

HOW TO (NOT) DO THINGS WITH JUDICIAL OPINIONS: MINDING THE PERFORMATIVE POWER OF FACTS AND DICTA

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“Three generations of imbeciles are enough.”¹ These words of Justice Oliver Wendell Holmes are some of the most infamous and evocative penned from behind the bench of the Supreme Court of the United States. Beyond the feelings of revulsion reading the opinion causes, the facts that Justice Holmes declared to be true and the dicta he used to bolster the Court’s holding in Buck v. Bell helped to create the social world we live in today and continue to affect it. Though previous scholarship has recognized the importance of acknowledging the performative power of words in the legal field, little of this scholarship has focused on judicial opinions. The existing studies of performativity and judicial opinions have primarily focused on rulings or the process of overruling and holdings. This Note uses the theory of performativity to better understand the precedential power of judicial opinions beyond their holdings. Acknowledging this power encourages judges to take greater responsibility for the parts of their opinions that do not directly state the law and undertake a more thoughtful writing process.

INTRODUCTION 1204

* JD Candidate, 2023, University of Colorado Law. I would like to dedicate this Comment to the many people dehumanized by judicial opinions—your life matters, and you are more than how a judge may describe you. Many thanks to Professor Scott Skinner-Thompson for providing thoughtful feedback and guidance. Your suggestions were instrumental in the transformation of my scattered ruminations into this Comment. Thanks, too, to Professor Pierre Schlag, Jake Hedgpeth, and Chandler Spoon for your help strengthening my argument and preparing this Comment for publication. And to Alyssa Ortiz, my deepest thanks for your advocacy, encouragement, and masterful guidance throughout each stage of the publication process. Finally, my warmest thanks to my husband, Luke Beasley, for your unwavering support and love, and for providing a listening ear as I developed my thoughts on performativity, judicial opinions, and disability rights. Any remaining errors are my own.

1. Buck v. Bell, 274 U.S. 200, 207 (1927).

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INTRODUCTION

Words written from behind the bench tell the reader “not only, ‘This is the right outcome for this case,’ but also ‘This is the right way to think and talk about this case, and others like it.’”² Through the words of judicial opinions, a “wholly different dimension of legal life and thought becomes possible—the systematic and reasoned invocation of the past as precedent.”³

Sometimes words describe things—“The chair is green.” Sometimes words do things—“I promise to wash your car.” When a word performs an action, the utterance is called a “performative.”⁴ Performativity is the study of the ways words do things and create reality.⁵ An understanding of the ways

2. See James Boyd White, *What’s an Opinion For?*, 62 U. CHI. L. REV. 1363, 1366 (1995).

3. *Id.* at 1367.

4. J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 6 (J.O. Urmson & Marina Sbisa eds., Harvard Univ. Press 2d ed. 1978).

5. See Jillian R. Cavanaugh, *Performativity*, OXFORD BIBLIOGRAPHIES (Mar. 10, 2015), <https://www.oxfordbibliographies.com/view/document/obo-9780199766567/obo-9780199766567-0114.xml#obo-9780199766567-0114-div1-0001> [https://perma.cc/VGG8-3GYB]; see also Judith Butler, *Performative Agency*, 3 J. CULTURE & ECON. 147 (2010) (“[P]erformativity starts to describe a set of

words create the realities we experience can be used as a tool to “counter a certain metaphysical presumption about culturally constructed categories and to draw our attention to the diverse mechanisms of that construction.”⁶ Performativity provides a helpful way “to articulate the processes that produce ontological effects, or the naturalized assumptions of what constitutes reality.”⁷

An understanding of the power of words is incredibly important to the practice and study of law.⁸ Within the context of judicial opinions, holdings—in their ability to create precedent and shape future decisions—have been recognized as performative speech acts.⁹ The performative nature of facts and

processes that produce ontological effects, that is, that work to bring into being certain kinds of realities.”).

6. Stephen Young, *Judith Butler: Performativity*, CRITICAL LEGAL THINKING (Nov. 14, 2016), <https://criticallegalthinking.com/2016/11/14/judith-butlers-performativity> [<https://perma.cc/3R5V-HNUN>].

7. *Id.* Ontological effects are, much like the term “naturalized assumptions” implies, the widely accepted pieces of what make up “reality.” The common phrase “that’s just the way it is” might be used to respond to inquiry about an ontological effect or naturalized assumption. Much of the difficult part of ontology is recognizing what might be an ontological effect. For more information about ontology, see generally, Thomas Hofweber, *Logic and Ontology*, STAN. ENCYC. PHIL., <https://plato.stanford.edu/entries/logic-ontology/#Oth> [<https://perma.cc/YQ3V-EWLW>] (Oct. 11, 2017).

8. See, e.g., Susan E. Provenzano, *Can Speech Act Theory Save Notice Pleading?*, 96 IND. L.J. 1157, 1165–66 (2021) (“Ever since David Mellinkoff pronounced, ‘The law is a profession of words,’ law has been understood as a language- and communication-driven discipline. And ever since H. L. A. Hart applied the philosophy of language to the philosophy of law, the meaning and function of legal communication have been the subject of serious study. In his mid-century work, Hart applied an analytical method for deciphering what legal communications mean using the theory of speech acts. That theory was the brainchild of British philosopher J. L. Austin and his compatriots, who developed the theory with the aim to define, explain, and categorize how communicators use language and how listeners grasp it.”) (footnotes omitted); Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1504 n.167 (2007) (“It is necessary to assume only that the content of the Court’s speech is relevant to the perlocutionary effect of its holding.”).

9. See, e.g., Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 94 (1998) (first citing RICHARD B. CAPPALLI, *THE AMERICAN COMMON LAW METHOD* 9 (1997); then citing STEVEN J. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* 37 (1985)) (“[T]he traditional common-law role for holding to establish the ‘authoritative core’ of the decision and to guide future cases demonstrates their significance within [J. L.] Austin’s philosophy of language.”) (footnote omitted). But see *id.* at 94 n.73 (saying that an opinion may not “technically” be a performative utterance, “at least the performative utterance that [J. L.] Austin referred to as a perlocutionary act, which achieves certain effects on the hearer of the utterance”). See also Pintip Hompluem Dunn, *How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis*,

dicta, however, has yet to receive the same attention. This Comment demonstrates why these portions of judicial opinions should also be understood and critiqued as performatives. By using the theory of performativity to evaluate the recited facts and dicta in judicial opinions, this Comment explains the importance of applying a heightened level of care when writing parts of the judicial opinion outside of the holding and maintaining the dignity of the people at the heart of the decision.

This understanding is developed in four parts. Part I introduces the theory of performativity, focusing on dimensions of illocutionary force, perlocutionary effect, and subjection. This theory is the foundation of the rest of the Comment and will be used as a mirror throughout to highlight the performative power of judicial opinions.

Part II discusses the performative power of fact recitation. It begins by briefly discussing narrative theory to set the stage for the discussion of how facts are used to create, rather than tell, a story. Then, by using examples from the marriage equality case *Obergefell v. Hodges*¹⁰ and the disability rights case *Buck v. Bell*,¹¹ it describes the way that pretrial decisions start constructing the narrative that will eventually be published in the court's opinion. Part II goes on to describe the narrative creation process judges undertake when writing the factual background of a case and, using the theory of performativity, demonstrates the reality-making power of that writing.

Part III begins by discussing the elusive distinction drawn between dicta and holdings. It then analyzes the performative power of the dicta in *Buck v. Bell* and the legacy and ongoing reality created by Justice Holmes's words. It ends by highlighting the importance of the judiciary to use words to "overrule" harmful dicta, even where the holding remains good law.

Finally, Part IV analyzes Judge Reeves's opinion in *United States v. Mississippi*¹² to propose ways of moving forward in recognition of the performative power of facts and dicta written in judicial opinions, ultimately suggesting greater care be given to writing judicial opinions.

113 YALE L.J. 493–94, 513 (2003) (discussing the act of overruling as a speech act). For a discussion of speech act theory, see *infra* Part I.

10. 576 U.S. 644 (2015).

11. 274 U.S. 200 (1927).

12. 400 F. Supp. 3d 546 (S.D. Miss. 2019).

I. PERFORMATIVITY AND SPEECH ACTS

Performativity is the recognition that words often *do* things, that language has the power to affect change in the world.¹³ J. L. Austin is largely credited as the first to describe the phenomenon of words performing actions.¹⁴ In *How to Do Things with Words*, he called these words *performative utterances*.¹⁵ A classic example of performative speech is the utterance “I do” as spoken during the course of a wedding ceremony.¹⁶ Although these are “just” words, the utterance performs the act of marriage.¹⁷ In addition to understanding words’ ability to create legal status, the study of performativity has been developed to understand the power of words to perform other types of actions such as creating an emotional response, creating social identity, and enforcing social status. The theory of performativity continues to be a source of scholarly discourse and while this Comment engages with only a limited scope of those discussions,¹⁸ this Part explains the foundational ideas of performative utterances as well as the concepts developed in response to those ideas.

Austin delineated three categories, or aspects, of performatives: locutionary, illocutionary, and perlocutionary.¹⁹ Locutionary acts are simply utterances that have meaning, such as “The grass is green.”²⁰ Illocutionary acts are performed *in* saying something, such as a warning or order.²¹ Perlocutionary acts are performed *by* saying something and affect the “feelings, thoughts, or actions of the audience, . . . the speaker, or of other persons.”²² All three aspects of an utterance can exist at the same time—that is, locutionary acts are statements as they are typically conceived, but “*in* performing the locutionary act, a speaker may also perform an illocutionary act” and “*by*

13. Cavanaugh, *supra* note 5 (“Performativity is the power of language to effect change in the world: language does not simply describe the world but may instead (or also) function as a form of social action.”).

14. *Id.*

15. AUSTIN, *supra* note 4, at 6–7.

16. *Id.* at 5.

17. *Id.*

18. See generally Cavanaugh, *supra* note 5, for an overview of this discourse.

19. See, e.g., AUSTIN, *supra* note 4, at 109.

20. See *id.* at 94.

21. *Id.* at 109.

22. *Id.* at 101.

performing a locutionary act, a speaker may perform a perlocutionary act.”²³

A. *Illocutionary Force*

Illocutionary acts create certain realities.²⁴ *Force* is a defining aspect of illocutionary acts because “the communicative significance of an act may be underdetermined by what has been said or observably done.”²⁵ John R. Searle expanded on Austin’s idea of illocutionary force and concluded that the force of an utterance is determined by the meaning of the sentence combined with whether other contextual conditions are met.²⁶

Searle determined three contextual conditions of force to be the most important.²⁷ First, the point or purpose of a statement, which “is part of but not the same as illocutionary force.”²⁸ For example, a request and a command both have the illocutionary *point* of getting another person to do something, but the illocutionary *force* is quite different.²⁹ Second, the force of an illocution is impacted by the direction of fit between its words and the world.³⁰ Some illocutions seek to make the world match their words, whereas others seek to make their words match the world.³¹ For example, a person writing a shopping list does so with the goal of making the world—their shopping cart—match the words of the list.³² By contrast, a detective taking notes on what the shopper purchases writes down what is placed in the shopping cart in an effort to have the words of their notes match the world.³³ Third, differences in expressed psychological states, such as belief or desire, impact the illocutionary force of a statement.³⁴ The expressed psychological state *belief* includes

23. Anjalee De Silva, *Addressing the Vilification of Women: A Functional Theory of Harm and Implications for Law*, 43 MELBOURNE U. L. REV. 987, 998 (2020).

24. Butler, *supra* note 5.

25. Mitchell Green, *Speech Acts*, STAN. ENCYC. PHIL., <https://plato.stanford.edu/archives/fall2021/entries/speech-acts> [<https://perma.cc/9B86-USPC>] (Sept. 24, 2020).

26. *Id.*

27. John R. Searle, *A Classification of Illocutionary Acts*, 5 LANGUAGE IN SOC’Y 1, 2, 5 (1976).

28. *Id.* at 2–3.

29. *Id.* at 3.

30. *Id.*

31. *Id.*

32. *Id.* at 3–4.

33. *Id.*

34. *Id.* at 4.

“statements, assertions, remarks and explanations” as well as “postulations, declarations, deductions and arguments.”³⁵

Beyond these three primary dimensions of illocutionary force, Searle articulated three³⁶ additional dimensions that are relevant to this Comment: the force with which the illocutionary point is presented; the status or position of the speaker relative to the audience; and whether the act requires an extra-linguistic institution, such as a government or university, for its performance.³⁷ The force of presentation is demonstrated by the other side of the request and command example given above—though they have the same point, the force is different.³⁸ The relative positions of the speaker and audience relates to a power differential. For example, a police officer asking a civilian to step out of their vehicle is a command, whereas a civilian asking a police officer to step out of their vehicle is a request.³⁹ The relative positions of the speaker and audience are distinct from the final dimension—whether an act requires an extra-linguistic institution for its performance.⁴⁰ Though power over another can exist outside of an institution, certain illocutionary acts, such as “declar[ing] war” or “call[ing] the base runner out,” can only be performed if the speaker, and sometimes the audience, has a position within an extra-linguistic institution.⁴¹

B. Perlocutionary Effect

A perlocutionary effect is the effect of the illocution on the listener;⁴² it is “what we bring about or achieve *by* saying

35. *Id.*

36. Searle identifies twelve dimensions of illocutionary force in total but not all are relevant for the purpose of this Comment. The dimensions not discussed in this Comment are: “the way the utterance relates to the interests of the speaker and the hearer”; the utterance’s “relation[] to the rest of the discourse”; the “propositional content” of the utterance; whether the act must always be a speech act; whether the act’s “corresponding illocutionary verb has a performative use”; and the “style of performance of the illocutionary act.” *Id.* at 5–7.

37. *Id.* at 5–6.

38. *Id.* at 5.

39. *See id.* (using the example of a general asking a private to clean up a room).

40. *Id.* at 6.

41. *Id.*

42. *See* Butler, *supra* note 5 (describing perlocutionary performatives as “utterances from which effects follow only when certain other kinds of conditions are in place”); *Perlocutionary Act*, OXFORD REFERENCE, <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100318202> [<https://perma.cc/N842-PFY2>] (defining a perlocutionary act as “[t]he effect of a speech act on a listener”).

something.”⁴³ Rather than creating something new, perlocutions are thought to alter an ongoing situation.⁴⁴ Because the focus is on the listener, the same illocution can have different perlocutionary effects on different listeners.⁴⁵ Like illocutionary force, the type and degree of perlocutionary effect depends on the power dynamic between speaker and listener.⁴⁶ For example, as explained by Rae Langton, the perlocutionary effect of pornography on some is arousal, however due to the subordinate social status of women, it can have the perlocutionary effect of sexual violence.⁴⁷ “If pornography has sexual violence as its effect and sexual violence as an aspect of women’s subordination, then pornography is a perlocutionary act of subordination.”⁴⁸

C. Power and the Combined Impact of Illocutionary Force and Perlocutionary Effect

Though a line is typically drawn between illocutionary and perlocutionary performatives, the two are not exclusive.⁴⁹ “All speech-acts theorists offer a version of this distinction[,] . . . [h]owever, whether or not there is such a distinction at all remains an essentially disputed issue.”⁵⁰ Even if clearly delineated, the force of each depends on the other.⁵¹ So, while the force is difficult to apportion, its aggregate force is easy to observe. An illocution “rel[ies] on a certain sovereign power of speech to bring into being what it declares, but a perlocution depends on an external reality.”⁵² Where an illocution “builds a reality,” a perlocution makes things happen.⁵³ Of course, the external reality upon which the effectiveness of a perlocution depends was built and brought into being by illocutions.⁵⁴ For these reasons, this Comment uses both concepts—illocutions

43. AUSTIN, *supra* note 4, at 109.

44. See Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHIL. & PUB. AFFS. 293, 306–07 (1993).

45. See *id.* at 306.

46. See *id.* at 306–07.

47. *Id.*

48. *Id.* at 307.

49. The same utterance can have both illocutionary and perlocutionary dimensions. Post & Siegel, *supra* note 8, at 1504.

50. James F. Bohman, *Emancipation and Rhetoric: The Perlocutions and Illocutions of the Social Critic*, 21 PHIL. & RHETORIC 185, 185 (1988).

51. See Butler, *supra* note 5, at 151 (“If illocutions produce realities, perlocutions depend upon them to be successful.”).

52. *Id.*

53. *Id.*

54. *Id.*

and perlocutions—to understand the performative power of judicial opinions without claiming either aspect of speech dominates.

Importantly, the understanding of both illocutionary and perlocutionary force relies on an acknowledgment of the power differential between speaker and listener.⁵⁵ Additionally, the power differential between the speaker, the listener, and the subject of the speech has significant impact on what act is performed and with what force. While acknowledging the importance of the status of whom or what the subject is, performative theory articulates that the speech itself creates the subject.⁵⁶ In this way, performativity “is the process of subject formation, which creates that which it purports to describe.”⁵⁷ This process is called subjection.⁵⁸ The concept of subjection used in conjunction with performative language provides an additional aid to understanding the power of speech and language to create reality.⁵⁹ For example, when a nurse declares, “It’s a girl!” after an infant is born, the utterance constructs “its” gender as “girl.”⁶⁰ “It” is the subject of the speech, but the speech also created what “it” is—a girl.⁶¹ The implications of subjection as performed by judges in judicial opinions are examined below.

II. THE REALITY-MAKING POWER OF FACT “RECITATION”

The U.S. legal system is structured around truth finding through the adversarial process and recitation of that truth through judicial opinions. The adversarial system is based on the assumption that truth can be discovered—or determined—“when each side fights as hard as it can to see to it that all the evidence most favorable to it and every rule of law supporting its theory of the case are before the court.”⁶² The ability of an adversarial system to discover the truth is questioned by

55. See *supra* notes 39 and 46 and accompanying text.

56. See Cavanaugh, *supra* note 5.

57. *Id.*; see also JUDITH BUTLER, *THE PSYCHIC LIFE OF POWER* 2 (1997).

58. BUTLER, *supra* note 57.

59. See Cavanaugh, *supra* note 5.

60. Young, *supra* note 6.

61. See BENJAMIN LEE, *TALKING HEADS: LANGUAGE, METALANGUAGE, AND THE SEMIOTICS OF SUBJECTIVITY* 333 (1997) (describing the performative power of the U.S. Constitution as simultaneously creating and describing the existence of a “we the people”).

62. Edward F. Barrett, *Adversary System and the Ethics of Advocacy*, 37 NOTRE DAME L. REV. 479, 480 (1962).

many.⁶³ In response to such criticism, Professor Edward F. Barrett stated that “a lawsuit is not a scientific investigation.”⁶⁴ In a similar sentiment, Judge Jack Weinstein conceded that “trials are not designed to get at the total truth in all its mystery.”⁶⁵ While we may not reasonably expect the adversarial system to uncover the whole truth from the mystery it is buried beneath, the challenge of digging it out should not be addressed by rewriting truth through the elimination of mystery.

The narrative that is eventually published in judicial opinions begins to take shape before any words of the opinion are written. Before trial, facts are narrowed and reality is sanitized. In writing the opinion, the judge further crafts the narrative that is then published as fact, in effect creating a new reality absent of mystery. This Part describes the reality-making power of factual recitation in judicial opinions.

A. *Fact Construction and Narrative Recitation*

Narrative theory has been recognized as providing useful tools for attorneys advocating for their clients.⁶⁶ Narrative theory is used by both attorneys and judges.⁶⁷ The power of narrative is not only a tool but also a serious responsibility.⁶⁸ The legitimacy and influence of the judiciary depends on the legitimacy of its reasoning and judgment.⁶⁹ “Because the Court’s legitimacy is an empirically contingent fact, it cannot simply be decreed [through] the illocutionary force of the Court’s principles; it must be causally produced through the impact of

63. *Id.* at 481; see also Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y. L. SCH. L. REV. 911, 912–29 (2012) (discussing the barriers to truth caused by the American adversarial system in criminal litigation).

64. Barrett, *supra* note 62, at 482.

65. *United States v. Jackson*, 405 F. Supp. 938, 946 (E.D.N.Y. 1975).

66. See, e.g., J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 53 (2008).

67. See Linda H. Edwards, *The Humanities in the Law School Curriculum: Courtship and Consummation*, 51 WAKE FOREST L. REV. 355, 360 (2016) (“To a greater extent than we have yet realized and explored, legal argument is made of the stories lawyers and judges tell each other about the law.”).

68. See Anne E. Ralph, *Narrative-Erasing Procedure*, 18 NEV. L.J. 573, 589 (2018) (“The study of narrative in law has also sparked some resistance to the use of storytelling, particularly in light of its persuasive abilities.”).

69. See THE FEDERALIST No. 78, at 291 (Alexander Hamilton) (J. & A. McLean ed., 1788) (“The judiciary . . . has no influence over the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgement; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgements.”).

the Court's words."⁷⁰ As such, the maintenance of the judiciary's legitimacy depends on the persuasiveness of its opinions.

Some narrative patterns (for example, the identities of the villain and hero) are more persuasive because they are more difficult to contest.⁷¹ For example, stories based on cultural norms and values create and explain the way a society understands the world⁷² and become "master narratives" or "official frameworks for understanding human events."⁷³ These "master-narratives are particularly persuasive because they are enshrined in a culture."⁷⁴ Because of this, when writing an opinion, it is advantageous to employ master narratives. But employing master narratives in judicial opinions does more than strengthen the opinion's legitimacy—the legitimacy of the master narrative itself is furthered through its presence in the writing of a judge or justice.⁷⁵

1. Pretrial Narrative Construction

Master narratives are inherently simplistic and do not reflect a complete picture.⁷⁶ This is in part because it is difficult to imagine anything outside of the known plot.⁷⁷ However, the missing pieces can be pieces intentionally removed rather than

70. Post & Siegel, *supra* note 8, at 1506.

71. Ralph, *supra* note 68, at 583.

72. *See id.* at 580–81 ("Certain stories enjoy special resonance within particular cultures. We might call these archetypes, cultural master stories, or master narratives. With respect to these master narratives, 'we carry the blueprints of these archetypal situations, and when events activate those archetypes, we create at least the rough outlines of a particular mythological story through which we view those events.'").

73. Craig Haney, *On Mitigation as Counter-Narrative: A Case Study of the Hidden Context of Prison Violence*, 77 UMKC L. REV. 911, 913 (2009).

74. Ralph, *supra* note 68, at 581.

75. *See* Haney, *supra* note 73 ("Contemporary historians have described master narratives as cultural frameworks that are institutionalized and legitimizing.").

76. *See, e.g.,* Dustin Hornbeck & Joel Malin, *Mobilising Historical Knowledge Without Master Narratives: How Historians are Correcting the Record in a Complicated Political Moment*, LONDON SCH. ECON. & POL. SCI. (Dec. 8, 2021), <https://blogs.lse.ac.uk/impactofsocialsciences/2021/12/08/mobilising-historical-knowledge-without-master-narratives-how-historians-are-correcting-the-record-in-a-complicated-political-moment> [<https://perma.cc/C8XN-WH4C>] (describing master narratives as "simplistic and mythologized").

77. *Cf. Ralph, supra* note 68, at 580 (quoting Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 890 (2010)) (explaining that master narratives become "blueprints of . . . archetypal situations, and when events activate those archetypes, we create at least the rough outlines of a particular mythological story through which we view those events").

just unimaginable. Many components of the pretrial process work to narrow a story so that it might fit within a box labeled: “Facts Inside: Apply the Law.” The box is delivered to a judge who uses what’s inside to write an opinion.

Pretrial procedure is designed to refine the narrative being told in a case. Professor Anne E. Ralph skillfully analyzed this occurrence, describing it as “narrative-erasing procedure.”⁷⁸ Beginning with the initial complaint, Federal Rule of Civil Procedure 8 requires a pleading to be composed of “short” and “plain” statements, “indicating how detailed the narrative should be.”⁷⁹ As the litigation moves forward, attorneys file numerous documents to the court, composing a narrative that will appeal to the decision-maker. These documents do not “tell[] things as they really are, without mediation or narration,”⁸⁰ but rather tell things as the attorney believes the court wants them to be.⁸¹ Professor Ralph outlines three instances of narrative-erasing procedure in the civil context: the plausibility pleading standard, the Rule 26(b)(1) proportional discovery requirement, and settlement.⁸² Each of these procedural items work to refine what contents are in the box when it is delivered to the judge. The plausibility standard and settlements can work to eliminate the box altogether.⁸³ Proportional discovery seeks to limit the burdens of the discovery phase of litigation.⁸⁴ This efficiency, however, “limit[s] the kinds of stories that can be told in a case.”⁸⁵

But even before a court or the Federal Rules of Civil Procedure are involved, the mystery-free story of judicial opinions begins to be crafted through plaintiff selection. “A well-

78. See generally Ralph, *supra* note 68.

79. *Id.* at 600–01; FED. R. CIV. P. 8.

80. Ralph, *supra* note 68, at 601.

81. See Scott Skinner-Thompson, *The “Straight” Faces of Same-Sex Marriage*, SLATE (Apr. 24, 2015, 2:19 PM), <https://slate.com/human-interest/2015/04/the-straight-faces-of-same-sex-marriage.html> [https://perma.cc/EX8P-9QSY] (describing the filings of plaintiffs’ attorneys in challenges to the constitutionality of same-sex marriage bans: “filing after filing emphasizes that the plaintiffs are devout Christians, military veterans, law enforcement personnel, and otherwise mainstream professionals and productive members of society”).

82. Ralph, *supra* note 68, at 609–18.

83. See *id.* at 611–12, 617, for discussion on the way “[i]ncreased granting of motions to dismiss” under the higher plausibility standard “deprives the system of narratives that could be developed and of advances in the law,” and how settlement of a case “erase[s]” the two narratives that otherwise would have been contested.

84. *Id.* at 614 (citing ADVISORY COMM. ON CIV. RULES, REPORT OF THE DUKE CONFERENCE SUBCOMMITTEE, 82–84 (2014)).

85. *Id.* at 615.

selected plaintiff can provide a concrete context for abstract legal concepts and personalize the stakes.”⁸⁶ Attorneys seek “to find, and more often package,” plaintiffs who conform to a story judges want to hear.⁸⁷ Often this selection has been used by advocates to create a sympathetic plaintiff,⁸⁸ one that fits inside a victim role of the master narrative rather than a villain. As one example, the selection of the plaintiffs in the seminal Supreme Court marriage equality case *Obergefell v. Hodges* was “part of a careful strategy.”⁸⁹ “The [*Obergefell*] plaintiffs reflect a traditional ‘Leave it to Beaver’ American ideal.”⁹⁰ According to Professor Scott Skinner-Thompson, these portrayals were common in the same-sex marriage challenges pending before *Obergefell* was decided.⁹¹ Despite higher rates of poverty among lesbian, gay, and bisexual individuals, the marriage equality plaintiffs “were frequently white collar professionals.”⁹² Because only white-collar professionals were brought as those impacted by marriage inequality, the selection of plaintiffs failed to accurately represent the full truth—in all its mystery and messiness—of the class of people impacted by a decision.

Though the reduction of a narrative may make the cause more palatable to a judge’s sensibilities or legal analysis, it simultaneously risks writing a new story—one that does not communicate reality but creates its own. In the realm of marriage equality, the selection and portrayal of LGBTQ+ couples “dispel[led] stereotypes about LGB culture and package[d] it as acceptable.”⁹³ It also effectively “stripped [the plaintiffs] of their sexuality.”⁹⁴ Plaintiff selection, though effective, facilitates the creation of a reality different than the lived experiences of those whom the decision might otherwise reach. “Narrative-erasing procedure endangers the civil

86. Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J. F. 136, 137 (2015), <http://www.yalelawjournal.org/forum/perfect-plaintiffs> [https://perma.cc/YS75-R749].

87. *See id.* at 142.

88. *See id.* at 137 (“The plaintiffs must be . . . both sympathetic and relatable to the average person.”).

89. Skinner-Thompson, *supra* note 81.

90. Godsoe, *supra* note 86, at 145.

91. Scott Skinner-Thompson, *The First Queer Right*, 116 MICH. L. REV. 881, 893 (2018).

92. *Id.* at 894.

93. Godsoe, *supra* note 86, at 152.

94. Skinner-Thompson, *supra* note 91, at 893 (“Not only were these plaintiffs stripped of their sexuality, but they were also routinely stripped of their politics—frequently depicted as ‘accidental activists.’”).

litigation system by silencing litigants' voices and depriving the law of the stories it needs to progress. Narrative-erasing procedure also has a particularly harsh impact on individuals who are already marginalized in society."⁹⁵ By limiting the affected group of people to only those sympathetic to a master narrative, the group is reduced. This reduction, which occurs in the pretrial events, informs the content of the subsequent judicial opinion, becoming a part of the performance itself.⁹⁶

Plaintiff selection also occurred in *Buck v. Bell*; however, this time the perfect plaintiff was one who would be seen as *unworthy* of fundamental rights.⁹⁷ The process that occurred before Carrie Buck's case was in front of the Supreme Court is no exception to the importance of crafting what is inside the box given to the judge, though it is unique. Following the institutionalization of her mother, Carrie was placed in foster care at a young age.⁹⁸ While living with her foster family, she attended school and performed well, advancing from grade to grade.⁹⁹ When she was sixteen, a nephew of her foster parents who was living with the family raped and impregnated her.¹⁰⁰ It was at this time that the couple Carrie lived with sought to get her committed, claiming she was "feeble-minded."¹⁰¹ "Almost surely, she was (as they used to say) committed to hide her shame (and her rapist's identity), not because enlightened science had just discovered her true mental status."¹⁰² Soon after her arrival at the institution, Virginia adopted a sterilization law, the Eugenical Sterilization Act,¹⁰³ which

95. Ralph, *supra* note 68, at 575.

96. Pleadings could be analyzed as performative separate from the relation they have to judicial opinions; however, for the purposes of this Comment, I focus on the way they inform judicial opinions.

97. See generally Paul Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30 (1985), for an in-depth discussion of the tactful orchestration of Carrie Buck's case by the attorneys on both sides.

98. Penny L. Richards, *Carrie Buck*, BRITANNICA, <https://www.britannica.com/biography/Carrie-Buck> [https://perma.cc/FSS3-ZP27] (Jan. 24, 2023).

99. Lombardo, *supra* note 97, at 52.

100. *Id.* at 54.

101. *Id.*

102. Stephen Jay Gould, *Carrie Buck's Daughter*, 93 NAT. HIST. 331, 336 (1984).

103. Paul Lombardo, *Eugenic Sterilization Laws*, EUGENICS ARCHIVES, <http://www.eugenicsarchive.org/html/eugenics/essay8text.html> [https://perma.cc/S6NG-5ZWF].

“focused on ‘defective persons’ whose reproduction represented ‘a menace to society.’”¹⁰⁴

Carrie Buck was chosen by state officials to be the first person to be sterilized.¹⁰⁵ She was a poor and pregnant girl—three damning characteristics in the 1920s—whose mother was also living in an asylum.¹⁰⁶ The “[o]fficials . . . said that Carrie and her mother shared the hereditary traits of ‘feeble-mindedness’ and sexually [sic] promiscuity.”¹⁰⁷ To those who believed that such traits were genetically transmitted, Carrie fit the law’s description as a ‘probable potential parent of socially inadequate offspring.’”¹⁰⁸ The officials hired an attorney to play the role of her counsel; however, he and the attorney for the institution were working toward the same goal.¹⁰⁹ The legal challenge was arranged to test—and affirm—the constitutionality of Virginia’s Eugenical Sterilization Act.¹¹⁰ To the state officials, Carrie was the “perfect plaintiff.”¹¹¹

* * *

Trial may well be incapable of uncovering every mystery, but pretrial narrative construction at least has the potential to actively eliminate mystery that does not fit neatly into a legal outcome—trading truth-finding for reality-making.

2. Fact “Recitation” in Judicial Opinions

In the adversarial system, judges and justices cloak themselves with the title of impartial umpire.¹¹² Umpires may simply apply the rules,¹¹³ but to apply the rules they determine whether the runner was on base. If impartial, the role of the

104. *Id.*

105. *Id.*

106. Lombardo, *supra* note 103.

107. *Id.*

108. *Id.*

109. Lombardo, *supra* note 97, at 50–58.

110. *Cf.* Lombardo, *supra* note 103.

111. *See* Godsoe, *supra* note 86.

112. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (“Judges are like umpires. Umpires don’t make the rules, they apply them.”) (statement of John G. Roberts, Jr.).

113. *Id.*

judiciary is not to “fight[] as hard as it can,”¹¹⁴ but to clarify and declare what is true.

Judges and justices take the already narrowed set of facts presented to them and use the tools of storytelling to compose a persuasive version of the story. The writer of an opinion has immense control over the construction of what is taken as objective and called, rather indifferently, a “recitation” of the facts. The facts section of an opinion is purported to be a recital (not an argument, assertion, or even discussion) of uncontested facts, yet the outcome of a case can often be predicted by reading the facts or background section alone. Sometimes, the statements purported to be facts are provably false, other times their narration renders them something not false but different enough from reality to be a new creation.¹¹⁵

To use the example from Subsection II.A.1., *Obergefell* was the case to guarantee the fundamental right of marriage to same-sex couples,¹¹⁶ yet “the introductory description of three of the plaintiff groups . . . refrains from identifying anything about the plaintiffs’ sexuality.”¹¹⁷ Though every detail of the story that brings a plaintiff before a judge or justice will not be relevant, often judges craft a narrative to accompany the facts which are necessary to apply the law in order to justify the outcome of that application. In *Obergefell*, the plaintiffs’ sexualities were certainly more legally relevant than their “piousness and professionalism.”¹¹⁸ Nevertheless, a decision was made about the story that would be told, one that fit into the master narrative of who is deserving of the foundational right of marriage and, as a result, Ijpe DeKoe became an “Army Reserve Sergeant First Class” rather than a gay man.¹¹⁹

The stories told of the couples in marriage equality cases have used the master narrative to portray plaintiffs in a sympathetic lens. However, this powerful tool can be, and is,

114. Barrett, *supra* note 62, at 480.

115. Compare, e.g., Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2416–19 (2022), with *id.* at 2435–40 (Sotomayor, J. dissenting).

116. *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

117. Skinner-Thompson, *supra* note 91, at 893; see also *Obergefell*, 576 U.S. at 658–59 (“Petitioner James Obergefell . . . met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation . . . April DeBoer and Jayne Rowse . . . celebrated a commitment ceremony to honor their permanent relation in 2007 . . . Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura . . . fell in love . . . [and] married in New York.”).

118. See Skinner-Thompson, *supra* note 89.

119. See *id.*; *Obergefell*, 576 U.S. at 659.

used to portray someone as the villain; someone whom the felicity of the master narrative depends on being guilty, unworthy, or dangerous.¹²⁰ In *Buck v. Bell*, Justice Holmes describes Carrie Buck as “a feeble-minded white woman . . . [who is] the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate feeble-minded child.”¹²¹ For a eugenicist like Justice Holmes, this description justified, and perhaps even required, the outcome of sterilization.¹²² What was not mentioned was the rape that resulted in her pregnancy and subsequent institutionalization.¹²³ Nor were her reports from school describing her work and behavior as “very good” and showing her name on the honor roll.¹²⁴ Beyond what was not included, many of the “facts” “recited” were not facts at all. “Carrie Buck was a woman of obviously normal intelligence,”¹²⁵ not “feeble-minded” or, as only Justice Holmes described her, an “imbecile.”¹²⁶

The argument here is not that the judiciary should become investigators, but rather that the words written to describe the “facts” of the case should be taken as seriously as those in the holding. Understanding the performative power of facts stated as true by the judiciary is one way to do this.

120. This is quite common in the criminal context. *See, e.g.*, Shirin Bakhshay & Craig Haney, *The Media's Impact on the Right to a Fair Trial: A Content Analysis of Pretrial Publicity in Capital Cases*, 24 PSYCH. PUB. POL. & L. 326 (2018); Haney, *supra* note 73; Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835 (2008). *But cf.* Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Biases*, 115 W. VA. L. REV. 305 (2012) (discussing the use of narrative to humanize criminal defendants).

121. *Buck v. Bell*, 274 U.S. 200, 205 (1927).

122. *See* Trevor Burrus, *One Generation of Oliver Wendell Holmes, Jr. is Enough*, CATO INST. (June 23, 2011, 5:03 PM), <https://www.cato.org/blog/one-generation-oliver-wendell-holmes-jr-enough> [<https://perma.cc/M96Y-86KU>].

123. Michelle Oberman, *Thirteen Ways of Looking at Buck v. Bell: Thoughts Occasioned by Paul Lombardo's Three Generations, No Imbeciles*, 59 J. LEGAL EDUC. 357, 372 (2010).

124. Lombardo, *supra* note 97; Lombardo, *supra* note 103.

125. Gould, *supra* note 102, at 336.

126. Lombardo, *supra* note 97, at 61; *see also* Gould, *supra* note 102, at 335 (explaining the differences between the official terms “imbeciles,” “idiots,” and “morons” during the time of *Buck v. Bell*).

B. Performative Power of “Fact” “Recitation”

The dimensions of illocutionary force¹²⁷ in conjunction with an understanding of perlocutionary effect and the concept of subjection demonstrate why even fact recitation has reality-creating capabilities. The point or purpose of recited facts, the direction of fit between the words stated as facts and the world, the expressed psychological state of fact recitation, the force with which the facts are stated, the status of the judge or justice reciting the facts in relation to the audience reading them, and the need for the connection to an extra-linguistic institution reciting the facts all demonstrate the strong illocutionary force of facts recited in judicial opinions. The way the factual recitation relies on master narratives impacts the perlocutionary effect. Lastly, the parties to a lawsuit are subjected—defined by their description—in the opinion.

The purpose of fact recitation in judicial opinions is to provide an explanation of the happenings and beings that put the legal issues in front of the court. In light of the understanding of narrative theory and the need to maintain judicial legitimacy through persuasive reasoning, the purpose of fact recitation in judicial opinions is also to provide a story that necessitates the outcome the judge or justice reaches—to make the outcome seem inevitable or, at least, persuasive. For example, in *Obergefell*, the careers of the plaintiffs and the length of their relationships were not relevant to the legal issue before the Supreme Court; however, those facts were relevant to the Court’s goal of fitting the plaintiffs into the master narrative used to strengthen its reasoning. Because the success of a perlocution depends on good circumstances, the success of the court legitimizing itself (arguably one intended perlocutionary effect of fact recitation) depends on what conditions the opinion creates as its external reality.¹²⁸

In describing this interplay between the role of the illocution and perlocution aspects of the opinion, it becomes clear that the process of subjection is also occurring. The direction of fit between the facts recited and the world are intended and

127. See *supra* Part I for a discussion of these dimensions.

128. Butler, *supra* note 5; see also Post & Siegel, *supra* note 8, at 1504 (“The question of whether the words of a court opinion have any particular empirical effect depends upon their perlocutionary force. The perlocutionary force of a court opinion is a matter of contingent causality that very much depends upon exactly how a court speaks (among other things).”).

portrayed to be a word-to-world fit. However, as with any narration, the facts are woven together to create a portrayal of the world that aligns with its purpose. The court essentially “creates that which it purports to describe.”¹²⁹

Furthermore, the recitation of facts in a judicial opinion is necessarily different than the retelling of facts in other circumstances. Facts recited in judicial opinions are presented with a force that portrays them as unquestionably true. Additionally, the position of the court in relation to the audience is one of authority. The facts chosen to be included in a judicial opinion not only impact immediate reality, but also become sources used in the making of future decisions.¹³⁰ Because Supreme Court opinions are the most persuasive precedent to cite, there has been an increased “tendency of lower courts to cite Supreme Court cases as authorities on factual subjects, as evidence that the factual claims are indeed true.”¹³¹ Even though it is not a factfinding institution,¹³² assertions made in Supreme Court opinions are taken as true, or at least more persuasively true than other sources.

The words composing the fact recitation section of judicial opinions have performative force. Of course, depicting the

129. Cavanaugh, *supra* note 5. This also bears on the expressed psychological state dimension of illocutionary force. In reciting facts, the court’s expressed psychological state is that of belief, specifically an assertion.

130. For example, the understanding of the likelihood of people previously convicted of sex offenses to convict subsequent sex offenses (recidivism rate) in judicial opinions is a result of judges citing to the facts of previous cases. *Smith v. Doe*, 538 U.S. 84 (2003), stated that the recidivism rate of sex offenders is “frightening and high.” Adam Liptak, *Did the Supreme Court Base a Ruling on a Myth?*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/us/politics/supreme-court-repeat-sex-offenders.html> [https://perma.cc/7ZKY-YKRU]. As of 2017, that language had appeared in over one hundred lower-court decisions and “has helped justify laws that effectively banish registered sex offenders from many aspects of everyday life.” *Id.* The opinion also stated that rate to be as high as 80 percent. *Id.* This number can be tracked through many citations to a 1986 article in the nonacademic magazine *Psychology Today*. *Id.* “The article was about a counseling program run by the authors, and they made a statement that could be good for business. ‘Most untreated sex offenders released from prison go on to commit more offenses — indeed, as many as 80 percent do,’ the article said, without evidence or elaboration.” *Id.*; see also Melissa Hamilton, *Constitutional Law and the Role of Scientific Evidence: The Transformative Potential of Doe v. Snyder*, 58 B.C. L. REV. 34 (2017).

131. See Allison Orr Larsen, *Factual Precedents*, 162 U. PA. L. REV. 59, 59 (2013) [hereinafter *Factual Precedents*]; Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757 (2014) (describing the way the Supreme Court cites to amicus curiae briefs for statements of fact).

132. *Factual Precedents*, *supra* note 131, at 59.

plaintiffs in *Obergefell* as asexual¹³³ did not actually transform their lived sexuality, but the use of master narratives such as this “assist in the ‘manufacture of a public truth’ by ‘control[ling] the presumptions and postulates of the discussion’ in ways that ‘reinforce the narrative and truncate alternative opinion.’”¹³⁴ Further, the words “Carrie Buck is a feeble-minded white woman”¹³⁵ did not change her cognitive abilities, but the world began to reflect that performed truth rather than reality. The sterilization was performed and “she remained under the control” of the institution for three more years and required to return at any sign of trouble.¹³⁶ Though in different ways, the plaintiffs in both *Obergefell* and *Buck v. Bell* were subjected as characters in the master narrative employed to justify the outcomes of the cases.¹³⁷

One might assign the performative power of judicial opinions to the words “judgment affirmed,” yet these words alone mean little and do little on their own. “The question of whether the words of a court opinion have any particular empirical effect depends upon their perlocutionary force.”¹³⁸ In *Buck v. Bell*, before those two words at the end of the opinion, Justice Holmes stated:

133. See Godsoe, *supra* note 86, at 138.

134. Haney, *supra* note 73, at 913 (quoting Toni Morrison, *The Official Story: Dead Man Golfing*, in *BIRTH OF A NATION’HOOD: GAZE, SCRIPT, AND SPECTACLE IN THE O.J. SIMPSON CASE*, at xvi (Toni Morrison & Claudia Brodsky Lacour eds., 1997)).

135. *Buck v. Bell*, 274 U.S. 200, 205 (1927).

136. Lombardo, *supra* note 97, at 60; Paul A. Lombardo, *In the Letters of an ‘Imbecile,’ the Sham, and Shame, of Eugenics*, *UNDARK* (Oct. 4, 2017), <https://undark.org/2017/10/04/carrie-buck-letters-eugenics> [<https://perma.cc/Y8UF-7FKW>] [hereinafter *Sham, and Shame, of Eugenics*].

137. Though the *Obergefell* plaintiffs were described in dignifying terms, the elimination of their sexuality served to subject LGB individuals to a certain palatable role in the master narrative. See Skinner-Thompson, *supra* note 91, at 889–99; cf. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 3–4 (1999) (“On the one hand, representation serves as the operative term within a political process that seeks to extend visibility and legitimacy to women as political subjects; on the other hand, representation is the normative function of a language which is said either to reveal or to distort what is assumed to be true about the category of women. For feminist theory, the development of a language that fully or adequately represents women has seemed necessary to foster the political visibility of women. This has seemed obviously important considering the pervasive cultural condition in which women’s lives were either misrepresented or not represented at all.”).

138. Post & Siegel, *supra* note 8, at 1504.

The judgment finds *the facts that have been recited* and that Carrie Buck “is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization,” and *thereupon makes the order*.¹³⁹

It was the declaration that Carrie Buck was “a feeble-minded woman” that changed her legal status and narrowed her rights. The illocutionary and perlocutionary force of Justice Holmes’s words created a new reality, one where Carrie Buck was legally an “imbecile.”

In 2001, the Eighth Circuit cited to *Buck v. Bell*,¹⁴⁰ describing the outcome as “rejecting due process and equal protection challenges to compelled sterilization of [a] *mentally handicapped woman*.”¹⁴¹ Though Carrie Buck was not in fact “mentally handicap[ped]” and had no “hereditary defects,”¹⁴² Justice Holmes’s words subjected her to that role and made that her legacy.

III. THE PERFORMATIVE PRECEDENT OF DICTA

The holdings of judicial opinion have been recognized as performative speech acts which “develop the law and alter parties’ legal status.”¹⁴³ Yet much of a judicial opinion is composed of words outside of the holding—dicta. Dicta are often the most memorable and powerful parts of a judicial opinion, yet they are understood as having little or no precedential power. By understanding the performative force of dicta in judicial opinions, specifically those of the Supreme Court, their precedential power is revealed.

A. *The Holding-Dicta Distinction*

To discuss the importance of recognizing the performative power of dicta in addition to the previously noted performative power of a holding, the two must be understood in their

139. *Buck*, 274 U.S. at 207 (emphasis added).

140. See *infra* Section IV.B for a discussion of *Vaughn v. Ruoff*, 253 F.3d 1124 (8th Cir. 2001).

141. *Vaughn*, 253 F.3d at 1129 (emphasis added).

142. Lombardo, *supra* note 97, at 61; *Sham, and Shame, of Eugenics*, *supra* note 136.

143. Provenzano, *supra* note 8, at 1167.

distinction.¹⁴⁴ Drawing the distinction is a task which commonly stumps first-year law students. But law students are not alone in this confusion. In fact, there is no “single governing source or universal agreement on how to define dicta.”¹⁴⁵ Nevertheless, given the judicial system of interpreting and creating precedent in the United States, “[t]here is no denying the importance of understanding—both as a matter of theory and at the level of practice—how to approach such a central task as sorting holding and dicta.”¹⁴⁶ In *Defining Dicta*, Professors Michael Abramowicz and Maxwell Stearns define a holding as “propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment.”¹⁴⁷ Dicta, on the other hand, are all other propositions which do not satisfy the definition of a holding.¹⁴⁸ Dicta have also been defined as “opinions of a judge which do not embody the determination of the court.”¹⁴⁹

Some scholarship has focused on the unworkability of a binary dividing dictum from holding.¹⁵⁰ In this view, statements that are not asides are treated as part of a spectrum, where “[s]tatements narrowly tailored to the facts have greater constraining force and approach the status of binding holding” but “broader or more general statements have less constraining force and tend to approach dicta.”¹⁵¹ However, because the formal, binary distinction is used for the purpose of setting and following precedent, this Comment discusses the distinction as a formal one.¹⁵²

144. The “need” for this distinction arises due to the default adoption of legal formalism in most discussion of holding, dicta, and precedent. *See, e.g.*, RICHARD A. POSNER, *HOW JUDGES THINK* 41 (2008) (calling formalism “the official theory of judging”).

145. *See* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 958 (2005) (“Despite [this] absence . . . the legal system does not threaten to devolve into chaos or general incoherence. Rather, disagreements as to whether a claimed proposition is part of a court’s holding, or is instead merely dicta, surface in discrete disagreements over particular cases without unraveling the fabric of the law.”).

146. *Id.*

147. *Id.* at 1065.

148. *Id.* (“If not a holding, a proposition stated in a case counts as dicta.”).

149. 17 MICHIE’S JURIS. OF VA. & W. VA., STARE DECISIS § 5 (2021).

150. Andrew C. Michaels, *The Holding-Dictum Spectrum*, 70 ARK. L. REV. 661, 664 (2017).

151. *Id.*

152. Still, the spectrum view of holding versus dicta provides a valuable perspective on the performative power of dicta. For clarity in this Comment, the nuance of the spectrum is largely ignored rhetorically and the traditional vocabulary of dicta and holding as a binary is utilized.

B. Dicta as Performatives

Buck v. Bell remains good law upholding the constitutionality of forced sterilization where “it is a narrowly tailored means to achieve a compelling government interest” and procedural protections are in place.¹⁵³ Yet anyone familiar with the case would not recall a case about due process, but may very well remark, “Oh, the ‘three generations of imbeciles is enough’ case?” This is, at least in part, a result of the performative power dicta have. As with fact recitation,¹⁵⁴ using the dimensions of illocutionary force as well as the concepts of perlocutionary effect and subjection to analyze dicta in judicial opinions demonstrates its power to perform actions. Because dicta take many different forms in judicial opinions, the dicta in *Buck v. Bell* are used as a point of analysis below.

The purpose of dicta in a judicial opinion is not easily determinable. Some sources regard dictum as if it has no purpose and was included in an opinion without thought or any connection to the view of the judge or justice who wrote it.¹⁵⁵ However, the inclusion of a statement considered dictum must have some purpose. In *Buck v. Bell*, the purpose of much of the dicta appears to be persuasion. Justice Holmes uses dicta to press upon the pathos of his audience. Harkening feelings of pride and loss at the plight of young soldiers fighting for the United States, he says:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence.¹⁵⁶

The perlocutionary effect at the time of the opinion was legitimization of not only the specific instance of Carrie Buck’s sterilization, but also the broader goals of eugenics. This perlocutionary effect lives on today. Justice Holmes’s words still

153. See *Vaughn v. Ruoff*, 253 F.3d 1124, 1129 (8th Cir. 2001) (citing *Buck v. Bell*, 274 U.S. 200, 207–08 (1927)).

154. See *supra* Section II.B.

155. See, e.g., 17 MICHIE’S JURIS. OF VA. & W. VA., STARE DECISIS § 5 (2021) (“Dicta are opinions of a judge . . . made without . . . full consideration of the point [and] are not the professed deliberate determinations of the judge himself.”).

156. *Buck*, 274 U.S. at 207.

serve to legitimize eugenic attitudes and disability discrimination.¹⁵⁷

The direction of fit of dictum varies depending on what the statement is. The persuasive power of master narratives, also found in dicta, can provide the right conditions for certain perlocutionary effects. By using a master narrative, the utterance has greater perlocutionary force and further refines the world to reflect the master narrative. In *Buck v. Bell*, it is easy to see that Justice Holmes intended the direction of fit to be world-to-word not word-to-world. Holmes was a “Social Darwinist at heart” and “believed that it might be possible for science to breed a better race of human beings.”¹⁵⁸ The last sentence of *Buck v. Bell* is not shy about communicating the desirability of forced sterilization, saying, “So far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached.”¹⁵⁹

In the dicta of *Buck v. Bell*, Justice Holmes’s expressed psychological state¹⁶⁰ is belief.¹⁶¹ His statements are matter of fact and leave no room for opinion. He concludes that “[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.”¹⁶²

As with fact recitation, statements made within a judicial opinion are unique to those made in another context. Justice Holmes’s statements regarding sterilization are presented with great force alongside statements that have the force of law. His position as a Supreme Court Justice in relation not just to Carrie Buck, but to the “citizens of the state, [who] have conferred on

157. See *supra* notes 151–154 and accompanying text; Jasmine E. Harris, *Why Buck v. Bell Still Matters*, BILL OF HEALTH (Oct. 14, 2020) <https://blog.petrieflom.law.harvard.edu/2020/10/14/why-buck-v-bell-still-matters> [<https://perma.cc/MPS4-BWY5>].

158. Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833, 835–36 (1986).

159. *Buck*, 274 U.S. at 208.

160. See discussion of the *expressed psychological state* dimension of perlocutionary force *supra* Section I.A.

161. See *supra* note 35 and accompanying text (explaining that *belief* includes “statements, assertions, remarks and explanations” as well as “postulations, declarations, deductions and arguments.”).

162. *Id.* at 207.

the [Justice] this special status,”¹⁶³ creates a great power imbalance and increases the illocutionary force of his statements. This is further increased by the connection of the dicta to an extra-linguistic institution, the U.S. Supreme Court.

The difficulty in distinguishing between dicta and holding, and the position of Supreme Court decisions as the most persuasive source of legal precedent, explains a portion of the precedential power dicta can have. By also understanding the dicta in *Buck v. Bell* as performatives, the reach of its precedential power can be understood. Though *Buck v. Bell* is often taught as a case from the past that is no longer good law, it has never been overturned.¹⁶⁴ *Skinner v. Oklahoma* is viewed as the redeemer for the sins of Justice Holmes’s opinion.¹⁶⁵ This case, though much less provocatively written, largely has the same “holding” but comes to the opposite conclusion. In *Skinner*, the Supreme Court decided Oklahoma’s Habitual Criminal Sterilization Act violated the Equal Protection Clause.¹⁶⁶ Rather than overturning *Buck v. Bell*, it cites to it repeatedly and at no time condemns its rhetoric. As recently as 2001, the Eighth Circuit cited *Buck v. Bell* as authority stating proper procedural protections are required to forcibly sterilize a person.¹⁶⁷ The court said, “It is true that involuntary sterilization is not always unconstitutional if it is a narrowly tailored means to achieve a compelling government interest.”¹⁶⁸ When cited to, *Buck v. Bell* appears to be a case about the importance of due process, but the action formed in its dicta persists.

“[*Buck v. Bell*’s] lasting power lies not in its doctrinal deployment, but in its expressive value and how it continues to shape public norms and legal interpretations about the humanity and dignity of Black, Latinx, Indigenous, and disabled bodies and minds.”¹⁶⁹ The COVID-19 pandemic once again illuminated the legacy of Justice Holmes’s words.¹⁷⁰ Policies meant to ration medical supplies and care “categorically exclude[d] certain bodies and minds—for example, those with

163. Carlos L. Bernal, *A Speech Act Analysis of Judicial Opinions*, 1 EUR. J. LEGAL STUD. 391, 391 (2007).

164. Lombardo, *supra* note 103.

165. See Hilary Eisenberg, *The Impact of Dicta in Buck v. Bell*, 30 J. CONTEMP. HEALTH L. & POL’Y 184, 187 (2013).

166. 316 U.S. 535, 541 (1942).

167. Vaughn v. Rudolf, 253 F.3d 1124, 1129 (8th Cir. 2001).

168. *Id.*

169. See Harris, *supra* note 157.

170. *Id.*

intellectual and developmental disabilities—deemed less worthy of lifesaving treatment.”¹⁷¹ *Buck v. Bell*’s performative precedential power exists today

not because it gave a green light to involuntary sterilization but, rather, because it used the highest court in the nation and the power of its laws to broadcast a lasting message to those with disfavored bodies and minds that their societal value lies not in their lives, but in their deaths.¹⁷²

If “[h]e who says something, does something,”¹⁷³ then he who says nothing, does nothing. Nothing is exactly what has been done by the federal judiciary since *Buck v. Bell*. “Since *Buck v. Bell* and *Skinner v. Oklahoma*, the Supreme Court has declined to address involuntary sterilization statutes explicitly.”¹⁷⁴ Only one court has explicitly questioned the legitimacy of the *Buck v. Bell* decision, saying “it is doubtful whether the eugenics law upheld in *Buck* would pass scrutiny today, irrespective of the procedural safeguards used to select those to whom such a law would be applied.”¹⁷⁵

* * *

The performative power of dicta means it has real consequences, created by language in judicial opinions. The way to begin undoing the consequences is through language in judicial opinions. Though the Supreme Court avoids overruling—or at least appearing to overrule—its past decisions, the simultaneous recognition of the distinction between dicta and holdings and the performative power of dicta creates the safety and the importance to address harmful statements in past opinions. Decisions such as *Brown v. Board of Education*,¹⁷⁶ overruling *Plessy v. Ferguson*,¹⁷⁷ and *Lawrence v. Texas*,¹⁷⁸ saying *Bowers v. Hardwick*¹⁷⁹ “was not correct when it was decided, and it is not correct today,” show that the Supreme

171. *Id.*

172. *Id.*

173. Bernal, *supra* note 163, at 1.

174. Eisenberg, *supra* note 165, at 191.

175. *State v. Schulpius*, 678 N.W.2d 369, 378–79 (Wis. App. Ct. 2004).

176. 347 U.S. 483, 492 (1954).

177. 163 U.S. 537 (1896).

178. 539 U.S. 558, 578 (2003).

179. 478 U.S. 186 (1986).

Court desires to repair the harm of past utterances so long as the risk of illegitimacy does not outweigh the desire to correct.¹⁸⁰ Correcting dicta does not present the same risks to the appearance of stability and legitimacy of the Supreme Court as overruling a holding, yet its impact makes such action important.

IV. MOVING FORWARD: JUDGE REEVES'S OPINION IN *UNITED STATES V. MISSISSIPPI*

Acknowledging the illocutionary force and performative power of fact recitation and dicta in judicial opinions raises the question of what change, if any, is appropriate. As discussed in Section III.B, the recognition of the impact of dicta and its distinction from a legal holding creates an avenue and incentive for courts to correct harmful language without overruling the legal holding. This proposition confronts past harms and proposes a way to fix them. However, an understanding of fact recitation and dicta through a performativity lens also provides insight for judicial writing moving forward. The additional weight that comes from utterances and writings understood to be speech acts increases the amount of care with which they are executed.¹⁸¹ Words such as “ordered,” “affirmed,” and “denied” are typically in a different typeface. The holding is typically marked by words such as “we therefore hold.”¹⁸² These ritualistic practices have been adopted in reverence of the power the words have to perform actions. The same care should be taken when writing the facts and dicta.

Judge Carlton Reeves's opinion in *United States v. Mississippi* provides an example of judicial writing that is conscious and thoughtful of its performative power beyond the holding. In this case, the court found that Mississippi's mental health system and reliance on hospital-centered care for people with mental health concerns violated the Americans with Disabilities Act.¹⁸³ Though a trial-level opinion, the subject-matter overlap between *United States v. Mississippi* and *Buck v.*

180. See *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (“The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit.”).

181. See Little, *supra* note 9, at 94–96 (“This theory helps to explain why holdings take on such importance to opinion writers, who generally tool carefully over the words and phrases they use in the holding paragraph.”).

182. *Id.* at 95.

183. *United States v. Mississippi*, 400 F. Supp. 3d 546, 549 (S.D. Miss. 2019).

Bell provides additional perspective for analyzing the importance of Judge Reeves's choice of words and construction of the opinion.

A. Thorough Factual Recitation

Judge Reeves thoroughly communicated the relevant facts of the case. The *United States v. Mississippi* opinion is thirty-three pages long, over twenty of which explain facts. Though written in an engaging style, the limiting story arc of a master narrative was avoided. By doing so, a full story is told accounting for complexities and issues that reflect the world the law is supposed to govern.

1. Legitimacy Sans Omnipotence

At times, fact recitation in judicial opinions takes on the voice of God, implicitly positioning the court as an omnipresent being, aware of the facts as they unquestionably happened. In contrast, the facts of *United States v. Mississippi* are not recited from Judge Reeves's point of view or presented as a neatly sequenced story of cause and effect with clear heroes and villains. Rather, each party's contribution to the facts is detailed using their own experts and evidence.

The opinion first details Mississippi's current mental health system. Judge Reeves begins by describing the community-based services to be provided by community mental health centers (CMHCs) as described in Mississippi's manuals, largely quoting direct language from the state's documents themselves.¹⁸⁴ He states that "[t]he evidence established that the descriptions of the services provided by CMHCs is adequate[, but t]he problem is that the descriptions do not match the reality of . . . what is actually provided and where it is provided."¹⁸⁵ This leads to a description of the findings that show where the description and reality of services do not align.¹⁸⁶ Some of the data used to demonstrate these shortcomings is glaring, but even in his description of the issues, the opinion includes other facts given by the state to support its side. For example, in describing the lack of supported employment services for Mississippians with severe mental illness (SMI), it reads, "In

184. *Id.* at 555–58.

185. *Id.* at 557.

186. *Id.* at 558–67.

2019, [the Mississippi Department of Mental Health] attempted to increase supported employment services by giving new \$40,000 grants to seven CMHCs While that is a step in the right direction, it represents one fewer supported employment specialist than DMH recommended *per region in 2011*.”¹⁸⁷

By structuring his explanation of the facts of the case to represent the duality that it is, Judge Reeves respects the fullness of the story behind the litigation. Rather than simply stating the failure of Mississippi’s community-based mental health services, the opinion acknowledges the factual, even if not legal,¹⁸⁸ importance of Mississippi’s program design. Likewise, alongside numerically based, indisputable facts, Judge Reeves acknowledges the progress of the state even if it is ultimately not enough to prevail.¹⁸⁹ These facts do not directly support the legal outcome of the case, however this does not mean they are irrelevant or unimportant. To omit them would be to create a reality through words that does not reflect the world in which the decision carries legal weight.

Decisions made in reliance on partial facts that point to an obvious, singular outcome are not good decisions. Good decisions are made in a messy world and rely on messy factual patterns. But perhaps to say, “Tell the whole story,” is a difficult, if not impossible, request. Judges have full dockets and clerks researching cases, and, because they are not in fact omnipresent beings, their field of view is inherently limited. Perhaps the awareness of the power of fact recitation should inspire two things. First, the goal of telling the full story, rather than the story that most easily leads to the decision made, even if perfect execution of this is impossible and unknowable. Second, the resolution to avoid using the voice of omnipresence and instead present the facts as existing in the complexity of their reality—at least then, proclaiming inaccurate information would not make it so.

187. *Id.* at 562.

188. *See id.* at 578 (“The fact remains that neither Congress nor the Supreme Court have made a state’s good intentions a defense to [this type of] claim.”).

189. The opinion notes, for example, that “despite the State’s best intentions about shifting from hospitalization to community-based care, the number of state hospital beds has been stable since 2014.” *Id.* at 577.

2. Centering Stakeholders' Voices

Judge Reeves's opinion is immediately distinguishable from other opinions, beginning with the plaintiffs' own words. It begins, "Melody Worsham has a unique perspective on Mississippi's mental health system."¹⁹⁰ This will go on to provide the structure of the entire opinion. The voices of those affected by the opinion, particularly those with less institutional power,¹⁹¹ are at the very center of the opinion. Judge Reeves does not merely paraphrase their experiences but includes numerous direct statements from the affected individuals each step of the way.

Judge Reeves begins his description of the state hospitals diagnostically, describing the number of Mississippians who were institutionalized the year prior, the number of hospital beds the State had and how that number had changed over time, and the amount of money the State spent on institutional care.¹⁹² But then, Judge Reeves says, "Life there is best described by those who have experienced it."¹⁹³ The rest of the section is around three hundred words of former and current patients describing their experiences.¹⁹⁴ Judge Reeves gave stakeholders in the outcome of this case—people systemically denied a voice in their own lives—the space in a federal judicial opinion to tell their stories. One patient described institutionalization as "anxiety and depression and paranoia all built up."¹⁹⁵ Another said that the state hospitals "take all your rights away and there is no dignity."¹⁹⁶ By doing this, Judge Reeves largely avoids directly subjectifying the parties and rather lets them define themselves and their experiences.

In this case, the words of the patients were persuasive to the court's decision. But their presence in the opinion would be no less important if the opposite decision was made. When thoughtful application of law to a fact pattern results in an outcome that unnerves some normative value, it is not the facts that should be changed to accommodate the law. For law to

190. *Id.* at 548.

191. *But see* the discussion of the inclusion of Mississippi's "voice" *supra* Section IV.A.

192. *See Mississippi*, 400 F. Supp. 3d at 555–66.

193. *Id.* at 565.

194. *Id.* at 565–67.

195. *Id.* at 565.

196. *Id.* at 566.

continue progressing, the impact of its application must be known.¹⁹⁷

The words of judicial opinions have the potential to create action and realities. Including the voices of those impacted by the decision not only acknowledges the importance of the opinion's performative power but also uses it to tell a more accurate story of the world as it exists. By telling the full story, particularly including the voices of those whom society seeks to silence, the performative power of the fact recitation can be used, not to create a new reality adjacent to the lives being lived, but to motivate change in laws improperly designed for the real, messy world.

B. Humanizing Dicta

Through the words outside of the holding, a court offers “its ways of imagining the world and its own role within it, . . . its sense of the shape of a proper argument It invites lawyers and judges in the future to think and speak as it does.”¹⁹⁸ The power of the court and the performative power of its words make these not just offerings, but paths others should use. Judge Reeves paved these paths with humanizing dicta.

People who have mental illness and psychological disabilities experience systemic dehumanization; language is an important component of this. Judge Reeves had the option to perpetuate this pattern of dehumanization through his words. He also very well could have left the pattern untouched, focusing solely on the statutory and constitutional questions related to the Americans with Disabilities Act. Instead, Judge Reeves used this opportunity to use the performative power of dicta to humanize. In addition to utilizing the words of people directly affected by Mississippi's reliance on hospital-based treatment, the opinion makes statements about “[the court's] ways of imagining the world,” in turn suggesting how the reader might see the world as well.¹⁹⁹ Before beginning any analysis, Judge Reeves states, “At its heart, this case is about how Mississippi can best help the thousands of [people needing mental health services] who call our State home.”²⁰⁰ The stories of patients are

197. See Ralph, *supra* note 68, at 575.

198. White, *supra* note 2, at 1366.

199. *Id.*

200. *Mississippi*, 400 F. Supp. 3d at 549.

shared, and the impact of the inadequate services remains in focus.

The opinion not only humanizes the patients, but it also humanizes the State by continuously acknowledging the positive efforts of the State to improve the services available. Foregoing an omnipotent voice yet again, Judge Reeves describes the complexity of the case but articulates a “moment of lucidity when [a witness] was cross-examined by one of the State’s attorneys.”²⁰¹ The opinion quotes the witness, who had experience with Mississippi’s mental health system both as a patient and as a professional, saying,

I think the people that I have worked with at the Department of Mental Health really want to see this change. I really do . . . [But] they stop right at that point to do the very thing that actually would make a difference . . . So there is a lot of talk, there is a lot of planning, but there is also a lot of people being hurt in the process.²⁰²

This “yes, but” rhetoric frames the rest of the opinion’s dicta as they pertain to the State’s actions. Judge Reeves acknowledges that the individual challenges posed by SMI means that a system designed to address those challenges, “even in its best form, will have problems.”²⁰³ He goes on to say that “the people that care for Mississippians suffering from SMI should be recognized for their efforts to expand community-based care Part of the difficulty of this case is to simultaneously acknowledge that progress and ensure that community-based services ultimately live up to DMH’s promises.”²⁰⁴ The opinion does not sugarcoat or water down the ways the State failed or the harm that failure caused and continues to cause. Judge Reeves condemns the length of time the state has had to address a problem it was aware of.²⁰⁵ Humanizing the faults of a person or entity is not to ignore them, but to allow room for them to exist outside of the role of villain.

201. *Id.* at 548.

202. *Id.* at 548–49.

203. *Id.* at 578.

204. *Id.*

205. *Id.* (“The problem is that the State has known for years that it is over-institutionalizing its citizens.”).

If an opinion is narrow minded or unperceptive or dishonest or authoritarian, it will trivialize the experience of those it talks about, and it will trivialize the law too. If it is open and generous, full of excitement at the importance it gives to the events and people it speaks of, and to its own treatment of them as well, it will dignify the experience of those it talks of, and in so doing it will dignify the law itself.²⁰⁶

The humans behind a judicial opinion should not be forgotten or ignored. The effect of the words in a judicial opinion on their dignity should not be an afterthought. Judge Reeves utilized the performative power of his words to speak honestly and generously, dignifying the experiences of the plaintiffs and the defendants while also dignifying the law.

CONCLUSION

Judicial opinions are the foundation of the common law system and their critique “is an essential part of the activity of law.”²⁰⁷ But to thoughtfully write and critique them, the depth of their power must be understood. The words written as facts and dicta in judicial opinions are performatives—they do not merely describe, they create. The care with which they are written should reflect the weight they carry in the world and their ability to create a new reality. Judges can do this by (1) prioritizing telling the whole story, even where it does not cleanly necessitate the legal outcome, and (2) resolving to avoid using an omnipresent voice and rather use the voice of their reality—a person with legal training called upon to make hard decisions in a messy world.

206. White, *supra* note 2, at 1368.

207. *Id.*