REVIEWS

Legal Narratology

Richard A. Posner†

Law's Stories: Narrative and Rhetoric in the Law. Peter Brooks and Paul Gewirtz, eds. Yale University Press, 1996. Pp v, 290.

The law and literature movement has evolved to a point at which it comprises a number of subdisciplines. One of the newer ones—call it "legal narratology"—is concerned with the story elements in law and legal scholarship. A major symposium on legal narratology was held at the Yale Law School in 1995, and *Law's Stories* is a compilation of essays and comments given at the symposium. The book is not definitive or even comprehensive. Not all bases are touched, and a number of leading practitioners of legal narratology did not participate. But it is about as good a place as any to start if you want to understand and evaluate the new field. The papers in the volume span a wide range, covering the narrative elements in legal scholarship, trials, sentencing hearings, confessions, and judicial opinions. The editors, Peter Brooks and Paul Gewirtz, a professor of comparative literature and a professor of law respectively, have each written a lucid and informative introduction. The book is well edited and highly readable—and so well balanced that, as we shall see, it makes the reader wonder just how bright the future of legal narratology is.

A story, or, better, a narrative (because "story" suggests a short narrative), is a true or fictional account of a sequence of

---

† Chief Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer in Law, The University of Chicago. I thank Martha Nussbaum for helpful comments on earlier drafts of this review.

events unfolding in time, the events being invented, selected, emphasized, or arranged in such a way as to explain, inform, or edify. As Brooks reminds us in his introduction, paraphrasing Aristotle, stories "must have beginnings, middles, and ends" and must be "so constructed that the mind of the listener, viewer, or reader [can] take in the relation of beginning, middle, and end" and "see the end as entailed by a process" (p 17). The story need not be true, but it must be coherent, intelligible, and significant.

Narrative is ubiquitous in history, in biography, in literature, in myth, and in most religions. It plays a smaller but still important role in other fields as well, including the visual arts and philosophy and even economics, where "story," contrasted with a formal model, is the name used for the informal, intuitive explanation, which is often indeed story-like, of an economic phenomenon. Asked to explain why manufacturers engage in resale price maintenance, an economist might tell the following "story": A manufacturer of microwave ovens wants his dealers to provide presale services, such as a demonstration of how you can cook with one. Each dealer would hesitate to incur the cost of providing such services lest a competing dealer be able to underprice him by avoiding the cost. So the manufacturer fixes a floor under the dealers' retail prices that is high enough to enable the dealers to defray the costs of the services. Forced to compete for customers without cutting prices, the dealers vie with one another to provide presale services that customers value. The manufacturer is better off, which is why manufacturers engage in resale price maintenance (or would if permitted by the antitrust laws). End of story.

Stories play a big role in the legal process. Plaintiff and defendant in a trial each tell a story, which is actually a translation of their "real" story into the narrative and rhetorical forms authorized by law, and the jury chooses the story that it likes better. (If it is a criminal case and the defendant's confession is placed in evidence, there is a story within the story. Criminal confessions are the subject of Peter Brooks's essay (pp 114-34).) This of course is not how the trial process is conceptualized by the law. The law says that the plaintiff must prove each element of his claim by a preponderance of the evidence (or must prove it beyond a reasonable doubt, if it is a criminal case, but I can ignore that detail), and likewise the defendant if he pleads any affirmative defenses. Ronald Allen, unfortunately not a participant in the symposium, has shown that if this, the official account of the trial process, were taken literally, it would imply that plaintiffs would win many cases in which the likelihood that their

claim was valid was actually very slight.[1] He argues convincingly that what really happens in a trial is that each side tries to convince the jury that its story is more plausible than the opponent's story. The storytelling, indeed mythmaking, potential of the criminal trial is the subject of a brilliant essay by Robert Ferguson on the trial of John Brown.[2] The essay is not in the book, but Robert Weisberg's paper on trials as narratives, which is, summarizes Ferguson's essay compactly and skillfully (pp 79-83).

The Supreme Court's capital punishment jurisprudence has magnified the story element in the sentencing phase of capital trials. The Court insists that the defendant be permitted to tell a no-holds-barred story of his life that is designed to persuade the jury that he does not deserve to be put to death.[3] And now the Court has decided that the victim's family may be allowed to tell the jury the absent victim's story, to offset the impact of the defendant's story.[4] One of the best papers in this volume is Paul Gewirtz's in defense of the "victim impact statement" in capital cases (pp 135-61).

Judicial opinions usually have a story element, the narration of the facts of the case that opens most opinions. Some judges try to cast the whole opinion as the story of the parties' dispute, using chronology rather than a logical or analytical structure to organize the opinion. Cardozo in the common law opinions that he wrote as a state court judge, and Learned Hand in his copyright opinions, were masters of vivid narration of the facts of the case.[5]

Stories play a smaller role in legal scholarship than they do in the legal process itself, but their role is growing. "Oppositional scholarship" by critical race theorists and by feminists relies heavily on stories—historical, autobiographical, or even science

---

[1] See generally Ronald J. Allen, *A Reconceptualization of Civil Trials*, 66 BU L Rev 401 (1986); Ronald J. Allen, *The Nature of Juridical Proof*, 13 Cardozo L Rev 373 (1991). Suppose that a plaintiff in a particular tort case must prove three things to prevail on his claim for $100,000 in damages for personal injury (forget any affirmative defenses the defendant might have): that the defendant was negligent, that the defendant's negligence caused injury to the plaintiff, and that the injury imposed a cost of at least $100,000 on the plaintiff. Suppose each of the three propositions has a probability of .51 of being true. Then the probability that all three are true (assuming they are independent of each other) is only .13 (.51 * .51 * .51). Yet, on these assumptions, according to the official story of the proof process, the plaintiff has proved his case! See also id at 374 n 4 (noting that "[s]uch issues will generally not be independent, but that simply makes the mathematics slightly more complicated without affecting the analysis").

[2] See Robert A. Ferguson, *Story and Transcription in the Trial of John Brown*, 6 Yale J L & Humanities 37 (1994).

[3] *Lockett v Ohio*, 438 US 586 (1978).

[4] *Payne v Tennessee*, 501 US 808 (1991).

[5] See, for example, *Hynes v New York Central Railroad Co*, 231 NY 229, 131 NE 898 (1921) (Cardozo); *Nichols v Universal Pictures Corp*, 45 F2d 119 (2d Cir 1930) (Hand).

fiction—of oppression, designed to stir the reader to a more vivid awareness of the predicaments of the oppressed.[6] Gewirtz links this literature to victim impact evidence in capital cases by pointing out that such evidence "consists of stories of victimized and silenced people, who are the usual concern of many in the [legal] storytelling movement" (p 143). "Oppositionists" do not like his point because they do not like capital punishment, and allowing victim impact statements is calculated to increase the number of cases in which it is imposed.[7]

If story is thus an important element in law, what are the best intellectual tools for examining and evaluating it? The natural places to look, it might seem, would be literary theory, which has long concerned itself with narrative as a pervasive feature of imaginative literature, and epistemology, which has long taken an interest in the truth value of narrative, for example historical narrative.[8] Yet much of the best scholarship on the story element in law owes little to these or any other fields outside of law itself. Gewirtz's paper on victim impact statements does owe a debt to recent philosophical writings by Martha Nussbaum, Robert Solomon, Ronald de Sousa, and others, on the role of emotion in practical reason. Gewirtz emphasizes that the emotionality of a victim's (or a defendant's) narrative may quicken thought by riveting attention, shaking the listener or reader out of his dogmatic slumber, making him more receptive to new ideas (pp 145-46). But the debt is slight; Gewirtz's analysis is powered mainly by his understanding of the criminal justice system, as well as by the simple common sense point that if the defendant is to be allowed to plead for mercy, the absent victim should be allowed to plead for justice (like the ghost of Hamlet's father, or the Commendatore in *Don Giovanni*). Ronald Allen's work on the story element in the trial, while it may owe something to the theory of probability and to reflections on that theory by philosophers, derives primarily from the author's engagement as a law professor with the law of evidence. Daniel Farber and Suzanna Sherry's criticisms of the oppositional storytelling literature as having serious problems with accuracy, typicality, and analytical content

---

[6] For an exhaustive survey, see Nancy L. Cook, *Outside the Tradition: Literature as Legal Scholarship*, 63 U Cin L Rev 95 (1994).

[7] Two narratologists have weighed in against the admissibility of victim impact evidence—and have not concealed their opposition to capital punishment. Martha C. Nussbaum, *Equity and Mercy*, 22 Phil & Pub Aff 83, 119, 121 n 93 (1993); Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U Chi L Rev 361, 392 & n 156 (1996).

[8] The literary and philosophical approaches to narrative are illustrated by Gérard Genette, *Narrative Discourse: An Essay in Method* (Cornell 1980), and Arthur C. Danto, *Narration and Knowledge* (Columbia 1985), respectively.

do not derive from any arcane extradisciplinary source; they are merely the application of logic and common sense to the work of the storytellers.[9]

Although *Law's Stories* is only 237 pages long (ignoring the index and the numerous notes, inconveniently tucked into the back), it contains twenty-one papers—enough, one might think, to provide the reader with a broad conspectus of the field. Many of them, however, turn out to be very short comments; subtracted, they expose the incompleteness of the book's coverage. Ronald Allen's work, as I mentioned, is not represented. The oppositional storytelling literature is represented only by feminists (Martha Minow and Catharine MacKinnon—and the latter turns out, surprisingly, to be a critic of the storytelling movement), and by critics, such as Farber and Sherry. Derrick Bell, Richard Delgado, Patricia Williams, and other well known contributors to this literature are not represented. The papers on the judicial opinion are concerned with the rhetoric of judicial opinions generally rather than with the narrative techniques used in them. Indeed, the subtitle of the book—"Narrative *and Rhetoric* in the Law" (my emphasis)—may reflect misgivings about whether there is enough to say about the story element in law to sustain a volume unless the canvas is enlarged to take in the entire rhetorical aspect of law.[10]

Particularly conspicuous by its absence from the volume is any sustained consideration of the methodological issue—by what means is one to study the story element in law? Literary theorists and philosophers who have written influential works on narrative, such as Wayne Booth, Arthur Danto, and Martha Nussbaum, are not represented; nor such doyens of the law and literature movement as Richard Weisberg and James Boyd White. (I do not fault the editors for these omissions; for all I know they invited all the people I've named either to the conference itself or to submit a paper for the conference volume.) Although the professors of literature who contributed to the volume refer at times to literary technique, they do not discuss the techniques special to narrative, such as the choice among types of narrator (ranging from the obtuse to the omniscient), the con-

---

[9] Farber and Sherry's criticisms appear in *Law's Stories* in an oblique and truncated form. For the full version, see Daniel A. Farber and Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 Stan L Rev 807 (1993). See also Richard A. Posner, *Overcoming Law* 368-84 (Harvard 1995), which makes similar criticisms of Patricia J. Williams's book *The Alchemy of Race and Rights* (Harvard 1991).

[10] Thankfully, the book does not attempt to swallow the law and literature movement whole by examining literary narratives of legal themes, such as *Bleak House*, *Billy Budd*, and *The Trial*.

struction of an implied author (who may be different from both the real author and the narrator), the role of description and extraneous detail, the juxtaposing of parallel stories (for example, Shakespeare's juxtaposition in *King Lear* of the story of Gloucester and his sons with the story of Lear and his daughters), and the handling of time. Ever since the *Iliad*, narratives have often begun and ended *in medias res*, so that the surface or foreground story does not coincide chronologically with the implied or background story that generates it.[11] These techniques are the subject of narrative theory proper, but they are not discussed in *Law's Stories*.

Not only is the book's coverage spotty, but the quality of the papers is uneven. Many (not all) of the comments, though they may have been effective when delivered orally at the symposium, are too ephemeral to warrant publication in a book that the copyright page assures us "meets the guidelines for permanence and durability" of a committee on "Book Longevity." Some of the papers and comments, as I have already suggested, do not belong in a book on narratology (maybe "and Rhetoric" was added to the subtitle in realistic recognition of the unwillingness or inability of many of the participants to stick to the subject). John Hollander's interesting essay on metaphor in law and in literature is an example. And although there is a long history of confessional literature, and of first-person narration in imaginative literature (think only of the narrator of *The Tell-Tale Heart*), Brooks's essay on confessions focuses on the non-narratological issues of voluntariness and of the merits of *Miranda*.

Remarkably, considering that the book is intended to showcase this new movement that I am calling legal narratology, the overall tone of *Law's Stories* is skeptical and critical, even defensive. Criticisms and expressions of doubt outweigh praise and claims of insight, and the criticisms are more convincing than the praise. At the very outset of the book, Gewirtz's introduction notes the problem of typicality (p 6). The significance of a story of oppression depends on its representativeness. In a nation of more than a quarter of a billion people all blanketed by the electronic media, every ugly thing that can happen will happen and will eventually become known; to evaluate policies for dealing with the ugliness we must know its frequency, a question that is in the domain of social science rather than of narrative.

---

[11] In *Oedipus Tyrannus*, for example, the implied story stretches from before the birth of Oedipus to his exile from Thebes (and possibly beyond—to his death and the deaths of his two sons and of his daughter Antigone), but the story depicted in the play itself begins only hours before his exile and ends just before his actual departure.

Related to the problem of typicality, and to the problem that Farber and Sherry have discussed under the rubric of analytical content, is the problem of causality. Stories often implicitly claim to identify causes. When a defendant in his plea of mercy tells a horrific (and let us assume truthful) story of childhood abuse and neglect, he implicitly asserts a causal relationship between the events narrated and the criminal act for which he is to be sentenced; the story has no relevance otherwise. But to assert and to prove are two different things. The proof is critical, and is not supplied by the story, which may merely be appealing to credulous and sentimental intuitions.

Martha Minow notes that "[v]ictim stories risk trivializing pain" and "adhere to an unspoken norm that prefers narratives of helplessness to stories of responsibility, and tales of victimization to narratives of human agency and capacity" (p 32). Nevertheless she thinks that they have value in "disrupt[ing] these rationalizing, generalizing modes of analysis [legal doctrine, economic analysis, and philosophical theory] with a reminder of human beings and their feelings, quirky developments, and textured vitality" (p 36). This sounds good, but it raises a question about the oppositional movement in legal scholarship that the book does not confront.[12] The question is the audience for this scholarship and is related to the sensitive issue of the narrative skills of the stories' authors. You need considerable literary skill to write a story that will effectively challenge a reader's preconceptions. People read junk that does not challenge their preconceptions; they do not read junk that does challenge them. Of all the legal storytellers, the only one who seems to me to have a real literary gift is Patricia Williams. This is not said in criticism of the others. A law professor should not be ashamed of lacking literary genius. But if he does lack it, he cannot expect to obtain a readership for his stories from among people whom those stories are intended to embarrass and shake up. It seems likely that almost the entire audience for oppositional legal scholarship, besides a restive and largely unimpressionable captive audience of law students, will consist of persons who are already part of the opposition. I would be interested to learn what function they

[12] It is discussed in Richard Delgado and Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 Tex L Rev 1929, 1933 (1991). Farber and Sherry come close, in their contribution to the symposium, when they remark (p 245 n 43) that the oppositionists' support of "hate speech" codes, codes intended to suppress "malign stories," indicates a lack of confidence that the oppositionists' "good" stories will prevail in the competition of stories.

think they are serving by swapping stories of oppression with each other.

Farber and Sherry remind us that if "'stories from the bottom' have the power to shift belief in progressive directions, stories from the top—pornography, hate speech, and symbolic government actions—can entrench racism, sexism, and other evils" (p 39). Anthony Kronman makes the same point more bluntly—"stories contribute no independent moral insight of their own" (p 56)—and Catharine MacKinnon makes the point angrily:

> Stories break stereotypes, but stereotypes are also stories, and stories can be full of them. . . . [T]here is much to be said for data. . . . Lies are the ultimate risk of storytelling as method. This may be embarrassingly non-postmodern, but reality exists. . . . It is my view that the major conflicts of our time are over the real and only secondarily over versions of it and methods for apprehending it (pp 235-36) (paragraph breaks omitted).

She is reacting to the frivolousness of postmodernism, which in claiming that all reality is constructed—everything is a story—tends to occlude the perception of real suffering by taking literally Hamlet's quip that "There is nothing either good or bad, but thinking makes it so."[13]

The risk of narratology to which MacKinnon herself succumbs in her writings on pornography is that of atypicality. MacKinnon is a magnet for the unhappy stories of prostitutes, rape victims, and pornographic models and actresses. Even if all these stories are true (though how many are exaggerated? Does MacKinnon know?), their frequency is an essential issue in deciding what if anything the law should try to do about the suffering that the stories narrate. So, despite her criticism of storytelling, she is herself a kind of paranarratologist, who makes her case through other women's stories.

Another risk in legal storytelling, besides atypicality, inattention to causation, preaching to the converted, and lack of analytical content, is emotionality. While Gewirtz, following the new philosophical literature on emotion, emphasizes the cognitive value of emotion (p 145), it would be dangerous to deny the risk that emotionality poses to law. (And Gewirtz does not deny it.) Evidence is regularly excluded from jury trials on the ground that it would unduly inflame the jury, and jury verdicts are sometimes set aside because the verdict shows that the jury was

---

[13] William Shakespeare, *Hamlet*, Act II, Scene II, ll 249-50 (Methuen 1982).

carried away by passion or prejudice. The legal narratologists know all this and do not, as far as I know, question it. But they have had difficulty specifying the appropriate role of emotion in trials and other legal settings. The narratologists who think it fine that a criminal defendant at his sentencing hearing should use the story of his life to stir the judge's sense of pity are appalled when the prosecutor uses the story of the victim's life to stir the judge's retributive sense.

I think that Gewirtz is right, and that in this setting what is sauce for the goose should be sauce for the gander. Bandes's response is that the passion for revenge is a bad emotion; she refers to it as the "crude passion for revenge" and "a thirst for undifferentiated vengeance."[14] Nussbaum argues in a similar vein that revenge is a primitive emotion because it abstracts from the particulars of the individual wrongdoer.[15] She thinks it is therefore unsuitable for sentencing, where the focus should be on the individual defendant. Revenge is primitive, in the sense of instinctual, as also is love, of which compassion for a criminal is a dilute form; but I do not think that the primitiveness of an emotion should disqualify it from playing a role in sentencing. Had Hitler been brought to trial in 1945 it would have been absurd to allow him to tell the story of his deprived childhood and the disappointments of early adulthood and being gassed in World War I and so forth while forbidding any statements by his victims concerning their sufferings at his hands. To complain that the admission of such statements would bespeak a "thirst for undifferentiated vengeance" would strike most of us as being in conspicuously poor taste. And likewise if the defendant were not a Hitler but a lesser monster, such as a serial killer or a terrorist bomber. The principal objection to revenge, that it lacks measure or discrimination because the victim of the wrong is the self-appointed judge, has no force when the issue is merely the admissibility of victim impact statements before a disinterested judge (or jury).

Robert Weisberg in his contribution to *Law's Stories* is caustic about poverty-law narratives, in which the author tries to reconstruct the client's true story from the version the lawyer or judge told. Weisberg says that in such narratives the author often "is overly engaged in the rhetoric of ethical or political self-congratulation, often lapsing into banality or sentimentality" (p 75). He emphasizes "the utility of narrative in promoting sym-

---

[14] Bandes, 63 U Chi L Rev at 398 (cited in note 7).

[15] Nussbaum, 22 Phil & Pub Aff at 89-90 (cited in note 7).

bolic national or group identity over abstract ideological or governmental structure" (p 77), using as his principal example the trial of John Brown (as analyzed by Robert Ferguson), which altered the terms of the slavery debate and paved the way for Lincoln's redefinition of national purpose. Brown "transformed himself from a man of questionable character, a feckless loser in both business and the military, into a mythic hero by artfully blending legal rhetoric, courtroom dramaturgics, and shards of junk culture from popular American romances" (p 79). Weisberg admires these theatrics but recognizes that they were a misuse of the trial process; they illustrate the trial turned into a circus; they suggest the danger of confusing trial with theater, law with literature. Gewirtz suggests that the growing intrusiveness of the news media, and the public's growing insistence on participating in the business of political and legal governance directly rather than merely voting for the officials who shall govern, are a growing threat to the efficacy and integrity of trial by jury (pp 156-57). And in Weisberg's reference to the utility of narrative in promoting a symbolic national identity and transforming a man of questionable character into a mythic hero we may sense an allusion to the master narrativist of our century, Adolf Hitler, who told his rapt audiences an emotion-charged story of the betrayal and humiliation of the nation.

My referring to Hitler in this connection is not hyperbolic. Lawrence Douglas, in an article published too recently to be mentioned in *Law's Stories*, points out that the arguments made by the growing corps of Holocaust deniers

> powerfully evoke the rhetoric of attorneys practiced in the art of adversarial litigation.
>
> . . .
>
> By casting the trial as a truth-seeking device, the [deniers] are thus able to present the most tendentious and partisan hyperbole as a proper contribution to public debate and historical instruction.[16]

As Douglas argues, and as the distortions of truth in John Brown's trial illustrate, criminal justice "has long been dedicated to values such as protecting the dignity and autonomy of the accused that may actually disable the pursuit of truth in a par-

---

[16] Lawrence Douglas, *The Memory of Judgment: The Law, the Holocaust, and Denial*, 7 Hist & Memory 100, 109-10 (Fall 1996).

ticular case."[17] That is, the trial suffers from the same epistemological inadequacies as narrative, which it employs and resembles. Supreme Court Justices who participate in the foolish trials of Shakespeare's authorship[18] do not realize that they are legitimating a misuse of trial procedure that undermines standards of historical accuracy.

Pierre Leval's essay begins: "I am a judge. I know nothing of the theories of narrative and of literary criticism of law. I wondered why I was invited to contribute to this volume" (p 206).[19] Then of course he tells a story, and very well too. But the point of the story, as of his essay as a whole, is that judges should forgo the "quest after persuasive power or beauty" in favor of "clear analysis and clear transmission" of their decisions (p 207). He quotes another contributor to the symposium: "When a story is well told, I park my analytic faculties" (p 208, quoting Harlon Dalton on p 57). Leval is caustic about judges who, "see[ing] themselves brushing up against immortality . . . spurn the vulgar tongue and use sonorous forms that will resonate in history" (p 208). But beauty and sonority are not synonyms; nor is clarity incompatible with rhetorical power. When judicial opinions tell stories, as they have to do in cases in which the facts matter, they might as well tell them well. Yet as Sanford Levinson in his paper for the symposium reminds us, judges have to know when not to tell stories, and by doing so he supports Leval's reservations about legal narratology (pp 198-99). Levinson argues convincingly that the Supreme Court in *Brown v Board of Education* was right to omit a narrative of the history of the oppression of black people in the South, even though that history is the essential background to understanding the harm of segregated schooling; for such a narrative would have made it even more difficult than it proved to be for the southern states to accept the decision. The Court's reliance in the *Brown* decision on social science in lieu of storytelling[20] has been criticized sharply and often; how ironic, but how telling, that its choice should be defended in a book on legal narrative!

---

[17] Id at 110.

[18] Irvin Molotsky, *You-Know-Who Wrote the Plays, Judges Say*, NY Times 1 (Sept 26, 1987); Amy E. Schwartz, *Three Justices, a Poetry-Starved Crowd and Shakespeare*, Wash Post A19 (Oct 14, 1987).

[19] Judge Leval is a highly regarded federal court of appeals judge and former federal district judge.

[20] *Brown v Board of Education*, 347 US 483, 494 n 11 (1954).