
ESSAY

DEPICTING MINORITY PETITIONERS' LIVES IN APPELLATE OPINIONS

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Mellouli v. Lynch, decided in June 2015, evaluated whether a state conviction for possession of drug paraphernalia used to conceal unknown pills could trigger an immigrant's deportation under federal law.¹ Justice Thomas's dissent chastised the majority opinion, authored by Justice Ginsburg, for "12 references to the sock that Mellouli used to conceal the pills."² In the dissent's view, this specific fact was "entirely beside the point"—irrelevant to the statutory interpretation.³ The dissent did not remark, though, on the majority's extensive discussion of Mr. Mellouli's life prior to the deportation proceedings.⁴ In the 2014–2015 Term, both *Mellouli* and the more prominent *Obergefell v. Hodges* discussed the lives of petitioners—members of minority groups seeking relief against state exercises of power—in remarkable depth.⁵ This Essay seeks to highlight the similarities between the characterizations of the petitioners in the two opinions, to explore the function of such depictions, and to suggest that such descriptions require careful thought because they may, counterintuitively, subvert counter-majoritarian goals.

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¹ 135 S. Ct. 1980, 1984 (2015).

² *Id.* at 1991 (Thomas, J., dissenting).

³ *Id.*

⁴ See *id.* at 1984–85 (Ginsburg, J., majority opinion) (summarizing Mellouli's educational, work, and personal history).

⁵ *Id.*; *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594–95 (2015).

I. PETITIONERS' STORIES BEYOND THE CASE

Both *Obergefell* and *Mellouli* diverge from comparable past opinions in their in-depth treatment of the lives of the petitioners,⁶ beyond the facts with direct bearing on their legal claims. In each case, the minority petitioner's place in the larger community was at stake—in *Obergefell*, in terms of entry into the power-conferring legal and societal institution of marriage, and in *Mellouli*, in the ability to physically remain in American society through relief from deportation. And in each, the Court, in granting relief pursuant to constitutional or statutory interpretation, highlighted the petitioners' families, careers, and lives outside of the litigation. This rhetorical move is markedly different from analogous past opinions in the civil rights and immigration contexts, which are (either almost or entirely) silent as to the petitioners' lives beyond the case.

Commentators have already dissected the rhetoric in the *Obergefell* majority opinion authored by Justice Kennedy.⁷ However, there has been surprisingly little discussion of how *Obergefell*'s detailed characterization of the plaintiffs departs from the language in other landmark civil rights opinions, including those involving LGBT rights.⁸ The opinion devotes over five hundred words to its factual narration of the plaintiffs' lives—about half as many as it spends discussing the entire pre-*Windsor* doctrinal history of marriage in the United States.⁹

The narrative of the plaintiffs' lives in *Obergefell* includes descriptions of how the couples met, their commitment ceremonies and weddings, and their experiences adopting children.¹⁰ The opinion notes that James Obergefell and

6 The *Obergefell* plaintiffs and Mr. Mellouli were all petitioners, in the procedural posture of the cases at the Supreme Court. I use "petitioners" here in a broader sense, however, to signify individuals seeking relief from governmental action. In *Obergefell*, plaintiffs sought to overturn state bans on same-sex marriage, see 135 S. Ct. at 2593; Mr. Mellouli was attempting to overturn a removal order issued by federal immigration officials, see Petitioner's Brief on the Merits at 12, *Mellouli*, 135 S. Ct. 1980 (2015) (No. 13-1034).

7 E.g., Michael C. Dorf, *Symposium: In Defense of Justice Kennedy's Soaring Language*, SCOTUSBLOG (June 27, 2015), <http://www.scotusblog.com/2015/06/symposium-in-defense-of-justice-kennedys-soaring-language/> [<https://perma.cc/UZJ8-ZP5J>]; Richard M. Re, *Rhetoric and Reason in Obergefell*, PRAWFSBLAWG (June 28, 2015), <http://prawfsblawg.blogs.com/prawfsblawg/2015/06/rhetoric-and-reason-in-obergefell.html> [<https://perma.cc/9KV4-RVFL>].

8 *But cf.* Amy Davidson, *What Does Marriage Equality Have to Do With Dred Scott?*, THE NEW YORKER (July 8, 2015), <http://www.newyorker.com/news/amy-davidson/what-does-marriage-equality-have-to-do-with-dred-scott> [<https://perma.cc/6Z3L-5SJ8>] (juxtaposing the *Obergefell* majority's rhetoric about plaintiffs with the language of Justice Curtis's dissent in *Dred Scott v. Sandford*). An essay using *Obergefell* as a lens to explore how lawyers select model plaintiffs for impact litigation also touches on Justice Kennedy's rhetoric regarding the plaintiffs. Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J.F. 136, 146, 149 (2015), <http://www.yalelawjournal.org/forum/perfect-plaintiffs> [<https://perma.cc/SC9J-VUG9>].

9 *Obergefell*, 135 S. Ct. at 2594-98.

10 *Id.* at 2594-95.

John Arthur “fell in love . . . establishing a lasting, committed relation.”¹¹ It narrates Arthur’s medical diagnosis and describes how the progression of his disease led to the Ohio couple’s “wed[ding] inside a medical transport plane as it remained on the tarmac in Baltimore” in the time of *Windsor*.¹² It describes three plaintiffs’ professions—we learn that April DeBoer and Jayne Rowse “work as nurses, DeBoer in a neonatal unit and Rowse in an emergency unit,” and that Ijpe DeKoe “works full-time for the Army Reserve.”¹³ Sergeant DeKoe is introduced with his full rank, and the opinion evokes the way his deployment must have shadowed the early days of his marriage.¹⁴ The Court also mentions the “special needs” of one of Ms. DeBoer’s and Ms. Rowse’s two children and that the other required “around-the-clock care” after a premature birth.¹⁵

Obergefell’s in-depth exploration of the lives of the lead plaintiffs contrasts vividly with the landmark racial discrimination opinions to which the case is compared,¹⁶ as well as with most prior LGBT-rights opinions. Neither *Brown v. Board of Education*¹⁷ nor *Loving v. Virginia*¹⁸ described the lead plaintiffs’ lives in detail. The *Brown* opinion did not even name the parents representing the class or their children, merely stating, “In each of the [consolidated] cases, minors of the Negro race, through their legal representatives, seek the aid of the courts”¹⁹ *Loving* sparsely recounted Mildred Jeter Loving’s and Richard Loving’s marriage in the District of Columbia, move to Virginia, and return to D.C. after convictions for interracial marriage.²⁰ We do not know, from reading the opinions, whether Linda Brown excelled in school, or whether the Lovings had children. Similarly, early LGBT-rights opinions—*Romer v. Evans*²¹ and *Lawrence v. Texas*²²—provided no details regarding the plaintiffs’ personal lives. *United States v. Windsor* gave a glimpse

¹¹ *Id.* at 2594.

¹² *Id.*

¹³ *Id.* at 2595.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See, e.g., Katie Eyer, Brown, *Not Loving: Obergefell and the Unfinished Business of Formal Equality*, 125 YALE L.J.F. 1 (2015), <http://www.yalelawjournal.org/forum/obergefell-and-the-unfinished-business-of-formal-equality> [<https://perma.cc/J45D-J659>] (comparing *Obergefell* to *Loving v. Virginia* and *Brown v. Board of Education*); Akhil Reed Amar, *Anthony Kennedy and the Ghost of Earl Warren*, SLATE (July 6, 2015), http://www.slate.com/blogs/outward/2015/07/06/obergefell_v_hodges_anthony_kennedy_continues_the_legacy_of_earl_warren.html [<https://perma.cc/55YQ-DMUL>] (same).

¹⁷ 347 U.S. 483 (1954).

¹⁸ 388 U.S. 1 (1967).

¹⁹ 347 U.S. at 487.

²⁰ 388 U.S. at 2-3.

²¹ 517 U.S. 620 (1996).

²² 539 U.S. 558 (2003).

of Edith Windsor and Thea Spyer's life together—the couple married in Canada due to “[c]oncern[] about Spyer’s health”²³—but *Obergefell*'s extended storytelling represents a departure.

While Justice Ginsburg's majority opinion in *Mellouli* does not treat Mr. Mellouli's life quite as extensively, it also gives fine-grained details in a way that departs from similar prior cases. The opinion describes Mr. Mellouli's education—he earned “master's degrees in applied mathematics and economics” and a “bachelor of arts degree, *magna cum laude*”—and his work, first as an actuary and then “t[eaching] mathematics at the University of Missouri–Columbia.”²⁴ It notes, too, his engagement to a United States citizen.²⁵ By contrast, other recent cases involving the intersection of criminal and immigration law mention almost no details about the petitioners' lives.²⁶ Two data points are merely enough to observe a potential emerging trend, not necessarily to pinpoint it.²⁷ Nonetheless, the Court's depictions of the lives of these petitioners who fall within minority groups is striking.

II. THE STORYTELLING FUNCTION

What, then, is the function of *Obergefell*'s and *Mellouli*'s focus on the petitioners' lives outside the legal dispute? Most obviously, judicial opinions tell stories,²⁸ and judges' choices in portraying the facts shape that story.²⁹ The facts on which the *Obergefell* and *Mellouli* majority opinions chose to focus

²³ 133 S. Ct. 2675, 2683 (2013).

²⁴ *Mellouli v. Lynch*, 135 S. Ct. 1980, 1984. The Eighth Circuit's unanimous opinion in the case, later reversed by the Supreme Court, provided no details as to Mr. Mellouli's career, education, or family. *Mellouli v. Holder*, 719 F.3d 995 (8th Cir. 2013), *vacated*, 135 S. Ct. 1980 (2015).

²⁵ *Mellouli*, 135 S. Ct. at 1985.

²⁶ See *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013); *Chaidez v. United States*, 133 S. Ct. 1103 (2013); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010). *Padilla v. Kentucky* briefly notes the petitioner's service in the Vietnam War but does not otherwise describe his life. 559 U.S. 356, 359 (2010).

²⁷ In fact, the case last term at the intersection of immigration and marriage—or, in other words, at the intersection of interests at stake in *Obergefell* and *Mellouli*—does not follow this trend. See *Kerry v. Din*, 135 S. Ct. 2128 (2015). None of the opinions in *Din* adverted to the biographical details of Ms. Din, an American who was seeking an explanation of the denial of her Afghan spouse's visa, or the couple's relationship. See *id.* The opinions finding against Ms. Din had no rhetorical reason to draw attention to the couple's marriage or background. Possibly, the dissenting opinion did not explore Ms. Din's or her husband's life to avoid the appearance of taking a position on the merits of the State Department's denial of the visa for national security reasons. See *id.* at 2145 (Breyer, J., dissenting). Exploring the petitioners' lives in *Din* could have implied that the visa denial was substantively erroneous. Concerns about executive discretion in the national security and admissibility contexts, then, could explain why the rhetoric in Justice Breyer's dissenting opinion in *Din* differs from the rhetoric in the other opinions discussed here.

²⁸ See generally Robert M. Cover, *The Supreme Court, 1981 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

²⁹ Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1386–90 (1995).

shape, in part, a narrative of the petitioners' belongingness, by emphasizing their commonalities with and ties to the rest of the community.

The audience for appellate courts' opinions, and particularly for Supreme Court opinions, is not just the legal world but also the American public. This is especially true in highly controversial and societally significant cases like *Obergefell*. *Brown*, for example, reflects this sense of a wider audience: the opinion's description of how social policies "demonstrate our recognition of the importance of education to our democratic society"³⁰ indicates an "our" beyond just the nine individuals on the Supreme Court. Chief Justice Earl Warren's dictate that the opinion "should be . . . readable by the lay public" shows that the justices are well aware of this broader audience in moments of historical import.³¹ Even in less obviously historic moments, opinions may build on themselves, over time, to add to an understanding of how minority groups fit within the United States' "imagined community."³² For example, representations of race in early twentieth century federal court opinions reinforced a narrative of Chinese, Japanese, and Indian immigrants as the "unassimilable" other while viewing Syrians and other Middle Easterners as assimilable and racially eligible for citizenship.³³ *Obergefell* and *Mellouli* similarly tell stories about both the specific petitioners and about the minority groups to which they belong—LGBT individuals and immigrants, respectively—to both a legal and a societal audience.

As others have noted, rhetoric in appellate opinions constructs (at least) two narratives: case-specific and societal.³⁴ First, as former D.C. Circuit Judge Patricia Wald notes, opinions tell "a 'story' that will convince the reader [the case] has come out right."³⁵ In this respect, the *Obergefell* and *Mellouli* opinions' emphasis on the sympathetic points of the lives of the petitioners—in *Obergefell*, struggles to maintain relationships in the face of personal hardship, and in *Mellouli*, a narrative of integration into American society—signal to the reader that the case has "come out right" in a sense of basic fairness. In essence, the opinions' focus on these characteristics highlights the positive

30 *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

31 See Lani Guinier, *The Supreme Court 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 52 (2008) (quoting Chief Justice Warren's memorandum to his colleagues regarding his draft opinion of *Brown*). Guinier has described Chief Justice Warren's opinion in *Brown* as "intentionally demosprudential" in its accessibility. *Id.* at 133.

32 See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 6-7 (1991) (defining a nation as an "imagined political community").

33 These opinions construed East and South Asian immigrants as not "white" and therefore ineligible for citizenship under the Naturalization Acts of 1790 and 1870. MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 38-46 (2004).

34 J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING 53, 77 (2008).

35 Wald, *supra* note 29, at 1386.

equities of the petitioners, even though the cases did not turn on equitable principles.

Legal scholars have also observed that, beyond indicating that a case “has come out right” in a fact-specific sense, Supreme Court opinions intervene in public discourse and dynamically interact with social movements.³⁶ Ultimately, opinions “locate[] [their] argument within an implicit narrative framework about what kind of people we are and what kind of world we might inhabit.”³⁷ The frequent quotation of Justice Kennedy’s *Obergefell* rhetoric in newspaper articles and social media postings demonstrates both that this public audience exists and that people perceive this kind of implicit narrative.³⁸ While *Mellouli*-style statutory interpretation typically has a smaller audience, these opinions also, in the aggregate, contribute to a narrative—in this case, the Court’s depiction of immigrants’ situation within American society.

In *Obergefell* and *Mellouli*, then, richly detailing the petitioners’ lives serves an expressivist function for a broader audience by humanizing and de-otherizing the petitioners. In this way, the rhetoric in the opinions both echoes and reinforces the underpinnings of societal shift in the contexts of both these groups—as LGBT individuals and undocumented immigrants have “come out” and shared their stories with a broader audience, public opinion has moved toward more expansive interpretations of their rights.³⁹ Representations of family and career create a sense of the petitioners’ connection to a larger community and of similarity. From a counter-majoritarian perspective, then, such depictions might at first seem desirable.

36 See Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1274-75 (2001) (elaborating on these points and characterizing “opinion writing practices [as] . . . an important dimension of American law”).

37 Rideout, *supra* note 34, at 77.

38 See, e.g., Robert Barnes, *Supreme Court Rules Gay Couples Nationwide Have a Right to Marry*, WASH. POST (June 26, 2015), https://www.washingtonpost.com/politics/gay-marriage-and-other-major-rulings-at-the-supreme-court/2015/06/25/ef75a120-1b6d-11e5-bd7f-4611a60dd8e5_story.html [<https://perma.cc/82D2-EMFZ>].

39 See, e.g., Ronald Brownstein, *Poll: Public Prefers Citizenship for Dreamers*, NAT’L J. (May 9, 2012), <http://www.nationaljournal.com/population-2043/poll-public-prefers-citizenship-dreamers?q=None&a=&t=Attitudes&c=None&s=None&e=None> [<https://perma.cc/YHJ3-KXYJ>]; Bruce Drake, *How LGBT Adults See Society and How the Public Sees Them*, PEW RES. CTR. (June 25, 2013), <http://www.pewresearch.org/fact-tank/2013/06/25/how-lgbt-adults-see-society-and-how-the-public-sees-them/> [<https://perma.cc/CXG4-MXSP>].

III. PROBLEMATIZING MINORITY STORIES: BETWEEN MODEL MINORITY AND COVERING

Whether including fact-specific depictions in appellate opinions is normatively a good idea is beyond the scope of this Essay.⁴⁰ However, I suggest that there is a tension, and potentially a danger to the protections that our law accords to otherized groups, in the kinds of representations of minority petitioners made in *Mellouli* and *Obergefell*. Both opinions depict the petitioners as not only within the imagined “us,” but as exemplars of the “us”—as model minorities. And, in their representations of the petitioners as ordinary, they implicitly suggest that their sameness to “us” is what renders them no threat. These representations of petitioners—as societal paragons and as not just similarly situated but as the same—may dangerously imply that rights recognition and statutory interpretation are *conditioned on* these characteristics.⁴¹

The opinions portray Mr. Mellouli and the *Obergefell* plaintiffs as not just typical Americans but exemplars—a *magna cum laude* graduate, parents of adopted special needs children, a servicemember. We read about Mr. Arthur’s and Mr. Obergefell’s love in the face of adversity, not the nights that they argued and one slept on the couch. The people seeking relief against governmental action described in these opinions are not car salespersons or

40 As Justice Thomas’s *Mellouli* dissent exemplifies, judges debate whether conscious storytelling in judicial opinions is a good idea. See *Mellouli v. Lynch*, 135 S. Ct. 1980, 1995 (Thomas, J., dissenting) (“I fail to understand why [the majority] chooses to [adopt its interpretation of the statute], apart from a gut instinct that an educated professional engaged to an American citizen should not be removed for concealing unspecified orange tablets in his sock.”). Judge Pierre Leval, for example, cautions that “judges risk sacrificing clarity of thought and expression for elegance or power” in “[r]hetoric, including reliance on emotional stories.” Pierre N. Leval, *Judicial Opinions as Literature*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 206, 208 (Peter Brooks & Paul Gewirtz eds., 1996). Judge Wald, by contrast, depicts rhetoric as a “skill at working [] levers of power” that makes judges “matter.” Wald, *supra* note 29, at 1419.

41 The seeming significance of sameness, along with a concomitant implied suggestion that majority understandings of minorities as similar have some relevance to rights recognition, is evident in an amicus brief filed on behalf of the Human Rights Campaign and “more than 200,000 Americans from across [the] country.” Brief of the Human Rights Campaign and 207,551 Americans as Amici Curiae Supporting Petitioners at 1, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574). The brief explained the shift in views on same-sex marriage as the result of LGBT individuals coming out and showing the public that they “have the same aspirations to life, liberty, and the pursuit of happiness as everyone else.” *Id.* at 3-4. Consequently, the majority of Americans can now recognize “that discrimination . . . in civil marriage . . . serves only to oppress.” *Id.* at 5. Publicity efforts described the brief as “the first time that tens of thousands of fair-minded Americans will have the opportunity to have their voices formally heard in a civil rights case of this magnitude.” *The People’s Brief*, HUM. RTS. CAMPAIGN, [http://www.thepeoplesbrief.com/\[https://perma.cc/A8VX-KS75\]](http://www.thepeoplesbrief.com/[https://perma.cc/A8VX-KS75]). The brief underscores the connection between sameness and majority approbation. However, if one sees anti-discrimination cases as intended to protect minority groups from the majority, majority views—particularly those emphasizing the minority group’s sameness—approach irrelevance.

members of Congress.⁴² And what if they were? Scholars have criticized prior LGBT rights opinions for their impersonal depictions of LGBT individuals.⁴³ *Mellouli* and *Obergefell*, however, might tilt too far in the other direction. By describing Mr. Mellouli's academic credentials and the *Obergefell* plaintiffs' positively perceived careers, the opinions may imply that success as a model minority is a prerequisite—or at least somehow relevant—to statutory interpretation and the recognition of rights.

Even to the extent that the opinions depict Mr. Mellouli and the *Obergefell* plaintiffs as undifferentiated from the mean, though, the implicit suggestion that securing legal protections *requires* similarity to an imagined “us” is pernicious. The lesson *Obergefell* derives from the plaintiffs' stories is, essentially, that they are no threat: “they seek not to denigrate marriage.”⁴⁴ Mr. Mellouli's accomplishments, too, place him in a nonthreatening role: not drug criminal but math professor. What if the petitioners were somehow different and therefore perceived as threatening to the majority? In creating an assimilationist narrative, the opinions imply that favorable outcomes are conditioned on a degree of sameness. More subtly, these opinions engage in a weaker form of covering—“permit[ting] individuals to retain and disclose their trait,” but doing so in a way that is not threatening to the majority.⁴⁵ Were Mr. Mellouli to have a different educational background or an immigrant spouse, presumably the statutory interpretation would not change, but the rhetorical emphasis suggests that these details are in some way relevant.

There may not be a perfect way to resolve these concerns or to strike a balance between ordinary and model plaintiff, particularly since many impact litigation cases *will* have model plaintiffs.⁴⁶ Appellate judges will continue to grapple with this tension, particularly if *Mellouli* and *Obergefell* signal a broader trend.

The pre-*Obergefell* opinions in the courts of appeals evaluating the constitutionality of same-sex marriage bans extend across a spectrum of factual specificity in their treatment of the plaintiffs' lives. At one extreme, in dissent from the Sixth Circuit opinion upholding marriage bans, Judge Martha Craig Daughtrey engaged in intensive description similar to that in

42 See Frank Newport, *Congress Retains Low Honesty Rating*, GALLUP (Dec. 3, 2012), <http://www.gallup.com/poll/159035/congress-retains-low-honesty-rating.aspx> [<https://perma.cc/D6R6-XW4R>] (listing these professions as the least trusted). Nurses—the profession of two of the lead *Obergefell* plaintiffs—are the most trusted. *Id.*

43 See, e.g., Martha C. Nussbaum, *Poets as Judges: Judicial Rhetoric and the Literary Imagination*, 62 U. CHI. L. REV. 1477, 1512-17 (1995).

44 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015).

45 Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 775 (2002).

46 See Godsoe, *supra* note 8, at 153 (describing lawyers' selection of “plaintiffs who seem ‘just like us’” as “undoubtedly a winning strategy”).

Obergefell.⁴⁷ Judge Daughtrey highlighted—in even greater detail than *Obergefell* and in language that *Obergefell* mirrors—Ms. DeBoer’s and Ms. Rowse’s careers and children.⁴⁸ A Tenth Circuit opinion also described its plaintiffs’ lives in great detail, down to the number of generations for which certain plaintiffs’ families had lived in Oklahoma.⁴⁹ The Fourth Circuit opinion and an earlier Tenth Circuit opinion detailed certain aspects of the named plaintiffs’ relationships, like the length of the relationship and joint business ownership, but these opinions used such details primarily in service of the concrete harms of the marriage bans.⁵⁰ The Ninth Circuit briefly noted the plaintiffs’ occupations and observed that they were “ordinary Idahoans and Nevadans” but otherwise did not detail particulars of the plaintiffs’ lives.⁵¹ The Seventh Circuit opinion most closely mirrored the silence of precedents like *Brown* and *Loving*: it did not treat the plaintiffs’ lives in any way or even name the plaintiffs.⁵²

One option, then, is to fall toward the end of the spectrum providing sparse detail about the petitioners, in the mode of the Seventh or Ninth Circuits. A more descriptive option would be to tell the story every time: to portray the petitioner in *all* cases, not just those with sympathetic facts, and to include less sympathetic facts. Disadvantages of this latter approach include both cutting against the spirit of generalization that we expect and depend on in appellate opinions and making justice seem contingent upon the personal. Individuals may not be typical of the larger group implicated by a particular claim. The use of personal narratives in judicial opinions risks implying that such stories are more widely shared by the group than they in fact are.⁵³ It also risks suggesting that the opinions have underlying grounds

47 *DeBoer v. Snyder*, 772 F.3d 388, 423-24 (6th Cir. 2014) (Daughtrey, J., dissenting).

48 *See id.* (describing the plaintiffs’ careers and cataloging the difficulties faced by their three adopted children, and characterizing the three birth mothers in turn as “homeless,” “a drug addicted prostitute,” and “a 19-year-old girl who received no prenatal care and who gave birth at her mother’s home”).

49 *See Bishop v. Smith*, 760 F.3d 1070, 1074 (10th Cir. 2014) (describing two of the lead plaintiffs as fourth- and sixth-generation Oklahomans).

50 *See Bostic v. Schaefer*, 760 F.3d 352, 368-69 (4th Cir. 2014) (noting that the lead plaintiff couples’ relationships had each lasted for more than twenty years and listing aspects of one couple’s familial life that suffered due to Virginia’s marriage ban); *Kitchen v. Herbert*, 755 F.3d 1193, 1199 (10th Cir. 2014) (mentioning one plaintiff couple’s joint ownership of a business but primarily focusing on the effects of exclusion from marriage on the couple’s financial wellbeing and legal stability, including challenges related to wills, taxes, and healthcare documents).

51 *See Latta v. Otter*, 771 F.3d 456, 467 (9th Cir. 2014) (noting that plaintiffs “teach[] deaf children,” “are parents,” and include a warehouse manager and historian).

52 *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014).

53 *See Daniel A. Farber & Suzanna Sherry, Telling Stories out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 838-39 (1993) (“If we checked with more people in the same situation, how many of them would tell similar stories? If most of their stories would be different, then the information value of the particular story . . . is limited.”).

in equity where none exist, or giving the appearance that the outcome turns upon the details. If the petitioner's life story is not relevant to the result, why is it in the opinion?⁵⁴

On the other hand, including greater detail in all opinions might highlight the repercussions of law in our lives, while suggesting that rights are not conditioned on flawlessness. By recognizing that those in imperfect marriages or those with lower-status jobs are also entitled to legal protections, representations of minorities seeking relief against the state might reinforce the idea that our legal system has protections for all, not just the deserving. (Imagine if one of the lead couples in *Obergefell* had been seeking a divorce.) And such an approach might fortify the constitutional norm of equal protection through an expression by the judicial branch that rights do not require sameness.

Courts might conclude that representing those who seek access to justice as family, neighbors, co-workers—as having what Hannah Arendt terms “a place in the world”⁵⁵—is helpful to the extent that the rhetoric of judicial opinions constructs community and contributes to our understandings of the legal system, each other, and our society. Or, courts might decide that the disadvantages, including the difficulty of defining the scope of factual depiction and the perverse incentives for finding model plaintiffs, make such rhetoric undesirable. Policing the limits of appropriate contextualizing information might prove too difficult. Courts might not want to create a system that requires or encourages public scrutiny of the lives of otherized individuals. They might also seek to avoid disadvantaging petitioners who are unwilling to open their lives to such scrutiny.

Obergefell's and *Mellouli's* representations of petitioners' lives are, ultimately, a challenge to judges' choices in omitting or including factual narrations—particularly beyond the most legally salient facts—and to the function of the appellate judicial opinion. The courts of appeals' opinions in the same-sex marriage cases provide a range of narrative approaches. Opinions may choose for expressive reasons to draw attention to the extra-legal lived experiences of minority petitioners or may decide, instead, to include less detail. The choice, though, ought to be both deliberate and consistent. Selectively describing the aspects of minority petitioners' lives that implicate sameness and achievement of broader community ideals, like family stability and career success, may undermine counter-majoritarian goals

⁵⁴ Cf. Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737, 743 (1997) (book review) (“Stories often implicitly claim to identify causes.”).

⁵⁵ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 296 (1973).

by suggesting that these characteristics are prerequisites to rights-regarding legal determinations.

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