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THE STORY OF A CLASS: USES OF NARRATIVE IN PUBLIC INTEREST CLASS ACTIONS BEFORE CERTIFICATION

Anne E. Ralph*

Abstract: When litigants in public interest class actions tell their stories, the narratives can advance the law and influence public debate. But before class members' stories can vindicate civil rights on the merits, plaintiffs must overcome the hurdle of class certification.

For decades, obtaining class certification under Federal Rule of Civil Procedure 23 was not a significant challenge for plaintiffs seeking to litigate as a class. But recent restrictive procedural developments—including heightened standards for class certification—threaten the powerful stories that can be told through public interest class actions.

Missing in the critical analysis of class action jurisprudence is any discussion of how advocates can use narrative techniques to meet that heightened certification standard. Similarly, law and narrative scholarship has devoted little attention to the class action.

This Article begins to fill that gap by engaging in a critical reading of two recent public interest class actions: one challenging family separations at the border, and one challenging the denial of abortion care to pregnant unaccompanied minors in immigration custody. The Article identifies narrative choices that ultimately enable class certification and further storytelling in public interest class actions. The Article argues that narrative theory can provide an important perspective on the debate over restrictive class action procedure and makes recommendations for courts and lawyers to pay greater attention to narrative in class action cases.

* Clinical Professor of Law, The Ohio State University Moritz College of Law. For their insight and input into this Article, I thank Olwyn Conway, Brian Glassman, Suzette Malveaux, Alan Michaels, Ruth Anne Robbins, Nantiya Ruan, and Dan Tokaji. I received helped commentary from the participants in the Faculty Colloquium at Sandra Day O'Connor College of Law at Arizona State University and the participants in the Seventh Biennial Conference on Applied Legal Storytelling. I thank the staff of *Washington Law Review* for their excellent editorial assistance. I am grateful to The Ohio State University Moritz College of Law for the funding that enabled me to write this Article. This Article would not exist without the support and inspiration of my mother, Susan M. Ralph, who taught me the power of stories, and my sister, Melissa C. Ralph, who always listens.

INTRODUCTION

Stories have power. During the summer of 2019, the stories of children held in immigration custody captured the nation's attention and conscience.[1] The narratives emerging from Border Patrol facilities painted a "bleak portrait"[2]: children being held in overcrowded facilities, some ill with the flu; children denied access to showers and clean clothing, even

1. *See, e.g.*, Cedar Attanasio et al., *Attorneys: Texas Border Facility is Neglecting Migrant Kids*, ASSOCIATED PRESS (June 21, 2019), https://www.apnews. com/46da2dbe04f54adbb875cfbc06bbc615 [https://perma.cc/XA28-N89V]; Caitlin Dickerson, *'There Is a Stench': Soiled Clothes and No Baths for Migrant Children at a Texas Detention Center*, N.Y. TIMES (June 21, 2019), https://www.nytimes.com/2019/06/21/us/migrant-children-bordersoap.html [https://perma.cc/J66M-AZXY]; Simon Romero et al., *Hungry, Scared and Sick: Inside the Migrant Detention Center in Clint, Tex.*, N.Y. TIMES (July 9, 2019), https://www.nytimes.com/interactive/2019/07/06/us/migrants-border-patrol-clint.html [https://perma.cc/YJP4-52VG].

2. Attanasio et al., *supra* note 1.

denied access to toothbrushes, toothpaste, and soap.[3] Lawyers who visited the immigration detention facilities described "inadequate food, water[,] and sanitation."[4]

These stories were told first in accounts provided to the news media from lawyers visiting the children,[5] and then in court filings that included first-hand narrative accounts from the detainees themselves.[6] As these stories entered the public debate, many Americans were moved to action:

3. Dickerson, *supra* note 1.

4. Attanasio et al., *supra* note 1. Some of the detainees were caring for even younger children. *Id*. ("A 2-year-old boy locked in detention wants to be held all the time. A few girls, ages 10 to 15, say they've been doing their best to feed and soothe the clingy toddler . . . .").

5. *See*, *e.g.*, Paul Farhi, *Migrant Children Are Suffering at the Border. But Reporters Are Kept Away from the Story.*, WASH. POST (June 25, 2019), https://www.washingtonpost.com/lifestyle/style/migrant-children-are-suffering-at-the-border-but-reporters-are-kept-away-from-the-story/2019/06/24/500313a2-9693-11e9-8d0a-5edd7e2025b1_story.html [https://perma.cc/7P4S-XJAY] ("Reporters were unable to see the facilities themselves or speak to any of the children. Instead, they relied on descriptions provided by lawyers and advocates who were granted access under a legal settlement with the Border Patrol.").

6. The standards for detention of unaccompanied minors in immigration custody were established in a 1997 consent decree in the *Flores* litigation. In the summer of 2019, advocates in the *Flores* litigation sought a temporary restraining order and other relief stemming from the violations of the Flores Settlement Agreement that they had observed. Ex Parte Application for Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction and Contempt Order Should Not Issue, Flores v. Barr, No. 2:85-cv-04544-DMG-AGR (C.D. Cal. June 26, 2019). The filing included declarations from individual detainees, describing the conditions. *See* Application for Leave To File Under Seal Portions of Exhibits Submitted in Support of Plaintiffs' Ex Parte Application for Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction and Contempt Order Should Not Issue and Memorandum in Support, *Barr*, No. 2:85-cv-04544-DMG-AGR (attaching redacted declarations of minors held in immigration custody); *see also id.* at Exhibit 32 ("I am often hungry . . . . I have not showered in 4 days . . . . I have been able to brush my teeth only once since I arrived, 7 days ago."). The narratives filed in *Flores* reached the public through new stories reporting on the filing's content. *See, e.g.*, Meagan Flynn, *Attorneys Seek Emergency Court Order to End 'Health and Welfare Crisis' in Migrant Detention Centers*, WASH. POST (June 27, 2019), https://www.washingtonpost.com/nation/2019/06/27/attorneys-seek-emergency-court-order-end-health-welfare-crisis-migrant-detention-centers/ [https://perma.cc/V8HY-52MU] (discussing the content of the *Flores* filing).

individual citizens engaged in protests[7]; elected officials spoke out and held hearings;[8] and presidential candidates visited the detention centers.[9]

The stories of children in immigration detention could be told because of a public-interest class action lawsuit, the *Flores* litigation, which granted attorneys access to visit children in detention facilities.[10] These stories came to light because of work done, decades earlier, to bring a lawsuit and obtain certification of a class of plaintiffs.[11] Among other things, the post-certification settlement agreement in the *Flores* litigation established a requirement that children in immigration detention be held "in facilities that are safe and sanitary and . . . consistent with the . . . concern for the particular vulnerability of minors."[12] The post-

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7. *See, e.g.*, Claire Hao, *Hundreds Protest Immigration Detention Camps, Walk Through Downtown Carrying 'Lights for Liberty' Candles*, MICH. DAILY (July 15, 2019), https://www.michigandaily.com/section/government/hundreds-protest-immigration-detention-camps-walk-through-downtown-carrying- [https://perma.cc/3Y5D-AUSD] (describing demonstration in Ann Arbor, Michigan); Lee Matz, *LULAC Members Swarm Senator Ron Johnson's Milwaukee Office in Protest of "Kids in Cages" at Border*, MILWAUKEE IND. (July 17, 2019), http://www.milwaukeeindependent.com/featured/lulac-members-swarm-senator-ron-johnsons-milwaukee-office-protest-kids-cages-border/ [https://perma.cc/RN5J-XB6T] (describing a demonstration by members of League of United Latin American Citizens (LULAC) at the Milwaukee office of U.S. Senator Ron Johnson).

8. *See* Ryan Nguyen, *U.S. Sen. Jeff Merkley Recounts Scenes of Migrant Abuse to Portland Crowd*, WILLAMETTE WEEK (July 28, 2019), https://www.wweek.com/news/2019/07/28/u-s-sen-jeff-merkley-recounts-scenes-of-migrant-abuse-to-portland-crowd/ [https://perma.cc/658J-NBYJ] (reporting on U.S. Senator Jeff Merkley's public accounts of visits to immigration detention centers); Maria Sacchetti, *'Kids in Cages': House Hearing Examines Immigration Detention as Democrats Push for More Information*, WASH. POST (July 10, 2019), https://www.washingtonpost.com/immigration/kids-in-cages-house-hearing-to-examine-immigration-detention-as-democrats-push-for-more-information/2019/07/10/3cc53006-a28f-11e9-b732-41a79c2551bf_story.html [https://perma.cc/6P23-DJ6N] (reporting on a hearing before the House Oversight and Government Reform Subcommittee on Civil Rights and Civil Liberties).

9. *See* David Weigel et al., *Before Debate, Democrats Visit Children's Migrant Shelter Amid Fresh Fury over Conditions*, WASH. POST (June 26, 2019), https://www.washingtonpost.com/politics/before-debate-democrats-visit-childrens-migrant-shelter-amid-fresh-fury-over-conditions/2019/06/26/08ed7de4-9815-11e9-8d0a-5edd7e2025b1_story.html [https://perma.cc/S87L-L688].

10. *See* Stipulated Settlement Agreement, Flores v. Reno, No. 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997) [hereinafter *Flores* Settlement Agreement], https://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf [https://perma.cc/5P7H-YVRQ].

11. *See* Gail Q. Goeke, *Substantive and Procedural Due Process for Unaccompanied Alien Juveniles*, 60 MO. L. REV. 221, 221 (1995). The *Flores* Settlement Agreement ended litigation regarding children in immigration custody that lasted over a decade. Devon A. Corneal, *On the Way to Grandmother's House: Is U.S. Immigration Policy More Dangerous Than the Big Bad Wolf for Unaccompanied Juvenile Aliens*, 109 PENN ST. L. REV. 609, 642 (2004). For a concise history of the *Flores* litigation, see Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 794–95 (2018).

12. *Flores* Settlement Agreement, *supra* note 10, ¶¶ 11, 12. Among other things, the *Flores* Settlement Agreement requires the government to hold minors in immigration custody "in the least restrictive setting appropriate," and requires minors to be detained "in facilities that are safe and sanitary." *Id.* The agreement also requires facilities holding minors to "provide access to toilets and sinks, drinking water and food as appropriate, medical assistance . . . adequate temperature control and ventilation, [and] adequate supervision . . . ." *Id.* ¶ 12.

certification settlement agreement also granted children in custody the right to attorney-client visits—the visits that ultimately enabled these stories to be told.[13]

The stories the *Flores* litigation helped to bring forth illustrate the power of the public interest class action and the narratives that it enables. The public interest class action makes possible a great deal of civil rights enforcement on behalf of private citizens against government actors.[14] Public interest class actions have benefited myriad groups seeking structural remedies,[15] such as prisoners,[16] foster children,[17] and individuals with disabilities.[18] In addition to furthering the goals of civil rights statutes through enforcement,[19] public interest class actions allow litigants to communicate their stories through official channels, attracting public attention in a particularly powerful way.[20]

But before class members' rights can be vindicated, and before their stories can be told with the kind of detail that can advance the law and mobilize public opinion, plaintiffs must overcome the hurdle of class certification. Plaintiffs must demonstrate that their claims are similar enough that group treatment, rather than individualized determinations and remedies, is the appropriate mechanism for resolving their claims.[21] Two requirements of class certification are particularly important to

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13. *Id.* at ¶ 32. The *Flores* Settlement Agreement also requires a coordinator to monitor the government's compliance with the agreement's terms. *Id.* ¶ 28A.

14. David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 780–81 (2016) (defining "public interest class action" as "litigation brought against government officials and agencies for injunctive relief").

15. *Id.* at 781.

16. Brown v. Plata, 563 U.S. 493 (2011), *cited in* Marcus, *supra* note 14, at 785 n.50.

17. CHILD WELFARE LEAGUE OF AM. & ABA CTR. ON CHILDREN & THE LAW, CHILD WELFARE CONSENT DECREES: ANALYSIS OF THIRTY-FIVE COURT ACTIONS FROM 1995 TO 2005, at 2 (2005), *cited in* Marcus, *supra* note 14, at 784 n.45.

18. *See, e.g.*, Michael Ashley Stein & Michael E. Waterstone, Disability, Disparate Impact, and Class Actions, 56 DUKE L.J. 861, 903–04 (2006), *cited in* Marcus, *supra* note 14, at 784 n.44.

19. *See* Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 ARIZ. L. REV. 575, 577 (1997) ("Civil rights and class actions have an historic partnership. Indeed, those who revised the federal class action rules in 1966 took particularly into account the concerns of civil rights litigants."); Marcus, *supra* note 14, at 783 ("The class action and impact litigation are and have always been inseparable."); David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953-1980*, 90 WASH. U. L. REV. 587, 593 (2013) (the class action "pushes the substantive law closer to maximal implementation").

20. Litigation, including class actions, can bring information to the public's attention "by forcing information out into the open that would otherwise remain hidden." ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 8 (2017). Litigation can also spur public conversation about the issues at the heart of a case. *Id.* at 9.

21. In order for a class to be recognized, a court must find that the putative class members "share some traits making it appropriate to recognize a representative empowered to pursue their claims." STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 2 (1987); *see also infra* notes 152–215 and accompanying text.

plaintiffs seeking to move forward with all the strength that the class designation affords. First, plaintiffs in a public interest class action must demonstrate, pursuant to Rule 23(a)(2), that "there are questions of law or fact common to the class."[22] Second, such plaintiffs must demonstrate, pursuant to Rule 23(b)(2), that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[23]

For decades, class certification was not a significant challenge for plaintiffs.[24] Recently, however, restrictive procedural developments, including those developed in the Supreme Court's 2011 *Wal-Mart Stores, Inc. v. Dukes*[25] decision, have heightened the standard plaintiffs must meet to achieve class certification in public interest class actions.[26] The *Wal-Mart* decision generated (and continues to generate) significant criticism for its interpretation of the Rule 23(a)(2) "commonality" standard, as well as for its impact on classes certified under Rule 23(b)(2), which governs most public interest class actions.[27]

Missing in the critical scholarly conversation is any discussion of how advocates can use narrative techniques to meet that heightened certification standard. Scholarship in law and narrative has also largely ignored the class action, which uses and produces narratives in ways not seen in more traditional litigation. Individual narratives in public interest class actions are a rich ground for critical narrative study, and that study can provide insight into questions of class action doctrine. The way individual narratives function in public interest class actions prior to certification echoes the theoretical tensions inherent in the concept of

22. FED. R. CIV. P. 23(a)(2).

23. FED. R. CIV. P. 23(b)(2).

24. Marcus, *supra* note 14, at 781.

25. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011); *see also* Marcus, *supra* note 14, at 792 ("Few doubt that the decision raises the bar for class certification.").

26. Marcus, *supra* note 14, at 781 ("Present-day upheaval in class action procedure threatens to alter—perhaps to imperil—structural reform litigation in the federal courts. Without class certification, a lot of structural reform litigation will prove much more difficult to bring.").

27. *See Wal-Mart*, 564 U.S. at 345–59 (addressing the "commonality" requirement for class actions). Prior to *Wal-Mart*, the commonality requirement "was seen as easy to satisfy, with the necessary showing being characterized as 'minimal' and permissibly construed." A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 463 (2013) (footnotes omitted).

group litigation,[28] especially as those tensions play out in an era of restrictive procedure.[29]

This Article begins to fill the gap in the literature by conducting a critical reading of litigation documents in two recent public interest class actions: one challenging family separations at the border,[30] and one challenging the denial of abortion care to pregnant, unaccompanied minors in immigration custody, which culminated in a 2019 D.C. Circuit opinion affirming class certification.[31]

The Article's narrative analysis yields several observations about how the parties use narrative before class certification—choices that ultimately enable the kinds of stories that make legal and cultural change possible. The Article critically assesses the nuanced narrative techniques that assist plaintiffs in achieving class certification in a challenging procedural context and concludes that narrative is doing important work in public interest class actions at the certification phase. This Article also makes recommendations for courts and lawyers to pay greater attention to the workings and complications of storytelling in class action cases.

This Article proceeds in three parts. Part I provides an essential background on narrative, the characteristics that make narratives persuasive, and the values that narrative serves in civil litigation generally. Part II addresses the procedure and doctrine of class actions, and in particular public interest class actions; this part also reviews recent restrictive procedural developments through a narrative-theory lens. Finally, Part III conducts a critical reading of the narratives in two recent public interest class action cases. Part III makes three novel observations about the narrative techniques that aid advocates in demonstrating the requirements for class certification. Effective class certification briefing presents what this Article calls "die cut" narratives, which repeat key phrases and sentence structures to emphasize commonality. "Die cut" narratives are told at a high level, fully coherent but devoid of personalized details. Although this method is effective at emphasizing commonality, it may deprive the briefing of the sympathetic details that make public interest class actions compelling to judges both on the merits

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28. *See* Deborah R. Hensler, *Happy 50th Anniversary, Rule 23: Shouldn't We Know You Better After All This Time*, 165 U. PA. L. REV. 1599, 1600 (2017) ("The joining of group litigation with a legal regime based on individual autonomy was long considered a marriage of convenience, justified by the inefficiency of resolving large numbers of claims arising out of the same facts and law in individual proceedings." (footnote omitted)).

29. *See* Marcus, *supra* note 14, at 781; Spencer, *supra* note 27, at 448 (stating *Wal-Mart* "is also disquieting in light of the Court's other recent decisions trending in the direction of restricting access to justice by making it more difficult for plaintiffs to bring claims and have them heard").

30. Ms. L. v. U.S. Immigration and Customs Enforcement, No. 18cv0428, 2018 WL 8665001, at *2 (S.D. Cal. June 26, 2018) (granting motion for class certification in part).

31. J.D. v. Azar, 925 F.3d 1291 (D.C. Cir. 2019).

and at the class certification stage. Finally, Part III makes recommendations for judges and lawyers to incorporate more vigorous and explicit narrative analysis around class certification.

I. THE STORY OF NARRATIVE IN LITIGATION

Narrative and civil litigation are inextricably connected.[32] Stories are told and retold in litigation, from the client's initial conversation with a lawyer, to the recounting of events in written pleadings and motions, from the oral testimony of witnesses and opening and closing statements of counsel at trial, to the final, canonical recitations of the facts of a case in a court opinion.[33]

Despite its inherent appeal, the connection between litigation and narrative bears further explanation in order to support this Article's claims. The following section covers the concepts encompassed by this Article's use of the term "narrative," how narrative works to persuade, and how narratives interact with litigation procedure.

A. Narrative: What it Means

Because the concept of narrative is central to this Article's claims, a precise definition of "narrative" is needed. Though narrative is vital to law, the term is often used in legal scholarship without attention to its meaning.[34] Indeed, the term is often used imprecisely.

A narrative requires certain irreducible elements. Amsterdam and Bruner offer this "austere definition" of "what is necessary to make a story": the narrative needs "a cast of human-like characters . . . capable of willing their own actions, forming intentions, holding beliefs, having feelings."[35] The narrative "also needs a *plot* with a beginning, a middle, and an end, in which particular characters are involved in particular events."[36] To unfold, "the plot requires . . . an initial *steady state* . . . that gets disrupted by a *Trouble* . . . in turn evoking *efforts* at redress or transformation, which succeed or fail . . . so that that the old steady state is *restored* or a new (*transformed*) steady state is created."[37]

For the purposes of this Article, the following definition of narrative is

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32. "Law lives on narrative." ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 110 (2000).

33. "[T]he law is awash in storytelling." *Id.*

34. *See* Anne E. Ralph, *Narrative-Erasing Procedure*, 18 NEV. L.J. 573, 576 (2018).

35. AMSTERDAM & BRUNER, *supra* note 32, at 113.

36. *Id.*

37. *Id.* at 113–14 (emphasis in original).

appropriate: "[t]he representation of an event or a series of events."[38] A second definition, also appropriate for this Article, incorporates the important concepts of audience and purpose: "[S]omebody telling somebody else on some occasion and for some purpose(s) that something happened."[39]

This Article's use of "narrative" should not be confused with less precise uses of the term. The important distinction to make, for lawyers and for legal scholars, is that the term narrative, as used here, does not mean a general treatment or a broad-strokes summary.[40] For purposes of this Article, "narrative" means a particular representation of an event or a series of events.

The narrative is not synonymous with the underlying event or events told about in the narrative.[41] As well, for the purposes of this Article, it is important to distinguish between narrative as a distinct entity on the one hand, and data or facts on the other. Points of data, alone, are not narratives. Similarly, one singular fact does not make a narrative. Indeed, mere collections of data and facts, without more, do not constitute narratives.[42] Nor do compilations of dates and events, without more, constitute narratives. Something more is required to constitute a narrative—that is, the sense of connection, causation, and forward motion that Amsterdam and Bruner's definition of narrative embodies.[43]

A narrative is one "telling" or one "version" of a story that might be told in many ways. Different tellings, different audiences, and different purposes all give rise to different narratives. At its most basic then, a narrative is one representation of events, put together for an audience and for a particular purpose.

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38. H. PORTER ABBOTT, THE CAMBRIDGE INTRODUCTION TO NARRATIVE 13 (2008).

39. James Phelan, *Narratives in Contest; Or, Another Twist in the Narrative Turn*, 123 PUBLICATIONS MOD. LANGUAGE ASS'N 166, 167 (2008). Though the work of some narratologists distinguishes between the terms "narrative" and "story," this Article refers to a narrative and story interchangeably, to be consistent with the way those terms are likely to be understood and used by law-trained academics, judges, and practicing lawyers. *See* ABBOTT, *supra* note 38, at 16.

40. *See, e.g.*, Simon Stern, *Narrative in the Legal Text: Judicial Opinions and Their Narratives*, *in* NARRATIVE AND METAPHOR IN LAW 124 (Michael Hanne & Robert Weisberg eds., 2018) ("[L]egal scholars often speak of 'narratives' when they mean something else . . . .").

41. Ralph, *supra* note 34, at 576 ("A narrative is the representation of the events that occur.").

42. *See* AMSTERDAM & BRUNER, *supra* note 32, at 123 ("Statistics can tell us that we are in, say, the lowest quartile of income in the city; but only through narrative do we come to understand whether that is bad luck, a sign of personal fecklessness, or an injustice.").

43. Stories are "always about events extended over time." AMSTERDAM & BRUNER, *supra* note 32, at 120; *see also id.* at 127 ("Stories go somewhere. They have an end, a *telos*.").

B. Narrative: How it Persuades

Narrative represents a fundamental mode of human communication and a key form of persuasion both in law and more broadly in human experience. Narrative theory studies how stories are written or composed, how they are transmitted, and how they are received by an audience.[44] As this section describes, narrative theory teaches what we seem to know innately: that stories are a powerful way of understanding and communicating our human experiences.

On an individual level, narrative is deeply engrained in the way we interact with the world. As Jerome Bruner has written, "we organize our experience and our memory of human happenings mainly in the form of narrative—stories, . . . myths, reasons for doing and not doing, and so on."[45] In fact, Bruner has written that having a narrative of one's own life is an essential component of having a sense of self.[46] Collectively, groups of people tell and retell stories as a means of sharing human experiences and creating communities and culture.[47]

Cognitive science has revealed that people understand the world by categorizing sense experiences into "schemas" that allow us to create a kind of "shorthand for an event or series of events that we've seen, heard, or experienced before."[48] A schema "contains general knowledge about a particular subject, including relationships between events and occurrences."[49]

We match our experiences to these schemas, likely unconsciously, which allows us to process what we are experiencing and predict what we will encounter next.[50] By calling on multiple schemas at once, humans

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44. Anne E. Ralph, *Not the Same Old Story: Using Narrative Theory to Understand and Overcome the Plausibility Pleading Standard*, 26 YALE L.J. & HUMAN. 1, 25 (2014) ("Narrative theory answers the complex question of why narratives are persuasive. Narrative theory also seeks to explain the characteristics that every narrative possesses and how those characteristics function.").

45. Jerome Bruner, *The Narrative Construction of Reality*, 18 CRITICAL INQUIRY 1, 4 (1991). *See also* AMSTERDAM & BRUNER, *supra* note 32, at 30–31 ("So predisposed is the human mind to narrative that we even experience the events of everyday life in narrative form and assign them to categories derived from some particular kind of story.").

46. Jerome Bruner, *Life as Narrative*, 54 SOC. RES. 11, 11 (1987).

47. AMSTERDAM & BRUNER, *supra* note 32, at 116–17.

48. Ralph, *supra* note 34, at 579.

49. Ralph, *supra* note 44, at 26 (citing Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1133 (2004)). Other concepts that have a similar meaning as "schema" include, "mental blueprints" or "stock structures," or "categories." *See* AMSTERDAM & BRUNER, *supra* note 32, at 19 (noting "[c]ategories are ubiquitous and inescapable in the use of mind" and even lawyers and judges cannot do without them); Ralph, *supra* note 34, at 579.

50. *See* Linda L. Berger, *The Lady, or the Tiger? A Field Guide to Metaphor and Narrative*, 50 WASHBURN L.J. 275, 282 (2011); *see also* Linda L. Berger, *How Embedded Knowledge Structures*

innately organize experiences into narrative form.[51] Our schemas also allow us to communicate our experiences to others.[52] Some of these schemas are in fact stories: narratives with plots, meaning a beginning, middle, and end.[53]

Some schemas represent stories that have special persuasive and cultural power. As people tell and retell their experiences in narrative form within a community, the community develops a pool of "stock scripts" that "embody normal expectations and normal practice in a culture"[54] and that "play out *recurrent* situations in our lives."[55] They allow us to "assess and interpret [our] circumstances and shape judgment regarding [our] experience," even regarding events we have not experienced before but about which we know stock scripts.[56] With respect to these scripts, "we don't so much create them as assimilate them from the people with whom we live."[57]

Some of these stock structures achieve heightened cultural significance. Through stories to which we refer as archetypes, cultural master stories, or cultural master narratives,[58] we "connect vitally with our deepest values, wishes and fears."[59] Some master narratives appear to be universal, such as "the quest[or] the story of revenge."[60] As the name suggests, many cultural master narratives are specific to individual cultures; indeed, "the more culturally specific the [master narrative], the greater its practical force in everyday life."[61]

Master narratives "can have strong rhetorical impact" in that people tend to attribute credibility to narratives that correspond with or are

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Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes, 18 S. CAL. INTERDISC. L.J. 259, 264 (2009).

51. Jennifer Sheppard, *Once upon a Time, Happily Ever after, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 WILLAMETTE L. REV. 255, 261 (2009) ("[N]arrative form is 'an innate schema' for the organization and understanding of human experience." (footnote omitted)).

52. Ralph, *supra* note 34, at 580 ("To the extent we share the same underlying schemas as others, we can understand what others are doing or even thinking. The more schemas with which we are familiar, the better we are able to understand the world.").

53. *See* AMSTERDAM & BRUNER, *supra* note 32, at 30–31.

54. *Id.* at 121.

55. *Id.* at 45.

56. Ralph, *supra* note 44, at 26.

57. AMSTERDAM & BRUNER, *supra* note 32, at 45.

58. *See* ABBOTT, *supra* note 38, at 43. A master narrative also could be called a "masterplot," "story skeleton," "canonical story," or an "archetype." *Id.* As Abbott has noted, it is confusing that these recurring cultural schemas are called "master *narratives*," because narratives are technically individual instances of storytelling. *Id.* at 43.

59. *Id.* at 42.

60. *Id.* at 43.

61. *Id.*

structured like cultural master narratives.[62] Often, master narratives have moral content, because they "create an image of the world in which good and evil are clearly identifiable, and in which blame can fall squarely on one party or another."[63] We tend to think about events, including events in our own lives, through the lens of master narratives, but we tend not to be conscious of those master narratives while they are doing their work on us.[64] In fact, "[s]ome would argue that our identities are so invested in [the master narratives that we know], that when [they] are activated it is impossible to break out of the vision they create."[65]

As do all national cultures, American culture—and American law, as well—has its own master narratives.[66] Importantly, "no culture can be summed up" with just one master narrative.[67] Different groups develop different master narratives for explaining the same events.[68] In short, the master narratives that we will apply to our experiences of the world are profoundly determined by the culture within which we live.

In addition to cultural recognition, other well-recognized properties drive narratives' persuasive power. Narrative scholars have determined three properties that make narratives psychologically persuasive[69]: narrative coherence, narrative correspondence, and narrative fidelity.[70] Narratives tend to be convincing to the extent they demonstrate these features.[71]

First, persuasive narratives demonstrate "narrative coherence."[72] Narrative coherence describes a story's "internal consistency" as well as its "completeness."[73] In an internally consistent narrative, all "the parts of the story fit together [well]."[74] A narrative is internally consistent when all its parts relate in a "quasi-logical" way and do not contradict each

62. *Id.* at 42.

63. *Id.* at 44.

64. *Id.* at 42.

65. *Id.* at 45.

66. *Id.* at 43–44 (explaining the American master narrative of the "Horatio Alger story" as a "local variation" on a universal master narrative).

67. *Id.* at 44.

68. *Id.*; ROGER C. SCHANK, TELL ME A STORY: NARRATIVE AND INTELLIGENCE 57 (Peter Brooks & Paul Gerwitz eds., 1990) ("Different people understand the same story differently precisely because the stories they already know are different.").

69. J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 53, 56 (2008).

70. *Id.* at 55.

71. *Id.* at 86.

72. *Id.* at 63.

73. *Id.* at 64.

74. *Id.*

other.[75] The inferences an audience member makes unconsciously can support a sense of internal consistency: as long as the parts of a story do not contradict one another, the audience member will put the key elements together and make inferences to connect them.[76] On the other hand, where the parts of a story are contradictory or ambiguous, it will be less persuasive.[77]

To achieve narrative coherence, the story must also be complete, in that "the sum total of the parts of the story seems" adequate.[78] Even an internally consistent story may be unpersuasive if it is incomplete.[79] A complete story contains all the expected parts needed to make a narrative.[80] A story that is missing, for instance, "important facts," will not strike the audience as complete.[81]

Persuasive narratives also embody the property of narrative correspondence.[82] Correspondence requires a connection to what the audience "knows about what typically happens in the world."[83] This property has a normative component: A story that possesses narrative correspondence will match "not only . . . a sense of what happens in the world, but to socially normative versions of what happens in the world."[84] Narrative correspondence gives stories plausibility.[85]

Narrative correspondence relates to social knowledge, including stock scripts and cultural master narratives, in that a narrative will "appear plausible to the extent that it manifests similarity with some model of narrative which exists within the stock of social knowledge . . . ."[86] Audience members, receiving a story, take the information in the story and test it against "the vast store of background knowledge about social

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75. *Id.* at 64–65; *see also* BERNARD S. JACKSON, LAW, FACT, AND NARRATIVE COHERENCE 58 (1988).

76. *See* Rideout, *supra* note 69, at 65.

77. *Id.*; *see also* ROBERT P. BURNS, A THEORY OF THE TRIAL 168 (1999) ("[A] story may be implausible simply because the relationships among the key story elements are indeterminate or ambiguous."); Ralph, *supra* note 44, at 28.

78. Rideout, *supra* note 69, at 64.

79. *Id.* at 65.

80. *Id.*

81. *Id.*

82. *Id.* at 66.

83. *Id.*

84. *Id.*

85. J. Christopher Rideout, *A Twice-Told Tale: Plausibility and Narrative Coherence in Judicial Storytelling*, 10 LEGAL COMM. & RHETORIC: JALWD 67, 71 (2013).

86. Rideout, *supra* note 69, at 67; *see also* W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 48–50 (1981).

life" encoded in the stock scripts and master narratives they know.[87] That background knowledge allows audience members to "fill in the framework of connections" as they make inferences that will help them interpret the story.[88]

Finally, persuasive narratives also exhibit "narrative fidelity."[89] Narrative fidelity encompasses the concept of "whether a story constitutes good reasons for belief or action," with respect to the "historical and social setting" in which the audience is situated.[90] This characteristic goes "beyond a narrative's structure and its correspondence to the stock stories of the culture" and instead describes "the narrative's similarity to what an audience member knows to be true in the real world."[91] Narrative fidelity requires a kind of "communal validity" for the audience, "grounded in historical and social particulars."[92]

Within this framework, we can understand the use of narrative techniques—the tools in the storyteller's toolbox that help to create coherence, correspondence, and fidelity. All parts of a story contribute to its persuasive effect, even those not strictly required for a narrative.[93] For instance, the storyteller can use sequence to make the narrative persuasive. Although a narrative must have a plot, it need not be chronological. The sequence in which the writer presents events can affect the narrative's persuasiveness.[94]

Similarly, the kinds of details and level of detail that a writer chooses to use can affect the story's persuasiveness.[95] Details can affect the way

87. BENNETT & FELDMAN, *supra* note 86, at 50.

88. *Id.*

89. Rideout, *supra* note 69, at 69.

90. *Id.* 72.

91. Ralph, *supra* note 44, at 30.

92. Rideout, *supra* note 69, at 75, 76.

93. ABBOTT, *supra* note 38, at 48. For instance, in constructing a story, the setting of a story is optional, unlike events and characters. *Id.* at 17. But details about the story's setting "can exert considerable rhetorical leverage on the way [an audience member] read[s]." *Id.* at 48.

94. A writer's "choice of beginning point has large implications for who the actors in [her] story will be and what their conduct will mean." JAMES B. WHITE, FROM EXPECTATION TO EXPERIENCE: ESSAYS ON LAW AND LEGAL EXPERIENCE 33 (1999); *see also* CAROLYN GROSE & MARGARET E. JOHNSON, LAWYERS, CLIENTS & NARRATIVE: A FRAMEWORK FOR LAW STUDENTS AND PRACTITIONERS 15 (2017) ("[P]eople are wired to look for causation in the transpiring of events. In constructing a narrative . . . the author sequences events in a way to explain the cause and effect.").

95. "Details elicit emotion, create mental pictures, stimulate associations, and lend coherence and fidelity to narratives." Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice*, 15 J. LEGAL WRITING INST. 3, 40 (2009). Detailed language allows a writer to "range in . . . descriptions of things from the concrete to the quite abstract. We get more concreteness by using words that are more fine-grained, more vivid, more graphic. Multiplying details . . . also adds solidity." AMSTERDAM & BRUNER, *supra* note 32, at 177.

the people and entities involved in the narrative appear to the reader.[96] Finally, a storyteller must also consider point of view—"the perspective from which the reader . . . experiences the story."[97] Traditionally, in litigation narratives, "the attorney is the narrator, telling [the client's] story from a lawyer's point of view."[98]

C. Narrative: How it Works in Litigation

Narratives pervade litigation, supporting important values in civil litigation.[99] The litigation process generates multiple narratives.[100] For instance, Jane telling her spouse what the boss said before firing her is one narrative. Jane later telling her *lawyer* what the boss said before firing her is yet another narrative.[101] An additional, separate narrative results when the lawyer drafts numbered paragraphs in a complaint recounting the factual background of the firing that underlies Jane's legal claims.[102] A narrative results from Jane retelling the story of her firing at her deposition.[103] If the case proceeds to trial, yet another narrative might come out of her trial testimony about the firing, which will be made in response to direct and cross-examination questions.[104] Her attorney's opening and closing statements—as well of those of the opposing party—will also be narratives.

As the parties generate narratives, they constantly test their narratives against one another.[105] In litigation, "the contesting of interpretation is

96. Well-developed characters will "feel real to the reader," and the reader can "be persuaded to empathize with" characters. Fajans & Falk, *supra* note 94, at 30.

97. Cathren Koehlert-Page, *Come a Little Closer So I Can See You My Pretty: The Use and Limits of Fiction Techniques for Establishing an Empathetic Point of View in Appellate Briefs*, 80 UMKC L. REV. 399, 404 (2011). A writer has considerable ability to manage the "closeness" between the reader and the story's characters. *Id.*

98. Fajans & Falk, *supra* note 94, at 37. The lawyer's voice (usually "uninflected, unemotional language") can "produce[] an appearance of objectivity that enhances credibility," but can also "distance[] the reader from the narrative and induces her to withhold judgment as to the truth of the matter." *Id.* at 37.

99. *See* Ralph, *supra* note 34, at 575.

100. *See* AMSTERDAM & BRUNER, *supra* note 32, at 110.

101. *See* JAMES B. WHITE, THE LEGAL IMAGINATION 243 (abridged ed. 1985) (noting the lawyer "must know how to tell a story, and how to listen to one: he starts with the story the client tells him; . . . he then tells the story over and over again to himself and to others, . . . constantly varying the terms of his narrative but coming at last to a version (or perhaps more than one) cast in terms of legal conclusion").

102. *See, e.g.*, Ralph, *supra* note 44, at 41.

103. Ralph, *supra* note 34, at 601. Discovery can contain narratives; even discovery that is not narrative serves a related purpose in that it generates information for the creation of future narratives. *Id.* at 598, 603.

104. AMSTERDAM & BRUNER, *supra* note 32, at 110.

105. Ralph, *supra* note 34, at 584. James Boyd White has called a legal dispute "a kind of narrative competition." WHITE, *supra* note 94, at 33.

expected: the conventions of the genre call for oppositional debate."[106] During litigation, parties put forth competing narratives in an attempt to activate powerful master narratives belonging to their audience.[107] Particularly skilled lawyers tell client stories in ways that invoke listeners' views of the world, counting on the fact that the listeners will thus supply inferences about the facts of the case.[108] In this contest of narratives, the parties ask legal decisionmakers to determine the ending of the story.[109]

In writing opinions, judges re-narrate the story of the parties and write the ending as they explain why the case is a particular type of tale—say, one consistent with liability—and not another.[110] Judges select facts that not only explain their decisions but also persuade.[111] Even in lawsuits that do not reach a decisionmaker in the form of a trial jury or a judge hearing dispositive motions, the parties nonetheless highlight and evaluate the strength of the stories they can tell as they work towards settlement.

Narrative concepts are also foundational to the way the law progresses in our common-law system.[112] The American common-law system, resting on the principle of stare decisis, under which like cases should be decided in like manner, can be understood through narrative principles as a storytelling system. Parties tell stories about what happened between them—stories for which the law will, one party hopes, provide a remedy. Plaintiffs tell stories that they hope will lead to the conclusion that what happened to them matches previous cases where plaintiffs have prevailed; defendants tell stories to support the conclusion that what happened doesn't match cases where defendants were found liable. The successful party will match the facts to an earlier tale matching her desired outcome on liability. As parties argue about the correct story to be told about the underlying events, they invite a decisionmaker (the judge or jury) to write

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106. AMSTERDAM & BRUNER, *supra* note 32, at 173 (emphasis omitted); *see also* JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE 37 (2002) ("[O]pposing stories are at the heart of what we loosely refer to as 'having your day in court.'").

107. ABBOTT, *supra* note 38, at 44.

108. *See id.* at 45.

109. The legal process is "at its heart . . . a way of telling a story about what has happened in the world and claiming a meaning for it by writing an ending to it." JAMES B. WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 36 (1985).

110. *See, e.g.*, Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 571–72 (1991).

111. *See id.* ("[T]he 'facts' that appear in a decision are those that the judge chose to mention. Judges who want to write persuasive opinions often emphasize facts that support their positions and ignore or downplay other facts . . . . In some [Supreme Court] cases, the majority and the dissent view the facts so differently that one might wonder whether the Justices read the same record.").

112. Martha Minow, *Stories in Law*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 24, 25 (Peter Brooks & Paul Gewirtz eds., 1996) ("[S]torytelling offers real continuities with common-law reasoning; it dwells on particulars while eliciting a point that itself may be molded or recast in light of the story's particulars reviewed in a different time.").

the ending to the story. With each new case, a court takes the story of the parties before it and attempts to fit that story into the models of earlier law-stories. Thus, our system of deciding like cases in like manners resembles the model of narrative correspondence that J. Christopher Rideout has described: "[a] narrative is plausible, and persuasive, to the extent that it bears a structural correspondence to one of these stock scripts or stories."[113]

The importance of narratives in litigation is not limited to the impact those narratives have on court opinions and the related long-term development of the law. In addition to advancing the substantive law, narratives developed in litigation serve other values: they can give participants a sense of procedural justice, can inform public debate, and can assist us in gaining a broader understanding of our past and ourselves.

Indeed, one important way in which the legal rules and procedures of litigation impact American democracy is bringing to light narratives. Throughout litigation, legal rules and procedures shape the kinds of stories that can be narrated. As I have written, some legal rules threaten to erase narratives from litigation altogether.[114]

The narratives revealed in lawsuits are "important for public debate."[115] Furthermore, the information revealed in lawsuits can help people—litigants and other members of the public alike—form their own narratives that help them understand the world.[116] Thus, the legal narratives described here can support a broader catalog of law-stories that are knowable in the world and that are useful for future lawsuits.[117]

This account of narrative has described some of the roles stories can play in civil litigation. The rules and procedures governing class action litigation place additional dimensions of pressure on individual narratives. The next section explains those rules and procedures. As the next section will demonstrate, the class action is a unique procedural creation in American litigation. This uniqueness has particular import for the way narratives work in class actions.

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113. Rideout, *supra* note 69, at 67.

114. *See* Ralph, *supra* note 34, at 600. I have written elsewhere about the pressure that procedure places on narratives in litigation. For instance, the heightened "plausibility" pleading standard encourages lawyers to frame client stories so as to best fit within already-existing "stock" narratives, rather than advancing potentially path-breaking narratives. Similarly, the recently introduced "proportional" discovery standard requires parties to make choices about discovery that may narrow their narrative options down the road.

115. LAHAV, *supra* note 20, at 144; *see also id.* at 83 (explaining that access to information is "critical" to citizens' ability to participate in self-government).

116. *See id.* at 61 ("The process of legal argument . . . also helps people form information into narratives in order to understand the world and create social meaning. These narratives provide frameworks for understanding the past and the present . . . .").

117. Ralph, *supra* note 34, at 607 ("Over time, as an expanding catalog of legal narratives have been contested and resolved in litigation, new legal pathways develop. Thus, narratives enable the law to accommodate citizens in constantly changing times.").

II. PUBLIC INTEREST CLASS ACTION PROCEDURE

This Part lays the groundwork of the law and rules governing public interest class action litigation. Class action litigation is procedurally complicated, both because of the rules themselves and because of additional hurdles created by court interpretations of the rules. The following section explains the Article's focus on public interest class actions; describes the procedural background for such lawsuits; and explores the Supreme Court's 2011 *Wal-Mart Stores, Inc. v. Dukes* decision, which has been widely criticized for raising the standards that plaintiffs must meet to achieve class certification.

A. Setting the Scene: Why Focus on Public Interest Class Actions?

This Article focuses on public interest class actions, meaning suits against government officials or government entities, seeking injunctive or declaratory relief, pursuant to Rule 23(b)(2).[118] Examples of public interest class action litigation include challenges to jail and prison conditions, litigation seeking reform of foster care systems, and school desegregation cases.[119] The *Flores* litigation and settlement described above began as a 23(b)(2) class action.[120]

A class action lawsuit "permits a large group of persons temporarily to become a single litigative entity" in order to seek a "collective legal remedy."[121] The class action as a procedural device has roots in equity,[122] but it became a prominent feature of American litigation in the federal

118. Marcus, *supra* note 14, at 780–81. Rule 23(b)(2) provides for class treatment when the requirements of Rule 23(a) are met and when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2). The Rule 23(b)(2) class action was designed to be used in segregation cases. *See* David Marcus, *Flawed but Noble: Desegregation Litigation and its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 702 (2011) ("The only recorded considerations to have shaped the provision [Rule 23(b)(2)] involved concerns about desegregation litigation."). Describing situations Rule 23(b)(2) was "intended to reach," the Advisory Committee stated: "Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." FED. R. CIV. P. 23(b)(2) advisory committee's notes to 1966 amendment.

119. The possible constituents of a class are broad. YEAZELL, *supra* note 21, at 1.

120. *See Flores* Settlement Agreement, *supra* note 10.

121. *Id.* In class action litigation "the group presents itself in court and is not only recognized as a litigative entity but is also in effect given a valuable piece of property at the same time—its right to sue on behalf of all members of the class." *Id.* at 3.

122. Hansberry v. Lee, 311 U.S. 32, 41 (1940).

courts after a 1966 change to the Federal Rules, when the Rule 23(b)(1), (b)(2) and (b)(3) classes were instituted.[123]

As an entity, a class has power that individual litigants simply do not.[124] The class action is an exception to the traditional American rule that each individual must litigate her own claim on her own behalf,[125] a rule that recognizes both the individual's right to control her own suit and the general principle that she should not be bound by a judgment unless she is party to a case.[126] Because the class action subverts the individual-lawsuit principle, it is accompanied by strict procedural requirements.[127]

As distinguished from individual litigation, the class action relies on a more "collective vision."[128] The class action achieves representation for groups by making the group, rather than the individual litigant, the relevant party.[129] By allowing litigants, including those with relatively low political and economic power, to pool their claims, class actions help ensure rights vindication.[130] Allowing individuals to sue as a group means that they have access to justice that they might not have on an individual basis and also means that lawyers have additional incentives to pursue the suits.[131]

Public interest class actions—that is, class actions brought against the government for injunctive or declaratory relief, rather than for damages[132]—ensure that the government can be held accountable when it

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123. John K. Rabiej, *The Making of Class Action Rule 23–What Were We Thinking?*, 24 MISS. C. L. REV. 323, 325, 329 (2005).

124. YEAZELL, *supra* note 21, at 2 (describing how a class becomes "capable of pressing claims in court"); *see also id.* at 10 (stating that class action litigation "creates power").

125. *Id.* at 2. In Yeazell's framing, class actions appear to require "bizarre" "compromises with individualism." *Id.* at 3.

126. Class action litigation is an equitable exception to the general constitutional principle that an individual can only be bound by judgment in a case when he or she is a party to the case in the traditional sense. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 808 (1985); *Hansberry*, 311 U.S. at 40; *see also* YEAZELL, *supra* note 21, at 2 (explaining that Anglo-American law "exalts individual choice" and describing support for the principle that "the individual is the bedrock unit both of social action and of legal thought").

127. "A class action . . . is an exception to the usual rule that an individual brings a case on his or her own behalf," and, in recognition of the fact that the class action "runs counter to this fundamental principle," Rule 23 "sets out the requirements for when a party can represent others so that efficiency and due process are both served." Suzette M. Malveaux, *The Power and Promise of Procedure: Examining the Class Action Landscape After* Wal-Mart v. Dukes, 62 DEPAUL L. REV. 659, 660 (2013).

128. YEAZELL, *supra* note 21, at 5.

129. *Id.* at 8.

130. *See* LAHAV, *supra* note 20, at 121. Class actions "guarantee the equality of individuals against large enterprises," including government. *Id.*

131. Alexandra D. Lahav, *The Political Justification for Group Litigation*, 81 FORDHAM L. REV. 3193, 3201 (2013).

132. Marcus, *supra* note 14, at 781.

fails to follow the law.[133] Achieving class certification is important in the public interest context because it "protects against mootness, avoids the need for multiple claimants to [pursue] their own separate litigation, ensures that the scope of the remedy will match . . . violation proved, limits a defendant's ability to resist system-wide enforcement, and subjects the plaintiffs to the same preclusive consequences as the defendant."[134]

Besides these important results of achieving class certification, this Article focuses on public interest class actions for several reasons. First, public interest class actions ultimately bring forward powerful individual narratives that can move the law forward and that can inform public debate. Recent filings in *Flores*, for instance, have shed light on the conditions in which children are living, with searing individual information.[135] For any of these public interest class actions to get to the merits stage, where these powerful stories can be told, the plaintiffs must get past class certification.

The class certification showing requires something unique in terms of narrative. Public interest class actions have particular resonance with narrative concepts generally; indeed, as described below, a recent Supreme Court decision interpreted the rule to require a kind of "glue" between the discrete allegations of individual harms suffered, which seems to be an implicit call for the kind of narrative that can make disparate events hang together.[136]

Public interest class actions, because they do not generally involve damages, are also clearer subjects for study than actions involving damages. When damages are involved, longstanding criticisms of the class action, both within the legal system and in the public consciousness, may be especially trenchant.[137] Some criticisms focus on the economic incentives embedded in class actions for money damages: the fact that lawyers are entitled to a percentage of the overall recovery in the case can mean that class lawyers receive millions even when individual litigants

133. *See* LAHAV, *supra* note 20, at 44.

134. Maureen Carroll, *Class Actions, Indivisibility, and Rule 23(b)(2)*, 99 B.U. L. REV. 59, 74 (2019); *see also* Malveaux, *supra* note 127, at 660 ("Whether an employee can aggregate her case with others is . . . a civil rights issue" because it is "an issue of access to justice" (emphasis omitted)).

135. *See supra* notes 1–13 and accompanying text.

136. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 352 (2011).

137. "Scholars and judges are torn about the nature of the class action device . . . [as the] result of tension between litigant autonomy on the one hand, and the need to solve the collective action problem posed by lawsuits that are too small to be fruitfully brought on their own." Alexandra D. Lahav, *The Continuum of Aggregation*, 53 GA. L. REV. 1393, 1397 (2019); *see also* YEAZELL, *supra* note 21, at 10 (noting that lass action litigation "has received considerable attention because, to a greater extent than ordinary litigation, it creates power").

only receive small awards.[138] Class actions also receive criticism because the all-important certification decision can "blackmail" defendants into settling,[139] because they subvert individual rights,[140] and because the class action incentives can encourage lawyers to file suits that lead to distorted decisions on the merits.[141]

These debates have contributed to deeply entrenched cultural master narratives surrounding class action litigation.[142] Class action litigation is, depending on one's perspective, an Excalibur that lets the powerless enforce their rights against the mighty, a culprit for the resource-draining litigation explosion in American courts, and a vehicle for plaintiffs' lawyers' self-enrichment.[143] In fact, there appears to be little empirical justification for any specific cultural master narrative.[144]

Importantly for this Article's purposes, the concerns at the heart of these master narratives are largely inapplicable to public interest class actions.[145] When money damages are not at stake, the typical distortions

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138. For instance, Robert Klonoff describes "isolated—but highly publicized—instances of abuse in which class attorneys obtained handsome fees while class members received meager recoveries or worthless coupons." Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 732 (2013). During the 1980s and 1990s, "numerous multi-million dollar and billion dollar settlements" led to "significant unfavorable press" for the class action device. *Id.* at 737; *see also* Alexandra D. Lahav, *Are Class Actions Unconstitutional?*, 109 MICH. L. REV. 993, 995 (2011) (summarizing critique of class actions as problematic because "[o]ften [the class action] is a lawsuit run by lawyers offering no meaningful compensation to individual litigants").

139. LAHAV, *supra* note 20, at 194 n.27 (summarizing argument that class actions "blackmail" defendants into settling, and identifying refutations of that argument).

140. *See also* Lahav, *supra* note 138, at 997 (summarizing argument that "the class action subverts individual rights by erasing an individual's cause of action in favor of the collective").

141. Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 147 (2011) ("Opponents of class actions argued that the form itself produced 'lemons'—distorting decisions on the merits by giving unfair advantages to its users or, more aptly, the lawyers who file suit.").

142. *See, e.g.*, Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem*,*"* 92 HARV. L. REV. 664, 664 (1979).

143. For instance, Miller's early characterization of the competing narratives regarding class action divided them into two camps. On the one hand, the valorous class action narrative "trumpeted" the procedural device's ability to "tak[e] care of the smaller guy." *Id.* at 665 (internal quotation marks omitted). On the other hand, opponents characterized the class action "as a form of legalized blackmail or a Frankenstein Monster." *Id.*; *see also* Hensler, *supra* note 28, at 1604 ("[T]he monster appellation connotes something large and out of control . . . .").

144. "[T]here is no proof that most class action litigation is meritless . . . ." LAHAV, *supra* note 20, at 126; *see also id.* ("The trade-off that society must make when deciding whether to restrict class actions is between the potential cost . . . of overenforcement and equal justice before the court for individuals. Before that trade-off can be reasonably made, there needs to be reliable information about the extent of meritless litigation as distinct from the enforcement of existing law. So far, no such evidence has been forthcoming.").

145. *See* Marcus, *supra* note 14, at 795 ("[F]ears about plaintiffs' lawyers enriching themselves at the expense of the class . . . are inapposite in public interest litigation. So are concerns that pressure generated by the amount of money at stake will push defendants toward settlements unwarranted by the facts and applicable substantive law.").

that give rise to a critique of class actions tend not to be present.[146] In the public interest class action context, then, there is room to go beyond the typical master narratives about class action and analyze the influence of other cultural master narratives and of narrative techniques on legal discourse.

The lack of focus on money damages also allows a stronger focus on narrative in class certification decisions and arguments. With classes under Rule 23(b)(1) and 23(b)(3), there is a greater need to focus on requirements of "ascertainability,"[147] on notice procedures and practicality, and on opt-out procedures. These complications also serve to drive up settlement pressures and settled cases can remove narratives from public-record court filings.[148] On the other hand, Rule 23(b)(2) class actions, freed from those concerns, put the focus on issues like commonality.[149]

This Article also focuses on public interest class actions because of the value generally that legal storytelling places on empathy and understanding.[150] These values underpin much of law and narrative scholarship, and they are reflected in this Article's use of narrative tools to examine public interest class actions. Narrative, like public interest class actions, can further human dignity.[151]

B. The "Initial Steady State": Rule 23's Procedural Framework

As referenced above, Rule 23 of the Federal Rules of Civil Procedure governs class actions and provides the basic standards for instituting a class action.[152] Introduced in 1966, Rule 23 was "a bold and well-

146. *See id.* at 781–82 ("The academic discourse chiefly addresses potential distortions that enormous monetary stakes create, an inapposite focus when the plaintiffs want structural reform, not money; when ideological commitments, not fees, motivate the plaintiffs' lawyers; and when government defendants, backed by the public fisc, experience risk and internalize cost differently than private defendants do.").

147. 7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1760 (3d ed. 2019) (the ascertainability requirement simply means that the class must exist).

148. *See* Ralph, *supra* note 34, at 617–18.

149. The "commonality requirement has no operative significance in suits for money damages" because Rule 23(b)(3)'s predominance requirement is a higher threshold than commonality; suits under 23(b)(2) do allow a deeper focus on commonality. Marcus, *supra* note 14, at 785.

150. *See* Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds*, 87 MICH. L. REV. 2099, 2105 (1989).

151. *Id.* at 2106.

152. Stockholder derivative actions are governed by a separate rule, FED. R. CIV. P. 23.1, as are actions brought by or against the members of an unincorporated association as a class, FED. R. CIV. P. 23.2.

intentioned attempt to encourage more frequent use of class actions."[153] The drafters of Rule 23 had desegregation in mind when they promulgated the rule.[154] Indeed, litigation seeking to remedy inequalities and the class action rule have always been closely connected.[155]

All class actions must meet Rule 23(a)'s threshold requirements: numerosity, commonality, typicality, and adequacy of representation.[156] The numerosity requirement protects the interests of members of small classes, keeping them from being deprived of their day in court, and thwarts attempts to evade joinder.[157] The typicality inquiry looks at whether the named plaintiffs are appropriate representatives of the class whose claims they want to litigate and whether those named plaintiffs' interests are the same as the class's interests.[158] The adequacy of representation inquiry looks at whether "the representative parties will fairly and adequately protect the interests of the class,"[159] and encompasses both class counsel and representative plaintiffs.[160]

For the purposes of this Article, the commonality requirement holds the most interest of all the Rule 23(a) threshold requirements. Commonality

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153. Charles A. Wright, *Class Actions*, 47 F.R.D. 169, 170 (1970). "In 1966 the Supreme Court promulgated an entirely new Rule 23." YEAZELL, *supra* note 21, at 238.

154. YEAZELL, *supra* note 21, at 240–45 (tracing development of modern Rule 23 to "[c]oncerns about racial discrimination and consumer and environmental injuries"); Marcus, *supra* note 14, at 783 ("Rulemakers had desegregation litigation in mind as they revised Rule 23 in the early 1960s." (footnote omitted)); Resnik, *supra* note 141, at 84 ("[R]ulemakers fashioned group proceedings to give members of racial minorities the ability to seek enforcement of injunctions mandating school desegregation and to give consumers claiming statutory rights the capacity to attract lawyers through the potential for large monetary recoveries."); *id.* at 134 ("One of the rule drafters' express goals was to facilitate access to courts for those who lacked the resources or the knowledge that they had possibly been harmed.").

155. Marcus, *supra* note 14, at 783 ("The class action and impact litigation are and always have been inseparable."); Resnik, *supra* note 141, at 84 ("The 1966 class action rule . . . provides another form of intervention to respond to power asymmetries in civil litigation."); *see also* Malveaux, *supra* note 127, at 660 ("[O]ne of the most important Supreme Court cases of the twentieth century—*Brown v. Board of Education*—was a class action."); YEAZELL, *supra* note 21, at 239 ("[T]he rule endorses a strong role for federal courts in social transformation, a role it has played chiefly but not exclusively in the context of racial discrimination.").

156. FED. R. CIV. P. 23(a); *see also* 32B AM. JUR. 2D *Federal Courts* § 1442, Westlaw (database updated Nov. 2019).

157. 32B AM. JUR. 2D *Federal Courts* § 1500. , Westlaw (database updated Nov. 2019). However, the numerosity requirement is applied in a relaxed way when only injunctive relief is at issue. *Id.*

158. *Id.* § 1517, Westlaw (database updated Nov. 2019).

159. FED. R. CIV. P. 23(a)(4).

160. CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1765 (3d ed. 2019) ("If the absent members are to be conclusively bound by the result of an action prosecuted or defended by a party alleged to represent their interests, basic notions of fairness and justice demand that the representation they receive be adequate."); *see also* Hensler, *supra* note 28, at 1600 (noting the relationship between the United States justice system and class actions "has always been uneasy, for the notion of resolving individual rights and property claims through a representative action on behalf of absent parties has always raised due process concerns").

and the requirements of Rule 23(b)(2) are the most "distinctive" requirements for a public interest class action.[161] By its terms, Rule 23(a)(2)'s commonality requirement asks whether "there are questions of law or fact common to the class."[162] Before the *Wal-Mart* era, commonality was understood not to require plaintiffs to surmount a particularly high bar.[163] In terms of its historical development, the commonality requirement is best understood as "no more than a simple requirement that there be issues for the court's determination that would arise in the adjudication of each class member's claims were they litigated separately."[164] Commonality ensures that a lawsuit will proceed with a shared set of facts and that the same behavior by the defendant can be evaluated by hearing all claims at once.[165] All of Rule 23(a)'s requirements, particularly the commonality requirement, undoubtedly restrict how litigants can craft narratives when seeking class certification; the impact of so-called "heightened" commonality standard post-*Wal-Mart* is addressed in the next Part.

When the prerequisites of Rule 23(a) are satisfied, section (b) authorizes a suit to proceed as a class action when one of its subsections is met.[166] The choice of which subsection(s) to use to certify a class has

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161. Rule 23 imposes two "distinctive requirements" for the certification of injunctive relief classes of the kind at issue in public interest litigation: Rule 23(a)'s commonality and Rule 23(b)(2). Marcus, *supra* note 14, at 785.

162. FED. R. CIV. P. 23(a)(2).

163. Marcus, *supra* note 14, at 785; *see also id.* at 786 ("Commonality proved easy to satisfy in part because common questions couched at 'high level[s] of abstraction' often sufficed." (quoting Marisol A. *ex. rel.* Forbes v. Giuliani, 126 F.3d 372, 377 (2d Cir. 1997))).

164. Spencer, *supra* note 27, at 463; *see also id.* at 443 (describing how, prior to *Wal-Mart*, commonality "had been seen as relatively easy to satisfy"). For a detailed history of the 23(a)(2) commonality requirements, beginning with its roots in English joinder and the Federal Equity Rules of 1912, see *id.* at 449–63 and accompanying notes.

165. *See* YEAZELL, *supra* note 21, at 257; *see also* Marcus, *supra* note 14, at 819 ("[C]ommonality determines that the class representative and the class members can plausibly link their injuries to the same . . . conduct that the substantive law proscribes" and "also ensures that litigation proceeds against a relevant factual background.").

166. FED. R. CIV. P. 23(b). The subsections of Rule 23(b) permit certification of a class in the following circumstances: when separate actions involving individual class members would risk "inconsistent or varying adjudications" and potentially "establish incompatible standards of conduct for the party opposing the class," Fed. R. Civ. P. 23(b)(1)(A); when separate actions involving individual class members would risk being "dispositive of the interests of" others or "would substantially impair or impede their ability to protect their interests," Fed. R. Civ. P. 23(b)(1)(B); when a "party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole," Fed. R. Civ. P. 23(b)(2); and when "questions of law or fact common to class members predominate over any questions affecting only individual members," making a class action "superior" as a method "for fairly and efficiently adjudicating" the matter, Fed. R. Civ. P. 23(b)(3). The categories in Rule 23(b) are not mutually exclusive, and courts may certify a class under multiple subdivisions of Rule 23(b), although the choice of which subsection(s) to use to certify a class has

implications for notice, opt-out rights, and the availability of money damages.[167]

The public interest class actions that are the subject of this Article (that is, class actions against the government for injunctive or declaratory relief) seek certification under Rule 23(b)(2). That rule requires that the government actor has "acted or refused to act on grounds that apply generally to the class" so that one injunction is an appropriate remedy for the class as the whole.[168] Rule 23(b)(2) was understood to be "an easy hurdle" for plaintiffs prior to *Wal-Mart*.[169] As explained in the next section, the Supreme Court also gave this requirement sharper teeth in *Wal-Mart* by writing that a Rule 23(b)(2) class has to have an "indivisible" remedy.[170]

The class certification decision is the most important point in the class action lawsuit.[171] Once a class is certified, Rule 23(d) grants a judge much broader discretion to determine the course of the action.[172] Class certification is vital for plaintiffs pursuing claims against the government for enforcement of civil rights, as class certification keeps defendants from mooting individual claims through piecemeal actions and allows plaintiffs to ensure broad-ranging relief.[173] As well, certification of a class

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implications for notice, opt-out rights, and the availability of money damages. 2 NEWBERG ON CLASS ACTIONS §§ 4:3, 4:4 (5th ed.).

167. For instance, 23(b)(2) class actions generally may not result in monetary relief. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 360 (2011) (holding that claims for monetary relief may not be certified under Rule 23(b)(2), "at least where . . . the monetary relief is not incidental to the injunctive or declaratory relief").

168. FED. R. CIV. P. 23(b)(2).

169. Marcus, *supra* note 14, at 788.

170. *See supra* section II.C; *Wal-Mart*, 564 U.S. at 360. This section focuses on the pressures that Rules 23(a) and 23(b)(2) place on narratives. The other parts of Rule 23 may also exert pressure on the kinds of class member stories that are told in class action litigation. For instance, Rule 23(c) establishes the procedure for certifying a class. FED. R. CIV. P. 23(c). Importantly, the "class must be defined" at a level more precise than simply "all those injured by defendant's actions," or "all those wishing to engage in certain types of activity." Richard Marcus, *Revolution v. Evolution in Class Action Reform*, 325 F.R.D. 1301, 1322 (2018) ("It does not suffice for a court to certify a class of 'all those similarly situated' to the plaintiff. One must explain what similarity suffices.").

171. *See* Klonoff, *supra* note 138, at 746 ("[T]he class certification decision is the defining moment in a class action."); Spencer, *supra* note 27, at 442 ("The class certification decision is one of the most hard-fought battles in civil litigation.").

172. FED. R. CIV. P. 23(d); *see also* George Rutherglen, *The Problem with Procedure: Some Inconvenient Truths About Aspirational Goals*, 56 SAN DIEGO L. REV. 1, 21 (2019) ("[O]nce additional parties are before the court, their presence calls for the exercise of increased judicial management. In class actions under Rule 23, the judge has broad authority over the conduct of the action, appointment of class counsel, and approval of settlements.").

173. Carroll, *supra* note 134, at 62 ("Class treatment can have a significant effect on this type of case; without it, the case might become moot before the merits can be adjudicated, or the relief might be limited to a single [plaintiff].").

creates serious pressure on defendants to settle.[174] Indeed, "most class actions settle."[175]

Most importantly for this Article, once a class has been certified, the narrative possibilities of a case open. As the case proceeds, the plaintiffs are no longer concerned with demonstrating commonality and the other requirements for certification, but rather can elicit and include more detailed and persuasive stories. While it may be argued that group litigation can erase individual litigant voices,[176] it is also true that once a class is certified, individual plaintiffs can participate by sharing their stories.[177] For instance, Alexandra Lahav has highlighted the example of the 1980s litigation, brought as a class action on behalf of Vietnam veterans against manufacturers of the chemical Agent Orange.[178] When the case settled as a class action, Judge Jack Weinstein held "town hall forums" at which affected veterans could, among other things, share their stories.[179] This process enabled individual veterans to participate in the litigation, "even though that participation did not involve them getting their own day in court."[180]

Moreover, class actions can give individual class members "a structure and a language for debating and deliberating together" about the issues in the case and their broader social impact.[181] The narratives generated in class actions can also inform broader public understanding of the issues in a case.[182]

As well, for class members, once a class is certified, participation in litigation offers important benefits, including participation in self-government.[183] Indeed, participation is a "promise" of our legal system, embodied in the concept "that each person will have his or her day in

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174. Klonoff, *supra* note 138, at 733, 738 ("Because of the high stakes, defendants often felt compelled to settle large class actions rather than risk a potentially bankrupting judgment.").

175. Lahav, *supra* note 137, at 1397.

176. LAHAV, *supra* note 20, at 91 ("[W]hen large numbers of plaintiffs are lumped together through a variety of procedures, individuals can be lost in the shuffle, without a voice in their own lawsuit . . . .").

177. *See id.* at 92 ("[I]n a class action where there is a trial, individuals can participate as witnesses . . . .").

178. *Id.* at 93–94.

179. *Id.* at 93.

180. *Id.* at 93–94.

181. *Id.* at 92–93.

182. "[T]he high profile nature of some class actions and other aggregate litigation also means that the information is publicized more readily than in individual litigation, which might receive less attention." Lahav, *supra* note 131, at 3199; *see also* LAHAV, *supra* note 20, at 67–68 (explaining how class action lawsuits against Swiss banks for retaining funds of Holocaust victims enabled "the formulation and dissemination of narratives that would not have been heard otherwise").

183. LAHAV, *supra* note 20, at 84 ("Litigation serves the democratic value of participation by enabling individuals to engage directly in the process of lawmaking and law enforcement.").

court."[184] The value of individual participation in self-government through litigation is particularly great when civil rights claims are at issue.[185]

Having set this scene, the next section turns to a recent Supreme Court decision that complicates the story for public interest class actions. As the next section describes, despite not being itself a public interest class action, *Wal-Mart* foretold a profound impact on public interest class actions.

C. "Disrupted by a Trouble": Wal-Mart Stores, Inc. v. Dukes

As this section describes, in *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court heightened the "commonality" requirement.[186] For this reason, the Court's opinion garnered significant criticism. As a narrative-theory reading of the opinion shows, powerful stock stories and master narratives can be excavated underlying the opinion.

1. The Supreme Court Redefines Commonality

The *Wal-Mart* plaintiffs were current and former female employees of Wal-Mart, who alleged that Wal-Mart discriminated against them in violation of Title VII.[187] Specifically, the plaintiffs alleged that the broad discretion that Wal-Mart entrusted to supervisors at local Wal-Mart outposts—discretion over pay and promotions—led to an unlawful disparate impact on female employees.[188] The case presented "one of the most expansive class actions ever," with the class "comprising about one and a half million plaintiffs."[189]

Wal-Mart's pay and promotion decisions were characterized by "broad discretion" that was "generally committed to local managers" and "exercised in a largely subjective manner."[190] Thus, in their Title VII claims, rather than alleging an "express corporate policy against the

184. *Id.* at 88.

185. *Id.* at 84 ("[W]hen a citizen sues the government . . . ordinary individuals, even those without many resources or political connections, can call government representatives into court to explain and be held accountable for unjust practices.").

186. Spencer, *supra* note 27, at 445.

187. 42 U.S.C. § 2000e–1 *et seq.* (2012).

188. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 345–46 (2011); *see also id.* ("The basic theory of their case is that a strong and uniform 'corporate culture' permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal-Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice.").

189. *Id.* at 342.

190. *Id.* at 343.

advancement of women," the plaintiffs alleged that the broad discretion vested in local managers led "to an unlawful disparate impact on [women]" and that Wal-Mart's continued provision of such discretion, combined with its awareness of the resulting impact on women, amounted to disparate treatment.[191] The plaintiffs sought injunctive and declaratory relief as well as back pay and punitive damages.[192]

The district court certified a class under Rule 23(b)(2).[193] A divided en banc Ninth Circuit affirmed the district court's class certification, holding, among other things, that the plaintiffs had met the commonality requirement by raising "the common question whether Wal–Mart's female employees nationwide were subjected to a single set of corporate policies (not merely a number of independent discriminatory acts)."[194]

The Supreme Court reversed, determining both that certification of the plaintiffs' claims for back pay was not proper under Rule 23(b)(2) and that the plaintiffs had not demonstrated the commonality required under Rule 23(a) for a class to be certified.[195] In so doing, the Court "redefin[ed] commonality."[196]

The Court unanimously agreed that the plaintiffs' claims for back pay were improperly certified under Rule 23(b)(2).[197] The Court held that claims for monetary relief could not be certified under Rule 23(b)(2) where "the monetary relief is not incidental to the injunctive or declaratory relief."[198] In its opinion as to Rule 23(b)(2), the Court invoked the concept of "indivisibility," explaining that "[t]he key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'"[199]

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191. *Id.* at 344–45.

192. *Id.* at 342.

193. *Id.* at 347.

194. Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 612 (9th Cir. 2010) (emphasis omitted).

195. *Wal-Mart*, 564 U.S. at 367.

196. Spencer, *supra* note 27, at 444.

197. *Wal-Mart*, 564 U.S. at 360.

198. *Id.* In other words, Rule 23(b)(2) simply does not authorize class certification when each plaintiff would be entitled to an individualized award. *Id.* The Court explained that claims that involve individual money damages "belong in Rule 23(b)(3)," with its accompanying procedural protections such as "mandatory notice, and the right to opt out." *Id.* at 362.

199. *Id.* at 360. The Supreme Court's *Wal-Mart* decision used the term "indivisible" for the first time in a published federal opinion to describe the requirement for the class certification under 23(b)(2). Carroll, *supra* note 134, at 63. For a historical account of the development of "indivisibility" as a requirement for 23(b)(2) class actions, including in the scholarship of Professor Richard Nagareda, see *id.* at 68–71 ("[T]he term [indivisibility] did not appear out of nowhere.").

The Court split five to four on the question whether the plaintiffs satisfied the commonality requirement set out in Rule 23(a)(2).[200] Writing for the majority, Justice Scalia explained that the plaintiffs failed to demonstrate the existence of a common question of law or fact.[201]

The Court held that commonality requires something more from the plaintiffs than demonstrating "merely that they have all suffered a violation of the same provision of law."[202] The plaintiffs' claims must depend on a "common contention" that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[203] In other words, commonality requires that the court "believe that all [plaintiffs'] claims can productively be litigated at once."[204]

The plaintiffs alleged that Wal-Mart engaged in a pattern or practice of discrimination, leading to "literally millions of employment decisions."[205] To demonstrate commonality in such circumstances, Justice Scalia wrote that the plaintiffs would need to provide more "glue," in the form of good reasons to believe all the class members' claims would "produce a common answer to the crucial question *why was I disfavored*."[206] The "glue"—which would hold together disparate individual experiences—would have to fill the "conceptual gap" between one individual claim of injury based on alleged discrimination, and "the existence of a class of persons who have suffered the same injury as that individual."[207]

The Court suggested some ways to "bridge" that "conceptual gap"[208]—for instance, demonstrating that the employer used biased evaluation practices, or demonstrating that the employer operated "'under a general policy of discrimination.'"[209] But the Court noted that the "only corporate policy that the plaintiffs' evidence convincingly establishe[d]" was that

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200. *See* Carroll, *supra* note 134, at 85–86 (noting that the Court agreed on the Rule 23(b)(2) holding as to individualized damages claims for backpay, but the majority and the dissent disagreed—by a margin of five to four—whether the putative class satisfied commonality).

201. *Wal-Mart*, 564 U.S. at 359.

202. *Id.* at 350.

203. *Id.*

204. *Id.* Spencer has explained the way that *Wal-Mart* embodies an efficiency requirement. Spencer, *supra* note 27, at 474.

205. 564 U.S. at 352.

206. *Id.* "Without some glue holding the alleged *reasons* for all those [employment] decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*." *Id.*

207. *Id.* at 353 (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 157–58 (1982) (internal quotation marks omitted)).

208. *Id.*

209. *Id.* (quoting *Falcon*, 457 U.S. at 159 n.15 (alterations added)).

Wal-Mart "*allow[ed] discretion* by local supervisors over employment matters"—quite "the opposite" of commonality.[210] Though discretion in employment matters can be the basis for a disparate treatment claim, more would be required; the Court found it simply "quite unbelievable that all managers would exercise their discretion in a common way without some common direction."[211]

The Court ultimately concluded that the plaintiffs had not provided the "glue" that would hold together all the reasons behind the unfavorable employment consequences they suffered; thus, the plaintiffs could not meet commonality.

Dissenting from the Court's holding on commonality, Justice Ginsburg wrote that the majority had misread Rule 23(a)(2)'s commonality requirement to contain "concerns properly addressed in a Rule 23(b)(3) assessment."[212] Justice Ginsburg wrote that, properly understood, the commonality requirement posed a lower bar than the one the majority set in its opinion; as a "threshold criterion," Rule 23(a)(2)'s commonality requirement was meant to be "easily satisfied," she explained.[213]

Justice Ginsburg characterized the Court's approach as overly focused on "dissimilarities," writing that the Court's attention was "train[ed] . . . on what distinguishes individual class members, rather than on what unites them."[214] Looking at what united the putative class members, Justice Ginsburg would have given "credence to the key dispute common to the class," namely, "whether Wal-Mart's discretionary pay and promotion policies are discriminatory."[215]

2. "Efforts at Redress": Critiques of Wal-Mart

Commentators quickly recognized that *Wal-Mart* stood to effect significant changes in class action procedure.[216] They largely agreed that

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210. *Id.* at 355.

211. *Id.* at 356. In addition to treating as uncompelling the plaintiffs' statistical evidence related to gender discrimination, the Court concluded that what it called the plaintiffs' "anecdotal" evidence was "too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory." *Id.* at 358. By the sheer numbers, the plaintiffs filed 120 affidavits describing experiences of discrimination—"about 1 for every 12,500 class members." *Id.*

212. *Wal-Mart*, 564 U.S. at 368 (Ginsburg, J., dissenting in part and concurring in part).

213. *Id.* at 375 (citing 5 J. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.23[2], at 23–72 (3d ed. 2011)).

214. *Id.* at 377.

215. *Id.* at 374. The majority's focus on dissimilarities, Justice Ginsburg wrote, "mimic[ked] the Rule 23(b)(3) inquiry into whether common questions 'predominate' over individual issues." *Id.* at 376. Justice Ginsburg also wrote that the evidence the plaintiffs had put forward at the district court would have adequately satisfied 23(a)(2)'s demands. *Id.* at 374.

216. *See, e.g.*, Marcus, *supra* note 14, at 790 (*Wal-Mart* "entrenched several changes that have unsettled the procedural regulation of the public interest class action."). The case was an unusual

the requirement for "commonality" had been heightened,[217] though there was little clarity about the historical and doctrinal roots for the heightened requirement.[218]

The strongest criticisms of *Wal-Mart* focused on its practical effects: critics warned that the opinion would make class certification more difficult[219] and would have an especially devastating impact on discrimination claims.[220] They predicted the heightened commonality standard would benefit the powerful at the expense of plaintiffs in public interest litigation.[221] There was also concern that the Court's language allowing lower courts to inquire into the merits of a claim as part of the class certification inquiry would drive up the costs of litigation for the plaintiffs and discourage claims.[222]

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vehicle for a change to class action procedure that would have such an impact on public interest litigation. Marcus notes that *Wal-Mart*, though it involved a putative class action under Rule 23(b)(2), was decidedly not a public interest class action—in fact, it involved "huge financial stakes." *Id.* at 790 ("[T]he case had little to do with policy concerns that public interest litigation might raise."); *see also id.* at 792 ("[N]othing in the opinion or even in the copious merits filings with the Court exhibit the slightest concern with the sort of distinctive policy concerns that structural reform litigation triggers.").

217. *See, e.g.*, Klonoff, *supra* note 138, at 774 ("The Supreme Court's . . . decision appears to have given new meaning to commonality."); Spencer, *supra* note 27, at 444 (explaining that the Court in *Wal-Mart* "redefin[ed] commonality.").

218. The heightened commonality standard also drew criticism for causing (or reflecting) doctrinal confusion. The Court's apparent grafting of the Rule 23(b)(3) predominance requirement onto the commonality inquiry "injects confusion over what is required to satisfy each element of 23(a) and (b)." Klonoff, *supra* note 138, at 764; *see also id.* at 778 (theorizing that *Wal-Mart* could "effectively impos[e] a predominance requirement where the drafters of Rule 23 chose not to include one"). Critics have also argued that the opinion "cannot be squared with the text, structure or history" of the commonality requirement set out in Rule 23(a)(2). *Id.* at 776; *see also* Spencer, *supra* note 27, at 444 ("Nothing in the language or history of Rule 23(a)(2) supports the . . . majority's interpretation of it.").

219. Critics predicted that *Wal-Mart* would make commonality "a standard part of a defendant's attack on class certification." Klonoff, *supra* note 138, at 779.

220. In particular, the *Wal-Mart* decision "heightens entry standards in the context of discrimination claims, a type of claim that historically has been treated as disfavored, particularly when advanced by members of outgroups." Spencer, *supra* note 27, at 479.

221. In *Wal-Mart*, "the Court drew a boundary line that favors large, powerful employers over everyday workers alleging systemic discrimination." Malveaux, *supra* note 127, at 661. Spencer has argued that the *Wal-Mart* majority's redefinition of commonality rested on "claimant animus, combined with hostility toward and a misunderstanding of claims of discrimination." Spencer, *supra* note 27, at 445. There is evidence that some lower courts have followed the more rigorous *Wal-Mart* approach to class certification. *See id.* at 445–46 (giving examples of "lower courts taking the heightened commonality approach to heart"). The heightened standard has also caused courts some concern. Klonoff, *supra* note 138, at 755 ("Several judges and commentators have expressed concern about imposing this high burden on plaintiffs at the class certification phase."); *see also id*. at 755 n.152 (giving examples of expressions of concern). Other commentators suggest that "Wal-Mart's impact on class certification has not been as dire as predicted." Linda Mullenix, *Is the Arc of Procedure Bending Towards Injustice?*, 50 U. PAC. L. REV. 611, 647 (2019).

222. In *Wal-Mart*, the Court also rejected the proposition that courts cannot rigorously examine the evidence before them, which may touch on the merits. By authorizing some level of inquiry into the merits at the class certification phase, the opinion also requires more proof at certification, which

Critics have linked the *Wal-Mart* decision to the Court's larger shift towards procedures that are hostile to individual claimants, especially those from social outgroups, and to claims of civil rights.[223] Such procedural developments have been termed "restrictive procedure."[224] As defined by A. Benjamin Spencer, "restrictive procedural doctrines are those reflective of a bias against claimants from societal outgroups asserting disfavored claims against members of the dominant class."[225] Restrictive procedure tends "to keep cases out of court or dismiss them immediately without giving the participants a chance to develop their proofs and arguments."[226] When courts, legislators, and rulemakers restrict the ability to bring lawsuits, the burden of these changes tends "to fall more on individuals than organizations, and more on cases implicating broad social questions than on cases of only individual concern."[227]

Class actions have not escaped these creeping restrictive trends.[228] In fact, restrictive procedure is particularly problematic when it comes to class actions, because of the important power imbalance that class actions

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"raises the cost of certification and diminishes the chance of successful certification." Spencer, *supra* note 27, 478; *see also* Resnik, *supra* note 141, at 149 ("This part of the Court's ruling imposed a heightened standard of proof at the certification stage that undercut the Court's prior law, which had been read to instruct trial judges not to go deeply into the merits when ruling on certification."); Klonoff, *supra* note 138, at 731 (noting how courts require plaintiffs to "put forward considerably more evidentiary proof at the class certification stage than ever before," including requiring plaintiffs to "prove major portions of their cases *on the merits*"). Allowing inquiry into the merits imposes additional burdens on plaintiffs with limited resources: "More inquiry into the merits of a case means more expensive and time-consuming discovery at the class certification phase." Malveaux, *supra* note 127, at 670; *see also id*. (discussing how in *Wal-Mart* the Supreme Court confirmed that some of the merits questions, to the extent they overlap with class certification issues, will be relevant, "the extent to which the merits should be considered and the amount of proof necessary at class certification stage is still being debated").

223. Spencer, *supra* note 27, at 448 (noting how *Wal-Mart* "is also disquieting in light of the Court's other recent decisions trending in the direction of restricting access to justice by making it more difficult for plaintiffs to bring claims and have them heard"); *see also* LAHAV, *supra* note 20, at 9 ("[T]he ability of litigation to promote fundamental values is quickly eroding.").

224. Spencer, *supra* note 24, at 476.

225. *Id.*

226. LAHAV, *supra* note 20, at 21. The developments may also stem from the opinion that there is too much litigation taxing the court system: "Federal judges have stated explicitly that there are too many cases and have developed doctrines to cull cases early and often." *Id.*

227. *Id.*; *see also Lahav*, *supra* note 138, at 1009 (arguing that "the laws that undo our rights piecemeal," including as "the ordinary procedural rules that limit access to justice" and "silently limit people's ability to vindicate their rights, particularly their civil rights," are "wrong as a policy matter").

228. LAHAV, *supra* note 20, at 126; *see also* Klonoff, *supra* note 138, at 731 (describing how the class action has "fallen into disfavor" as "courts have become skeptical about certifying class actions"). *Wal-Mart* is not the only instance of restrictive class action procedure; the restrictive trend is also on display in the court's jurisprudence on class action waivers. *See* Mullenix, *supra* note 221, at 622–23 ("[T]he Court's rulings on class action waivers are construed as part of the Court's pro-corporate, anti-plaintiff bias . . . . Since 2010, the Court has upheld mandatory arbitration clauses and class action waivers in five decisions.").

can correct[229] and because of the important rights that class actions, including public interest class actions, vindicate.[230]

3. "Efforts at Transformation": A Narrative Reading of Wal-Mart

Narrative theory provides an additional locus for examining the Court's opinions in *Wal-Mart.* Justice Scalia's majority opinion and Justice Ginsburg's opinion, particularly with respect to the commonality question, can be read in a narrative light. Parsing the discussions of commonality serves to demonstrate the power that stock stories and master narratives can have in the class action context.[231]

The majority and Justice Ginsburg fall on different sides of recognizing what this Article calls the "unconscious bias" master narrative, and of recognizing the Wal-Mart plaintiffs' experiences as instances of that narrative.[232] The "unconscious bias" master narrative describes situations like the ones the Wal-Mart plaintiffs alleged they experienced: where a decision-maker exercises discretion and makes decisions that favor one group and disfavor another group, based on unexamined but powerful biases.[233] As with all master narratives, the audience's ability to understand and recognize the underlying "unconscious bias" master narrative as underlying any individual set of events will depend on the stories with which the audience is already familiar.

As a narrative reading demonstrates, the majority simply could not (or would not) recognize a master narrative about discretionary decision-making leading almost certainly to discriminatory decisions. Justice Scalia's opinion concluded that evidence of discrimination was "entirely absent,"[234] meaning that it would be "quite unbelievable" that all

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229. Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. REV. 1494, 1498 (2013) ("Current developments of class action doctrine . . . are reinforcing in the courtroom the asymmetry that exists between individual plaintiffs and organizational defendants outside litigation.").

230. LAHAV, *supra* note 20, at 24 ("When the barriers to class certification are too high, important cases . . . never reach the merits or are delayed too long.").

231. The parties in *Wal-Mart* themselves resembled the characters in an archetypal David-against-Goliath master narrative. As Judith Resnik wrote, "[h]ad the litigants appeared in a novel, reviewers would have protested that they were clichés." Resnik, *supra* note 141, at 93.

232. Spencer outlines *Wal-Mart* in terms of what we might understand as a master narrative or stock script: the "doubt-of-group-bias perspective." Spencer, *supra* note 27, at 483. He describes the majority decision as evincing "serious doubts about the existence of group bias within an organization that is pervasive, cultural, and unconscious or condoned – but not always express." *Id.* In turn, that stock story "yielded a disbelief that important commonalities could exist, since discrimination is personal and must be detected on a case-by-case basis absent a formal, global policy." *Id.*

233. *See* Spencer, *supra* note 27, at 480 ("The . . . plaintiffs also sought to challenge implicit gender bias that manifested itself through the policy of excessive subjective decisionmaking with respect to pay and promotion decisions.").

234. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 353 (2011).

managers in a corporate structure and culture like Wal-Mart's "would exercise their discretion in a common way without some common direction."[235] He wrote that because the managers' avowed reasoning for their decisions might differ, the plaintiffs' individual narratives could not be read as multiple instances of a similar narrative.[236] Scalia's opinion implies that the majority found the plaintiffs' narratives incomplete in terms of narrative coherence—their allegations of delegated discretion left empty gaps that meant they fell short of telling a complete tale of discrimination—and faulty in terms of narrative correspondence—the plaintiffs failed the test of whether a story fits with the audience's normative sense of what happens in the world.

Justice Ginsburg, on the other hand, credited the "unconscious bias" master narrative. Her opinion alludes to a stock script or schema with which she was familiar; she recognized that "[m]anagers, like all humankind, may be prey to biases of which they are unaware."[237] Thus, she found that the plaintiffs' stories were coherent—complete and internally consistent—and that they corresponded with the way the world ordinarily works. Unlike the majority, Justice Ginsburg recognized the stock scripts and legal master narratives at the core of the plaintiffs' claims, writing that "[t]he practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects."[238] She recognized the plaintiffs' allegations as resembling a canonical master narrative of discrimination, "one of the prototypical cases in this area."[239] She also noted that the Court had already recognized stories involving discretionary employment practices as narratives of Title VII violations before, "not only when such practices are motivated by discriminatory intent but also when they produce discriminatory results."[240] She also gave an example of an earlier instance of the unconscious bias master narrative.[241]

Reading *Wal-Mart* through a narrative lens demonstrates that the commonality question can be understood as asking whether the narrative offered by the plaintiffs possesses narrative coherence and narrative correspondence, particularly when considered in light of potentially

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235. *Id.* at 356.

236. *See id.* at 357. Malveaux has written about the majority's deep skepticism of evidence that discrimination was at work in the Wal-Mart corporate culture. Malveaux, *supra* note 127, at 662. More broadly, Spencer has written that jurists who disfavor discrimination claims "do so because they do not believe in them." Spencer, *supra* note 27, at 480.

237. *Wal-Mart*, 564 U.S. at 372–73.

238. *Id.* at 372.

239. *Id.* at 373 (citing Leisner v. N.Y. Tel. Co., 358 F. Supp. 359, 364–65 (S.D.N.Y. 1973)).

240. *Id.*

241. *See id.* at 373 n.6.

applicable master narratives. Now that the Court has made the commonality standard harder to meet, prospective plaintiffs in public interest class actions faced a difficult narrative puzzle: how to craft a story to satisfy the class certification requirements.

As the next Part illustrates, in order to comply with the procedural complexities inherent in class action, and in order to navigate the newly heightened commonality threshold under *Wal-Mart*, successful class actions use narrative tools and create narrative effects in ways not observed in traditional litigation. This subject—how advocates use narrative tools to achieve certain effects at the class certification phase—has not been studied comprehensively. This next Part begins to fill that gap in the literature.

III. CLASS STORIES IN ACTION: NARRATIVES PRIOR TO CERTIFICATION

In addition to the procedural complexities that class actions pose for scholars of procedure, the class action also presents an interesting subject for narrative study. The procedural hurdles a class must overcome to be recognized require some level of conformity among individual class member narratives—quintessential "narrative-erasing" procedure.[242] Class actions represent at some level a combining of distinct, individual narratives—the artifacts with which narrative studies in the law are often so concerned—into one, shared, communal story for the purposes of seeking legal redress.

On a narrative level, a fundamental tension exists between the expression of individual stories in litigation as a mechanism for advancing law and public discourse, and the procedural tool of the class action as a means for advancing rights and securing redress for particularly powerless groups. This tension mirrors the underlying theoretical tension in class actions and group litigation generally: the compromise between individuality and collective vision.[243]

To illustrate the unique uses of narrative tools and the careful calibration of narrative effects at work in class action certification efforts, this section conducts a critical reading and analysis of two recent public interest class actions: *Ms. L. v. U.S. Immigration and Customs Enforcement*[244] and *J.D. v. Azar*.[245]

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242. *See* Ralph, *supra* note 34, at 575.

243. *See supra* notes 124–131 and accompanying text.

244. No. 3:18-cv-00428, 2018 WL 8665001, at *2 (S.D. Cal. June 26, 2018) (granting motion for class certification in part).

245. 925 F.3d 1291 (D.C. Cir. 2019).

The following sections provide important background on the legal proceedings in the *Ms. L.* and *J.D.* cases; offer descriptive observations about the way narrative techniques are used to help inform class certification decisions; and finally, make recommendations to courts and advocates regarding narrative in public interest class actions before certification.

A. Two Recent Public Interest Class Actions

Before identifying the way advocates in these cases used narrative, the Article provides summaries of the cases' underlying facts and procedural histories. Both the *Ms. L.* and *J.D.* cases resulted in successful certification of the relevant classes. As well, both cases involve minors in immigration custody (similar to the *Flores* litigation discussed in the Introduction of this Article), but concern very different key facts and causes of action: *Ms. L.* involved the separation of parents and children at the U.S. border. *J.D.* involved the rights of unaccompanied minors in immigration custody to access abortion care.

As described below, the cases provide rich ground for the application of narrative analysis. Both present situations where a compelling, detailed, personal narrative might be especially persuasive to a non-legal audience. Yet the narratives developed in this case do not take on the form one might expect. The contrast between the potential for a powerfully told story and the minimal narratives that are required to comply with the strict requirements for class certification provides an important perspective on the way narrative tools can be used to inform class certification decisions.

1. Ms. L. v. ICE*: Challenging Family Separations at the Border*

Ms. L. arose out of the government practice during the summer of 2018 of separating migrant families and placing their children in facilities for unaccompanied minors.[246] The case asserted claims for violation of due

246. *See Ms. L.*, 2018 WL 866500, at *1–*3 (granting motion for class certification in part).

process,[247] for violation of federal statutes governing asylum,[248] and for violations of the Administrative Procedure Act.[249]

The case began with one plaintiff: Ms. L., a resident of the Democratic Republic of the Congo, fled Congo with her seven-year-old daughter.[250] As Judge Sabraw of the Southern District of California later described it, Ms. L. "did everything right."[251] She and her child arrived lawfully at a port of entry along the southern United States border, and Ms. L. requested asylum in her limited Spanish.[252] She was detained with her child for several days, but then she and her daughter were later forcibly separated; Ms. L. was held in San Diego while her asylum claims proceeded, and her daughter was sent to a facility in Chicago.[253]

A few weeks after Ms. L.'s claim was filed, her attorneys filed an amended complaint, adding another named plaintiff, Ms. C., and including class action allegations.[254] The plaintiffs simultaneously moved for class certification.[255] The second named plaintiff, Ms. C., had a different story—as the court later noted, "Ms. C., by contrast, did not do everything right."[256] Ms. C. came to the United States from Brazil, and she brought her fourteen-year-old son.[257] Although she made an asylum claim, she was arrested and convicted of entering the country illegally (a

247. Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief at 7–8, *Ms. L.*, 331 F.R.D. 529 (S.D. Cal. 2018) (No. 3:18-cv-00428-DMS-MDD) [hereinafter *Ms. L.* Petition for Writ of Habeas Corpus and Complaint] (alleging liberty interest under the Due Process Clause in "remaining together as a family" and alleging the separation of families violates substantive and procedural due process); *see also* Amended Complaint for Declaratory and Injunctive Relief with Class Action Allegations at 11, *Ms. L.*, 331 F.R.D. 529 (S.D. Cal. 2018) (No. 3:18-cv-00428-DMS-MDD) [hereinafter *Ms. L.* Amended Complaint] (alleging due process claim).

248. *See Ms. L.* Amended Complaint, *supra* note 247 at 8 (alleging family separation violates federal asylum law because it impedes the ability to pursue asylum under 8 U.S.C. § 1158 (2012)); *see also id.* at 11–12 (same).

249. *See Ms. L.* Petition for Writ of Habeas Corpus and Complaint, *supra* note 247 at 8 (alleging family separation is arbitrary and capricious, violating the Administrative Procedure Act, 5 U.S.C. § 706 (2012)); *see also Ms. L.* Amended Complaint, *supra* note 247 at 11 (same).

250. *See Ms. L.* Petition for Writ of Habeas Corpus and Complaint, *supra* note 247 at 1.

251. Ms. L. v. U.S. Immigration & Customs Enf't, 302 F. Supp. 3d 1149, 1164 (S.D. Cal. 2018).

252. *See Ms. L.* Petition for Writ of Habeas Corpus and Complaint, *supra* note 247 at 1.

253. *Id.*

254. *See Ms. L.* Amended Complaint, *supra* note 247 at 1.

255. Notice of Motion and Motion for Class Certification at 1, *Ms. L.*, 331 F.R.D. 529 (S.D. Cal. 2018) (No. 3:18-cv-00428-DMS-MDD) [hereinafter *Ms. L.* Notice of Motion and Motion for Class Certification]. The plaintiffs sought certification of a class defined as follows: "[a]ll adult parents nationwide who (1) are or will be detained in immigration custody by the Department of Homeland Security, and (2) have a minor child who is or will be separated from them by DHS and detained in ORR custody, absent a demonstration in a hearing that the parent is unfit or presents a danger to the child." *Id.*

256. *Ms. L.*, 302 F. Supp. 3d at 1164.

257. *Ms. L.* Notice of Motion and Motion for Class Certification, *supra* note 255, Exhibit 12, at 1–2 [hereinafter Restricted Declaration of Ms. C.] (Restricted Declaration of Ms. C.).

misdemeanor) and she was separated from her son while serving a twenty-five-day criminal sentence.[258] When Ms. C. was released, she was held in immigration detention, and remained separated from her son.[259]

As the case continued,[260] the plaintiffs' counsel introduced declarations from immigration attorneys—telling stories about what the attorneys had seen in terms of family separations.[261] Later, along with the reply in support of the motion for class certification, the plaintiffs' counsel attached additional declarations, including narratives from asylum seekers—some very short and fairly boilerplate, and some with more detail.[262]

Ultimately, the Southern District of California granted in large part the plaintiffs' motion for class certification, certifying a class of the following:

> [a]ll adult parents who enter the United States at or between designated ports of entry who (1) have been, are, or will be detained in immigration custody by the DHS, and (2) have a minor child who is or will be separated from them by DHS and detained in ORR custody, ORR foster care, or DHS custody, absent a determination that the parent is unfit or presents a danger to the child.[263]

On the same day the court certified the class, it also granted the plaintiffs' motion for a class-wide preliminary injunction, enjoining defendants from detaining class members "without and apart from their minor children, absent a determination that the parent is unfit or presents a danger to the child" and from "continuing to detain the minor children of the Class Members" after the class members' release from DHS custody.[264] The injunction further ordered defendants to reunify class

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258. *See Ms. L.* Notice of Motion and Motion for Class Certification, *supra* note 255, at 4.

259. *See* Restricted Declaration of Ms. C., *supra* note 257, at 2.

260. While the plaintiffs' class certification motion was pending, the district court granted in part a motion to dismiss the Administrative Procedure Act and asylum claims but denied the motion to dismiss as to the plaintiffs' due process claim. *Ms. L.*, 302 F. Supp. 3d at 1168.

261. *Ms. L.* Notice of Motion and Motion for Class Certification, *supra* note 255 at Exhibit 14, at 1–2 (Declaration of Mayra Jiminez); *Ms. L.* Notice of Motion and Motion for Class Certification, *supra* note 255, at Exhibit 15, at 1–3 (Declaration of Shalyn Fluharty).

262. Plaintiffs' Reply in Support of Motion for Class Certification, *Ms. L.*, 331 F.R.D. 529 (No. 3:18-cv-00428-DMS-MDD), 2018 WL 8665001.

263. Order Granting in Part Plaintiffs' Motion for Class Certification at 9, *Ms. L.*, 331 F.R.D. 529 (No. 3:18-cv-00428-DMS-MDD). The certified class excluded migrant parents with criminal history or communicable disease, as well as those who were in the interior of the United States or were subject to an Executive Order intended to "maintain family unity" by "keeping migrant families together during criminal and immigration proceedings to the extent permitted by law." *Id.* at 2, 9 n.10 (citing Donald J. Trump, Executive Order, Affording Congress an Opportunity to Address Family Separation § 1, 2018 WL 3046068 (June 20, 2018)).

264. Ms. L. v. U.S. Immigration & Customs Enf't, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018).

members with their children and to facilitate communication between class members and children.[265]

2. J.D. v. Azar*: Challenging the Denial of Abortion Care to Pregnant Unaccompanied Minors in Immigration Custody*

J.D. v. Azar involved unaccompanied minors without lawful immigration status who were being held in federal custody—in particular, those unaccompanied minors in federal custody who were pregnant and wished to terminate their pregnancies.[266] On its merits, the case concerned the constitutionality of a federal government policy, instituted in 2017, under which "any unaccompanied alien child in its custody" was "effectively barr[ed] . . . from obtaining a pre-viability abortion."[267] The case asserted claims for violations of the Fifth Amendment right to privacy and liberty,[268] for freedom of speech violations,[269] for informational privacy violations,[270] and for Establishment Clause violations.[271]

As with *Ms. L.*, the case began with the story of a single individual: plaintiff Rochelle Garza (a pseudonym) initially brought a lawsuit on behalf of one unaccompanied minor—Jane Doe ("J.D."), for whom Garza served as guardian ad litem—as well as a proposed class of others

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265. *Id.*

266. J.D. v. Azar, 925 F.3d 1291, 1299 (D.C. Cir. 2019). The case was initiated as "*Garza v. Hargan*." *See* Complaint for Injunctive Relief and Damages (Interference with minor's constitutional right to obtain an abortion) at 1–2, Garza v. Hargan, 925 F.3d 1291 (D.D.C. 2017) (No. 1:17-cv-02122) (D.D.C. 2017) [hereinafter *Garza* Complaint].

267. *J.D.*, 925 F.3d at 1299.

268. *See Garza* Complaint, *supra* note 266, at 12–13 (alleging "Defendants violate unaccompanied immigrant minors' right to privacy guaranteed by the Fifth Amendment by wielding a veto power over their abortion decisions, and obstructing, interfering with, or blocking access to abortion, including by forcing minors to visit crisis pregnancy centers and preventing them from going to medical facilities where they can obtain legal abortions"); *see also* Second Amended Complaint for Injunctive Relief (Interference with Minors' Constitutional Right to Obtain an Abortion) at 15–16, *Garza*, 925 F.3d 1291 (No. 1:17-cv-02122) [hereinafter *Garza* Second Amended Complaint].

269. *See Garza* Complaint, *supra* note 266, at 13 (alleging that defendants "compelled unaccompanied minors to discuss their decisions to have abortions and the circumstances surrounding those decisions with crisis pregnancy centers" and others, violating the right against compelled speech); *Garza* Second Amended Complaint, *supra* note 268, at 16.

270. *See Garza* Complaint, *supra* note 266, at 13 (alleging that defendants violated "minors' rights to informational privacy guaranteed by the Fifth Amendment" by requiring them "to disclose their identities, their pregnancies, and their decisions to seek or have an abortion"); *Garza* Second Amended Complaint, *supra* note 268, at 16 (same).

271. *See Garza* Complaint, *supra* note 266, at 13–14 (alleging that defendants required plaintiffs "to obtain counseling at crisis pregnancy centers that are often religiously affiliated, and that proselytize," thereby imposing on plaintiffs and advancing "a particular set of religious beliefs"); *Garza* Second Amended Complaint, *supra* note 268, at 16–17 (same).

similarly situated.[272] J.D., who entered the United States as an unaccompanied minor ("UC") was in the custody of the federal government when a medical examination revealed she was pregnant.[273] J.D. sought to have an abortion, and despite securing a sponsor and other necessary requirements, such as private funding for the abortion and transportation for the procedure, officials of the Office of Refugee Resettlement ("ORR") refused to release her for the abortion.[274] J.D. also alleged ORR officials forced her to undergo counseling provided by religiously oriented crisis pregnancy centers.[275] The initial complaint was brought on behalf of a proposed class of all other pregnant unaccompanied immigrant minors in ORR custody, including those who would become pregnant during the pendency of the lawsuit.[276]

The case proceeded along two tracks: one track was specific to J.D. and her individual needs, and the other track concerned the class. Prior to certifying a class of "all pregnant UCs who are or will be in legal custody of the federal government,"[277]the plaintiff sought,[278] and the district court granted, a temporary restraining order ("TRO") requiring the defendants

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272. *See Garza* Complaint, *supra* note 266, at 1.

273. *Id.*; J.D. v. Azar, 925 F.3d 1291, 1303 (D.C. Cir. 2019). As explained in the D.C. Circuit's opinion in *J.D. v. Azar*, "minors in the United States with no lawful immigration status and no parents or legal guardians in the country able to care for them"; thus, after having been apprehended by immigration authorities at the border, they are referred by the Department of Homeland Security (DHS) to the Office of Refugee Resettlement (ORR), a program in the Department of Health and Human Services (DHS). *See J.D.*, 925 F.3d at 1300–01 (citing 6 U.S.C. § 279(b)(1)(A) (2012) and U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF REFUGEE RESETTLEMENT, UNACCOMPANIED ALIEN CHILDREN PROGRAM FACT SHEET 1–2 (Mar. 2019), https://web.archive.org/web/20190331205756/https://www.hhs.gov/sites/default/files/Unaccompanied-Alien-Children-Program-Fact-Sheet.pdf [https://perma.cc/Z8J9-JP2D]).

274. *J.D.*, 925 F.3d at 1303–04.

275. *See Garza* Complaint, *supra* note 266, at 13–14.

276. *Id.* at 11. The plaintiffs also later filed a second amended complaint. *See Garza* Second Amended Complaint, *supra* note 268, at 1. The defendants moved to dismiss the second amended complaint. *See* Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint Pursuant to Fed. R. Civ. Pro. 12(b)(1) and 12(b)(6) at 1–2, Garza v. Hargan, No. 1:17-cv-02122, 2017 WL 9854552 (D.D.C. Oct. 13, 2017). The defendants' motion to dismiss was later denied as moot in light of the appeal of the class certification and injunction decision to the D.C. Circuit. In addition to the litigation that is the subject of this Article, J.D. also brought a habeas corpus lawsuit in Texas state court, challenging her confinement, and sought to join an already-pending lawsuit asserting similar claims in the Northern District of California. *See* Defendants' Memorandum of Law in Opposition to Plaintiff's Application for a Temporary Restraining Order and Motion for a Preliminary Injunction, *Garza*, 2017 WL 6522466 (No. 1:17-cv-02122-TSC). The Texas case proceeded under seal; although J.D. was not successful in joining the Northern District of California case, that case proved to be a fruitful source of information for the plaintiffs' counsel in *J.D.*, as discovery documents in that case were ultimately filed in briefing in support of class certification. *See* Am. Civil Liberties Union of N. Cal. v. Burwell, No. 3:16-cv-03539, 2017 WL 1540606 (N.D. Cal. 2016).

277. Plaintiff's Motion for Class Certification at 1, *Garza*, 2017 WL 6522466 (No. 1:17-cv-02122-TSC) [hereinafter *Garza* Plaintiff's Motion for Class Certification].

278. Application for a Temporary Restraining Order at 1, *Garza*, 2017 WL 6522466 (No. 1:17-cv-02122-TSC) [hereinafter *Garza* Application for a Temporary Restraining Order].

"to transport J.D.—or allow J.D. to be transported . . . —promptly and without delay" for abortion counseling and ordering the government defendants to refrain from "interfering with or obstructing J.D.'s access to abortion counseling or an abortion."[279]

The question of the government policy affecting the proposed class of pregnant minors in immigration custody remained, and the case proceeded along that track. As the parties briefed the district court on class certification and the appropriateness of issuing a class-wide preliminary injunction, the plaintiffs added Jane Roe, Jane Poe, and Jane Moe, all UCs, as named plaintiffs.[280] J.D. and Jane Roe served as class representatives.[281]

The D.C. District Court granted the plaintiffs' motion for class certification, certifying a class of "all pregnant, unaccompanied minor children (UCs) who are or will be in the legal custody of the federal government."[282] The government defendants appealed the class certification decision and the preliminary injunction to the D.C. Circuit, which affirmed the trial court on class certification and sustained the injunction in large part.[283]

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279. *Id.* at 2. The government immediately appealed the district court's TRO, and a three-judge panel of the D.C. Circuit vacated part of the TRO and directed the court to allow HHS time J.D. to secure a sponsor and release her to that sponsor. *Garza*, 2017 WL 6522466 (No. 1:17-cv-02122-TSC) (vacating in part district court's temporary order and directing district court to allow defendants time "for a sponsor to be secured for J.D. and for J.D. to be released to the sponsor," rendering J.D. "lawfully able, if she chooses, to obtain an abortion on her own"). Four days later, the en banc D.C. Circuit recalled the panel's mandate and remanded the case to the district court. Garza v. Hargan, 874 F.3d 735, 736 (D.C. Cir. 2017). The district court issued an amended TRO and subsequently, J.D. obtained an abortion. *See* Azar v. Garza, 584 U.S. __, 138 S. Ct. 1790, 1792 (2018). Following the en banc D.C. Circuit decision, Garza's lawyers sought an amended restraining order directing defendants to make J.D. available for counseling and the abortion procedure, which the district court issued. *Id.* While the defendants planned to seek emergency review in the Supreme Court of the D.C. Circuit's en banc order, J.D. obtained an abortion. *Id.*

280. *See* Application for a Temporary Restraining Order at Exhibit 1, *Garza*, 2017 WL 6522466 (No. 1:17-cv-02122-TSC) [hereinafter Jane Roe Declaration] (Declaration of Jane Roe); Declaration of Jane Poe at 1–2, Notice of Filing of Declaration of Jane Poe, *Garza*, 2017 WL 6522466 (No. 1:17-cv-02122-TSC) [hereinafter Jane Poe Declaration] (Declaration of Jane Poe); *Garza* Application for a Temporary Restraining Order at Exhibit 1, *Garza*, 2017 WL 6522466 (No. 1:17-cv-02122-TSC) [hereinafter Jane Moe Declaration] (Declaration of Jane Moe).

281. *See Garza* Plaintiff's Motion for Class Certification, *supra* note 277, at 8 (identifying J.D. as class representative); Supplemental Memorandum Regarding Additional Class Representative in Support of Plaintiffs' Motion for Class Certification at 1, *Garza*, 2017 WL 6522466 (No. 1:17-cv-02122-TSC) [hereinafter *Garza* Supplemental Memorandum in Support of Class Certification] (requesting addition of Jane Roe as additional class representative).

282. Order Granting Motion for Class Certification and Motion for Preliminary Injunction as to the Class, Garza v. Hargan, No. 17-5236, 2017 WL 9854552 (D.C. Cir. Oct. 20, 2018). The court also issued a preliminary injunction to restrict defendants from interfering with class members' access to abortion, counseling, or other pregnancy related care. *Id.* The injunction also restrained defendants from revealing or forcing class members to reveal pregnancies or abortions, and from retaliating against class members or shelters for actions related to abortions. *Id.*

283. J.D. v. Azar, 925 F.3d 1291, 1312 (D.C. Cir. 2019). The D.C. circuit affirmed the portions of the district court's preliminary injunction enjoining obstructions to abortion access. *Id*. at 1339. The

B. Conclusions About Individual Plaintiff Narratives Prior to Certification

Both *Ms. L.* and *J.D.* involved hard-fought battles over class certification, and both ended with grants of class certification. These class certification battles relied heavily on narrative, both in the form of the plaintiffs' stories told in their own voices (as in signed declarations) and in those stories narrated by the plaintiffs' attorneys and, later, by defendants' attorneys and by judges.

A critical narrative analysis of all the filings prior to class certification in both cases provides valuable lessons about the specific way advocates use narrative to establish (or attack) commonality and the other requirements for class certification.[284] As the rest of this section explains, this critical reading yields significant observations about the transformative way the plaintiffs' narratives in these cases use narrative coherence and correspondence; about the unexpected way the narrative contest plays out in class certification debates; and about the way pre-certification narratives persuade.

1. Plaintiff Narratives: Minimal Narrative Coherence and "Die Cut" Similarity

A critical reading of the case documents first shows that, while the plaintiffs' narratives in these cases are short, they evince the use of sophisticated narrative techniques. Indeed, the individual narratives used in these cases are carefully crafted stories, both in attorney-written documents and in the individual declarations signed by the plaintiffs. As this Part explains, a close reading of the plaintiff narratives demonstrates that they use specific narrative techniques with precision to demonstrate commonality. Class certification narratives make creative use of narrative tools and modify the traditional characteristics of persuasive narratives in order to meet the unique standards of Rule 23. In particular, class certification narratives eschew traditional narrative correspondence and instead adopt what this Article calls "die cut" narrative correspondence. As well, class certification narratives aim at "minimal" narrative coherence.

From the very first filings in both cases, the plaintiffs' narratives are strikingly succinct. For instance, in *Garza*, individual plaintiffs' stories

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court also rejected defendants' mootness arguments because of the "inherently transitory" exception. *Id.* at 1307.

284. In addition to this narrative analysis, there is also room for a substantive-law analysis of the plaintiffs' legal claims. Given this Article's focus on narrative in class certification decisions, this section is limited to narratives and does not take up the substantive merits of the plaintiffs' claims.

are told in brief form. The original plaintiff J.D.'s declaration is only two pages long.[285] Similarly, Jane Roe's, Jane Poe's, and Jane Moe's declarations are only two pages long.[286]

These declarations are not just similar for their brevity; they are highly conventionalized.[287] They use similar phrasing, almost boilerplate. For instance, the declarations of J.D., Jane Roe, Jane Poe, and Jane Moe all contain common sentences, such as, "I came to the United States from my home country without my parents,"[288] and "I do not want to be forced to carry a pregnancy to term against my will."[289] There is no gesture towards authenticity of voice or point of view in these declarations—they are clearly attorney-drafted, and we do not "hear" the plaintiffs themselves.[290] The same brevity and conventionality is evident in later documents in the case that are more obviously expected to speak in the attorney's voice.[291]

The narratives are brief and stylized, but they are still narratives. They have all the characteristics of a narrative, including human characters, a "trouble" that requires efforts at redress, and organization that is ordered in time like a plot.[292] These are multiple discrete narratives with the same key points: arrival, detention, discovery of pregnancy, decision to seek an abortion, and denial of access.

Similarly, in *Ms. L.*, the stories of the two named plaintiffs were initially told in the complaint and amended complaint, and in declarations from Ms. C. and Ms. L. In terms of their substance, Ms. L.'s and Ms. C.'s declarations each take up no more than two pages, and they are (as in *J.D.*) strikingly similar, despite the different case facts. Even language that gestures at individual point of view and voice is in fact boilerplate. For instance, Ms. L.'s declaration contains the following sentences: "I hope I

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285. *See* Plaintiff's Memorandum in Support of Her Application for a Temporary Restraining Order and Motion for a Preliminary Injunction, Garza v. Hargan, No. 17-5236, 2017 WL 9854552 (D.C. Cir. Oct. 14, 2017) [hereinafter J.D. Declaration] (Declaration of J.D.).

286. *See* Jane Roe Declaration*, supra* note 280, at 1–2; Jane Poe Declaration, *supra* note 280, at 1–2; Jane Moe Declaration at 1–2, *supra* note 280, at Exhibit 1.

287. *See* AMSTERDAM & BRUNER, *supra* note 32, at 127–28 (describing "conventionalized" stories as ones that present the same kind of "match-up").

288. J.D. Declaration, *supra* note 285, ¶ 2; Jane Roe Declaration, *supra* note 280, ¶ 2; Jane Poe Declaration, *supra* note 280, at 1–2; Jane Moe Declaration, *supra* note 280, at ¶ 3.

289. J.D. Declaration, *supra* note 285 at ¶ 16; Jane Roe Declaration, *supra* note 280, ¶ 9; Jane Poe Declaration, *supra* note 280, ¶ 10; Jane Moe Declaration, *supra* note 280 ¶ 9.

290. *See* ABBOTT, *supra* note 38, at 70 ("Voice in narration is a question of who it is we 'hear' doing the narrating.").

291. For instance, in a supplemental memorandum in support of class certification, the J.D. plaintiffs' counsel describes Jane Roe's journey to the U.S., subsequent discovery of her pregnancy, and efforts to obtain an abortion in a paragraph that takes up about half of a page. *See* Supplemental Memorandum Regarding Additional Class Representative in Support of Plaintiffs' Motion for Class Certification at 2, Garza v. Hargan, No. 17-5236, 2017 WL 9854552 (D.C. Cir. Oct 20, 2017).

292. *See supra* notes 35–43 and accompanying text.

can be with my daughter as soon as possible. I miss her so much and am scared for her."[293] Ms. C.'s declaration contains similar language, stating "I hope I can be with my son very soon. I miss him and am scared for him."[294]

Likewise, in the *Ms. L.* Plaintiffs' Motion for Class Certification, the Background (which states the case's underlying facts) and the Argument both filter the narratives through attorneys' voices to make them as similar as possible.[295] The stories are stripped down to bare facts, presented in the same order, and include the same pieces of information.[296]

In short, the plaintiffs in both cases craft narratives that use matching word choice, matching sentence structure, minimal reference to specific dates in time, and a general lack of specific detail and individual voice. These are unique attempts to build narrative coherence and narrative correspondence in the procedural context.

First, regarding narrative coherence, recall that this feature of narratives looks for "internal consistency, how well the parts of the story fit together, and completeness, how adequate the sum total of the parts of the story seems."[297] In the *Ms. L.* and *J.D.* narratives, one can recognize what this Article terms "minimal" narrative coherence. In other words, in their stripped-down detail, the plaintiffs' stories contain the parts required of a narrative, and nothing more. In this way, pre-certification narratives are unlike early narratives in traditional litigation; for instance, in traditional cases at the pleading phase, the parties are most concerned with including sufficient detail to make the merits claims plausible under the standard announced in *Bell Atlantic Corp.*[298] *v. Twombly* and *Ashcroft v. Iqbal*.[299] Second, regarding narrative correspondence, the *Ms. L.* and *J.D.* plaintiffs' narratives also reveal that they are crafted with an eye towards a unique kind of narrative correspondence. The narrative correspondence these class action stories aim towards is not exactly like the kind of correspondence litigants strive for in other forms of litigation. To account for this difference in class action litigation, this Article proposes a new kind of narrative correspondence: "die cut" narrative correspondence.

The narrative correspondence required by most litigation can be conceptualized as "linear" correspondence—an image that evokes a line

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293. Petitioner-Plaintiff Notice of Motion and Motion for Preliminary Injunction at 95–96, ¶ 6, Ms. L. v. U.S. Immigration & Customs Enf't, No. 3:18-cv-00428, 2018 WL 866500 (S.D. Cal. Mar. 2, 2018) (attaching declaration of named plaintiff Ms. L.).

294. Restricted Declaration of Ms. C., *supra* note 257 at 31–33, ¶ 10.

295. *See Ms. L.* Notice of Motion and Motion for Class Certification, *supra* notes 255, at 3–6, 9–13.

296. *See id.* at 9–11.

297. Rideout, *supra* note 69, at 64.

298. 550 U.S. 544 (2007).

299. 556 U.S. 622 (2009); *see* Ralph, *supra* note 44, at 2.

stretching across time. In this model, the relevant reference point for a lawyer looking to establish similarity, to connect her case to establish narrative correspondence, is the past. In a successful case, the plaintiff will match her facts to an earlier set of facts. Because of the stare decisis concept that like cases should be decided in like manner, the line might be a zero-degree curve; because the common-law method permits growth and change of the law over time, we might envision the line as curving somewhat to reflect cases that recognize new factual situations where legal outcomes apply.

In class actions prior to certification, on the other hand, the correspondence that plaintiffs seek to achieve is less about matching prior cases than it is about matching proposed plaintiff class members to each other. Rule 23(a)'s commonality requirement makes the important inquiry about whether numerous parties all present the same narrative at the same time. The relevant match is not whether one party's story matches past narrative exemplars, but rather whether current uniformity exists.

Thus, this Article proposes a novel version of narrative coherence that plaintiffs pursue in class action cases: "die-cut" narrative coherence. In other words, uniformity of the kind that one might produce when using a press machine to cut several pieces of material from a pattern at the same time. Those pieces could be stacked one on top of the other and the "footprint" would not change.

In non-class action litigation, cases can use other tools to show conformity with past decisions (in the spirit of "linear" narrative correspondence): for instance, history and public policy, as well as facts. As this Part has shown, advocates seeking to establish that all potential class members' stories conform to a similar "die cut" shape use narrative techniques with surgical precision, because they have a narrower set of tools to use.

Rather than using narrative to persuade a court that a client's story matches a canonical legal narrative of liability, prior to class certification the plaintiffs' counsel can be envisioned as attempting to demonstrate a new stock script or master narrative. By establishing the desired new script, counsel can show that all class members' experiences are instances of that stock script, and thus that all can be resolved logically, economically, and efficiently at the same time.

The absence of detail and individual voice that this Article has noted also interacts with the notion of stock stories and master narratives in that, by limiting unnecessary details and pursuing "minimal" narrative coherence, the plaintiffs may successfully avoid activating any powerful, unspoken master narratives that judges may unconsciously apply and that may disincline them towards the plaintiffs' claims. As this Article has argued, *Wal-Mart* had the potential to invoke master narratives that could have affected the Court's reception of the plaintiffs' claims.

To sum up this first point, class certification narratives use narrative tools to achieve effects that meet the unique standards of Rule 23: "minimal" narrative coherence and "die cut" narrative correspondence.

2. The Narrative Contest: How to Set the Magnifying Lens

The second observation that a critical reading of the case documents yields is this: Class action plaintiffs' narratives, like other litigation narratives, are susceptible to re-narration and involve a contest of narratives. Certainly, because class certification may be the most important decision in a case, one would expect the pre-certification narratives to be highly contested. Indeed, prior to class certification, individual plaintiff class members' stories of the sort examined in the previous section are susceptible to re-narration by the parties, and ultimately by the court, as the case progresses. What makes public interest class action litigation unique is that the narrative contest plays out along a different dimension than in typical litigation.

In typical litigation, each side engages in the contest of narratives, attempting to demonstrate the strength of its own version of the story, attempting to convince a jury or a judge or to achieve early resolution of the case through a dispositive motion or settlement. The traditional litigation narrative contest is between different narratives, usually describing the same underlying events (to the extent the facts are undisputed). It often invokes powerful underlying master narratives.[300] To demonstrate the strength of its story, each side narrates and re-narrates the tale in different written and oral forms, often for different procedural purposes.

In class actions, narration and re-narration occurs, but the battle is not about which of two stories is the better "fit"—the battle is over whether there is a common story *at all.* The contest of narratives centers on the appropriate level of generality at which to examine the stories' similarities.[301] At the class certification phase, the parties argue about this

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300. *See, e.g.*, ABBOTT, *supra* note 38, at 46 (describing the O.J. Simpson trial "as a contest of narratives" in which the contestants draw on "masterplot[s]").

301. As Malveaux has written, "[c]ommonality depends on the locus of analysis." Malveaux, *supra* note 127, at 663. If the locus is framed in a certain way, with a focus "on the trees rather than the forest," (for instance, in *Wal-Mart*, if the locus was to be "the thousands of supervisors in the field making myriad decisions that affect 1.5 million separate employees") then commonality will not be easy to see; in that case, "it is easy to conclude that there is no common question to be answered that would help resolve the case." *Id.* at 663–64. Focusing differently, however—on the forest, in Malveaux's metaphor—can yield different results: in *Wal-Mart*, for instance, "if the locus is the company, which gives its agents the authority to make biased employment decisions while looking the other way, it is easier to see how the case can be resolved on a classwide basis." *Id*. at 664. In this view, with the focus on the corporate employer, "[t]he various ways the discrimination plays out . . . becomes a red herring." *Id.*

different kind of matching by manipulating the level of focus or generality at which they frame their competing narratives.

Much like any item that appears smooth at a distance can appear rough under a magnifying glass or microscope, the narratives of a group of potential class members can appear to share significant commonalities when viewed at a high level of generality and can appear quite different when examined in detail. As the previous section showed, plaintiffs seeking certification use narrative techniques to make their stories appear common; those techniques enable advocates to smooth out differences in each plaintiff's narrative, essentially "zooming out" to a point where all proposed plaintiff narratives look similar. Defendants opposing certification, on the other hand, will "zoom in" on specific details to make narratives appear richer and more unique; in doing so, they argue that the proposed class members' stories are each sufficiently different and distinct that they cannot possibly be grouped together as narratives that share commonality. In other words, the parties are arguing about the right point at which to set a narrative magnifying lens.

For example, in *Ms. L.*, the government defendants argued that the plaintiffs could not have suffered a common injury because "family separation may result from a variety of different fact-specific scenarios that would be unique to each purported family unit," and that a court would need to evaluate individually.[302] The defendants attempted to show a lack of commonality by emphasizing differences in the way parents and children entered the country, and the presence or absence of personal documents: for instance, they argued that Ms. L.'s separation from her daughter was too different from Ms. C.'s separation from her son, because Ms. L. "had no identity documents" and was unable to "confirm the claimed relationship," while Ms. C.'s occurred because she was "prosecuted for a criminal offense as a result of crossing the . . . border . . . unlawfully."[303] As the court later characterized the argument, defendants attempted to show that class treatment of separated families was inappropriate because "the circumstances surrounding each separation of parent and child are different."[304] By highlighting these differences, the government was using a high degree of magnification to zoom in to show differences in the narratives that bespoke a lack of commonality.

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302. Respondent-Defendants' Opposition to Plaintiffs' Motion for Class Certification at 10, Ms. L. v. U.S. Immigration & Customs Enf't, 331 F.R.D. 529 (S.D. Cal. 2018) (No. 3:18-cv-00428).

303. *Id.* at 1, 10–11.

304. Order Granting in Part Plaintiffs' Motion for Class Certification at 5, *Ms. L.*, 331 F.R.D. 529 (No. 3:18-cv-00428).

The district court in *Ms. L.* ultimately found commonality was satisfied, despite "the circumstances giving rise to the separations of [Ms. L. and Ms. C.] and their children in this case, which are indisputably different."[305] The court concluded that the plaintiffs had proven commonality because they had successfully shown that the key facts "underlying their claims are the same: each was detained with their child by government actors, who then separated them from their children, or failed to reunite them, without a showing they were unfit or presented a danger to the child."[306] The court found that the claims did not "rest on the individual circumstances of each separation of parent and child."[307] Rather, they rested on what the claims all had in common: policies and practices that were unlawful as to all class members or as to none.[308] The court specifically called these policies and practices the "glue"—the very phrase used in *Wal-Mart*—that held the class together.[309]

Similarly, in *Garza*, the government defendants attempted to defeat commonality by focusing closely on the plaintiffs' distinct experiences. For instance, opposing class certification, defendants cited the "various circumstances" of the named plaintiffs, distinguishing Ms. Roe, who knew about her pregnancy before coming to the United States, from other plaintiffs who learned of their pregnancy while in ORR custody and had already voluntarily disclosed it to family members, and from other plaintiffs who did not wish to inform family members.[310] The defendants argued "the circumstances of each class member will vary broadly, including . . . whether such procedure would be elective or necessary to avoid serious harm to the mother, . . . and the circumstances surrounding the minor's pregnancy."[311] Similarly, defendants argued that the named plaintiffs could never establish commonality with respect to pregnant UCs who had no desire to obtain an abortion.[312] In response, the plaintiffs argued that "minor factual variations in individual class members' circumstances" could not defeat commonality and typicality; the magnifying lens for commonality needed to be set, they argued, only at

305. *Id.*

306. *Id.*

307. *Id.* at 7.

308. *Id.*

309. *Id.*

310. Defendants' Opposition to Plaintiffs' Renewed Motion for Class Certification and a Preliminary Injunction at 15–16, Garza v. Azar, No. 1:17-cv-02122, 2017 WL 9854552 (D.C. Cir. Mar. 16, 2018). The defendants cited *Wal-Mart* in support of their commonality argument. *Id.*

311. *Id.* at 13–14.

312. *Id.* at 18–20.

the level that would show the "Defendants' uniform policy" towards all pregnant UCs.[313]

The district court agreed that the "variations in individual class members' factual circumstances" did not defeat commonality because there were "key common circumstances": class members were pregnant, had a right to privacy, and were subject to government policies while in government care.[314]

After the district court certified a class, defendants argued to the D.C. Circuit that the finding of commonality was in error. They again argued that the stories of the four named plaintiffs all "implicated distinct circumstances that demonstrate the variability of the claims throughout the class," adding such differences as "inability to return to [one's] country of nationality," "varying stages . . . of pregnancy," and "different ages and maturity levels."[315]

The D.C. Circuit refused to zoom in to that level of detail and concluded that the narratives of the representative plaintiffs J.D. and Jane Roe were "substantially—arguably entirely—identical to those of the class."[316] As the court wrote, the class satisfied commonality and typicality because they all asserted claims that fit a common narrative: that they had all been affected by the department's policy that allegedly "violate[d] the class members' protected right to choose to terminate their pregnancies before viability."[317] In other words, the court would not zoom in to magnify the plaintiffs' stories at such a searching level that the common story would be destroyed by "certain factual variations among the class members—namely, their age, maturity, stage of pregnancy, mental health, length of sponsorship search, and ability to return to country of origin."[318]

As this Part has shown, the narrative contest is present in public interest class actions, but it takes on a unique form in such settings. The contest of narratives at the class certification phase is like zooming in and out to focus a magnifying lens; in other words, determining that proper level of focus at which similarity should be examined. *Wal-Mart* teaches that Rule 23 demands that class counsel present more than a broad-strokes

313. Plaintiffs' Reply in Further Support of Their Renewed Motion for Class Certification and a Preliminary Injunction at 3, *Garza*, 2017 WL 9854552 (No. 17-cv-02122).

314. Memorandum Opinion and Order Granting Class Certification at 13, *Garza*, 2017 WL 9854552 (No. 17-cv-02122).

315. Brief of Appellants at 31–34, J.D. v. Azar, 925 F.3d 1291 (D.C. Cir. 2019) (No. 18-5093) [hereinafter Appellants' Brief in *J.D.*]. The defendants' briefing also demonstrated that other 23(a) elements, such as adequacy and numerosity, can also be tools for trying to create narrative differences. *Id.* at 27–31, 34–37.

316. *J.D.*, 925 F.3d at 1322.

317. *Id.* at 1321.

318. *Id.*

archetype of a legal claim; thus, narratives cannot be examined at a level of focus so high that all one can see is the law claimed to have been violated—with myriad other differences obscured. But the examples of *Ms. L.* and *J.D.* show that the Rules 23 does not require such a tight focus that factual differences like those in Ms. L. and Ms. C.'s cases, or like those of the various Janes in *J.D.*, are distinguishable.

3. Details Can Make, as Well as Break, the Certification Showing

A third observation that a critical reading yields is this: the class action rules push stories towards generality, with "zoomed-out," stripped-down narratives; however, specific individual details remain convincing, even on certification questions.

For instance, Jane Poe, one of the *J.D.* plaintiffs, had become pregnant as the result of a rape that occurred in her country of origin.[319] The plaintiffs' counsel did not include that allegation in her initial declaration or in their initial description of her situation, perhaps out of concern for destroying commonality or typicality, or perhaps out of fear of Poe not being believed.[320] Poe's rape does not appear in the plaintiffs' Second Amended Complaint, possibly for the same reason.[321]

Discovery in a separate litigation provided information that arguably strengthened the *J.D.* plaintiffs' claims both on the merits and for the purposes of class certification.[322] This discovery revealed more information about Poe's pregnancy, including that it resulted from rape and that Poe had threatened to harm herself if forced to carry to term.[323] Importantly, this information gained through discovery—albeit in a different litigation—would figure prominently in the D.C. Circuit's opinion affirming certification.

Later, defendants used this mental health information to argue that differences in the potential class members' pregnancies could destroy the commonality required under Rule 23, claiming that class members

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319. *Id.* at 1304.

320. As described above, Poe's declaration reads very similarly to the other named plaintiffs' declarations. *See* Jane Poe Declaration, *supra* note 280, at 1–2; *see also supra* notes 286–291 and accompanying text.

321. *See Garza* Second Amended Complaint, *supra* note 268, ¶¶ 24–26 (describing Poe as plaintiff).

322. *See* Plaintiffs' Renewed Motion for Class Certification and a Preliminary Injunction Based on New Facts Demonstrating Continued Need for Urgent Relief at 2–3, Garza v. Azar, 2017 WL 9854552 (D.C. Cir. Mar. 2, 2018) (explaining that plaintiffs obtained additional facts through discovery in *American Civil Liberties Union of Northern California v. Hargan*).

323. *See id.* at 9; *see also id.* at Exhibit I (displaying email exchange between government employees identifying that "[t]he Child/Minor claims that the pregnancy was a product of a rape by an unknown man" and that "she prefers to harm herself rather than continue with the pregnancy, with that in mind her mental health is at threat").

"present distinct mental health issues that affect their decision-making abilities."[324] They argued that this kind of individual story that Jane Poe presented meant that class-wide relief would not be appropriate.[325]

Ultimately, when the court found commonality and granted certification, the distinguishing details about Jane Poe's assault did make it into the court's decision on class certification. In just the fourth paragraph of its opinion affirming the certification of a class of pregnant UCs, the D.C. Circuit wrote the following:

> The claim of one minor in this case brings the policy's breadth and operation into stark relief. She had been raped in her country of origin. After her arrival here and her placement in government custody, she learned she was pregnant as a result of the rape. She repeatedly asked to obtain a pre-viability abortion, to no avail.[326]

Here, the court zooms in on the specific detail of Jane Poe's story, finding it brings the case "into stark relief."[327] These sad and personal details, which defendants argued helped to destroy commonality, appears to have done significant work in convincing the D.C. Circuit to affirm class certification.

Significantly, the details of Poe's experience appear to have confirmed for the court that the class members all shared the same master narrative, rather than destroying the appearance of a shared story. The fact that *even* in the face of such circumstances, Poe would be denied medical care, demonstrated to the court that a government policy rather than a case-by-case determination was at work in all the plaintiffs' narratives.

In public interest class action cases, policies may be the "glue" or connective tissue that can demonstrate that a class shares common claims and needs an indivisible remedy.[328] Providing some details seems to be vital in building a narrative of those policies. Particularly in suits against government defendants, where plaintiffs and their counsel may not have access to the underlying policies and procedures resulting in their individual harms, details can help build the narrative in ways that capture the decisionmaker. Those details might weigh against commonality, but they get at the heart of identifying a problem that requires remedy on a large scale. Sometimes a striking detail is worth a thousand similar characteristics.

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324. *See* Appellants' Brief in *J.D.*, *supra* note 315, at 34.

325. Appellants' Reply Brief at 12–13, J.D. v. Azar, 925 F.3d 1291 (D.C. Cir. 2019) (No. 18-5093).

326. *J.D.*, 925 F.3d at 1300.

327. *Id.*

328. Particularly in suits against government defendants or other powerful defendants, where the plaintiffs and their counsel may not have access to the underlying policies and procedures resulting in their individual harms, discovery can help build the narrative.

This observation illustrates once more the tension between the individual and the collective, discussed earlier in this Article. This observation also show that narrative theory may inform the debate over whether courts' interpretations of certification requirements are too restrictive. If details and other tools create the kind of psychologically persuasive narratives that move judges to take action—and yet class members are discouraged from using narrative details, out of concern those details will be used to defeat commonality—then a narratologist might say that the class action rules, as currently interpreted, put class action plaintiffs in a difficult, if not impossible, bind. An awareness of that bind is essential to the recommendations this Article makes in the following section.

C. The Next Chapter: A Narrative Turn in Legal Argument on Public Interest Class Certification to Resolve the Narrative Bind

This Article now turns to recommendations about class action practice, in light of the observations about the way narratives work in public interest class certification decisions. In particular, an awareness of narrative in public interest class actions prior to certification leads to the following recommendations. First, judges deciding certification should limit the inquiry into the merits as much as possible, informed by an awareness of the narrative bind placed on plaintiffs due to the competing requirements at the class certification phase. Second, judges and advocates considering the proper role for pre-certification discovery should similarly consider the narrative possibilities of such discovery. Finally, judges and advocates should take a "narrative turn" in legal argument on class certification, in order to insulate public interest class action certification decisions from the potentially outsized influence of unarticulated and unexamined, yet culturally powerful, master narratives.

First, an awareness of public interest plaintiffs' "narrative bind"—the way narratives must be used to demonstrate commonality at the class certification phase—should lead judges to limit the merits inquiry as much as possible at this point in the litigation. As this Article has shown, advocates in class actions who think carefully about narrative will use storytelling tools surgically and precisely prior to class certification, rather than use a more-narrative-is-always-more-effective approach. To support a showing of commonality, plaintiffs' individual narratives often contain minimal narrative details, and are carefully crafted to resemble one another.

As a result of these certification-specific narrative goals, the narratives that judges might expect to see in merits arguments may be lacking at the certification phase. For instance, the stories in *Ms. L.* and *J.D.* are quite unlike those one would expect to see in individual asylum proceedings,

for instance, where individual details can help support a claimant's case on the merits. The contrasts between the stories told here and the stories that the parties might tell or might have told in different legal contexts related to their plights help to illustrate the constraints that class action procedure places on narrative and should inform judges to apply a different narrative standard at class certification.

For example, some of the plaintiffs whose stories are told in these sample cases were claiming a right to asylum. Individual asylum cases present a classic opportunity to use detailed storytelling for persuasion.[329] An individual claiming asylum must demonstrate a well-founded fear of persecution,[330] and her testimony is subject to careful review for credibility, persuasiveness, and specificity.[331] The applicant's testimony is often the core of her case, and her testimony will be assessed by the factfinder.[332] A claimant's narrative can be harmed by things like "inconsistencies" and "small mistakes."[333] The richness of these "other"

329. *See, e.g.*, Stacy Caplow, *Putting the "I" in Wr*t*ng: Drafting an A/Effective Personal Statement To Tell a Winning Refugee Story*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 249, 255–57 (2008) ("As every experienced asylum advocate knows, the personal statement describing the grounds for asylum is the 'centerpiece' of the asylum application . . . . [A personal statement should] strive for a . . . comprehensive, creative, and painstakingly detailed document that delicately balances the case theory and the client's voice but also tells a story of courage, suffering, loss, sacrifice, and exile."); Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 457, 460 (2016) ("Claims for asylum are a striking example of storytelling in the context of law . . . . [W]hether asylum is granted depends largely on the applicant's ability to tell a 'good' story; one an immigration judge deems to be 'credible' and that fits within the statutory definition of a 'refugee.'").

330. To be entitled to the refugee status that makes an individual eligible for asylum, she must demonstrate she is "unable or unwilling to return to" the country in which she last habitually resided "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(42) (2012) (defining "refugee"); *see also* 8 U.S.C. § 1158(b)(1)(A) (stating that the federal government may grant asylum to an alien if, among other things, there is a determination that the alien is "a refugee"); *id.* § 1158(b)(1)(B)(i) (providing that "the burden of proof is on the applicant to establish that the applicant is a refugee").

331. *See* 8 U.S.C. § 1158(b)(1)(B)(ii) ("The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee."). Similarly, as *Flores* shows, once a class is certified, that opens up room for more-detailed narratives that can show substantive violations of law and persuade a decisionmaker. Recent declarations filed in *Flores* to demonstrate the need for continuing oversight and involvement, for instance, utilize a high degree of detail, individual voice, and other narrative techniques.

332. *See* 8 U.S.C. § 1158(b)(1)(B)(iii) (identifying factors on which trier of fact may base a credibility determination, including "the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements, . . . the internal consistency of each such statement, the consistency of such statements with other evidence of record, . . . and any inaccuracies or falsehoods in such statements").

333. *See* Caplow, *supra* note 329, at 255. Some of the characteristics of narratives of trauma survivors actually weight against finding their narratives credible. *See* Paskey, *supra* note 329, at 494 ("[*N*]*early all* of the criteria used to assess credibility are unreliable when applied to the stories told by trauma survivors.").

stories, told in the context of individual claims or after the class certification hurdle has been overcome, contrasts sharply with the stripped-down certification narratives in *J.D.* and *Ms. L*.

In short, the stories told to achieve class certification and the stories told towards more merits-related inquiries differ sharply because of the requirements of the different procedural standards. A plaintiff class attempting both to meet the class certification standards and to make a strong showing on the merits would find itself in a "narrative bind." To the extent that *Wal-Mart* both enables judges to inquire into the merits at the class certification phase, but also leaves considerable leeway concerning how searching that inquiry ought to be, an awareness of the narrative bind ought to encourage judges to limit the merits inquiry until later in the litigation.

Second, an awareness of the "narrative bind" should also inform pre-certification requests for and decisions about discovery. This point is particularly salient in public interest litigation, where information about plaintiffs' claims is particularly likely to be in the hands of government defendants and inaccessible without formal discovery. Advocates seeking discovery and judges considering pre-certification discovery should consider carefully the way that the details learned through discovery may support or detract from commonality and should consider especially the extent to which discovery may provide information that can supply the "glue" required for commonality. As the *J.D.* litigation demonstrated, access to information (including through pre-certification discovery) can help plaintiffs demonstrate the minimal coherence and die-cut similarity that the certification question demands. In *J.D.*, the discovery materials came from a separate, related litigation; in future cases, judges could use the broad discretion granted by Rule 23(d) to permit early-stage, focused discovery into matters relevant to certification.

The final recommendation this Article makes is for judges and lawyers to take what I call a "narrative turn" in their class certification arguments and analysis. As this Article has shown, class action certification, particularly as it concerns the "commonality" requirement, can be influenced by unarticulated, unexamined assumptions about narratives. To ameliorate the effects, and to allow the class action to function as the drafters of the modern Rule 23 intended, advocates and judges should both work to make these unseen master narratives and stock stories visible.

When telling or transmitting plaintiffs' stories in filings prior to certification, advocates should not only be aware of and use the narrative tools that will best serve their purposes; they should also be prepared to speak clearly about the way narrative reasoning may be influencing the certification question. *Wal-Mart* is a paradigmatic example of the way different, yet powerful, cultural master narratives can be implicated in court decisions on commonality. For instance, advocates should be

prepared to point out when a particularly powerful master narrative appears to be capable of supplying "glue" that is not there, or when a contradictory master narrative makes it harder for a party to point to the "glue" in its case. By placing more emphasis on the narratives underlying the parties' competing stories, advocates will focus the certification issue to be less abstract. This Article's recommendation is not for advocates to warn judges that they may be in thrall to a particular master narrative—that would hardly help an advocate's case. Instead, advocates can observe and bring to the court's attention the variety of master narratives that might "match" the case, on the theory that airing multiple master narratives will inoculate the reasoning in the case from unconscious and undue reliance on any one narrative.

Furthermore, judges should consciously assess the narrative features of a proposed class; judges should consider the possibly relevant master narratives and stock scripts that might be influencing their reception of the parties' stories, thereby minimizing the effect those mental constructs have on their decisionmaking. Judges can articulate the potential applicability of those master narratives and stock scripts when issuing orders on class certification, as Justice Ginsburg did in her dissent in *Wal-Mart*. By addressing narrative as they give reasons for decisions on certification, courts will better ensure that decisions are free from the undue influence of powerful stock stories that threaten to undermine the law's integrity.

CONCLUSION

Public interest class actions are powerful vehicles for groups to tell their stories in pursuit of justice. The stories plaintiffs tell in class actions can advance the substantive content of the law and can also influence public debate. Before the most powerful stories can be told in public interest class actions, plaintiffs must advance successful certification narratives—which are unlike stories told for other purposes and at other points in litigation.

This Article has begun to illuminate how certification narratives function, in order to help judges, lawyers, and academics better understand this important phase in litigation. It has made a descriptive contribution by illustrating in detail how narrative techniques work to meet the unique procedural challenges of class certification in public interest litigation following *Wal-Mart Stores, Inc. v. Dukes*. Prior to certification, advocates must use narrative coherence with delicacy and must aim at a modified version of narrative correspondence. Advocates must also carefully select the level of generality at which they frame client stories to achieve their ends. And finally, advocates must remain aware of the tension between the innate desire for persuasion, which relies on

detail, and the stripped-down version of narrative required by the Federal Rules and the Supreme Court's class action jurisprudence.

Recognizing this tension, this Article has also argued that courts and lawyers should pay greater attention to the desire for and complications of storytelling in class action cases. With greater attention to narrative techniques and narrative effects, public interest class actions can better fulfill the original goals of Federal Rule 23(b)(2).