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Narrative and Justice Reinvestment

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Narrative and Justice Reinvestment

NARRATIVE AND JUSTICE REINVESTMENT

ROBIN WALKER STERLING[†]

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I. INTRODUCTION

In 2015, the Colorado General Assembly passed the Community Law Enforcement Action Reporting Act (CLEAR Act).¹ The CLEAR Act requires the Division of Criminal Justice (DCJ) of the Colorado Department of Public Safety to collect data from law enforcement agencies, the Judicial Department, and the adult Parole Board; synthesize the data by race, ethnicity, and gender at discretionary points throughout the criminal justice process; and issue a report on its findings.² In December 2016, the DCJ presented a report analyzing the data from the over 325,000 criminal justice system contacts in the 2015 calendar year to the House and Senate Judiciary Committees of the Colorado General Assembly.³ According to the state demographer's office, in 2015, Colorado's population was 5,443,608 and was comprised as follows: White, 69.1%; Black, 4.2%; Hispanic, 22.2%; and Other, 4.6%.⁴ Men made up 50.3% of the state population and women made up 49.7% of the

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1. See COLO. REV. STAT. § 24-33.5-518 (2016).

2. PEG FLICK, KIM ENGLISH & LAURENCE LUCERO, COLO. DEP'T OF PUB. SAFETY, SUMMARY: REPORT ON THE C.L.E.A.R. ACT: COMMUNITY LAW ENFORCEMENT ACTION REPORTING ACT, at 8 (2016), <http://cdpsdocs.state.co.us/ors/docs/reports/2016-SB15-185-Rpt.pdf>.

3. *Id.*

4. *Id.*

population.⁵ And, in the country that has the highest incarceration rate in the world,⁶ Colorado does its fair share to contribute to those high rates.⁷

As in virtually every other jurisdiction in the country, black people were disproportionately represented at every measured discretion point in the criminal justice process.⁸ Although black people comprise just 4.2% of Colorado's population, black people received 12.4% of the over 200,000 arrests and summonses issued by law enforcement agencies in 2015.⁹ The DCJ's study of 105,156 case filings in county, district, and juvenile courts combined found that black people accounted for 10.5% of court filings.¹⁰ In district court, black people accounted for 20.9% of the cases sentenced, were more likely than the other race or ethnicity categories to receive initial sentences of confinement, and were less likely to receive probation or a deferred judgment for offenses, including drug and violent offenses, even after controlling for concurrent cases or prior criminal history.¹¹ In those drug cases where black people did receive a more lenient sentence, probation or a deferred judgment was revoked at the rate of 40.3%.¹² And black people convicted of violent offenses were more likely to be revoked than people of other races or ethnicities who had been convicted of violent offenses.¹³ Black people who were sentenced to prison time were far less likely to receive the benefit of discretionary parole than incarcerated whites and Asian Americans.¹⁴

5. *Id.*

6. *Criminal Justice Facts*, SENT'G PROJECT, <http://www.sentencingproject.org/criminal-justice-facts> (last visited Mar. 14, 2017). At 471 per 100,000 people, the United States has the highest incarceration rate in the world. *Criminal Justice Facts: State-by-State Data*, SENT'G PROJECT, <http://www.sentencingproject.org/the-facts> (last visited Mar. 14, 2017) (select "U.S. Total" from the drop down bar provided for United States incarceration statistics). Over 2.2 million people are currently held in our nation's jails and prisons. See NAT'L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 33 (Jeremy Travis et al. eds., 2014) (reporting that in the United States in 2012, "[i]n absolute numbers, the prison and jail population had grown to 2.23 million people, yielding a rate of incarceration that was by far the highest in the world").

7. Colorado's incarceration rate is 383 per 100,000 people. *Criminal Justice Facts: State-by-State Data*, *supra* note 6 (select "CO" from the drop down bar provided for Colorado incarceration statistics). By way of comparison, the average European rate of incarceration is 133.5 per 100,000; the rate for Canada is 188 per 100,000; the rate for Australia is 130 per 100,000; the rate for New Zealand is 192 per 100,000, and the rate for Japan is 51 per 100,000. Michelle Ye Hee Lee, *Yes, U.S. Locks People up at a Higher Rate than Any Other Country*, WASH. POST (July 7, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country>.

8. African Americans and Latinos make up a disproportionate share of those incarcerated. SENTENCING PROJECT, *FACT SHEET: TRENDS IN U.S. CORRECTIONS* 5 (2017), <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> ("More than 60% of the people in prison today are people of color. Black men are nearly six times as likely to be incarcerated as white men and Hispanic men are 2.3 times as likely. For black men in their thirties, 1 in every 10 is in prison or jail on any given day.")

9. FLICK ET AL., *supra* note 2, at 8.

10. *Id.* at 9.

11. *Id.* at 9–10.

12. *Id.* at 10.

13. *Id.*

14. *Id.* at 11.

The disparity reached into Colorado's juvenile courts as well. Black youth, at just five percent of Colorado's youth population, account for a wildly disproportionate sixteen percent of cases in juvenile court.¹⁵ Like their adult counterparts, system-involved black youth were more likely to receive an initial sentence to the Division of Youth Corrections and were less likely to receive a deferred judgment.¹⁶ Black youth who received probation or a deferred judgment were more likely than their similarly-charged white counterparts to be revoked for drug offenses and other crimes and were least likely to be revoked for violent offenses.¹⁷

But even in the face of numbers like these, many key criminal justice system stakeholders cling to the idea that the criminal justice system is no more than the sum of its individual defendant parts, each bearing personal responsibility. For example, in May 2016, George Brauchler,—the District Attorney for the Eighteenth Judicial District, and the president of the Colorado District Attorney's Council—gained prominence for prosecuting the Aurora theater shooting trial and tweeting, “‘Mass incarceration’ is a myth. Individuals with their own attorneys were convicted and sentenced individually.”¹⁸ The response from the Twitterverse was swift and damning. One person responded, “[P]lanets too are myths. Gravity holds individual and singular rocks together.”¹⁹ Another tweeted, “There’s no such thing as ‘genocide,’ really. Every death is unique.”²⁰ To these two critics, mass incarceration is as solid a concept as planets, and as obvious, targeted, and measurable as genocide. But Brauchler disagreed. Brauchler explained that his tweet, if “inartful,” aimed “to reject what I think this movement has become, and that is a vehicle for people who are anti-police, anti-prosecutor, and anti[-]courts, to shift the blame away from them and onto individual responsibility that got those people in trouble in the first place.”²¹ He further explained, “I am not in favor of locking up everybody for every little thing.”²² Instead, he said, “I am in favor of personal responsibility.”²³

Brauchler's tweet distills, to ninety-six characters, the narrative that is most threatening to systemic criminal justice reform: rejection of the idea that there is a shady, conspiratorial effort to over rely on incarceration

15. *Id.*

16. *Id.*

17. *Id.*

18. Corey Hutchins, *Colorado DA George Brauchler Explains ‘Mass Incarceration is a Myth’ Tweet*, COLO. INDEP. (May 6, 2016), <http://www.coloradoindependent.com/159201> (quoting George Brauchler (@GeorgeBrauchler), TWITTER (Apr. 29, 2016, 4:47 PM), <https://twitter.com/GeorgeBrauchler/status/726196183819907072>).

19. *Id.* (quoting Matt Ferner (@matthewferner), TWITTER (Apr. 29, 2016, 8:28 PM), <https://twitter.com/matthewferner/status/726251858205925376>).

20. *Id.* (quoting Jonathan M. Katz (@KatzOnEarth), TWITTER (Apr. 30, 2016, 8:17 AM), <https://twitter.com/KatzOnEarth/status/726430312343982080>).

21. *Id.*

22. *Id.*

23. *Id.*

in favor of the idea that defendants are system-involved through their own actions because the system safeguards innocence through ironclad procedural and substantive due process protections. But this narrative is the fable that enabling police procedurals like “Law and Order” and “The First 48” peddle so that criminal justice system bystanders can believe the system is fair.²⁴ Application of narrative theory illuminates the familiar structure. The steady state of public safety is troubled by the individual criminal actions of the scofflaw defendant. The conflict is resolved by the heroic actions of the police and prosecutors who investigate and try the defendant so that the defendant is held accountable for his or her crime. Finally, a new steady state, in which public safety is restored, is resumed.²⁵

Understanding the troubling statistics that the DCJ reported to the Colorado legislature as the result of thousands of individual cases is not the problem; the problem is the narrative that explains the statistics that describe these thousands of cases. Instead of being solely the result of countless instances of personal responsibility, these cases often also result from thousands of individual system failures, in case after case, in courtroom after courtroom, and in county after county. This Article argues that applications of narrative theory to criminal proceedings can help chart a course to convert our criminal processing system into an actual criminal justice system.

II. NARRATIVE THEORY IN ACTION

A. Narratives Behind the Myth of the Right to Counsel

Brauchler’s tweet argued, “Individuals with their own attorneys were convicted and sentenced individually.”²⁶ But the issues surrounding the vindication of the right to counsel are well-documented. While every state attempts to comply with the mandate of *Gideon v. Wainwright*²⁷ by providing some type of indigent defense delivery system,²⁸ Colorado is

24. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 59 (2012).

25. The best examinations of narrative theory in law are ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 11–13 (2000), and MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE*, at xviii (1995). Other articles applying storytelling and lawyering theory to courtroom practice include the following: Ty Alper, Anthony G. Amsterdam, Todd E. Edelman, Randy Hertz, Rachel Shapiro Janger, Jennifer McAllister-Nevins, Sonya Rudenstine & Robin Walker-Sterling, *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 *CLINICAL L. REV.* 1, 1–2, 4 (2005) (applying an interdisciplinary set of legal practice criteria to analyze the defense’s tactics in the state-side prosecution of the police officers accused of using excessive force against motorist Rodney King); Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 *STAN. L. REV.* 39, 41–42 (1994).

26. Hutchins, *supra* note 18 (quoting George Brauchler (@GeorgeBrauchler), TWITTER (Apr. 29, 2016, 4:47 PM), <https://twitter.com/GeorgeBrauchler/status/726196183819907072>).

27. 372 U.S. 335 (1963).

28. *Id.* at 344.

one of the few states with a statewide public defender system.²⁹ The Colorado Public Defender's Office is widely regarded as one of the best in the country.³⁰ The Office employs 488 lawyers in twenty-one regional trial offices around the state.³¹ The Colorado Public Defender Office's active cases numbered more than "140,000 in 2013–2014, including 18,000 new cases from January 2014 to July 2015" in response to an increased mandate to represent misdemeanor defendants.³² With a budget of about \$80 million a year, the Colorado Public Defender Office's budget averages out to sixteen dollars per resident.³³ By way of comparison, Oregon spends the most at twenty-five dollars per resident, while Mississippi spends the least, at just five dollars per resident.³⁴ That \$80 million pays for attorneys, investigators and investigation, support staff, forensic tests, experts, and all the costs associated with the overhead of running an office.³⁵ But all these state systems operate in a context in which the average state or local public defender has a caseload of 371 cases each year, and over seventy percent of state systems report that they are hindered from doing their jobs by a lack of funding and low salaries.³⁶

In contrast, Colorado state prosecutors have a budget of just over \$157 million, almost twice as much.³⁷ And that \$157 million does not include the separate, million-dollar budgets for police, who act as the investigatory arm for the state, and for the Department of Human Services, which pays for forensic testing for the government.³⁸

But the fact is that in many municipal and juvenile court cases, it is very common for defendants and respondents to proceed without counsel. As relatively well-resourced as the Colorado Public Defender's Office is, the strict income requirements it has to observe necessarily mean that many accused defendants and respondents who want a lawyer, who make too much to qualify for a public defender, but who do not make near

29. LYNN LANGTON & DONALD FAROLE, JR., U.S. DEP'T OF JUSTICE, STATE PUBLIC DEFENDER PROGRAMS, 2007, at 1 (2010), <https://www.bjs.gov/content/pub/pdf/spdp07.pdf> ("Twenty-two states had a state public defender program that oversaw the operations, policies, and practices In the remaining 27 states, public defender offices were county-based, administered at a local level, and funded principally by the county or through a combination of county and states funds.").

30. Callie Jones, *Public Defenders Vital to Criminal Justice System*, J.-ADVOC. (Apr. 26, 2013, 8:06 AM), http://www.journal-advocate.com/ci_23107280.

31. Carol McKinley, *Meet Colorado's Public Defender*, COLO. INDEP. (Dec. 17, 2015), <http://www.coloradoindependent.com/156704>.

32. *Id.*

33. *Id.*

34. *Id.*

35. *See id.*

36. SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 7 (2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCP.pdf>.

37. McKinley, *supra* note 31.

38. *Id.*

enough money to afford a private attorney, end up navigating their cases without counsel.³⁹

For example, in a recent juvenile case, a 15-year-old girl who was charged with assault arrived for her trial date.⁴⁰ The allegations were that she got into a fight with another girl who lived in her same apartment building. The respondent arrived at court, which was held on a school day during school hours, with her mother. When the case was called, the judge asked if the government was ready for trial. The prosecutor announced ready. The court turned to the young woman and asked if she was ready for trial. She said that she was not because she had two witnesses, but they were in school and their parents would not let them leave school to come to court to testify. The judge asked her how she wanted to proceed. The young woman said she wanted more time so that the two witnesses could come testify that the complainant hit her first, and that she simply defended herself. The judge immediately got impatient. The court told the young woman that she would not be able to get a continuance; that the case had to be settled that day; and that she had to either go to trial or accept a plea. The young woman looked at her mother for help; her mother did not know what to do. The young woman told the judge she did not do anything wrong. The judge insisted that the case had to be resolved that day. One hour later, the girl and her mother were before the court again, this time entering into a plea agreement that left the girl with a conviction for assault. The girl and her mother left the courtroom in tears.

In another example in a different jurisdiction, a man charged with disorderly conduct represented himself in a trial. Before the trial started, the judge warned the man that he would be held to the same standard as any attorney, and that he was at a disadvantage because he had no legal training. The man said he understood, but he could not afford an attorney and he did not do anything wrong. The trial started. It was difficult to watch. The pro se defendant tried to give an opening statement, but was admonished by the judge that he was discussing inadmissible or otherwise tainted evidence. The defendant tried to object to the prosecutor's questions on direct examination on the grounds that the witness was not telling the truth, but was told that that was an incorrect ground for an objection, and that he could ask questions on cross examination. Then the defendant tried to ask questions on cross examination about how he was actually able to hear what he testified to, and whether he actually observed the defendant say the alleged offensive language, but was told that his questions were beyond the scope of the direct, that he was arguing with the witness, and that he was taking too much time with his questions. Finally, the pro se defendant tried to give a closing argument, only to be

39. For an outline of the statutory and fiscal criteria for state-funded counsel, see OFFICE OF THE CHIEF JUSTICE, SUPREME COURT OF COLO., APPOINTMENT OF STATE-FUNDED COUNSEL IN CRIMINAL CASES AND FOR CONTEMPT OF COURT 1-2 (2014). The fiscal eligibility standards and guidelines are itemized specifically in Attachment A. *Id.* at Attachment A.

40. The following are examples I observed when I have been in court with students.

told that he was testifying and arguing evidence that had not been previously introduced. The trial was over and the defendant was convicted in a matter of minutes.

Several things were disheartening about this display. First, the judge's participation in the fiction that the pro se defendant could comply with the rules of procedure, evidence, and ethics without a single day of legal training was dedicated. The judge was so frustrated with the defendant's lack of legal training and failure to pick up in minutes what most learn over years of practice that by the time the trial was over, the judge was barking instructions with barely controlled annoyance verging on anger. Second, the judge did this policing without prompting from the prosecutor, who lodged not a single objection during the entire proceeding. Far from protecting the defendant's rights, the judge instead positioned the court as an ally of the prosecutor. Most importantly, throughout the proceedings, the defendant was frustrated, humiliated, and angry. At the close of the trial, there was no sense that the proceedings had been fair.

Of course, there is likely more to each of these stories. But they do cast suspicion on Brauchler's tweet that mass incarceration is merely made up of "[i]ndividuals with their own attorneys [who] were convicted and sentenced individually."⁴¹ The famous post-script to the *Gideon* case is that, after he won his case in the United States Supreme Court, Gideon was re-tried, this time represented by W. Fred Turner, the best criminal defense attorney in the Panama City area.⁴² Turner won an acquittal after successfully impeaching the government's star witness.⁴³ The outcome of the *Gideon* case illustrated its moral perfectly: defense attorneys make a difference, and without them, no one else in the courtroom, neither prosecutors nor judges, can be relied upon to protect defendants' rights. Each of the examples above are possible pre-retrial cases, where the accused ended up with a criminal record even though having a lawyer might have made a critical difference in the outcome. As in the *Gideon* case, well-resourced defense counsel is the best way to ensure a criminal justice system instead of a criminal processing system. Indeed, the worst criminal justice scandal in our country's history, in which two judges received millions of dollars in kickbacks for each youth they sentenced to a private juvenile detention facility in which the judges had a financial stake, happened in a courtroom in which fifty-four percent of youth litigants waived their right to defense counsel;⁴⁴ before they set foot in the courtroom, many of the youths and their parents were given a set of forms

41. Hutchins, *supra* note 18 (quoting George Brauchler (@GeorgeBrauchler), TWITTER (Apr. 29, 2016, 4:47 PM), <https://twitter.com/GeorgeBrauchler/status/726196183819907072>).

42. Bruce R. Jacob, *Remembering Gideon's Lawyers*, CHAMPION, June 2012, at 16.

43. *Id.*

44. See JUVENILE LAW CTR., LESSONS FROM LUZERNE COUNTY: RIGHT TO COUNSEL (2011); see also JUVENILE LAW CTR., LESSONS FROM LUZERNE COUNTY: PROMOTING FAIRNESS, TRANSPARENCY AND ACCOUNTABILITY, at i-ii (2010).

to fill out and sign, and unknowingly waived their right to counsel, so there was no defense attorney protecting their interests.

B. Narratives Behind the Myth of the Truth-Based System

Brauchler's tweet revealed a second deceptive narrative that perpetuates the criminal justice system. Brauchler explained that his tweet was spotlighting the "individual responsibility that got those people in trouble in the first place."⁴⁵ His underlying assumption is that we have a truth-based system in which only people who are guilty are arrested, charged, convicted, and sentenced.

But this assumption is also a facade. By now, the growing number of death row exonerees has been well-documented.⁴⁶ Since 1972, more than 156 people have been exonerated from death row.⁴⁷ From 1973–1999, there was an average of three exonerations each year; from 2000–2011, there was an average of five exonerations each year.⁴⁸ And these are only the capital cases, which should, theoretically, represent the cases litigated with the most care, since the defendant's very life was at stake. Beyond the capital context, the National Registry of Exonerations, launched in May 2012, has tracked over 1,600 exonerations nationwide.⁴⁹ Of those cases, thirteen percent of defendants pled guilty (209/1,600) and the rest were convicted at trial, seventy-nine percent by juries (1,262/1,600) and seven percent by judges (114/1,600).⁵⁰ The National Research Council has released meticulously documented reports assailing the reliability of all manner of forensic evidence from bite marks, to bullet casings, to hair samples.⁵¹ Similarly, the problems with eyewitness identification are well-known.⁵² And the Center for Wrongful Conviction of Youth, with Brendan Dassey's case, has brought new attention to the alarmingly high rate of false confessions by young people interrogated by the police.⁵³ In

45. See Hutchins, *supra* note 18.

46. See INNOCENCE PROJECT, 250 EXONERATED, TOO MANY WRONGFULLY CONVICTED: AN INNOCENCE PROJECT REPORT ON THE FIRST 250 DNA EXONERATIONS IN THE U.S. 2–51 (2010). For a list of exonerations from death row from 1973–2017, see *Innocence Database*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence> (last visited Mar. 14, 2017). For biographical information on each exoneree, see *Meet Our Exoneree Members*, WITNESS TO INNOCENCE, <http://www.witness-to-innocence.org/exonerees.html> (last visited Mar. 14, 2017).

47. NAACP CRIMINAL JUSTICE DEP'T, DEATH PENALTY FACTSHEET (2017), <http://www.naacp.org/wp-content/uploads/2017/01/Death-penalty-fact-sheet-1-17-1.pdf>.

48. See *Innocence: List of Those Freed from Death Row*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited Mar. 14, 2017).

49. THE NAT'L REGISTRY OF EXONERATIONS, UNIV. OF MICH. LAW SCH., THE FIRST 1,600 EXONERATIONS 1 (2015), https://www.law.umich.edu/special/exoneration/Documents/1600_Exonerations.pdf.

50. *Id.* at 2.

51. See NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 127, 182 (2009).

52. See *State v. Henderson*, 27 A.3d 872, 885–89 (N.J. 2011).

53. Crystin Immel & Rebecca Palmore, 'Making a Murderer' Shines Light on False Youth Confessions, CHI. TONIGHT (Jan. 19, 2016, 3:45 PM), <http://chicagotonight.wttw.com/2016/01/19/making-murderer-shines-light-false-youth-confessions>.

fact, seventy-five percent of the exonerations resulted from something other than DNA testing.⁵⁴

Moreover, the high rate of exonerations for defendants who have been sentenced to prison portends an even higher rate in the hundreds of thousands of cases in which defendants have been sentenced to jail, house arrest, or probation. As the risk of incarceration decreases, the risk of wrongful conviction increases, because other factors, like repeated court appearances that threaten hourly employment, weigh more heavily in the plea agreement calculus than the truth of what happened.⁵⁵

C. Narrative as an Advocacy Tool

Narrative is the most subversive element that defense attorneys can inject into a courtroom hearing. Using narrative is disruptive for several reasons. First, narrative is an incredibly effective advocacy tool. It has long been established that “[t]he attraction of narrative is that it corresponds more closely to the manner in which the human mind makes sense of experience than does the conventional, abstracted rhetoric of law.”⁵⁶ We make sense of the world through narrative. The books of the three great monotheistic religions are written in parables. Children crave bedtime stories—all the better if the story stars them. Each year we spend thousands of hours and billions of dollars watching movies and television shows that tell us stories.⁵⁷ Against this backdrop it is hardly surprising that research in cognitive science has shown that lawyers whose closing arguments tell a story win jury trials against their legal adversaries who just lay out “the facts of the case.”⁵⁸ In other words, “[t]he story is not a parlor trick used to draw attention away from the logic of law. It is part of the logic itself.”⁵⁹

Capitalizing on this hardwiring, structuring arguments as narratives in intensely fact-bound determinations where the law is not contested may help to create an atmosphere in the courtroom in which it is far more difficult to treat the accused without compassion. A narrative that “convey[s] the human context of stop and frisk” might be more persuasive

54. THE NAT’L REGISTRY OF EXONERATIONS, *supra* note 49, at 2.

55. See Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 77–78 (1995) (“A defendant and his or her defense lawyer may be influenced by a host of systemic forces and individual pressures to agree to a particular plea bargain.”).

56. Steven L. Winter, *The Cognitive Dimension of the Agony Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2228 (1989).

57. See John Lynch, *The Average America Watches So Much TV It’s Almost a Full-Time Job*, BUS. INSIDER (June 28, 2016, 4:57 PM), <http://www.businessinsider.com/how-much-tv-do-americans-watch-2016-6>. For the most recent data on Americans’ expenditures on entertainment, see Press Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Consumer Expenditures - 2015 (Aug. 30, 2016, 10:00 AM), <https://www.bls.gov/news.release/pdf/cesan.pdf>.

58. Drew Westen, *What Happened to Obama*, N.Y. TIMES (Aug. 6, 2011), <http://www.nytimes.com/2011/08/07/opinion/sunday/what-happened-to-obamas-passion.html>.

59. Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client’s Story Using the Characters and Paradigm of the Archetypal Hero’s Journey*, 29 SEATTLE U. L. REV. 767, 769 (2006).

than an argument that bloodlessly weighs Fourth Amendment factors.⁶⁰ A sentencing narrative that includes discussion of the brutal conditions of confinement of the specific prison to which a defendant is likely to be sent might give the sentencing judge pause before meting out a sentence at the top of the sentencing range.⁶¹ For example, juvenile attorneys at the D.C. Public Defender Service wrote and filed a motion detailing the unsanitary and harsh conditions at the local maximum security juvenile detention center.⁶² The detention center did not have air conditioning in the summer or heat in the winter.⁶³ Youth were forced to wear underwear for more than one day, and sometimes to share underwear.⁶⁴ The detention center was infested with cockroaches and rats.⁶⁵ In response, one juvenile court judge openly refused to detain any more children there until its glaring problems had been addressed.⁶⁶

Second and more mechanically, telling a narrative is counter to most courtroom procedures, which prioritize case processing and anticipate that arguments will come in the form of lists to maximize court time. Take the bail determination, for example. In most jurisdictions, the court has two overarching concerns when deciding whether to grant bail: (1) whether the defendant is a flight risk and (2) whether the defendant is a danger to the community.⁶⁷ Often the court has a list of factors that it can consider in deciding whether to detain, grant bail to, or release the accused on his or her own promise to return to court.⁶⁸ Most bail arguments last a matter of seconds, and consist of a list: “Mr. Smith is forty-three years old, has no prior record, lives in a home he owns, has a wife and two daughters, and has been working as a roofer for the last ten years.” But knitting those factors into a narrative will convey to the court that Mr. Smith’s life is more than the sum of the factors on the list, and that Mr. Smith is more than the allegations against him. It will also be more vindicating to Mr. Smith as he listens to his lawyer fight for him. In short, use of narrative is the best way to turn a client into a three-dimensional person who is more than his case number and the allegations against him.

60. Nicole Smith Futrell, *Vulnerable, Not Voiceless: Outsider Narrative in Advocacy Against Discriminatory Policing*, 93 N.C. L. REV. 1597, 1617 (2015).

61. Lindsey Webb, *Slave Narratives and the Sentencing Court* 17–18 (Univ. Denv. Sturm Coll. Law Legal Research Paper Series, Working Paper No. 16-32), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2844872.

62. Peter Slevin, *D.C. Juvenile Facility Begins Needed Overhaul*, WASH. POST (Mar. 16, 1998), <https://www.washingtonpost.com/archive/local/1998/03/16/dc-juvenile-facility-begins-needed-overhaul/a2e1271e-632f-4560-923d-cd55c3681ddc>.

63. *See id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *See, e.g.*, United States v. Hir, 517 F.3d 1081, 1086 (9th Cir. 2008). *See also* Lindsey Webb, *Slave Narratives and the Sentencing Court*, __ NYU Rev. of Law and Social Change __ (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2844872.

68. *See, e.g., id.*

D. Narrative as a Vehicle for Racial Justice

Finally, narrative has a hallowed history as an effective tool for racial justice.⁶⁹ In the 18th and 19th centuries, the abolitionist movement was fueled by “slave narratives,” accounts of life in slavery and escape to freedom written by formerly enslaved people.⁷⁰ Slave narratives were transformative works, for both abolitionists, and for the authors. Slave narratives offered bystanders a detailed, nuanced reconstruction of the workaday horrors of enslavement in a format that was difficult to disentangle from the story’s unflinching emotional impact.⁷¹ In the typical narrative construction, the hero was the enslaved person who struggled to freedom; the villain was always an acolyte of American chattel slavery—a slave owner, an overseer, or the like; the conflict always included a detailed account of the unimaginable conditions of enslavement, like the constant threats of violence and rape, the complete lack of autonomy, and the backbreaking forced labor.⁷² But more than that, since these were the words and thoughts of the slaves themselves, slave narratives included brutal recountings of how families mourned when they were split up; how parents ached to be able to give their children a different life; how enslaved people yearned for freedom and self-determination; and how they resisted, in ways large and small.⁷³ The mere relating of these stories was disruptive because they upended widespread fallacies about slavery as a benevolent institution and stereotypes of black people as vacuous, dangerous, devious, and lazy.⁷⁴ In the hands of these narrators, the institution was brutal and violent, and slaves were intelligent, courageous, industrious, and hopeful.⁷⁵

69. For a well-written and nuanced discussion of slave narratives as a model for criminal sentencing advocacy, see Webb, *supra* note 61, at 5.

70. See WILLIAM L. ANDREWS & HENRY LOUIS GATES JR., *THE CIVITAS ANTHOLOGY OF AFRICAN AMERICAN SLAVE NARRATIVES* 7 (1999) (defining slave narratives as stories that cast American chattel slavery as “a condition of extreme physical, intellectual, emotional, or spiritual deprivation,” from which the author “undertakes an arduous quest for freedom that climaxes in his or her arrival in the north”). The University of North Carolina at Chapel Hill has compiled an extensive online collection of slave narratives. See *Documenting the American South: North American Slave Narratives*, U.N.C., <http://docsouth.unc.edu/neh/> (last updated Mar. 18, 2017).

71. See Charles H. Nichols, *Who Read the Slave Narratives?*, 20 *PHYLON* Q. 146, 155 (1959).

72. See *id.*

73. See *id.*

74. See Jason A. Gillmer, *Poor Whites, Benevolent Masters, and the Ideologies of Slavery: The Local Trial of a Slave Accused of Rape*, 85 *N.C. L. REV.* 489, 535–36 (2007).

75. See Nichols, *supra* note 71, at 155–56 (stating that slave narratives were written to help a white audience understand the horrors of slavery and find commonality with enslaved people with “[s]ensitive readers of the narratives . . . would begin to see that Negroes were not unlike themselves [and] . . . shared with them the ordinary feelings of human beings”). In 2013, the movie *12 Years a Slave*, adapted from the 1853 slave narrative memoir by Solomon Northrup, a free black man who was kidnapped and sold into slavery in Louisiana. The movie was nominated for and won the Golden Globe Award for Best Motion Picture—Drama. At that year’s award show, co-hosts Tina Fey and Amy Poehler discussed the film with the following joke that humorously illustrates exactly how slave narratives worked.

Amy Poehler: “One of the most nominated films this year is ‘*12 Years a Slave*.’ I loved ‘*12 Years a Slave*’, and I can honestly say that after seeing that film, I will never look at slavery the same way again.”

Defense attorneys are uniquely suited to recognize issues of racial injustice.⁷⁶ Defense attorneys are the interface between the accused and the court.⁷⁷ Because of their role and ethical obligations, defense attorneys can appreciate the full impact of involvement in the criminal justice system on their clients' lives.⁷⁸ How will the case affect the client's family? Or the client's own personal goals? If there is a conviction, will the client have to move out of or have difficulty moving into public housing? How might a conviction affect the client's current custody arrangement? What about the client's professional goals? How will a conviction for shoplifting affect a client's chances of, for example, getting a security clearance to work in a job deicing planes at the airport? Or working in a day care center, if the client is convicted of disorderly conduct for getting into an argument with her neighbor? Or becoming a nurse, if the client is currently scheduled to shadow another nurse practitioner and there is no flexibility in that schedule? Or getting a scholarship to attend college classes? Or even enlisting in the military? And, importantly, how does the answer to each of these questions interface with the fact of the client's race or ethnicity? Defense attorneys, with their frontline access to the client, are the ones who can best "confront[] and nam[e] race in the lawyering and criminal justice process, and recast[] racial identity and narrative in the defense of clients and communities of color."⁷⁹ This unique vantage point, combined with the defense attorney's ethical obligation to represent the client's stated interests, conspire to make the defense attorney the courtroom actor most likely to even appreciate the racial disparity that statistics across the country so uniformly etch.⁸⁰ In a 2011 study, when asked whether minority overrepresentation in the juvenile justice system was a problem, "[b]y a very wide margin, defense attorneys are most inclined to strongly agree or agree . . . , followed by probation officers and judges. Few prosecutors express any agreement with this statement."⁸¹

Tina Fey: "Wait, how were you looking at it?"

Alexandra Petri, *Tina Fey and Amy Poehler Explain the Problem with '12 Years a Slave' Think-Pieces in a Single Golden Globes Monologue Joke*, WASH. POST (Jan. 13, 2014), <https://www.washingtonpost.com/blogs/compost/wp/2014/01/13/tina-fey-and-amy-poehler-explain-the-problem-with-12-years-a-slave-think-pieces-in-a-single-golden-globes-monologue-joke>.

The joke may have been a nod to the reaction of Washington Post film critic Richard Cohen to the film. In a piece published in November 2013, Cohen wrote that the movie had showed him that "slavery was not a benign institution in which mostly benevolent whites owned innocent and grateful blacks." Richard Cohen, *Richard Cohen: '12 Years a Slave' and Art's Commentary on the Past*, WASH. POST (Nov. 4, 2013), https://www.washingtonpost.com/opinions/richard-cohen-12-years-a-slave-and-arts-commentary-on-the-past/2013/11/04/f0e57a92-4588-11e3-b6f8-3782ff6cb769_story.

76. Robin Walker Sterling, *Defense Attorney Resistance*, 99 IOWA L. REV. 2245, 2251 (2014).

77. See Hon. William C. Griesbach, *Defending Public Defenders*, WIS. LAW., May 2008, at 20, 20–21.

78. See *id.* at 21.

79. Anthony V. Alfieri, *Objecting to Race*, 27 GEO. J. LEGAL ETHICS 1129, 1157 (2014).

80. Sterling, *supra* note 76.

81. Geoff Ward, Aaron Kupchik, Laurin Parker & Brian Chad Starks, *Racial Politics of Juvenile Justice Policy Support: Juvenile Court Worker Orientations Toward Disproportionate Minority Confinement*, 1 RACE & JUST. 154, 169 n.16 (2011).

Incongruously, even though defense attorneys are in the best position to ensure system fairness, the defense attorney's role has been limited to vindicating legal issues associated with individual clients' cases instead of social issues attendant to mass incarceration and disproportionate minority contact.⁸² Defense attorneys have specific tools to implement concerning the adversarial process, like rules of evidence, rules of criminal procedure, and case law. So, for example,

If the evidence is weak, counsel have litigation weapons to attack the government's case. If police violate the Fourth or Fifth Amendment during an investigation, counsel have constitutional tools to eliminate the evidence obtained. Good defense counsel [is] well-situated to uncover government errors with respect to law, evidentiary admissibility, guidelines calculations, and the like.⁸³

But defense attorneys have far fewer tools to police systemic unfairness.⁸⁴ Systemic unfairness leeches into the process at discretion points like arrest, the charging decision, bail, plea negotiations, and sentencing.⁸⁵ At each of these points in the life of a typical case, there is a courtroom actor who has an immense amount of discretion that is virtually unreviewable. At arrest, it is the police officer; at the charging decision, it is the prosecutor;⁸⁶ at the bail hearing, it is the judge.⁸⁷ But in a system where discretion is the coin of the realm, defense attorneys are paupers. Defense attorneys are the system actors with the least amount of discretion. And discretion matters far more in the petty offense context:

To put it another way, when case outcomes actually depend on the law and the evidence, defense counsel can be very powerful. But at the bottom of the penal pyramid where offenses are petty, caseloads immense, and litigation rare, law and evidence exert weak influences. Instead, prosecutorial discretion and institutional habits dominate cases, and defense lawyers are at a structural disadvantage.⁸⁸

Employing narratives about mass incarceration and all its contours is a possible response to all the cases that have foreclosed race-based arguments in criminal proceedings. With the same goals that motivated abolitionists to promote slave narratives, criminal defense attorneys can promote narratives about the decimating impact of mass incarceration on black communities and other communities of color.

82. See Sterling, *supra* note 76, at 2263–64.

83. Alexandra Natapoff, *Gideon Skepticism*, 70 WASH. & LEE L. REV. 1049, 1054 (2013) (footnotes omitted).

84. See Sterling, *supra* note 76, at 2256–57.

85. See *id.*

86. Natapoff, *supra* note 83, at 1064.

87. Note, *Judicial Discretion in Granting Bail*, 27 ST. JOHN'S L. REV. 56, 57 (1952).

88. Natapoff, *supra* note 83, at 1054–55 (footnote omitted).

III. NARRATIVES AND CONCEPTIONS OF HOPE OF JUSTICE

This year marks the 147th anniversary of the passage of the 15th Amendment, the third and last of the Reconstruction Amendments.⁸⁹ In the wake of the Civil War, Congress looked to take steps to interpose the federal government as a shield between the newly-freed black Americans and southern white landowners' continuing need for exploitable labor. Congress was concerned that black Americans would be effectively re-enslaved through state provisions that might revive all the characteristics of slavery. The Reconstruction Amendments were meant to be that legislative shield.

The 13th Amendment, which was ratified by three-fourths of the states on December 6, 1865, abolished slavery except in cases of criminal conviction.⁹⁰ The 14th Amendment, which was ratified on July 9, 1868, granted citizenship to everyone born or naturalized in the United States and guaranteed everyone equal protection under the law,⁹¹ to protect the new freedmen and women from the vagaries of white landowners who still subscribed to the prevailing myths about black criminality, intellectual inferiority, and dangerousness, and about white superiority, which had been created to sustain American chattel slavery.⁹² The 15th Amendment, which was ratified on February 3, 1870, prohibited states from preventing people from voting by reason of race, color, or previous condition of servitude.⁹³ Unfortunately, the Amendment left room for the states to impose ostensibly race-neutral voter qualifications, like poll taxes and literacy tests, that were anything but race-neutral.⁹⁴

As many historians and legal scholars have noted, periods of civil rights advancement are almost always followed by periods of retrenchment.⁹⁵ Reconstruction is the quintessential example of that

89. *The Battle Over Reconstruction: The Reconstruction Amendments*, BOUNDLESS, <https://www.boundless.com/u-s-history/textbooks/boundless-u-s-history-textbook/reconstruction-1865-1877-19/the-battle-over-reconstruction-139/the-reconstruction-amendments-740-2340> (last visited Mar. 14, 2017).

90. *The United States Ratifies the 13th Amendment to the Constitution*, AFR. AM. REGISTRY, http://www.aaregistry.org/historic_events/view/united-states-ratifies-13th-amendment-constitution (last visited Mar. 14, 2017).

91. *Primary Documents in American History: 14th Amendment to the U.S. Constitution*, LIBR. OF CONGRESS, <https://www.loc.gov/rr/program/bib/ourdocs/14thamendment.html> (last updated Mar. 6, 2017).

92. See Paul Finkelman, *Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law*, 89 CHI.-KENT L. REV. 1019, 1021 (2014) ("Congress tried to figure out how to prevent former Confederates from regaining political power in the South and the nation, which would enable them to oppress former slaves and white unionists.").

93. *Primary Documents in American History: 15th Amendment to the U.S. Constitution*, LIBR. OF CONGRESS, <https://www.loc.gov/rr/program/bib/ourdocs/15thamendment.html> (last modified Dec. 20, 2016).

94. *Id.*

95. Alton Hornsby Jr., *Looking Back on the Fight for Equal Access to Public Accommodations*, ECON. POL'Y INST. (July 2, 2014), <http://www.epi.org/publication/fight-equal-access-public-accommodations>.

premise.⁹⁶ After Reconstruction, white southerners succeeded in re-establishing legal and political dominance over blacks through brutal violence, financial exploitation, intimidation, and, above all, the persistence of the narratives that undergirded the peculiar institution.⁹⁷ Southern white landowners and business owners first employed convict leasing, a system by which convicts were used to fill the South's demand for exploitable labor.⁹⁸ Convict leasing was followed by Jim Crow, our own American system of apartheid, an intricate latticework of laws that relegated black people to permanent second class citizenship.⁹⁹ Jim Crow was sustained by a spectrum of social checks, that included intimidation and lynching on the one end and active indulgence of narratives about black inferiority on the other.¹⁰⁰ Jim Crow put in place a strict group of laws that reinforced social mores circumscribing how black southerners had to act in almost every aspect of life: segregated water fountains,¹⁰¹ not passing white motorists,¹⁰² and swearing on a different Bible in court.¹⁰³

Colorado became the 38th state in the Union on August 1, 1876, after the end of the Civil War and before the end of Reconstruction ended in 1877, just in time for the retrenchment that followed.¹⁰⁴ So it is not surprising that here in Colorado the vestiges of the debates around the passage of those Amendments persist in protean guises.

For example, the myths about black dangerousness and criminality seem to show up in modern-day shibboleths about black criminality and predictably concomitant disparate arrest and imprisonment rates of people of color.¹⁰⁵ And myths about black intellectual inferiority—that justified

96. See Richard Wormser, *Jim Crow Stories: Reconstruction (1865–77)*, PBS, http://www.pbs.org/wnet/jimcrow/stories_events_reconstruct.html (last visited Mar. 14, 2017).

97. See Edward L. Ayers, *Reconstruction*, GILDER LEHRMAN INST. OF AM. HIST., <https://www.gilderlehrman.org/history-by-era/reconstruction/essays/reconstruction> (last visited Mar. 14, 2017) (discussing the “massive changes in American culture, economy, and politics”); see also Joe R. Faegan, *Foreword* to LESLIE HOSSFELD, *NARRATIVE, POLITICAL UNCONSCIOUS AND RACIAL VIOLENCE IN WILMINGTON, NORTH CAROLINA*, at xii (2005) (describing how local white populations around Wilmington, North Carolina used a “substantially fictional white narrative of . . . violence . . . to control the black population during periods of social change”).

98. *Convict Leasing*, PBS, <http://www.pbs.org/tpt/slavery-by-another-name/themes/convict-leasing> (last visited Mar. 14, 2017).

99. See David Pilgrim, *What Was Jim Crow*, FERRIS ST. U. (2012), <http://www.ferris.edu/jimcrow/what.htm>.

100. *Id.*

101. *Id.*

102. *Id.*

103. See Garrett Epps, *The Other Sullivan Case*, 1 N.Y.U. J.L. & LIBERTY 783, 787 (2005) (noting that “even the Bibles were segregated”).

104. See *Colorado Became a State August 1, 1876*, AMERICA'S STORY FROM AMERICA'S LIBR., http://www.americaslibrary.gov/jb/recon/jb_recon_colorado_1.html (last visited Mar. 14, 2017).

105. Nazgol Ghandnoosh, SENT'G PROJECT, *RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES 6* (2014), <http://sentencingproject.org/wp-content/uploads/2015/11/Race-and-Punishment.pdf>; Brad Heath, *Racial Gap in U.S. Arrest Rates: “Staggering Disparity,”* USA TODAY (Nov. 18, 2014, 2:24 PM), <http://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207>.

not allowing slaves to go to school or learn to read English¹⁰⁶—seem to manifest in disparate school funding, suspension, and expulsion rates.¹⁰⁷ In 2010, black public-school students were nearly three times as likely to face serious discipline as their white peers, most often for subjective reasons like disobedient behavior.¹⁰⁸

While black students make up just 5.9 percent of the student population, they were the subject of 12.7 percent of the discipline cases, up from 11.7 percent five years ago. White students, on the other hand, who were about 61 percent of the population, were the subject of 46.8 percent of discipline cases.¹⁰⁹

Certainly justice reinvestment requires a reallocation of money, but it also requires reinvestment of the emotional capital that undergirds the money flow. The best way to re-channel that emotional capital is through promoting new narratives of many different kinds, but in particular, a new narrative that promotes an alternative vision of justice. Vaclav Havel, in defining hope, also sketches an alternative vision of justice: “Hope is definitely not the same thing as optimism. It is not the conviction that something will turn out well, but the certainty that something makes sense, regardless of how it turns out.”¹¹⁰ Described in this way, hope and justice seem to be the two sides of the same narrative about reliable fairness. A narrative built on hope and fairness would be an excellent place to locate reform.

106. See Irene Monroe, *Theory of Blacks' Intellectual Inferiority Rears Ugly Head at Harvard*, HUFFINGTON POST (May 25, 2011, 7:15 AM), http://www.huffingtonpost.com/irene-monroe/theory-of-blacks-intellec_b_589916.html.

107. See CIVIL RIGHTS DATA COLLECTION, U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, DATA SNAPSHOT: SCHOOL DISCIPLINE 1–3 (2014), <http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf>.

108. Burt Hubbard, *Data Shows Racial Gaps in Colorado Public-School Suspensions*, DENV. POST (Jan. 4, 2010, 2:40 PM), <http://www.denverpost.com/2010/01/04/data-shows-racial-gaps-in-colorado-public-school-suspensions>.

109. *Id.*

110. VÁCLAV HAVEL, *DISTURBING THE PEACE: A CONVERSATION WITH KAREL HVÍŽD'ALA* 181 (1990).

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