Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts*, 29 BUFF. L. REV. 487 (1980); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

102. Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1526

activity"[103] that interacts with real humans every day. The legacy of the Legal Realists and the Critical Legal Studies movement has, in part, been to dismantle the metaphysical edifice constructed by the formalists of the 19th and early 20th centuries[104] and bring the law back down to earth as a phenomenon, a thing susceptible to direct observation. The common thread of the literature that I discuss in this subsection is its "phenomenological"[105] approach, and its focus on how the phenomenon of the law is perceived and experienced.

Some of this literature has been produced by authors approaching the relationship between the public and the legal system from a cultural studies perspective, particularly as information about, and portrayals of, legal proceedings multiplied exponentially in the early 1990s with 24 hour news, the advent of Court TV, and O.J. Simpson's (first) highly publicized criminal trial.[106] A more substantial body of work comes from a sociological perspective and attempts to study societal perceptions of justice and the procedures that are generally perceived by the public at large as "fair."[107] A third strain, which often shares the social sciences approach of the second, studies the psychological effects of court proceedings, sometimes under the banner of "therapeutic jurisprudence."[108] By exploring

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(1991). Whether or not they are actually perceived as "political" by the protagonists is another question.

103. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 60 (1984).

104. For a discussion of the origins of legal formalism and the ideology of law as a science, see MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 3–7 (1992). *See also* Jonathan Lahn, *The Demise of the Law Finding Jury in American and the Birth of American Legal Science: History & Its Challenge for Contemporary Society*, 57 CLEV. ST. L. REV. (forthcoming 2009) (advocating a reconsideration of the use of the jury as fact-finder).

105. *See* Stanford Encyclopedia of Philosophy, Phenomenology, http://plato.stanford.edu/entries/phenomenology (last visited Sept. 1, 2009) ("Literally, phenomenology is the study of 'phenomena': appearances of things, or things as they appear in our experience, or the ways we experience things . . . .").

106. *See, e.g.*, Anthony Chase, *Lawyers and Popular Culture: A Review of Mass Media Portrayals of American Attorneys*, 1986 AM. B. FOUND. RES. J. 281 (1986) (discussing portrayals of lawyers in various media); David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785 (1993) (comparing television portrayals of the criminal justice system and their effect on public perceptions of justice and the judicial process).

107. *See, e.g.*, E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953 (1990); William M. O'Barr & John M. Conley, *Lay Expectations of the Civil Justice System*, 22 LAW & SOC'Y REV. 137 (1988); Jeffrey Swanson et al., *Justice Disparities: Does the ADA Enforcement System Treat People With Psychiatric Disabilities Fairly?*, 66 MD. L. REV. 94 (2006); Tom R. Tyler, *What is Procedural Justice: Criteria Used By Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988).

108. *See, e.g.*, Carolyn S. Salisbury, *From Violence and Victimization to Voice and Validation: Incorporating Therapeutic Jurisprudence in a Children's Law Clinic*, 17 ST. THOMAS L. REV. 623

this literature, we can get a picture of how legal processes are perceived and experienced by those that the system is designed to serve (and at the same time, to control). Particularly important for the purposes of this paper is the relationship between participation, written opinions, and perceptions of justice and fairness.

As we might have anticipated, based on the more theoretical writings of the Legal Process scholars, scholarship focusing on the lay experience or perception of the legal system demonstrates that participation is key to a sense of fairness and justice. The sociological literature indicates that litigants value process more than one might otherwise expect; indeed, Tyler, summarizing numerous studies, has observed that "the major criteria used [by litigants] to assess process fairness are those aspects of procedure least linked to outcomes . . . ."[109] Furthermore, while Lind et al., conclude that "[p]erceptions of the litigation process account for much (39 to 50 percent) of the variation in procedural justice judgments . . . ."[110] Authors writing from various perspectives confirm that participation and having a voice in proceedings are key to positive assessment of a legal procedure. Children who interact with the court system as victims of violence and subjects of child protective proceedings value the ability to take part in proceedings, while a lack of meaningful participation exacerbates their feelings of powerlessness and victimization.[111] Studies show that litigants value the ability to tell their story even when they know that their story will not impact the outcome of a case, as when they are allowed to present their side after a decision has been made.[112] And litigants who have gone through a trial experience the legal system as more "fair" than those who settle with or without a court's assistance.[113]

All of this suggests that processes, and specifically processes that allow individual litigants to have a voice, are essential to a positive perception of a judicial proceeding. This is true even when participation has no tangible benefit in terms of the outcome of a given case. Why is this so? The answer is tied to the societal role of the court. It is a public forum. It is a special

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(2005); Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 U. KAN. L. REV. 39 (1994); Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433 (1992); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17 (2008); David B. Wexler, *An Orientation to Therapeutic Jurisprudence*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 259 (1994).

109. Tyler, *supra* note 107, at 128.

110. Lind et al., *supra* note 107, at 972.

111. Salisbury, *supra* note 108, at 656–58.

112. Tyler, *supra* note 108, at 440.

113. Lind et al., *supra* note 107, at 965–66.

zone set apart from the rest of the world in which individuals come together to mediate between the abstract world of legal principles and the everyday world of experience. It is the place where the law is instantiated in a real-world setting. It is due to the special status of courts that, as Tyler observes, "[j]udicial hearings in general are . . . used by people to gain information about their status as members of society."[114] Legal proceedings and authorities "provide people with information about their standing both in the eyes of the law and in society more generally."[115] Law and legal categories are constitutive of consciousness and social relations, shaping our lived world,[116] which is why we can neither succumb to the temptation, represented by Critical Legal Studies scholarship in its more extreme forms, to reduce all law and legal process to violence,[117] nor completely repudiate the "jurisprudence . . . [of the 1960s] that sees adjudication as the process for interpreting and nurturing a public morality."[118] This appears to be a case where the theoretical speculation about the role of the court in society is actually confirmed by empirical data showing that people's understanding of themselves and their place in society is influenced by their experience of the process of adjudication in the courts.

If, as Tyler argues, people go to court "to gain information about their status as members of society[,]"[119] then this provides a justification not only for the norm of participation identified by the process theorists, but also for the norm of responsiveness. When the court renders an opinion that respects and integrates the unique facets of a case and the parties rather than ignoring their unicity in favor of generalized principles, it affirms that they and their experiences are, in fact, crucial to the case and matter in the eyes of the law. This affirmation is one of the things for which litigants come to the court. It is especially important because, as Laurence Tribe has noted, the practice of litigation creates an entrée into the public forum for individuals and groups that are *de facto* excluded from republican or pluralist discourse, allowing for participation in the life of society by those who would otherwise not be heard in the more majoritarian realms of civic

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114. Tyler, *supra* note 108, at 444.

115. *Id.* at 443.

116. *See* Gordon, *supra* note 103, at 103–04 (discussing societal implications of "legal relations").

117. *See, e.g.*, Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986); Robin West, *Adjudication is Not Interpretation: Some Reservations about the Law-as-Literature Movement*, 54 TENN. L. REV. 203, 205 (1987) (advancing thesis that adjudication is not legal interpretation but "the creation of law backed by force" beneath an interpretive façade).

118. Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 2 (1986).

119. Tyler, *supra* note 108, at 444.

life.[120] In sum, the literature on popular experiences of the legal system suggests that written opinions that are responsive to the arguments and experiences of the litigants enhance perceptions of legitimacy and satisfaction with the legal process by affirming the meaningful participation, dignity, and subjectivity of litigants, who in fact desire this type of affirmation from the courts.

### *C. The Significance of the Specific: Facts, Narratives, and Empathy*

There is a final field of scholarship that bears mentioning at this point in the discussion. As we have seen already, the practice of issuing written opinions that are responsive to the particular arguments and facts advanced by the parties to a case finds justification in the theoretical work of the Legal Process school and its progeny, as well as scholarship that looks at the experiences and expectations of laypeople in relation to the legal system from social science perspectives. To these perspectives, I would briefly add the literature that focuses on the link between narratives, the particular, and the values of mercy, empathy, and understanding.

Legal scholars have long recognized a link between storytelling and law.[121] This relationship is multifarious. On the one hand, we can say with Robert Cover that the law itself is a kind of story, and like all stories it has a narrator, a certain context, and a certain voice.[122] We might use this insight to uncover unstated cultural biases in the law along axes of gender, race, class, and so on. Alternatively, we might use our own stories to present a new vision of the law or to bring the experience of marginalized individuals or groups to the mainstream of the legal community.[123] "First-person agony narratives" can be used to promote assent to the narrator's account of "unapprehended harm" resulting from a practice or rule, while "insider perspective" narratives can illuminate a poorly understood group or experience and promote understanding and empathy.[124] Rather than explicitly recommending or implying legal outcomes, "[n]arratives are

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120. *See* Laurence Tribe, *Seven Pluralist Fallacies: In Defense of the Adversary Process—A Reply to Justice Rehnquist*, 33 U. MIAMI L. REV. 43, 45–46, 54 (1978).

121. Perhaps the most influential work in this genre is Robert Cover's *Nomos and Narrative*, 97 HARV. L. REV. 4 (1984). In 1989, The Michigan Law Review devoted a symposium to legal storytelling. Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989).

122. Cover, *supra* note 121, at 5 ("In this normative world, law and narrative are inseparably related.").

123. *See* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 808 (1993) (attempting to "provide an overview of the legal storytelling movement and evaluate its claims").

124. Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1021–22 (1991) (internal quotations omitted).

more likely to reveal a neglected perspective or theme that needs to play a role in legal decisionmaking, or to establish a new context or backdrop for legal discussions."[125] Much of the scholarship on narrative focuses on its potential to create new bonds of empathy and understanding and on its use as a tool for expanding the legal discourse to recognize new groups and perspectives.[126] Richard Delgado has argued that "outgroup" narratives can not only build or strengthen bonds between marginalized groups and the mainstream, but also have a beneficial effect on the storyteller and a community-building effect on the group whose story is told.[127]

Yet the power of narrative is not unidirectional. As Susan Bandes has astutely observed, the same forces of narrative and empathy that may work to the benefit of marginalized outgroups by promoting a jurisprudence of compassion can also bring unwanted emotion to bear against criminal defendants, who already find the forces of law and society arrayed against them when deployed in the form of "victim impact statements" during criminal sentencing.[128] Thus she writes that "neither narratives nor benigu [sic] emotions such as caring, empathy, or compassion are always helpful or appropriate in the legal arena."[129] But if attention to the particular, to details, and to narratives is not a *sufficient* condition for the creation of a normatively desirable jurisprudence of inclusion, understanding, and empathy, it may be a *necessary* one, according to a fascinating essay by Martha Nussbaum.[130] Starting from Aristotle's belief that in order to perceive an event clearly "one must 'judge *with*' the agent who has done the alleged wrong,"[131] Nussbaum proceeds to expose "the nature of the connection between mercy and a vision of the particular . . . ."[132] In Nussbaum's view equitable judgment is "judgment that attends to the particular"; narrative, with its attention to the particular, is aligned with

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125. *Id.* at 1031.

126. *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (arguing that storytelling can be a vehicle for change by persuading dominant groups to challenge their complacency and assumptions); Abrams, *supra* note 124; Farber & Sherry, *supra* note 123, at 809–10. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (arguing that storytelling can be a vehicle for change by persuading dominant groups to challenge their complacency and assumptions);

127. Delgado, *supra* note 126, at 2412–13, 2436–37.

128. *See* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 364 (1996) (discussing narratives in the form of victim impact statements in criminal cases and arguing that narratives are only normatively desirable when they serve to include the experiences of subordinate groups).

129. *Id.* at 365.

130. *See* Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 85, 94 (1993) (defending narrative as an important legal tool for promoting equitable and merciful punishments).

131. *Id.* at 94.

132. *Id.* at 85.

equity and mercy, in opposition to the harsh, abstract, categorical rigidity of the law.[133]

The scholarship on narrative merely reinforces the points that we have already derived from the legal process and sociological and psychological literature on participation, responsiveness, and opinion writing. Litigants hope and expect to have a meaningful opportunity to participate and to have the court take their particular arguments and facts into consideration. Strongly responsive opinions serve these values, as well as the political and ideological values of attention to the specific, respect for individuality and autonomy, and bottom-up rulemaking that are reflected in the structure of our adversarial adjudicative process. And finally, as we have seen, there is a strong link between narratives that focus on the individual and the particular and the values of human dignity and mercy. In light of all this, it is clear that the process of adjudication presents courts with an obligation and an opportunity. Courts have an obligation, secured by various procedural rights of the parties, to allow a meaningful degree of participation in the adjudicatory process. This participation creates an opportunity for courts to reinforce the legitimacy of their decisional process and its outcome by explaining their decisions in a way that is strongly responsive to the arguments and factual situations presented by the parties. In doing so, they have the chance to go beyond merely ensuring that that parties will recognize and accept their decisions. Courts, by attending to the particulars of the case and of the litigants who present it, can use their position as a public forum to affirm the personhood and dignity of the litigants who submit themselves to the courts' authority, thereby promoting inclusiveness and understanding in the legal order as well as the full citizenship of the parties. The means for achieving this goal, which is ancillary but not necessarily subordinate to the courts' dispute resolution and lawmaking functions, is the written opinion.

Armed with this insight, I return in the final Part of this article to the problem of personal status litigation described in Part I. I argue that highly-responsive written opinions that are attentive to the details of individual litigants' stories can be a dignity- and equality-affirming remedy for litigants who have been wronged, but whose cases fail to meet the formal requirements for recovery under the applicable substantive law.

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133. *Id.*

## III. WRITING AS REMEDY

What happens when a person genuinely feels, rightly or wrongly, that he or she has been subjected to abuse at the hands of an individual in a position of power, such as an employer or a police officer? We cannot know, objectively, what that person experiences. Even if we have had a similar experience in our own lives, the diversity of human character and social difference[134] prevent us from grasping, with any certainty, the reality of another's subjective experience. Nonetheless, we can imagine a spectrum of emotional reactions: anger, even rage, a sense of powerlessness and possibly despair, in the face of a wrong that is unrequitable in light of differences in power and social authority between the victim and the author of the injury. Now consider the type of injury—not just any insult, but perhaps the deprivation of a right so vital that it is of constitutional stature: a home invaded, hands shackled, arms bent at seemingly impossible angles, while a suspect—an hour ago he was a man, or a father, or a son, but now he is "a suspect"—is pulled from his home, dressed as the police found him, for interrogation (and possibly something more) at the station. Sometimes it may not be the injury itself that hurts as much as the reason for the injury. A worker performs her job adequately, even admirably, but sees those she considers her peers, and even those with less experience, promoted ahead of her. She feels a distance from her supervisor, and senses that he is not entirely comfortable with her. She hears directly or through office gossip about a remark here, a joke there, denigrating her race. Or her gender, religious or ethnic background, or sexual orientation.[135] This may be only the latest in a series of encounters with prejudice and hate, or maybe it is the first time it has actually touched her, that she has felt it, experienced it as something visceral and immediate, rather than something in the realm of social history that happened to someone else.

Despite the tremendous progress and "opening up" of legal discourse to new voices and styles over the last several decades,[136] the preceding paragraph does not fit comfortably in a legal essay. It feels out of place. It is speculative, emotional, un-sourced and un-footnoted, and the prose may be (just a little bit) "purple." But this discomfort, this tension, merely serves to highlight the fact that our laws and our legal discourse do a poor job of

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134. Or, we might say in a nod to Jacques Derrida, "*differance*."

135. Under federal employment law, sexual orientation is not a protected characteristic. *See* 42 U.S.C. § 2000(e) (2006) (prohibiting employers from discriminating on the basis of race, color, religion, sex, or national origin).

136. *See* Farber & Sherry, *supra* note 123.

acknowledging and responding to the "hedonic,"[137] that which belongs to the realm of pain and pleasure. This is especially the case when the pain is experienced by individuals belonging to groups that traditionally have been subordinated and silenced in American culture, particularly women and racial minorities.[138] Yet these are precisely the types of plaintiffs—and precisely the types of injuries—that federal courts around the country are faced with on a daily basis in suits arising under § 1983 and Title VII: police abuse, invasion of privacy and bodily autonomy, false arrest, and myriad forms of job discrimination. That is why I have dubbed this corpus of cases the "litigation of personal status": something is at stake beyond the establishment of a formal right to recover under a statute. To borrow Tyler's phrase, § 1983 and Title VII litigants go to court "to gain information about their status as members of society"[139] they "value the affirmation of their status by legal authorities as competent, equal, citizens . . . ."[140]

Of course, the law that is enacted in statutes and applied by courts does not speak in terms of "affirming status," "vindicating personal dignity," or "hedonic lives." The law speaks in a relatively small number of discrete categories and prerequisites for recovery. Although it is seldom this simple in practice, in theory the adjudication of a constitutional tort or racial discrimination case, like any other case, requires an application of the facts to the categories set forth by the statute (and perhaps some further glosses by the court of appeals) to see if all of the requirements for recovery are satisfied. If all of the "boxes" are not checked, the plaintiff loses. The disparity between the rich hedonic texture of lived experience and the vital nature of the rights involved on the one hand, and the rigid, flat categories of the law on the other, is responsible for what Herbert A. Eastman has described as the "chasm" separating his clients' stories about their lives and the formal legal allegations that are ultimately alleged in their civil rights complaints.[141]

This "chasm" is a real place. I have tried to show, in Part I of this article, that it is populated by large numbers of litigants who come to court with complaints about deprivations of constitutional rights or invidious

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137. "[O]f, relating to, or characterized by pleasure." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 577 (11th ed. 2003).

138. There is not room here to discuss the rich literature discussing this point, but an excellent starting point is Robin West's *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149 (2000) (discussing the law and its relationship to the different life experiences of women).

139. Tyler, *supra* note 108, at 444.

140. *Id.* at 440.

141. Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigants*, 104 YALE L.J. 763, 766 (1995).

discrimination. Their cases are not so insubstantial that they can be dismissed early in the litigation; rather, they consume a disproportionately large amount of judicial resources because they require more hearings and more discovery.[142] Yet in the end, these plaintiffs are disproportionately unsuccessful.[143] This gap between what we can intuitively or empathetically recognize as hurt, as hedonic damage, and the formal hurdles to recovery embodied in the letter of the applicable laws, is the consequence of residing in the chasm. The fictional arrestee, whose case I outlined at the beginning of this Part, will not recover. This is true regardless of his physical and emotional suffering, so long as the police had a plausible reason to suspect him of a crime, or if he cannot prove that the amount of force used was excessive under the circumstances. The passed-over employee may be convinced of her boss's prejudice, but she may not persuade a judge or jury. Her employer may have enough evidence to rebut a presumption of discriminatory intent, but not enough to convince her or undo her emotional harm. These plaintiffs embody the Latin maxim I referred to in Part I above: *damnum absque injuria*, harm that is not "harm" in a legally cognizable sense.

The foregoing discussion invites a question: *should* these plaintiffs recover? This is not a question that I intend to answer here except to make a few observations. First, the answer may hinge on how the goal is achieved. It is one thing to advocate for legislative changes that might amend existing laws or create new laws that more fully incorporate the hedonic and dignity concerns discussed above. Such changes may or may not be desirable, and the debate would have to include considerations about the feasibility of administering the new laws and their possible deleterious effects on areas such as law enforcement and employment practices. It may be that the preservation of rigid, formal categories is desirable from any number of standpoints, including efficiency, public safety, etc. Whatever the merits of this legislative policy debate, it seems much clearer that, left to themselves, courts would tread on very thin ice to adopt such changes *sua sponte*. Unless we are prepared to accept federal judges in a role akin to that of the 16th century Lord Chancellor, making decisions guided by little more than vague notions of conscience and fairness, it is difficult to see how the lacunae in the law, deleterious as they may be, can be overcome by judicial fiat.

Finally, it may be that simply allowing these plaintiffs to recover damages is beside the point. The very thing that makes these cases so compelling is the fact that they are imbued with issues of a different order than those implicated in an automobile collision, a breach of contract, or an

142. Eisenberg & Schwab, *supra* note 35, at 674–75.

143. *Id.* at 679–80.

antitrust violation. While personal status cases under § 1983 or Title VII may have more straightforward economic components, we care about them because they turn on questions of dignity, personhood, and equality. Therefore, while there is always a certain incommensurability in using money to compensate for injuries (aside from purely economic losses), the incongruity of damage awards is heightened when intangible core values are at stake. Furthermore, in cases based on invidious and illegal discrimination or the violation of quasi-sacred rights guaranteed by the Constitution, any amount of damages may be insufficient.[144] For this reason, scholars have considered the potential use of alternative remedies, such as court-ordered apologies, in civil rights cases.[145] A third factor calling into question the desirability of expanding the potential for monetary recovery is the issue of the efficacy of monetary damages in curbing offenses, particularly in constitutional tort cases. While it is true that damage awards can "send a message,"[146] scholars of law and economics, such as Daryl J. Levinson, have questioned whether that message is likely to be received by the right people when the costs are ultimately born by the taxpayers as a whole, not by individual wrongdoers.[147]

I have tried to show in Part II of this article that courts have the capacity to do more than simply grant or withhold monetary damages. They can do more than order apologies. The key tool is one that they already use on a daily basis, and one that has come to be expected as part of a legitimate judicial decision-making process: the written opinion. When a court issues a written opinion, it does more than simply resolve a legal question. It uses its "voice"—the voice of the public that has vested it with decision-making authority—to confirm the meaningful participation of the parties, to validate their status as full citizens whose views and arguments must be reckoned with, and, perhaps more remotely, to affirm the court's continued commitment to a centuries-old American ideology of bottom-up decision-making with the input of the governed. This emphasis on the importance of the written judicial opinion is not merely a fantasy of ivory-tower theorists or the wishful thinking of a one-time participant in the creation of a judicial opinion. Rather, as discussed above, studies show that litigants look to the court and its actions for validation and affirmation of their status as equals

144. *See* Shuman, *supra* note 108, at 45–48 (discussing inadequacy of monetary damages for certain types of injuries).

145. *See, e.g.*, Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261 (2006) (discussing civil rights plaintiffs' desire for apologies as a remedy in civil rights cases as well as possible consequences of apologies as a form of remedy).

146. *See id.* at 1278 ("Legal remedies serve an expressive function.").

147. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 346–47 (2000).

and full members of society. This concern not only goes beyond the outcome of the case, it eclipses the outcome.

That is why courts must attend to the importance of the particular, of narratives, and of empathy. These concepts are linked: attention to the particulars of litigants' lives and experiences, as Nussbaum argues, is essential in order empathize with their condition and the damage or hurt that brings them to the courtroom. The point is not that empathy should somehow lead to a short-circuiting of the formal substantive and procedural roadblocks to recovery that the law imposes. The realm of the law and the realm of emotion are largely separate, as perhaps they should be. But empathy on its own, however, may be worth something. It goes beyond an imagined identification between individuals, because it involves oneness, a temporary inhabiting of the other person's place, and being "in" the feeling that they feel.[148] When the court is attentive to the particulars of a litigant's experience, it makes possible that empathic connection between the individual who stands before the court and the court as representative of society. It makes possible an empathic transcendence of the rupture between the litigant and society. The opinion that manifests empathy between the court and the plaintiff is a symbolic gesture of solidarity that affirms the litigant's status as a member of society.

Narrative is also crucial. The plaintiff's story, as told by the complaint and the plaintiff's evidence, is the source of the particular facts the court must understand to make the empathic connection to the litigant. However, the plaintiff's story also manifests his or her voice, and his or her interpretation of the situation and the events that led to the case before the court. As discussed above, this narrative not only has the potential to build empathy but constitutes an assertion of personhood and subjectivity. The formation of the facts of the plaintiff's life and the situation that led to the suit, the selection of certain details and the emphasis they are given, are a reflection of that person's identity as well as an assertion of their right to have a voice and to be heard. The court can affirm that right and the validity of the plaintiff's personal experience by restating the plaintiff's narrative in the written opinion. In tangible terms, the benefits of written opinions may be poor substitutes for a monetary remedy. However, if litigants truly value process and look to the courts as fora for confirming their status as equal members of society possessed of inalienable personal dignity, then opinions that evince empathy and mirror the plaintiffs' personal narratives of their

148. *See* 5 OXFORD ENGLISH DICTIONARY 184 (2d ed. 1989) (describing the history of "empathy"). Crucial to all historical uses is a sense of being "in" a feeling, phenomenon, or experience.

experiences may be capable of remedial effects far beyond those attainable through damage awards.

The statistics strongly suggest that there is a real problem in the federal courts associated with what I have called the litigation of personal status. Courts are faced with thousands of cases each year in which plaintiffs have suffered harm that is "real" but does not entitle them to recover under the substantive law of § 1983 and Title VII. These cases may be marginal in terms of their importance to the doctrinal development of the law, but their numbers alone demand that they be taken seriously if we care about the law as a social phenomenon. Faced with compelling stories and palpable harm, it would be understandable if courts were tempted to stretch the formal categories of the law in order to allow "deserving" plaintiffs to recover. Unsurprisingly, data suggests that some juries do just that.[149] However, I have argued for a third way between rigid formalism and bending the law. Written opinions that attend to the particulars of the plaintiff's experience and that express the plaintiff's narrative voice may unlock a remedial potential beyond what is possible with mere damage awards while at the same time preserving the doctrinal integrity of the law, pending legislative reform by majoritarian means.

In this article I have tried to illustrate that personal status litigation arising under § 1983 and Title VII is a real phenomenon that presents a sort of "perfect storm." There is a yawning gap—or "chasm," in Eastman's terminology—between *damnum* and *injuria*, harm and legally cognizable injury. At the same time, there is a parallel gap between the stakes of these cases, which deal with norms of equality and personal autonomy that form the foundation of equal membership in society, and the redress available through traditional remedies, particularly money damages. Courts, mindful of their status as public fora and articulators of public values, should take seriously the possibility of bridging these divides through their written output.

149. *See* discussion *supra* at pp. 135–36.